SPEECH, STRUCTURE, AND BEHAVIOR ON THE SUPREME COURT OF INDIA

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Abstract

This Article captures what can be termed as "structural" and "behavioral" features of the Indian Supreme Court's decision-making process in speech cases. It demonstrates that speech cases are not a high priority on the docket of the Supreme Court of India, which is worrying in a liberal democracy. The Chief Justice of India participates less in these cases than he once had, and assigns these cases to smaller panels. Speech cases generate less debate and deliberation than before and engender fewer dissents and concurring opinions. The proportion of speech cases relative to the size of the court's docket is also troublingly small. If sixty years of decision-making in speech cases on the Supreme Court of India were viewed as a seamless narrative, one could conclude that the Court has been ambivalent towards speech—harboring neither a clear bias in favor of nor against speech.

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INTRODUCTION

A great deal of scholarly doctrinal work has been done in the area of free speech law in India.[1] However, almost no quantitative studies exist to measure the voting behavior of the Supreme Court of India, as an institution, in speech cases. In a 1995 study, Vijay Gupta conducted an analysis of the "decisional output" of the Supreme Court of India between 1973 and 1981, examining such factors as the geographic spread of the court's appellate docket, the identity of the litigant before the court, the nature of its docket, and latent biases in favor of or against the state and corporations.[2] Gupta found that 6.88% of the cases before the court during this time contained civil liberty claims.[3] However, he did not identify the type of liberty claims involved or the nature of the court's decisions in speech cases. Similarly, both George H. Gadbois, Jr.[4] and Rajeev Dhavan[5] separately carried out analyses of voting patterns of the court's individual justices, but neither dealt with free speech law specifically. Sriram Shyam Krishnan[6] examined and found no evidence of any caste bias in assigning cases to judges on the Supreme Court. Another survey[7] studied "constitution bench"[8] decisions of the Supreme Court of India, but their study did not isolate speech cases and left out the decisions of smaller benches that admittedly have become increasingly commonplace in recent times.

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[1] *See, e.g.*, SOLI SORABJEE, THE EMERGENCY, CENSORSHIP AND PRESS IN INDIA (1977); T.R. Andhyarujina, *Scandalising the Court—Is It Obsolete?* (2003) 4 S.C.C. (Jour) 12; Vinod A. Bobde, *Scandalising the Court*, (2003) 8 S.C.C. (Jour) 32; Madhavi Divan, *From Secrecy to the Freedom of Information—A Reluctant Transition*, (2003) 8 S.C.C. (Jour) 60.

[2] VIJAY GUPTA, DECISION MAKING IN THE SUPREME COURT OF INDIA (1995).

[3] *Id.* at 92.

[4] George H. Gadbois, Jr., *Selection, Background Characteristics, and Voting Behavior of Indian Supreme Court Judges, 1950–1959*, *in* COMPARATIVE JUDICIAL BEHAVIOR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST (Glendon Schubert & David J. Danelski eds., 1969).

[5] RAJEEV DHAVAN, THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES (1977).

[6] Sriram Shyam Krishnan, Caste and the Court: Examining Judicial Selection Bias on Bench Assignments on the Indian Supreme Court (June 9, 2006) (unpublished M.A. thesis, Georgia State University), *available at* http://digitalarchive.gsu.edu/political_science_theses/6.

[7] Nick Robinson et al., *Interpreting the Constitution: Supreme Court Constitution Benches Since Independence*, 9 ECON. & POL. WKLY. 27 (2011).

[8] The term "constitution bench" refers to a bench of five or more justices of the Supreme Court of India convened to decide a case concerning a "'substantial question of law as to the interpretation' of the Constitution," as required by the Indian Constitution. *Id.* (citation omitted).

Indian society has had an unhappy relationship with Article 19, Section 1(a) of its Constitution,[9] which enshrines the right to freedom of speech and expression. Lawrence Liang[10] has highlighted the difference between the first amendments of the Indian and U.S. constitutions. Where the First Amendment of the U.S. Constitution created a right to speech, the first amendment made to the Constitution of India created exceptions to free speech.[11] This contrast becomes a little less stark when one accounts for the fact that the First Amendment in the United States was actually the third amendment; the states did not ratify the first two amendments.[12] Intuitively, the numerical precedence of the first amendment to the U.S. constitution may seem to be evidence of its hierarchical superiority. However, the status of speech in the United States is more likely a reflection of the values of American society, rather than of doctrine or constitutional text.

Legal discourse in India makes much of the fact that the Indian Constitution contains restrictions on free speech, whereas the U.S. Constitution does not.[13] This is often cited as a justification for Indian courts' adoption of a different approach from the one used by U.S. courts in free speech cases.[14] However, the mere fact that the U.S. Constitution does not contain textual exceptions to the First Amendment has not prevented American courts from carving out exceptions to free speech based on harms to society. Debates in the United States concerning whether the First Amendment generates absolute rights, or whether it ought to be subject to

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[9] Article 19(1)(a) provides: "(1) All citizens shall have the right - (a) to freedom of speech and expression . . . ." INDIA CONST. art. 19, § 1, cl. a. Article 19(2) of the Indian constitution contains restrictions to Article 19(1)(a). It provides:

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Id. art. 19 § 2.

[10] Lawrence Liang, *Reasonable Restrictions and Unreasonable Speech*, 4 SARAI READER 434 (2004), *available at* http://www.sarai.net/publications/readers/04-crisis-media/56lawrence.pdf.

[11] *See* The Constitution (First Amendment) Act, 1951, INDIA CODE (2000), *available at* http://indiacode.nic.in/.

[12] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Stephen H. Klitzman, *The Fourteen Transformative Words of the First Amendment: From Fear To The "Courage To Be Free,"* 16 COMM. L. CONSPECTUS 567 (2008) (reviewing ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT [2007]).

[13] *See, e.g.*, Reliance Petrochemicals v. Indian Express, A.I.R. 1989 S.C. 190.

[14] *Id.*

categorization or balancing, tend to underscore this principle.[15] Exceptions to free speech exist even in the United States; child pornography,[16] defamation,[17] and perjury[18] are examples of speech prohibited in the United States despite the textually absolute First Amendment. The U.S. Supreme Court has decided several cases against the speaker.[19] When compared with society and its prevalent culture, text and doctrine play a much smaller role than is ordinarily attributed to them in free speech law, and arguably in all constitutional law.

Speech in India is not merely restricted by the government. Non-state actors like political parties and vigilante groups, both organized and

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[15] *See, e.g.*, Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967).

[16] *See* New York v. Ferber, 458 U.S. 747 (1982); Osborne v. Ohio, 495 U.S. 103 (1990); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

[17] *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977). *See also* Matthew D. Bunker et al, *Not That There's Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 581 (2011).

[18] *See* Daniel J. McGinn-Shapiro, *Perjury*, 48 AM. CRIM. L. REV. 997 (2011).

[19] *See e.g.*, City of Los Angeles v. Alameda, 535 U.S. 425 (2002) (upholding a municipal ban on adult entertainment establishments in certain areas); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (upholding state sentencing enhancement for crimes where choice of victim was motivated by bias); Cohen v. Cowles, 501 U.S. 663 (1991) (holding that the First Amendment did not prevent an action for promissory estoppel in a state court in a case involving confidentiality); Arcara v. Cloud Books, 478 U.S. 697 (1986) (solicitation occurring on the premises of an adult bookstore); Renton v. Playtime Theaters, 475 U.S. 41 (1986) (regulations governing the location of adult theaters); Clark v. Community for Creative Non Violence, 468 U.S. 228 (1984) (right of demonstrators to sleep in a public park); Larkin v. Grendel's Den, 459 U.S. 116 (1982) (law regulating the issue of liquor licenses within a certain perimeter of a church); FCC v. Pacifica, 438 U.S. 726 (1978) (use of "filthy words" on the radio); Zacchini v. Scripps Howard, 433 U.S. 562 (1977) (holding that the First Amendment does not protect the media when they broadcast a performer's act without his consent); Young v. American Mini Theaters, 427 U.S. 50 (1976) (Detroit "Anti-Skid Row" ordinance); Hudgens v. NLRB, 424 U.S. 507 (1976) (right of warehouse employees to picket in a store); Paris Adult Theater v. Slaten, 413 U.S. 49 (1973) (dealing with obscenity); Miller v. California, 413 U.S. 15 (1973) (obscenity); Lloyd v. Tanner, 407 U.S. 551 (1972) (right of anti-war activists to distribute leaflets in a shopping center); Roth v. U.S., 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Dennis v. U.S., 341 U.S. 494 (1951) (communist propaganda advocating overthrow of government); Feiner v. New York, 340 U.S. 315 (1951) (fighting words); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (same); Whitney v. California, 274 U.S. 357 (1927) (membership in the communist party); Gitlow v. New York, 268 U.S. 652 (1925) (holding a speaker guilty of criminal anarchy for publication of a left wing manifesto); Abrams v. U.S., 250 U.S. 616 (1919) (circulars urging workers' strikes in ammunitions factories during the war); Debs v. United States, 249 U.S. 211 (1919) (speech made by a Socialist Party leader in Ohio); Frohwerk v. United States, 249 U.S. 204 (1919) (anti-national war propaganda); Schenk v. U.S., 249 U.S. 47 (1919) (Espionage Act of 1917).

unorganized, have served as despotic censors to free expression in India. One of India's most famous painters, M.F. Husain, lived out his last days in self-imposed exile because of death threats he received from vigilante groups in India—groups that were ostensibly offended by his nude paintings of Hindu goddesses[20]—despite a decision of the Delhi High Court quashing warrants of arrest and summoning orders issued against Husain.[21] Legal doctrine and constitutional text had little to do with Husain's self-imposed exile. More recently, a noted Bollywood director created headlines when he personally visited the chief of a political party in Mumbai at his residence to apologize for referring to Mumbai as "Bombay"[22] in one of his movies. Perhaps his visit was meant to ensure that the political party's workers would not resort to vandalizing movie theaters.[23] Article 12 of the Indian Constitution, the repository of the "state action doctrine" in India, defines the "state" for the purposes of constitutional analysis, and political party workers are not the "state", although the coercive power of some political parties in India may work to diminish free speech. Most recently, the youth leader of another political party in Mumbai succeeded in getting Mumbai University to remove a novel written by Rohinton Mistry, a prize-winning author of Indian origin, from one class's syllabus because of "obscene" references in the novel to the political party's leadership.[24] Although this evidence is anecdotal, in each of

[20] *MF Husain Passes Away in London*, TIMES OF INDIA (June 9, 2011, 11:53 AM), *t* http://articles.timesofindia.indiatimes.com/2011-06-09/india/29637594_1_hindu-goddesses-mf-husain-indian-artist; *Eminent Painter Maqbool Fida Husain Passes Away in London*, INDIAN EXPRESS (June 9, 2011, 11:20 AM), http://www.indianexpress.com/news/excellent/801368/.

[21] Maqbool Fida Hussain v. Raj Kumar Pandey, (2008) Crim. L.J. (Delhi H.C.) 4107.

[22] The name "Bombay" was changed to "Mumbai" in 1995. The word "Mumbai" is derived from the Marathi name of the goddess Mumbadevi. *See* William Safire, *Mumbai Not Bombay*, N.Y. TIMES MAG., Aug. 6, 2006, at 14, *available at* http://www.nytimes.com/2006/08/06/magazine/06wwln_safire.html. However, the name change was perceived as having a politically divisive agenda. The city of Mumbai houses residents of various linguistic communities. The political party charged with changing the city's name from Bombay to Mumbai agitates that a particular linguistic group has a superior claim to the city. The change of name was symbolic of this claim. For an account of the transition of the city from Bombay to Mumbai, *see* Rashmi Varma, *Provincializing the Global City: From Bombay to Mumbai*, 81 SOC. TEXT 65 (2004).

[23] Bharati Dubey, Somit Sen & Sanjeev Shivadekar, *Karan Kowtows to Raj Thackeray, Sorry About 'Bombay,'* TIMES OF INDIA, Oct. 4, 2009, *available at* http://articles.timesofindia.indiatimes.com/2009-10-03/mumbai/28080878_1_raj-thackeray-karan-johar-marathi-manoos; *'Bombay' Lands Karan Johar At Raj Thackeray's Door*, INDIAN EXPRESS, Oct. 2, 2009, *available at* http://www.indianexpress.com/news/bombay-lands-karan-johar-at-raj-thackeray/524459/.

[24] Rohinton Mistry, *Consider the Options*, OUTLOOK (Oct. 19, 2010), http://www.outlookindia.com/article.aspx?267532; *Aditya Thackeray Criticized By Own College Principal*, TIMES OF INDIA, Oct. 10, 2010, *available at*

these instances, the fear of non-state thuggishness stifled free speech in India. Any study of free speech law in India that is court-centric is likely to be limited to state actors, and such non-state violations of speech may therefore be invisible in such studies.

Nevertheless, a court-centric quantitative study of free speech jurisprudence in India is not without utility. State actors in India are not necessarily any more tolerant of free speech. Speakers in India must not only worry about offending vigilante groups or political parties, but judges of the constitutional courts. The Supreme Court of India and the High Courts wield potent powers to punish for "contempt" of court, which includes any statements that tend to "scandalize" the court.[25] Although "truth" is now a defense to the offence of "contempt" after an amendment in 2006,[26] the court can still punish statements implicating the judiciary if the statements are not in the "public interest" even if they may be truthful, and honest opinion is still outside the defense's ambit. Ironically, the justification for the contempt law is that Indian citizens will lose their "faith" in the judiciary if disrespectful or critical statements are made about judges. This tends to obscure the possibility that citizens may lose their faith in the Indian judiciary anyway if it punishes citizens for criticizing its members. The contempt power in India exists despite the fact that the Supreme Court of India has applied a strong *Sullivan*[27]-like standard to govern statements made against "other" public officials.[28]

Further, the Indian judiciary's distrust of the media recently became apparent in a highly visible nationally televised interview, where a retired judge of the Supreme Court of India accused the media of playing an "anti-people role."[29] Former Justice Markandey Katju said that media corporations

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http://articles.timesofindia.indiatimes.com/2010-10-10/mumbai/28261197_1_aditya-thackeray-political-party-shiv-sena.

[25] The Contempt of Courts Act §2(c), No. 70 of 1971, INDIA CODE (2000), *available at* http://indiacode.nic.in. *See also* Andhyarujina, *supra* note 1.

[26] The Contempt of Courts (Amendment) Act, 2006, No. 6, Acts of Parliament, 2006.

[27] The "Sullivan standard," named after the case in which it first appeared, N.Y. Times v. Sullivan, 376 U.S. 254 (1964), requires a public official or public figure to prove "actual malice" in order to prevail against a news source in a defamation or libel case. The "actual malice" requirement may be satisfied by demonstrating knowledge that the publicized information was false or reckless disregard for the truth or falsity of the publicized information.

[28] R. Rajagopal v. Tamil Nadu, A.I.R. 1995 S.C. 264. The court held that as far as public officials were concerned, the right to privacy or the remedy of action for damages were not available for acts and conduct relevant to the discharge of official duties.

[29] *Devil's Advocate* (CNN-IBN broadcast Oct. 30, 2011), *available at* http://www.youtube.com/watch?v=EbFvcgppjs4 (interview by Karan Thapar with Justice Markandey Katju, Chairman, Press Conference of India). *See also* Justice Markandey Katju, Op-Ed., *The Role that Media Should Be Playing in India*, THE HINDU, Nov. 5, 2011, *available at* http://www.thehindu.com/news/article2600319.ece.

in India divert public attention from real economic problems and focus on entertainment (on "film stars, fashion and cricket"), publish divisive stories after terrorist attacks, and promote superstition and astrology rather than facilitating India's transition from a "feudalistic" to industrial society. At the time of the interview, the judge was (and still is) Chairman of the Press Council of India, a statutory body charged with the duty of maintaining and improving the "standards" of newspapers.[30] He has called for instilling "some fear" in the media and for the use of a "stick" against media corporations in certain "extreme" situations, opining that the media's attempts at self-regulation in India have failed.

Similar occurrences point to the culture of speech regulation in India. Recently, the Supreme Court of India affirmed an interim order requiring a prominent broadcast media corporation to deposit[31] a sum of Rs. 100 crore (approximately $20 million U.S. dollars) with the Court for "defaming" a former Supreme Court judge by mistakenly running his picture on screen during a story about corruption.[32] Perhaps more interestingly, the censor board in India ordered that a song in a Bollywood movie blur or delete images of Tibetan flags,[33] presumably so as not to irk Chinese sentiment. These events occur amid fears that the Indian government is attempting to impose restraints on corporations like Facebook and Google and thereby censor the web.[34] These encroachments upon free speech are worrying in a liberal democracy.

Article 19(2) of the Indian Constitution carves out eight exceptions to the freedom of speech and expression in India: (1) the sovereignty and integrity of India, (2) security of state, (3) friendly relations with foreign states, (4) public order, (5) decency or morality, (6) contempt of court, (7) defamation, and (8)

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[30] The Press Council Act, 1978, No. 37 of 1978, *available at* http://presscouncil.nic.in/act.htm.

[31] Twenty percent of the amount was ordered to be deposited in cash, and a bank guarantee was required to be furnished for the remaining amount. *See SC Asks Times Now to Deposit Rs. 100 Crore Before HC Takes Up Its Appeal in Defamation Case*, TIMES OF INDIA, Nov. 15, 2011, *available at* http://timesofindia.indiatimes.com/india/SC-asks-Times-Now-to-deposit-Rs-100-crore-before-HC-takes-up-its-appeal-in-defamation-case/articleshow/10734614.cms.

[32] *Id.*

[33] *See Censor's Decision to Blur Tibet Flag Angers Tibetans*, HINDUSTAN TIMES, Nov. 10, 2011, *available at* http://www.hindustantimes.com/Entertainment/Bollywood/Censor-s-decision-to-blur-Tibet-flag-angers-Tibetans/Article1-767399.aspx.

[34] *See Kapil Sibal: Facebook, Google Should Obey Law*, TIMES OF INDIA, Feb. 21, 2012, *available at* http://articles.timesofindia.indiatimes.com/2012-02-21/social-media/31082762_1_social-media-kapil-sibal-google-and-facebook; *Kapil Sibal for Content Screening: Facebook, Twitter Full of Posts Against Censorship*, ECON. TIMES, Dec. 6, 2011, *available at* http://economictimes.indiatimes.com/tech/internet/kapil-sibal-for-content-screening-facebook-twitter-full-of-posts-against-censorship/articleshow/11008648.cms.

incitement to an offense.[35] Any law passed by a legislative authority or any executive action in India that imposes a restriction on speech must be justified under one or more of these eight exceptions. Further, the restriction must be "reasonable," a qualification much contested during the debate on the first amendment to the Indian constitution.[36] But how do these restrictions actually interact with speech in Indian society? How has the Supreme Court of India, dubbed one of the world's most powerful courts,[37] treated speech cases? What is the Court's attitude towards speech and what does this say about speech as a value in Indian society?

In this Article I attempt to formulate an answer to these broad questions by venturing into a quantitative study of the Indian Supreme Court's free speech cases. This study captures what can be termed "structural" and "behavioral" features of the court's decision-making process in speech cases.[38] At the *structural* level, this Article seeks to answer questions relating to panel composition and case assignment on the Supreme Court of India in speech cases. First, in how many speech cases was the Chief Justice of India a part of the panel deciding the case? Presumably, the Chief Justice of India would dedicate his own time to high priority issues, and the question of whether or not he assigned free speech cases to himself would indicate how important free speech cases were in the court's docket. Second, what was the size of the panel that decided speech cases? A larger panel would be indicative of the importance of the case (the more important the issue, the more judges needed to decide the case), and would also offer an insight into the court's deliberative process (presumably, the more judges on a panel, the greater the effort needed to build consensus). Third, how was the bench composed in terms of "seniority?" Did the bench consist of a majority or minority of "senior" judges? "Seniority" in the higher judiciary in India is measured in terms of the number of years a judge serves in office, and is one of the single most important factors taken into account today while appointing judges to the Supreme Court of India.[39] Do "senior" judges monopolize speech cases as well? Fourth, did the Chief Justice of India attempt to cultivate specialists while assigning speech cases to judges? Answers to these questions would give rise to a better understanding of the value and importance of speech on the court's docket, and would also offer an insight into the decision-making process on the Supreme Court of India.

At the *behavioral* level, this Article seeks answers to questions dealing with the voting pattern of Supreme Court judges, and of the Court as an institution, in speech cases. It asks the following five sets of questions. First,

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[35] INDIA CONST. art. 19, § 2.

[36] Liang, *supra* note 10, at 438.

[37] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).

[38] Vijay Gupta used similar terminology. *See* Gupta, *supra* note 2.

[39] *See* Abhinav Chandrachud, *The Age Factor*, FRONTLINE, Oct. 8, 2011, *available at* http://www.frontline.in/fl2821/stories/20111021282104900.htm.

who wrote the opinions in free speech decisions? Second, is there a discernible pattern of individualistic behavior in speech cases? How frequently were concurring or dissenting opinions written? Third, did outcomes in speech cases differ based on the jurisdiction invoked? How did free speech cases come to the courts? Were they directly filed before the Supreme Court, or did they come by way of appeal? If they were appeals, what was the rate of reversal or affirmation? Further, were benches that heard appeals staffed in such a way that one or more of its judges previously served as High Court judges at the court whose decision was being appealed? Fourth, were the court's decisions pro-speech or anti-speech? Are there any statistically significant correlations between extralegal independent variables and case outcomes? Fifth, substantively, what types of claims did the speech docket of the court contain and are there any statistically significant variations in voting behavior based on case type?

Part I sets out a brief background to the decision-making process on the Supreme Court of India—the appellate hierarchy of courts, the process of appointing judges to the Supreme Court of India, the demographic features of its judges, and the role of seniority on the court. Part II describes the methodology that was used in this study and addresses both methodological objections to the usefulness of quantitative research in studying judicial decisions and the strategies employed in this Article to deal with methodological hurdles faced while conducting this study. Part III contains an analysis of structural features of the court's decision-making process in speech cases. This analysis shows that the participation of Chief Justices of India in speech cases has gone down over the years, that more two-judge benches than constitution benches decide speech cases today, that speech cases are assigned to benches composed of a majority of senior judges, and that although speech cases are democratically distributed by the Chief Justice to a large number of judges on his court, there is some evidence of the cultivation of speech specialist judges. Part IV contains an analysis of the court's voting behavior in speech cases. It observes that a senior judge almost always writes the court's majority opinion, that dissenting and separate concurring opinions have declined in speech cases over the years, that the court was most pro-speech in its outcomes in the 1980s, that the presence of the Chief Justice and the type of speech case involved have a statistically significant correlation with the outcome, and that certain types of speech cases are more prominent on the court's docket than others, although the court hears a variety of speech cases.

I. BACKGROUND

India is a federal country with a strong central government[40] and twenty-eight states with a unitary court structure.[41] In other words, there are no

[40] The central government has the power to dissolve state legislative assemblies. *See* INDIA CONST. art. 356; *but see* S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918 (holding that the power to dissolve state assemblies is subject to judicial review). *See*

separate state and federal courts, and all laws, both state and federal, are litigated in a single court system. While three tiers generally exist in the appellate hierarchy of the court system, only two tiers are available in constitutional litigation: subordinate courts do not have powers of constitutional adjudication and cannot interpret the Constitution or invalidate statutes inconsistent with it.[42] The High Courts in India have powers of constitutional review and can decide "fundamental rights" cases, including speech cases. Much like the different component states in the United States that share federal circuit courts, eleven states in India share three High Courts among them. First, the northern states of Punjab and Haryana share a High Court. Second, seven north-eastern states (Assam, Arunachal Pradesh, Mizoram, Manipur, Meghalaya, Nagaland, and Tripura) share one High Court. Third, two western states (Maharashtra and Goa) share a High Court. The remaining states have their own High Courts, and so does the National Capital Territory of Delhi. High Court decisions may, under certain circumstances,[43] be appealed before the Supreme Court of India, the court of last resort. India does not have a separate constitutional court, but the Supreme Court of India functions not merely as an appellate court but also as a court of first instance, particularly in cases involving violations of "fundamental rights." These rights, contained in Part III of India's Constitution, include the right to freedom of speech and expression. Accordingly, individuals can file cases directly before the Supreme Court of India claiming a violation of fundamental rights.[44]

The Supreme Court of India has thirty-one judges, including the Chief Justice.[45] At its inaugural session held on January 28, 1950, two days after India's new constitution came into force, there were only six judges on the court.[46] The maximum permissible strength of the court was later increased to eleven, fourteen, eighteen, twenty-six, and thirty-one judges (including the

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also Soli J. Sorabjee, *Decision of the Supreme Court in S.R. Bommai v. Union of India: A Critique*, (1994) 3 S.C.C. (Journal) 1.

[41] *See* Gadbois, *supra* note 4.

[42] *Cf.* INDIA CONST. arts. 32, 226, 233–237.

[43] A High Court decision can be appealed if the High Court grants a certificate of appeal, if the case is a criminal case and the High Court either reverses an order of acquittal and sentences the accused to death or withdraws a case from a lower court to hear it itself and sentences the accused to death, or if the Supreme Court grants special leave to appeal. INDIA CONST. arts. 132–36.

[44] INDIA CONST. art. 32.

[45] INDIA CONST. art. 124, § 1; The Supreme Court (Number of Judges) Amendment Act, 2008, No. 11 of 2009, Gazette of India, section II(1) (Feb. 5, 2009),. *available at* http://supremecourtofindia.nic.in/the%20supreme%20court%20%28number%20of%20judges%29%20amenment%20act,%202008.pdf.

[46] The maximum permissible strength of judges on the Supreme Court of India at the time was 7 judges. INDIA CONST. art. 124, § 1.

Chief Justice) in 1956,[47] 1960,[48] 1977,[49] 1986,[50] and 2009[51], respectively. Consistent with the norm for appointment to the U.S. Supreme Court,[52] almost all Indian Supreme Court judges are appointed from amongst the ranks of state High Court judges[53] and now, increasingly, from amongst High Court Chief Justices.[54] The overwhelming majority of the judges who made it to the Supreme Court, before initially being appointed High Court judges, were litigating lawyers, typically High Court lawyers, informally termed "counsel," lawyers who appear before the courts and make arguments, to distinguish them from solicitors or transactional lawyers. Data collected for the purposes of this study from the website of the Supreme Court of India[55] reveal that approximately 47% of the judges appointed to the Supreme Court of India between 1950 and 2011 once served in some formal capacity as lawyers for the government, and approximately 27% of the judges appointed to the Supreme Court of India between 1950 and 2011 studied abroad in some formal capacity, typically to obtain a law degree or a post-graduate degree in law, and typically in the United Kingdom, although some judges, appointed to the court more recently, have also obtained LL.M. degrees at U.S. universities.[56]

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[47] The Supreme Court (Number of Judges) Amendment Act, No. 55 of 1956, INDIA CODE (2000), *available at* http://indiacode.nic.in/.

[48] Supreme Court (Number of Judges) Amendment Act, 1960, No. 17 of 1960, Gazette of India, section II(2), 120 (May 6, 1960).

[49] Supreme Court (Number of Judges) Amendment Act, 1977, No. 48 of 1977, Gazette of India, section II(2), 742 (Dec. 31, 1977).

[50] Supreme Court (Number of Judges) Amendment Act, 1986, No. 22 of 1986, Gazette of India, section II(2) (May 9, 1986).

[51] The Supreme Court (Number of Judges) Amendment Act, 2008, No. 11 of 2009, Gazette of India, section II(1) (Feb. 5, 2009), *available at* http://supremecourtofindia.nic.in/the%20supreme%20court%20%28number%20of%20judges%29%20amenment%20act,%202008.pdf.

[52] Stephen Choi & Mitu Gulati, *A Tournament of Judges*, 92 CAL. L. REV. 299, 303 (2004) (arguing that the "norm today appears to be that a candidate for the [U.S.] Supreme Court must first sit on a federal circuit court of appeals before she may be considered for a seat on the Court.").

[53] Only four out of approximately 196 judges appointed to the Supreme Court of India were not formerly High Court judges: S.M. Sikri, S.C. Roy, Kuldip Singh, and Santosh Hegde. *See* Abhinav Chandrachud, *An Empirical Study of the Supreme Court's Composition*, 1 ECON. & POL. WKLY. 71 (2011); GEORGE H. GADBOIS, JR., JUDGES OF THE SUPREME COURT OF INDIA (1950–1989) (2011).

[54] *Id.*

[55] SUPREME COURT OF INDIA, http://supremecourtofindia.nic.in (last visited Sept. 2, 2012).

[56] These data have been compiled by the author from publicly available sources of information, such as the website of the Supreme Court of India, websites of High Courts, and law journals.

An effort is typically made to ensure that judges are appointed to the Supreme Court of India from different geographic regions of India.[57] An effort is also made to ensure that Muslims, India's largest religious minority,[58] have some representation on the court. Some attempts also have occasionally been made to ensure representation on the court for members of "backward" castes and for women. Between 1950 and 2011, approximately 196 judges have served on the Supreme Court of India, of whom approximately 38 have become Chief Justice of India.[59] All but five have been men. There is no fixed term for Supreme Court Justices, but the Constitution requires them to retire at age 65.[60] This means that the younger a judge is appointed to the court, the more time he[61] will serve on the court. Typically, Supreme Court judges serve three to seven years in office. The power to appoint judges to the Supreme Court theoretically rests with the executive, but in practice, at least after Supreme Court decisions in 1993[62] and 1998,[63] Supreme Court judges are now appointed by a self-perpetuating "collegium" of senior Supreme Court judges. This collegium consists of the Chief Justice of India and the four most senior associate judges on the court.[64]

The Supreme Court of India does not convene in plenary sessions. Instead, it sits in numerous "benches," or panels, of varying strengths. Two judge benches are the most common, but benches of three, five, seven, nine, eleven, and thirteen have also been seen on the Court, with diminishing frequency as the number increases. Presumably, the greater the number of judges hearing a case, the more important the issue involved, at least in the perception of the Chief Justice of India. The Chief Justice of India has the power to assign cases, and to determine the composition of different benches or panels that decide cases on the Supreme Court. This is unlike some systems

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[57] *See* Chandrachud, *supra* note 53; Gadbois, *supra* note 53.

[58] Muslims constitute 13.4% of the population. *See* OFFICE OF THE REGISTRAR GEN. & CENSUS COMM'R, GOV'T OF INDIA, 2001 CENSUS, *available at* http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx.

[59] *See supra* note 57. This study was conducted before Justices Dipak Misra and Jasti Chelameswar were appointed to the court in October 2011, and these judges are not included as part of the study.

[60] INDIA CONST. art. 124, § 2.

[61] I purposely use the word "he" as opposed to the more politically correct "she" or as opposed to gender neutral terminology. Out of approximately 196 judges who have served on the court so far, only five have been women, and none has been Chief Justice of India. *See* Chandrachud, *supra* note 39.

[62] Supreme Court Advocates on Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268.

[63] *In re* Article 143, A.I.R. 1999 S.C. 1.

[64] *Id. See also* Lord Cooke of Thorndon, *Where Angels Fear to Tread, in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al. eds., 2000).

in which cases are randomly assigned to judges, as in the United States,[65] and it is also unlike systems where courts sit in plenary sessions. This is a key function. George Gadbois argues, for example, that "[t]he power of the Chief Justice to manipulate the composition of each bench is (ex hypothesis) the power to bias both the decision-making process and, necessarily, also the decisional policy output."[66] However, as one study points out, the "constitution bench," composed of five judges or more, is almost an anomaly today.[67]

Seniority plays a very important role on the Supreme Court of India, as evidenced by the fact that, barring only five exceptions,[68] the most senior associate justice in the Supreme Court on the eve of the retirement of a Chief Justice has always been appointed Chief Justice of India. Seniority is calculated according to the date of appointment to the Supreme Court. For example, if Judge 1 and Judge 2 are appointed to the Supreme Court on January 1, 2011 and January 2, 2011, respectively, Judge 1 is considered "senior" to Judge 2, even though Judge 2 might be older than Judge 1. Since all Supreme Court judges retire at age 65, if there is no younger judge on the Supreme Court more "senior" to Judge 1, then Judge 1 will ordinarily become the Chief Justice of India in the due course of time under the "seniority convention,"[69] assuming that he lives to the age of 65 and does not resign. If two judges are appointed on the same day, then the judge who was appointed to a High Court prior in time is considered senior.[70] Thus, if Judge 1 and Judge 2 are appointed to the Supreme Court on the same day, and if Judge 1 was appointed to High Court A on January 1, 1990, while Judge 2 was appointed to High Court B on December 31, 1989, Judge 2 will be considered senior to Judge 1. However, if either Judge 1 or Judge 2 was a lawyer directly appointed to the Supreme Court of India, a very rare phenomenon, then the lawyer will be given seniority, although this norm has not always been observed on the court.[71]

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[65] *See* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 47–52 (2009).

[66] Gadbois, *supra* note 4, 239.

[67] *See* Robinson et al., *supra* note 7.

[68] The following judges were not appointed Chief Justice of India despite having been eligible to have been so appointed by the norm of seniority: Syed Jaffer Imam, J.M. Shelat, K.S. Hegde, A.N. Grover, H.R. Khanna. *See* Gadbois, *supra* note 53.

[69] *See* Abhinav Chandrachud, *Supreme Court's Seniority Norm: Historical Origins*, 8 ECON. & POL. WKLY. 26 (2012).

[70] This observation is based on interviews conducted by the author with judges and lawyers in India.

[71] Thus, for example, when Kuldip Singh and four High Court judges were appointed to the Supreme Court of India on the same day, December 14, 1988, all four High Court judges were considered senior to Kuldip Singh, a "bar" judge. This was particularly significant given that if Kuldip Singh were considered senior to the other four judges appointed on the same day as he, he would have become Chief Justice of India after Chief Justice M.N. Venkatachaliah retired. *See* S.S. SODHI, THE OTHER SIDE OF JUSTICE

Seniority plays a key role not only in the question of who becomes Chief Justice of India and who appoints Supreme Court judges, but also in the day-to-day lives of judges in India. For example, how senior a judge is on a High Court could determine what kind of apartment that judge lives in or what kind of car that judge drives—both benefits Indian higher court judges are entitled to receive. Judges in India also sit on the bench in their order of seniority, much in the same way as constitutional courts the world over. Thus, the Chief Justice of India or most senior judge sits in the center, the next most senior judge sits to his right, the next to his left, and so on, with the result that the most senior judges are concentrated towards the center of the bench, while the junior judges sit in the flanks.

II. METHODOLOGY

I systematically analyzed the results of a search conducted on the Manupatra database in November 2011.[72] The search was conducted for the term "19(1)(a)", the portion of India's constitution that deals with the freedom of speech and expression, and was confined to cases decided by the Supreme Court of India. I found 107 speech cases decided by the court during this time, and a list of these cases is set out in Appendix 1. Each case was classified according to the Chief Justice who was at the helm of affairs at the Supreme Court of India during that time. The cases were then coded for different variables. During the course of my study, I encountered several methodological problems, and in this section I set out the strategies that I used to address these problems.

A. Quantitative Techniques in Legal Studies

In a recent law review article, Judge Harry T. Edwards, the former Chief Judge of the District of Columbia Circuit Court of Appeals, and Michael Livermore identify methodological and conceptual problems with employing quantitative research techniques to analyze court decisions. First, methodologically, they argue that there are problems associated with "translating textual decisions into raw data," and with coding cases based on binary outcomes. Second, at a conceptual level, they argue that there are problems with the "attitudinal model" of judicial behavior and that appellate

294–98 (2007). However, later, when Justices Santosh Hegde and R.P. Sethi were appointed to the Supreme Court of India on the same day, January 8, 1999, Santosh Hegde, the "bar judge", was considered senior to R.P. Sethi, the Karnataka High Court Chief Justice.

[72] Manupatra is a subscription-based database containing Indian legal materials, including up to date acts, regulations, and amendments made by Parliament and State legislatures, and judgments issued by the Supreme Court and the High Courts. MANUPATRA, http://www.manupatra.com (last visited Sept. 2, 2012).

court judges do not always vote in accordance with their political ideologies or personal policy preferences. Third, they also argue that such studies do not account for other factors that may go into the decision, for example the role of precedent.[73]

However, within the Indian context, these arguments are capable of being addressed. First, the binary coding of cases into "liberal" or "conservative" decisions may be problematic, but in this Article I only code cases as being either in favor of or against the claimant, which is arguably easier to measure. I do not code a case based on whether the outcome was "liberal" or "conservative," but only on the basis of whether the outcome was pro-claimant or anti-claimant, where the claimant was the one who complained of the speech deprivation by the government.

Second, the "attitudinal model" would be difficult if not impossible to employ while studying decisions of the Indian Supreme Court, and in this study I do not employ this model. Unlike in the United States, in India Supreme Court justices are not appointed in a partisan manner by presidents, and their political ideologies are incapable of being ascertained and coded as a binary variable.[74] In this Article, I do not posit, as Cass R. Sunstein does in the U.S. context,[75] that there is "ideological dampening" or "ideological amplification" based on "panel effects" in Indian Supreme Court cases. Instead, I attempt to measure "panel effects" of a different kind: whether and to what extent non-ideological variables impact the voting behavior of judges, and whether they impact the outcomes of speech cases. In other words, I will not be coding cases based on the "external proxy"[76] of the political party of the appointing authority, since this methodology does not apply in India. Third, precedent may play a larger role in appellate courts that are not the highest courts in the appellate hierarchy, but it arguably plays a less dominant role in courts of the last resort, where "hard" cases may be more prevalent.

The use of quantitative techniques in legal analysis has additional drawbacks.[77] A quantitative analyst treats each case as having the same value or worth, whereas this may not be so. The risk of carrying out pure quantitative studies in constitutional cases is that there is no foolproof manner in which the *Marbury v. Madison*-type landmark case can be distinguished

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[73] Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

[74] *See also* Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH U. J.L. & POL'Y 133 (2009).

[75] CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

[76] *See* Corey Rayburn Yung, *Judged By the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1148 (2010).

[77] *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2008).

from ordinary cases.[78] A hundred cases might be decided in favor of the government, but the one case decided against it may be the one that truly counts in the scheme of things. Quantitative techniques may miss out such observations. Out of the 107 speech cases I analyzed, three or four may have fundamentally influenced the jurisprudence of the Court, either because of the issues involved, because of the personality of the justice or justices deciding the case, or otherwise. In this quantitative study, each case is treated as an equal data point and the influence of each decision on the free speech jurisprudence in India is not measured. However, the purpose of this study is not to study constitutional doctrine, or to assess significant doctrinal changes in the Court's free speech jurisprudence. Rather, the objective of this study is to measure the Supreme Court's jurisprudence from a sociological standpoint, to gain a better understanding of how the court decides free speech cases, to draw generalizable conclusions as to the importance of free speech in the court's docket, and to assess whether the background influence of the judges deciding free speech cases has had any impact on the outcome of those cases. As Mark Hall and Ronald Wright put it, the goal here is not to "audition soloists" but to "assemble a chorus, listening to the sound that the cases make together."[79]

The 107 cases I examined for this study may omit cases that involved a free speech component but where Article 19(1)(a) was not cited before the Court. For example, though I have not encountered such cases, it is possible that contempt of court cases, or other cases involving a free speech component, were not couched by the claimant or the court as free speech cases. If Article 19(1)(a) was not cited in the Court's opinion, such cases would fall outside my data set. Nonetheless, but cases do not pose a systemic problem to the ability to generalize based on my data set because the randomness of the sample remains unaffected. The data set may also exclude cases where the Court may have cited the Indian constitution's free speech provision incorrectly (e.g., as "Article 19[a]" instead of Article 19[1][a]). Again, this does not contaminate the randomness of my sample or its validity.

Finally, it is important to qualify that this is only an empirical study of the Court's reported decisions. It does not include cases, for example, where the

[78] One possible way of accounting for this difficulty could be to measure the number of times each decision was cited thereafter, or to measure whether the decision was followed, distinguished or overruled. However, in this methodology, cases decided earlier would have an unfair advantage over those decided later. For example, assume that Case A and Case B are decided in 1950 and 2000 respectively, and both are of equal foundational importance to free speech jurisprudence in India. Case A may be cited, or followed, on more occasions that Case B. However, since Case A would have been on the books for 60 years, and Case B only for 10 years, Case A would have an unfair advantage over Case B. Another way of accounting for this difficulty could be to accord different weight to cases decided by different benches (i.e. to assign more weight to cases decided by larger benches, presumably because those cases are more important)—difficult to do in India where two-judge benches have become commonplace.

[79] SUNSTEIN ET AL., *supra* note 75, at 76.

Court may have denied "special leave petitions" in the exercise of its discretionary jurisdiction without giving any reasons for its decision.[80] It does not include unreported decisions, although there is no reason to believe that decisions are not reported for non-random reasons. In fact, all decisions where judgment is reserved are reported, unlike High Courts in India, where the judge exercises discretion as to whether the decision should be reported.[81] This study also does not include decisions where the court may not have given any reasons for its orders, although such instances may be very rare.

The absence of data concerning special leave petitions appears to be the most problematic for the purposes of this study, although this problem is capable of being addressed. When a court admits or denies a "special leave petition" under Article 136 of the Constitution[82] it is exercising its discretionary jurisdiction under the Constitution.[83] My study deals only with the Court's exercise of its original and appellate jurisdiction, but not its discretionary jurisdiction. Further, decisions where a court denies a special leave petition without assigning reasons (termed "non-speaking" orders) are not "decisions" in the strictest sense of the term: the order has no binding or precedential effect and is limited to the facts of the case, and the doctrine of "merger" does not apply to such orders.[84] Of course, had data concerning the summary dismissal of special leave petitions been available, that evidence would have helped shed some additional light on speech cases, particularly with regard to what kinds of speech cases were admitted into appeal and what kinds of speech cases the Court considered important. However, the absence of these data does not pose a problem to the study in this Article, which only catalogues decisions rendered under the Court's original and appellate jurisdictions.

B. Problems with the Database

The search engine that I used, Manupatra, was at times problematic. First, in many cases, Manupatra does not indicate who wrote the majority, concurring, or dissenting opinions. For example, assume that in a bench of seven judges, Judge 1 wrote the majority opinion (in which Judges 2, 3 and 4 joined), Judge 5 wrote a concurring opinion (in which Judge 6 joined), and Judge 7 wrote a dissenting opinion. At times, Manupatra would not indicate

[80] A High Court decision in India can be appealed in any one of three circumstances. *See supra* note 43. My study in this paper does not cover the third type of appeals, those in which the Supreme Court specifically grants leave to appeal.

[81] Interview with anonymous Supreme Court Attorney in Mumbai, India (Nov. 8, 2011).

[82] If the petition is admitted, the case becomes an appeal.

[83] *See* Kunhayammed v. Kerala, A.I.R. 2000 S.C. 2587. *See also* Bakshi Dev Raj v. Sudhir Kumar, 8 S.C.A.L.E. 259 (2011).

[84] *See* Kunhayammed, A.I.R. 2000 S.C. 2587; Bakshi Dev Raj, 8 S.C.A.L.E. 259. It does not apply to speaking orders in such cases either.

which decision was the majority opinion, which the concurring opinion, and which the dissent. Further, at times Manupatra also failed to indicate how Judges 2, 3, 4, and 6 voted. Since only three judges wrote opinions, the answer was not self-evident. For this reason, in such cases, I independently verified such details, by going through published law reports—either the Supreme Court Reporter (S.C.R.) or the All India Reporter (A.I.R.).

Second, Manupatra does not list judges in their order of seniority. For example, if Judges 1, 2, and 3 decided a case, Judge 1 being the most senior, Judge 2 being the next most senior, and Judge 3 being the most junior, Manupatra may at times list such judges in random order, e.g. as Judges 2, 3, 1. This was not helpful to me, as I was attempting to ascertain whether the Chief Justice of India always composed benches with a majority of senior judges on the bench, and whether senior judges always wrote opinions. In order to accurately collect data for this variable, I independently ascertained the order of seniority of the judges on each bench, based on data I have collected for another study. This entailed my ascertaining who was on the court at the time the case was decided, and then determining whether to classify the judges who decided the case as either "senior" or "junior."

Third, it is possible that Manupatra does not contain the entire universe of free speech decisions delivered by the Supreme Court of India. Supreme Court decisions are reported in various journals. The editor of each journal exercises a certain level of discretion in deciding whether or not to include a decision in its volumes. It is possible—although I have thus far found no evidence of this—that Manupatra might have missed some free speech decisions. However, this problem does not contaminate the validity of the sample used in this study, and thus does not pose an insurmountable difficulty. There is no reason to believe that the cases not included in Manupatra's archives have systemically been excluded for any non-random reason. Accordingly, even if the 107 free speech cases I found on Manupatra's archives constitute only a sample, and not a census, the sample is valid because each case has an equal chance of being a part of the sample.

C. Excluding Decisions from the Data Set

The search on Manupatra yielded 212 results. Of these, I found that only 107 were "speech" cases. On some occasions, the question of whether to exclude a case from the study was simple. For example, a case may have referred to section "19(1)(a)" of some statute, as opposed to the Indian constitution, which is why it may have appeared in response to my search. I could easily exclude such cases from my study. Other cases posed harder difficulties. My guiding principle was to err on the side of over-inclusion, as I would prefer to include a potentially relevant case rather than exclude it.[85]

[85] Some cases did not appear to be free speech cases at all, but the claimant raised Article 19(1)(a) of the constitution as a claim. At the risk of over-inclusion, these were included in the study if the court (or at least some justices) addressed the question. Thus, in *A.K. Gopalan v. Madras*, A.I.R. 1950 S.C. 27, a preventive detention case, the

petitioner argued that his rights under Article 19 (including the right to free speech) had been violated by his detention. This contention was rejected. However, for the purposes of this study, this case was categorized as a speech case. However, where the claimant raised a free speech claim, but the Court did not deal with the issue at all, I did not include it as a free speech case in this study, unless it struck me as an obvious free speech case, *see, e.g.*, Ahmedabad St. Xavier's College v. Gujarat, A.I.R. 1974 S.C. 1389 (dealing with the right of a minority institution to establish and maintain educational institutions, governed by a separate right under the Indian constitution). In many cases, a right which was in substance a right to form associations and unions [recognized by Article 19(1)(c) of the Indian constitution], was also put forward by the claimant as a speech case under Article 19(1)(a). These were not considered "speech" cases in this study. *See, e.g.*, Dharam Dutt v. Union of India, A.I.R. 2004 S.C. 1295; PUCL v. Union of India, A.I.R. 2004 S.C. 456. Privacy cases involving search and seizure were not considered free speech cases, *see, e.g.*, District Registrar v. Canara Bank, A.I.R. 2005 S.C. 186 (dealing with the inspection of bank records), although doctrinally the court may have found that the "right to privacy" emanated from Article 19(1)(a) of the Indian constitution.

In some cases, there may have been a way of looking at the case through a free speech lens, but the court may not have dealt with the free speech question at all, and the claimant may apparently not have raised a free speech issue. The only reason such a case would have shown up in my search would be if the court quoted another case that incidentally happened to cite Article 19(1)(a). Such cases were counted as free speech cases if they involved obvious free speech issues, *see, e.g.*, Ram Singh v. Delhi, A.I.R. 1951 S.C. 270 (preventive detention consequent to speeches made by members of the Hindu Mahasabha). I have also counted cases where a free speech element was definitely involved, but the court did not address it, *see, e.g.*, R.M. Seshadri v. District Magistrate, A.I.R. 1954 S.C. 747 (licensing of a cinema theater considered only from the point of view of Article 19(1)(g), the right to practice any profession or to carry out any occupation, trade or business, even though free speech was definitely implicated)A.I.R.. Many cases were removed from this study because although the court mentioned Article 19(1)(a), the case did not involve a free speech question at all, and the court was only referring to past jurisprudence for interpretive guidance, *see, e.g.*, West Bengal v. Subodh Gopal Bose, A.I.R. 1954 S.C. 92.

A dispute between private parties was not considered a free speech dispute, unless the state was involved in some way, for example if a government statute was under challenge, or a court gag order was under consideration, or an election petition was being considered. Thus, for example, in *Laxmi Devi Sugar Mills v. Nand Kishore*, A.I.R. 1957 S.C. 7, the court considered whether a speech made by a dismissed employee was "subversive" under the labor standing orders (approved by the government), and held in favor of the corporation. However, since the standing order was not challenged, and no "state action" was involved, this was not considered a speech case. Similarly, in *Naresh Sridhar Mirajkar v. Maharashtra*, A.I.R. 1967 S.C. 1, a High Court decision concerning two private parties was challenged via a writ petition filed before the Supreme Court. The court held that it was not possible to claim that a High Court had violated Article 19(1)(a) of the Constitution. Since no "state action" was involved, this was not counted as a free speech case. However, in *Reliance Petrochemicals v. Indian Express*, A.I.R. 1989 S.C. 190, the court considered whether an injunction could be continued against the publication of newspaper reports relating to a matter that was *sub judice*. This was counted as a free speech case since it involved a question of prior restraints, a topic clearly within the free speech domain. Almost all questions involving the press were counted as free speech cases, *see, e.g.*, Express Newspapers v. Union of

To determine whether or not a case should form a part of my sample for the study, I first ascertained whether the claimant cited Article 19(1)(a) of the Constitution. This tended to be problematic at times because Article 19 is cited in numerous cases in India, even if the case does not involve any conventional speech issue. The rule adopted in this study was that if the claimant cited Article 19(1)(a) (and if this was recorded in the court's decision), the case was counted as a "speech" case, unless it obviously involved another limb of the Indian constitution, such as (1) the right to form associations and unions under Article 19(1)(c), (2) the right to freedom from search and seizure (i.e. privacy) under Article 21, or (3) defection under the tenth schedule.

Second, where the claimant did not cite Article 19(1)(a) of the Constitution, but the case still showed up in the search, I included the case in the study if the case obviously involved a free speech component. Third, all cases involving the press were considered free speech cases, even though they may not immediately have involved free speech issues (for example, taxation of the press or the withholding of construction approvals from the press), because such cases could have been used by governments as proxies to speech regulation.

D. Classification of Cases

Sometimes, it was difficult to classify whether the decision was pro-speech or anti-speech, pro-government or anti-government. To establish whether the case ought to be categorized as pro-speech or anti-speech, I determined whether or not the operative part of the court's decision (i.e., the final order) on balance benefitted the claimant. For example, in *Bihar v. Shailabala Devi*,[86] the Supreme Court reversed the Patna High Court's ruling that the statute in question was unconstitutional, but the Court then held in favor of the claimant anyway, finding that the pamphlet in question did not violate the law. Similarly, in *Madhu Limaye v. Sub-Divisional Magistrate*,[87] the court refused to accept the petitioner's argument that the statute in question was unconstitutional, although it held that the magistrate had not acted legally. In

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India, A.I.R. 1986 S.C. 872 (government investigation into the permission granted to the *Indian Express* newspaper corporation to construct a building).

Not every interim victory was counted in this study. For example, in cases where the Supreme Court referred a question to a larger bench because it involved a substantial question of law, the paragraph-long order was not counted for the purposes of this study, see, e.g., *Ravindra Kumar v. Union of India*, (1986) 3 S.C.C. 587. Similarly, cases in which the court merely referred the question of whether the right to vote was a part of the freedom of speech to a larger bench, see, e.g., *People's Union for Civil Liberties v. Union of India*, (2009) 3 S.C.C. 200, were not included in this study. Defection cases were not counted as speech cases, even though a party may have made a passing reference to Article 19(1)(a), see, e.g., *Balchandra v. Yedyurappa*, (2011) 7 S.C.C. 1.

[86] Bihar v. Shailabala Devi, A.I.R. 1952 S.C. 329.

[87] Madhu Limaye v. Sub-Divisional Magis., A.I.R. 1971 S.C. 2486.

such cases, since the eventual outcome favored the claimant, the decision was classified as pro-speech.[88]

[88] In *Hamdard Dawakhana v. Union of India*, A.I.R. 1960 S.C. 554, the court held partially in favor of the claimant, striking down two sections in the impugned statute. However, using the doctrine of severability, the court held that the rest of the statute was constitutional, and even said that there was no right to freedom of speech in commercial advertisements. For this reason, this case was counted as an anti-free speech case. In *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597, the court innovatively held that the order of a passport officer impounding a passport could violate a person's rights under Article 19(1)(a). However, despite this broad interpretation, the court did not strike down the order impounding the claimant's passport, in light of a statement made by the Attorney General that the matter was being reconsidered. For this reason, this case was counted as an anti-speech case.

Where a sentence against the claimant was mitigated (for example, in contempt of court proceedings), but the claimant was still found guilty despite the right of free speech, the case was classified as anti-speech, see, e.g., *Rama Dayal v. Madhya Pradesh*, A.I.R. 1978 S.C. 921. In a contempt of court case, the case was counted as anti-speech not only in those cases where the speaker was imprisoned, but also in those cases where the court arrived at a finding of wrongdoing, and directed that remedial actions be taken, although it stopped short of criminal punishment; for example, in *In re Harijai Singh*, A.I.R. 1997 S.C. 73, the court accepted the speakers' unconditional apology, but directed them to publish a statement that the statements were "absolutely incorrect and false." However, if the court accepted the claimant's unconditional apology and took no further action, the case was counted as a pro-speech case, see, e.g., *Sanjoy Narayan v. Allahabad*, (2011) 9 S.C.A.L.E. 532.

Some cases were treated as neither pro-speech nor anti-speech cases. For example, in *Virendra v. Punjab*, A.I.R. 1957 S.C. 896, the court heard two petitions at once, and the results differed in each petition. The court permitted one, but dismissed the second petition. Such cases were neither counted as pro-speech nor anti-speech. Similarly, in *P.V. Narasimha Rao v. State*, A.I.R. 1998 S.C. 2120, the Supreme Court held that a member of Parliament who had cast a vote in a motion could not be prosecuted, because of the right to free speech in Parliament, but also held that one who had abstained from voting was not so immune, even though abstentions are arguably as much a part of the exercise of free speech as voting is. I have not counted this case as either a pro or anti free speech case. *Raja Ram Pal v. Union of India*, (2007) 3 S.C.C. 184, which dealt with the expulsion of members of Parliament for having allegedly accepted bribes to ask questions in the House, was not counted a speech case since the court did not appear to record a contention by the petitioners that their expulsion from the House for allegedly accepting a bribe was a violation of their free speech under Article 105(1) of the constitution. In *Narayan Bhat v. Tamil Nadu*, A.I.R. 2001 S.C. 1736, the court held that the government was entitled to require hoardings to be licensed, but it extended the time within which the claimants could apply for a license. *Narayan Bhat* was counted as an anti-free speech case, since on balance, the claimants lost their claim.

Some cases were even harder to categorize. For example, does a decision which holds in favor of a press corporation against a government order that requires them to create a fund for the pensions of journalists constitute a pro-speech or anti-speech decision? It is in favor of the corporation, but against the individual journalist. These have unhappily been categorized as pro-speech cases, where they are in favor of the news corporation, see, e.g., *Hindustan Times v. State of Uttar Pradesh*, A.I.R. 2003 S.C. 250.

The categorizations "pro-free speech" and "anti-free speech" must, to some extent, be understood in this study as being value-neutral. The mere fact of a court's decision being "anti-free speech" does not mean that the decision was not "just" or "right" in the facts and circumstances of the case; for example, in a hate speech case, a judgment that is "anti-speech" may be considered even by liberal thinkers as "just."[89]

As described above, each speech case was categorized based on the judge who was Chief Justice of India at the time. However, an "acting" Chief Justice of India, i.e., a temporary Chief Justice of India, was not counted for this purpose or for the purposes of determining the question of whether or not the Chief Justice of India was on the bench.[90] Sometimes it was hard to classify a case as falling within a certain Chief Justice's court. For example, the case of *Chairman, State Bank of India v. All Orissa Officers Association*,[91] was decided on B.N. Kirpal's first day as Chief Justice of India, and it was highly doubtful if Kirpal had assigned this case to the bench that decided the case. This case was therefore attributed to Kirpal's predecessor, Chief Justice S.P. Bharucha.

A case was not considered an "appeal" if it did not go through a High Court. For example, an appeal from a tribunal, a very rare phenomenon, was not considered an appeal for purposes of this study. [92] I excluded such cases because I was primarily interested in finding out whether the manner in which a case was staffed by the Chief Justice of India had anything to do with the High Court being appealed—in other words, whether the judges hearing the appeal had formerly served as judges on the High Court whose decision was

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Similarly difficult to categorize are cases in which, for example, the court may agree with one part of the claimant's argument, and reject another part. In *Kameshwar Prasad v. Bihar*, A.I.R. 1962 S.C. 1166, the court struck down the portion of 4A of the 1956 Bihar Government Servants' Conduct Rules that prohibited government employees from taking part in "any demonstration", but not the part that banned "resort to any form of strike." This case has been treated as one in favor of free speech. Similarly, in *K.A. Abbas v. Union of India*, A.I.R. 1971 S.C. 481, the court held that censorship of films was permissible under the Indian constitution, and that prior restraints were permissible. However, the claimant's petition was allowed, on the strength of certain concessions made by state counsel, and certain observations made by the court. Because the claimant's petition was allowed, this case was counted as a decision in favor of free speech.

[89] *See, e.g.*, Das Rao Deshmukh v. Kamal Kishore, A.I.R. 1996 S.C. 391. In *Das Rao Deshmukh*, the court held that a candidate who had intentionally aroused communal passions during the course of his election campaign was guilty of corrupt practices. Although the court turned down the speech claim, the court's holding may not necessarily have therefore been "unjust." *See also* Stanley Halpin, *Racial Hate Speech: A Comparative Analysis of the Impact of International Human Rights Law Upon the Law of the United Kingdom and the United States*, 94 MARQ. L. REV. 463 (2010).

[90] *See, e.g.*, Sambhu Nath Sarkar v. West Bengal, A.I.R. 1973 S.C. 1425 (opinion of Shelat, J.).

[91] Chairman, State Bank of India v. All Orissa Officers Ass'n, A.I.R. 2002 S.C. 2279.

[92] *See, e.g.*, Jamuna Prasad v. Lacchi Ram, A.I.R. 1954 S.C. 686.

being appealed. Next, an appeal allowed in part was considered a "reversal" of the High Court. When there were many appeals before the court, the question of whether the appeal was reversed or affirmed was eschewed, because often, in such cases, the court did not identify the courts from which the appeals had been preferred. If a case was a consolidated appeal and writ petition, it was counted as an appeal. A High Court's decision was considered to have been affirmed if the outcome was affirmed.

E. Deciphering Seniority and Voting Patterns

To calculate whether a judge was "senior" or "junior," I divided by two the total number of judges actually serving on the court at the time that a given case was being decided, and the top half was considered senior, the bottom junior. If the total number (N) on the court was odd, and a judge was (N/2)+1 in seniority, he was considered a senior judge.[93]

A judge was counted as having "dissented" from the majority opinion only if he dissented from the conclusion or the operative part of the decision, but not in the reasoning. For example, in *Madhu Limaye v. Sub-Divisional Magistrate*,[94] Justice Bhargava disagreed with the majority view concerning the interpretation of certain sections in the statute, but agreed with the conclusion of the majority that the statute under challenge was constitutional. His opinion was counted as a concurring opinion (an opinion in which a judge agreed with the majority, though for different reasons).

III. STRUCTURAL OBSERVATIONS

A. Chief Justice of India Participation

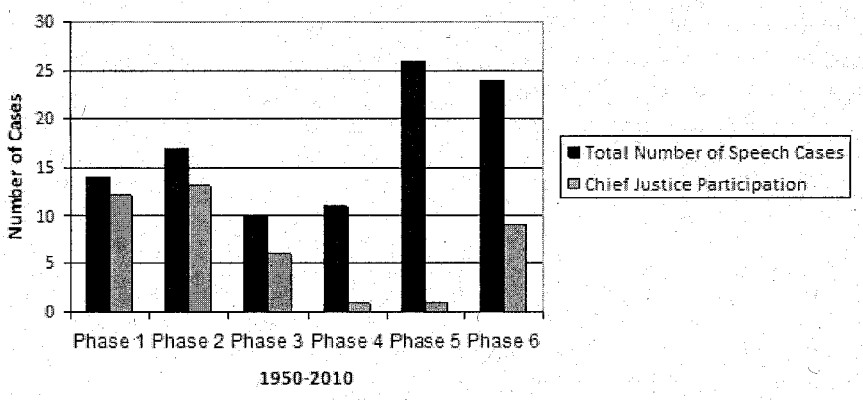
Of the 107 speech cases examined in my study, the Chief Justice of India was not a part of the bench deciding the case 40.1% of the time. Historically speaking, the Chief Justice of India heard the large majority of free speech cases decided by the Supreme Court of India between 1950 and 2011. However, this figure has not remained constant over the years. To analyze temporal changes in the Chief Justice's presence in free speech cases, I divided the court's cases into six phases, each roughly corresponding with a decade. Phase 1 ran from 1950 to 1959, Phase 2 from 1959 to 1970, Phase 3 from 1970 to 1978, Phase 4 from 1978 to 1990, Phase 5 from 1990 to 2001, and Phase 6 from 2001 to 2010. Each phase begins with the term of a Chief Justice of India and ends with the term of a different Chief Justice of India appointed roughly during that

[93] I followed this approach in cases like *S. Rangaraj v. P. Jagjivan*, (1989) 2 S.C.C. 574, for example.

[94] Madhu Limaye, A.I.R. 1971 S.C. 2486.

decade.[95] For example, Phase 1 begins with the term of Harilal J. Kania as Chief Justice of India, and ends with the term of S.R. Das as Chief Justice of India. The data indicate that the participation[96] of the Chief Justice of India in speech cases decreased over the decades from 85.7% to only 3.8% of the cases in the 1990s (Phase 5). The last decade (Phase 6) witnessed a slight resurgence of Chief Justice participation in free speech cases, but the Chief Justice of India no longer participates in free speech cases like he did in the 1950s, 1960s, and to some extent, the 1970s.

Table 1
Participation by the Chief Justice of India



This finding potentially points to the hypothesis that free speech cases in India are less crucial to the court's docket, since the Chief Justice of India no longer devotes as much time to such cases. This is despite the fact that the last two decades have witnessed the most speech cases that the Court has decided.[97] The finding that the Chief Justice of India participates in speech cases less than he did in the early phases of the court's history cannot merely be explained away by the fact that more work on the court today is done by smaller benches. Consistent with the results of the study conducted by Nick Robinson and his coauthors,[98] it will be seen that the presence of the

[95] I decided to run the analysis in terms of these six phases instead of six decades because it would not be fruitful to bifurcate data concerning the term of a Chief Justice of India that ran between two decades

[96] That is, his presence on a bench deciding a free speech case.

[96] That is, his presence on a bench deciding a free speech case.

[97] The results of my study suggest that the court heard and decided the highest number of cases involving the right to free speech, from amongst any Phase, in Phase 5, and the next highest number of cases involving the right to free speech, from amongst any Phase except Phase 5, in Phase 6. *See supra* Table 1.

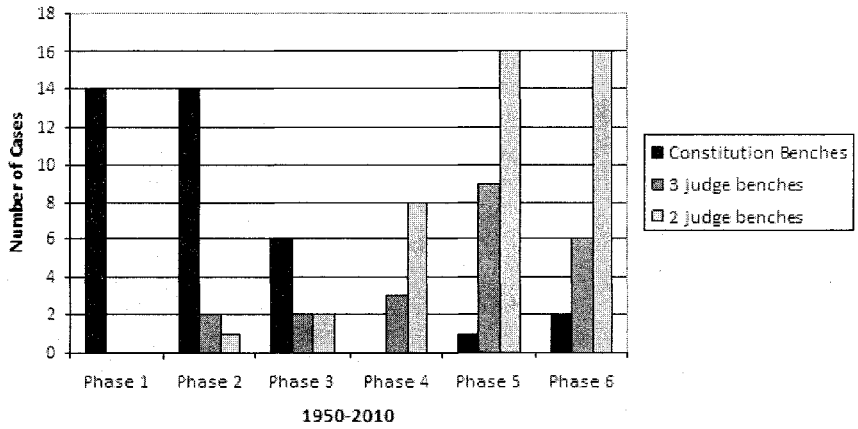
[98] Robinson et al., *supra* note 7.

"Constitution bench," a bench of five or more judges,[99] has diminished on the Supreme Court in speech cases. However, the Chief Justice of India still has the power to assign speech cases to himself. The fact that the Chief Justice has done so less over the years points potentially to the diminishing importance of free speech cases on the court's docket and its list of priorities.

B. Bench Strength

The highest proportion of speech cases were decided by benches of two judges (44.8%). Constitution benches accounted for the next highest proportion of speech decisions in the Supreme Court of India (34.5%), while benches of three judges followed (20.5%). In the 1970s, Chief Justice Hidayatullah appeared to be perhaps the first Chief Justice to delegate speech cases to benches of two or three judges. Until then, such cases had been decided by Constitution benches. Constitution benches then were phased out on the court, such that in the 1980s (Phase 3), no speech case was decided by a Constitution bench.

Table 2
Bench Strength



The fact that speech cases today are overwhelmingly decided by smaller panels of judges, typically two-judge panels, indicates that speech cases no longer engender the same level of deliberation among judges that they once did, or the same attempts to build consensus as seen in earlier cases. This may not be a finding exclusive to speech cases.[100] Research indicates that larger panels are rare in all cases, across the board.[101] Speech cases are no exception

[99] *Id.*

[100] *Id. See also* Gupta, *supra* note 2, at 101.

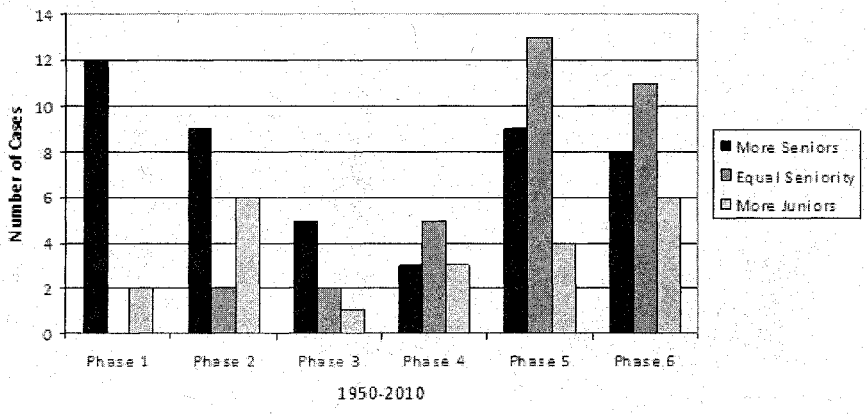
[101] Robinson et al., *supra* note 7.

to this paradigm. These cases no longer generate the same levels of discussion on the bench.

C. Seniority

While composing benches, the Chief Justice of India places a very high premium on ensuring that the bench has either more senior judges than junior judges on it, or, typically in even-size two-judge benches, that at least one judge is a senior judge. This seems to be the trend amongst nearly all Chief Justices, although there were exceptions. Chief Justice B.P. Sinha in the 1960s, for example, assigned a large number of cases to benches where the junior judges outnumbered the senior judges. Similarly, Chief Justices A.N. Ray (1970s), Y.V. Chandrachud (1980s), M.N. Venkatachaliah (1990s), and K.G. Balakrishnan (2000s) delegated speech cases on at least two or more occasions where the junior judges on the bench outnumbered the senior judges.[102] Of course, as the phenomenon of two-judge benches increased, so did the phenomenon of benches of equal seniority, two-judge panels in which one judge was a senior judge and the other a junior judge.

Table 3
Seniority on Benches



Senior judges overwhelmingly dominate decision-making in speech cases. Here, speech cases possibly offer an insight into the court's decision-making process generally. The Indian judiciary is defined today by the norm of

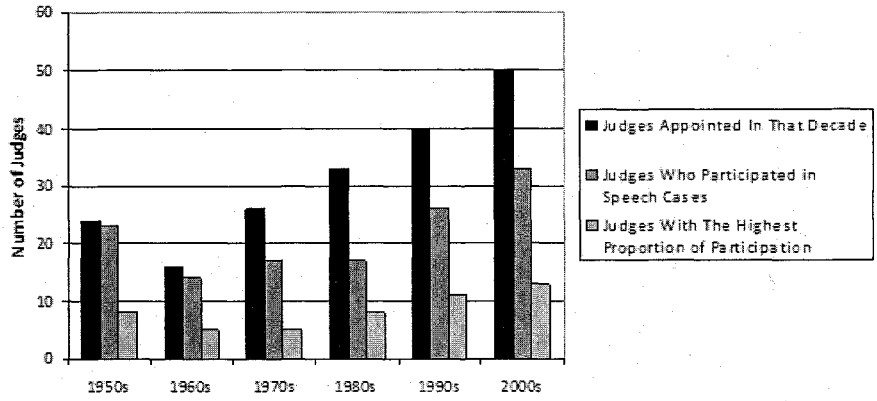
[102] *See* Khushboo v. Kanniamal, A.I.R. 2010 S.C. 3196; Directorate of Film Festivals v. Gaurav Ashwin, A.I.R. 2007 S.C. 1640; R. Rajagopal v. Tamil Nadu, A.I.R. 1995 S.C. 264; Printers (Mysore) v. Assistant Comm'r, (1994) 2 S.C.C. 434; Prabha Dutt v. Union of India, A.I.R. 1982 S.C. 6; Rama Dayal Markarha v. Madhya Pradesh, A.I.R. 1978 S.C. 921; Baradakanta v. Orissa High Court, A.I.R. 1974 S.C. 710; V.K. Javali v. Mysore, A.I.R. 1966 S.C. 1387; O.K. Ghosh v. E.X. Joseph, A.I.R. 1963 S.C. 812; Kameshwar Prasad v. Bihar, A.I.R. 1962 S.C. 1166; Sakal Papers v. Union of India, A.I.R. 1962 S.C. 305; Superintendent v. Ram Manohar Lohia, A.I.R. 1960 S.C. 633.

seniority. Seniority determines promotions, benefits, and arguably, status. The dominance of senior judges on speech benches indicates their monopoly over the court's decision-making process. If this phenomenon were exclusive to speech cases, then the occurrence would say something about the value of speech on the court's docket; it would indicate that speech cases are important enough for senior judges to decide them. However, it is far more likely that senior judges monopolize decision-making on the Supreme Court generally, and not just in speech cases.

D. Speech Specialists

While assigning speech cases, did the Chief Justice of India attempt to cultivate specialists? To answer this question, I categorized each of the 196 judges appointed to the Supreme Court of India between 1950 to 2011 according to the different decades in which each was appointed, and compared the participation of each such judge in speech cases against the participation in such cases of other judges appointed to the court during that decade.

Table 4
Speech Specialization



Between 1950 and 2011, the Court heard approximately 107 free speech decisions, in which approximately 131 judges participated (approximately two-thirds of the total number of judges appointed to the Supreme Court during that time). With every passing decade, the number of judges who participated in speech cases diminished. Thus, 95.8% of the judges appointed to the court in the 1950s went on to participate in at least one speech decision, but this figure fell to 87.5% for judges appointed in the 1960s, 65.3% in the 1970s, 51.5% in the 1980s, and then rose marginally to 65% in the 1990s and 66% in the 2000s. Thus, a smaller proportion of the judges appointed to the Court today are assigned to speech cases than were in the early decades of the Court's

existence. This distinction could exist because the speech cases today are decided by smaller benches.

Further, even amongst the judges who participated in speech cases during each decade, a small proportion of the judges, representing approximately one third of the total number of judges appointed to the court during each decade, accounted for 50% or more of the total participation in speech cases from amongst all judges appointed during each decade to the court. Therefore, there is some evidence to demonstrate that the Chief Justice of India may have cultivated specialists to hear speech cases.

To illustrate this hypothesis, consider that 24 judges appointed to the court in the 1950s participated approximately 128 times in free speech cases.[103] By this measure, 8 judges appointed to the Court in the 1950s (Sastri, Mahajan, Mukherjea, Das, Sinha, Gajendragadkar, Sarkar, and Wanchoo), constituting one-third of the judges appointed to the Court in the 1950s, dominated the participation in speech cases such that their collective participation in speech cases exceeded 50% of the total participation of all the judges appointed to the Court during that decade. Similarly, of the 16 judges appointed to the court in the 1960s, the participation in speech cases of 5 judges (Ayyangar, Sikri, Shelat, Vaidialingam, and Ray), less than one-third of the total number of judges appointed to the court in that decade, exceeded 50% of the total participation in speech cases of all the judges appointed to the court during that decade. Of the 26 judges appointed to the court in the 1970s, the participation in speech cases of as few as 5 judges (Mathew, Beg, Chandrachud, Bhagwati, Krishna Iyer, and Kailsam), less than even one-fifth of the total number of judges appointed to the Court during that decade, exceeded 50% of the total participation of all the judges appointed to the Court during the 1970s. Similarly, the participation in speech cases of 8 out of 33 judges appointed to the court in the 1980s (A.N. Sen, Sabyasachi Mukherjee, Misra, M.M. Dutt, Ahmadi, Kuldip Singh, Verma, and Sawant), 11 out of 40 judges appointed to the court in the 1990s (Jeevan Reddy, G.N. Ray, N.P. Singh, Bharucha, Hansaria, Manohar, K. Venkataswami, Pattanaik, Khare, Babu, and M.B. Shah), and 12 out of 50 judges appointed to the court in the 2000s (Sabharwal, Balakrishnan, Brijesh Kumar, Bhan, B.P. Singh, Dharmadhikari, Sinha, Lakshmanan, Kapadia, Chatterjee, Bedi, and Chauhan) each substantially exceeded 50% of the total participation of all the judges appointed to the court during that respective decade.[104]

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[103] Each speech case was counted as having generated as many participations as there were judges on the bench. For example, in Case A if Judges 1, 2 and 3 participated, Case A was counted as having generated 3 participations.

[104] Each of the 8 judges in the 1950s heard 7 to 13 speech cases (56.2% of the total participation of judges in that decade in speech cases); the 5 judges in the 1960s heard 5 to 8 speech cases (61.2% of the total participation of judges in that decade in speech cases); the 5 judges in the 1970s heard 3 to 5 speech cases (54.5% of the total participation of judges in that decade in speech cases); the 8 judges in the 1980s heard 2 to 6 speech cases (70.9% of the total participation of judges in that decade in speech cases); the 11 judges in the 1990s heard between 3 and 7 speech cases (69.2% of the total participation of judges in that decade in speech cases); the 12 judges in the 2000s heard

For this reason, there is evidence that a smaller number of judges were more frequently assigned to speech cases, and that there was a certain degree of specialization on the Court, although this was not prevalent to a very high degree. The attempt to make some judges specialists in speech cases has positive implications for the judicial system in India. At a minimum, the rule of law requires that legal rules be clearly defined and consistently applied. The assignment of cases to specialists means that those specialists will be more attuned to the nuances of the law in their area of specialization, and will produce more consistent and predictable outcomes. The fact that speech cases are assigned to specialists means that the speech jurisprudence of the court can be developed and applied in a consistent and predictable manner, notwithstanding the high volume of two-judge benches that have the potential to make legal decision-making less predictable.

IV. BEHAVIORAL OBSERVATIONS

A. Opinion Writing

Historically, in 51.4% of the cases, the most senior judge on the bench wrote the majority opinion on the bench. For the purposes of this study, an opinion is considered a "majority opinion" if it is either the only opinion written in a case, or if the most number of judges on the bench agreed with the opinion. In another 15.8% of the cases, a senior[105] judge on the bench (though not the senior-most) wrote the majority opinion. Only in 20.5% of the cases would a junior judge write the majority opinion. In the remaining cases, either there was no majority opinion, or information concerning the author of the majority opinion was unavailable.

Historically, the onus of writing the majority opinion has always been shared by the senior judges on the bench. In each phase of the court's history, the number of senior judges (i.e., the most senior judge, or one of the senior judges) who wrote the majority opinion outnumbered the junior judges who wrote the majority opinion. However, in the last phase of the court's history, that between 2001 and 2010, the highest proportion of junior judges wrote the majority opinion of the bench.

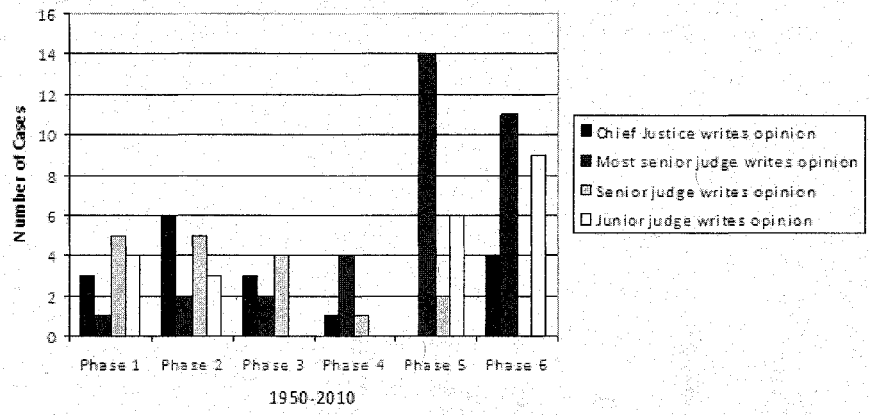
Once again, this phenomenon points to the dominance of senior judges in the court's decision-making process. Not only do senior judges outnumber junior judges on speech panels, but they also monopolize opinion writing. As before, although it is tempting to attribute the monopoly of senior judges in speech cases to the importance of speech cases on the court's docket, it is

between 2 and 4 cases (61.1% of the total participation of judges in that decade in speech cases).

[105] Here, a judge was considered a "senior judge" if he was either the most senior judge in a 2 judge bench, one of the two most senior judges on a 3 judge bench, or one of the 3 most senior judges on a 5 judge bench.

more likely that senior judges monopolize opinion writing in all cases generally, and not just in speech cases.

Table 5
Opinion Writing



B. Individualistic Behavior

Between 1950 and 2010, the tendency of Indian judges in speech cases to display individualistic behavior was low. Separate concurring opinions were written in only 15.8% of the cases, while dissenting opinions were written in only 10.2% of the cases. This occurrence could point to a high degree of homogeneity of viewpoints amongst the judges in speech cases, or even other cases in general. In the first few years of the Court's existence, when the Court would typically sit in plenary sessions, there was a dissent in every speech case. However, as the Court broke up into smaller benches, the number of dissents and concurring opinions drastically decreased, although they made a brief appearance again in the 1970s (Phase 3), at a time when the Court was mired in a conflict with the executive for custody of the Constitution.[106]

In his autobiography, Chief Justice Gajendragadkar attributed the high number of concurring opinions in the early years of the Court's existence to the "unfriendly" atmosphere prevalent in the Supreme Court at the time of Chief Justice Kania's term. Kania and another judge, Mahajan, apparently did not get along too well, and the result was that "[e]ach judge wanted to write a judgment of his own."[107] Gajendragadkar wrote that the "tendency to write long, elaborate, repetitive, concurrent judgments continued for quite some time until [the Chief Justice] S.R. Das with his tact and ability to carry his colleagues with him tried to control that tendency and gradually concurrent

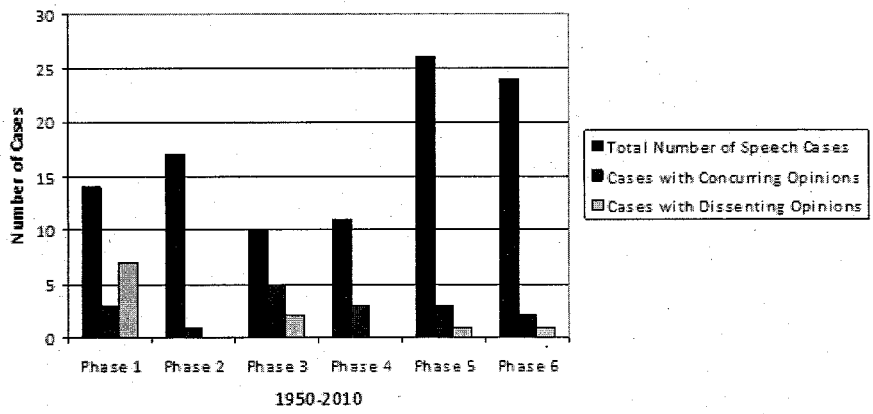
[106] *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 171–405 (2003).

[107] P.B. GAJENDRAGADKAR, TO THE BEST OF MY MEMORY 132 (1983).

judgments ceased to be normal."[108] In Justice Gajendragadkar's assessment, by the time he took over as the Chief Justice of the Court, "concurrent but separate judgments had become very rare."[109]

Between 1950 and 2011, the court witnessed approximately 93 majority opinions, 30 concurring opinions, and 15 dissenting votes in speech cases.[110] Justice Fazl Ali voted the highest number of dissents (5), while Justice Krishna Iyer wrote the highest number of concurrences (3), in speech cases.

Table 6
Individualistic Behavior



I ran a logistic regression to determine the likelihood that any of 12 different independent variables bore a statistically significant correlation with the cases in which dissents or separate concurring opinions were written: (1) whether the Chief Justice of India was present on the bench (variable 2), (2) whether the Chief Justice of India had formerly been a government lawyer (variable 3), (3) whether the Chief Justice of India had studied abroad (variable 4), (4) whether the number of justices on the bench who were "junior" outnumbered those who were "senior" justices (variable 5), (5) whether the number of justices on the bench who had not studied abroad outnumbered those who had studied abroad (variable 7), (6) whether the number of justices on the bench who had served as government lawyers outnumbered those who had not served as government lawyers (variable 9), (7) whether the case involved contempt of court (variable 11), (8) whether the case involved religious hate speech (variable 12), (9) whether the case involved a non-speech, government infringement of a press right (variable 13), (10) whether the case involved elections in some form (variable 14), (11) whether the case involved

[108] *Id.*

[109] *Id.*

[110] Appendix B also contains a detailed analysis of the number of speech cases in which a judge participated, wrote the majority or concurring opinion, or cast a dissenting vote.

speech with elements of communism or overthrow of the state (variable 16), and (12) whether the case came to the court under its original jurisdiction as distinguished from its appellate jurisdiction (variable 21). All the independent variables were dummy variables. If the answer to the foregoing question was positive, the variable took the value of 1, otherwise it was 0.

There were five correlations between independent variables and the dependent variable that were statistically significant. First, there was a strong positive correlation (p-value 0.02) between the Chief Justice of India having studied abroad and the case producing a dissenting or concurring opinion (dependent variable). It is tempting to hypothesize that the Chief Justices who had studied abroad encouraged individualistic behavior, discussion, or dissent on their courts, because their formal legal training had arguably made them more accustomed to critical thinking and argument. However, this could possibly also be explained by the fact that most of the Chief Justices of India who studied abroad served on the court between 1950 and 1978, when a large proportion of the dissenting and concurring opinions were written. Therefore, rather than telling us that dissents and concurring opinions were highly probable when the Chief Justice of India studied abroad, these results could also only be suggesting that dissents and concurring opinions were highly probably between 1950 and 1978.

Second, there was a negative correlation (p-value 0.014) between the seniority of the judges on the bench and the dependent variable. In other words, benches in which the senior judges outnumbered the junior judges were more likely to produce dissenting or concurring opinions. Junior judges often dissented or wrote separate concurring opinions in such cases. This happened not merely in the 1950s, when the court sat in plenary sessions, but also later, in the 1970s. For example, in two cases decided in 1972, the two most junior judges on the Constitution bench either wrote concurring opinions or dissented.[111] A few examples of individualistic behavior of this kind, displayed by the junior justices on a bench, were also visible in the 1990s and the 2000s. Perhaps the junior justices felt marginalized by the majority justices and felt the need to assert their presence on the court. Two judge benches, where one judge was senior and the other junior, were not counted as benches where the seniors outnumbered the juniors.

Third, there was a negative correlation (p-value 0.01) between the professional background of the judges on the bench (i.e., whether the judges worked as lawyers for the government) and the dependent variable. In other words, benches where the number of judges who had previously worked as lawyers for the government outnumbered those that had not, were more likely not to produce dissenting or concurring opinions. Benches with a numerical majority of judges, who as former private lawyers, had had no formal

[111] *See* Bennet Coleman v. Union of India, (1973) 2 S.C.R. 757, 799 (Mathew, J., dissenting); Bennet Coleman v. Union of India, (1973) 2 S.C.R. 757, 826 (Beg, J., concurring); Himat Lal v. Comm'r of Police, (1973) 2 S.C.R. 266, 283 (Mathew, J., concurring); Himat Lal v. Comm'r of Police, (1973) 2 S.C.R. 266, 293 (Beg, J., concurring).

affiliation with the government as law officers or otherwise, were more likely to produce individualistic behavior.

Fourth, cases where the speaker had advocated communism bore a strong positive correlation (p-value 0.039) with the dependent variable. In other words, a speech case involving communism was more likely to produce a dissent or a concurring opinion. Yet, out of 107 cases, only 4 dealt with communism, and each of these cases was decided during 1950-62, when judges displayed more individualistic behavior. That should not take away from the fact, however, that this issue might genuinely have created a great deal of disagreement in the court, and engendered individualistic behavior.

Lastly, there was a positive correlation (p-value 0.042) between the jurisdiction invoked by the claimant in a speech case and the dependent variable. If the case came before the court by way of appeal from a High Court decision, the case was likely to produce no individualistic behavior. It was more likely that speech cases that came to the court under its original jurisdiction would result in judges writing dissents or concurring opinions. This could also potentially be because the court heard a large number of appeals in the last two decades of its existence, when two judge benches dominated the structure of the court. However, even on two judge benches there is potential to refer the case to a larger bench in case of disagreement, and this tended not to happen.

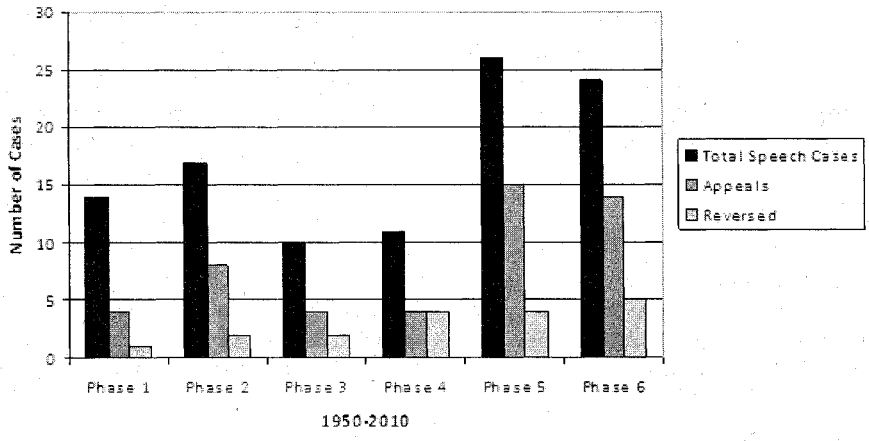
Logistic regression
Number of observations = 105
Prob > chi2 = 0
Pseudo R2 = 0.4494s

Dependent Variable	Coefficient	Std. Error	Z-statistic	P-value
Variable 2	-0.19291	0.816237	-0.24	0.813
Variable 3	-0.64306	0.866787	-0.74	0.458
Variable 4	2.159184	0.97301	2.22	0.026
Variable 5	-1.99825	0.815632	-2.45	0.014
Variable 7	2.494632	1.336606	1.87	0.062
Variable 9	-2.33515	0.909729	-2.57	0.01
Variable 11	-0.03805	0.897464	-0.04	0.966
Variable 12	0.648396	1.415644	0.46	0.647
Variable 13	-2.27269	1.775276	-1.28	0.2
Variable 14	-0.27069	1.350365	-0.2	0.841
Variable 16	3.751897	1.813308	2.07	0.039
Variable 21	1.719744	0.846205	2.03	0.042
_cons	-3.29929	1.832706	-1.8	0.072

C. Jurisdiction

Amongst the 107 speech cases that came to the Court between 1950 and 2011, 49.5% came to the Court as appeals from the High Courts. About 49% of these were affirmed in appeal. While staffing cases, the Chief Justice would very rarely assign a judge to hear an appeal from a High Court where the judge had previously served as an associate judge. This happened in only 16.9% of the appeals that the Court heard in speech cases. The largest number of appeals came from the Bombay High Court, followed by the Madras and Delhi High Courts. These three High Courts alone accounted for 50% of the appeals that came to the Supreme Court in speech cases. The fact that speech cases arose out of these three courts offers a telling glimpse into the cosmopolitan nature of the local societies in which they arose—each an urban center rife with the potential for the exercise of individual expression, and a conflict of diverse ideologies. Amongst these courts, the Madras High Court was the most likely to be reversed in speech cases, followed by the Delhi and Bombay High Courts, respectively. Cases from four High Courts (Allahabad, Kerala, Punjab and Haryana, and Bihar) were the next most appealed before the Supreme Court in speech cases, collectively accounting for 25% of the court's appellate speech docket. Cases from six High Courts (Gujarat, Karnataka, Andhra Pradesh, Madhya Pradesh, Orissa, Calcutta) accounted for the remaining 25%. Notably absent from this list are the states of Jammu and Kashmir, and the north-eastern states represented by the Gauhati High Court, regions of India that have witnessed claims of human rights abuse, and, arguably, demands of secession. The absence on the court's docket of speech cases emanating from these states is therefore troubling. Also absent from the list is the state of Rajasthan, amongst others.

Table 7
Jurisdiction



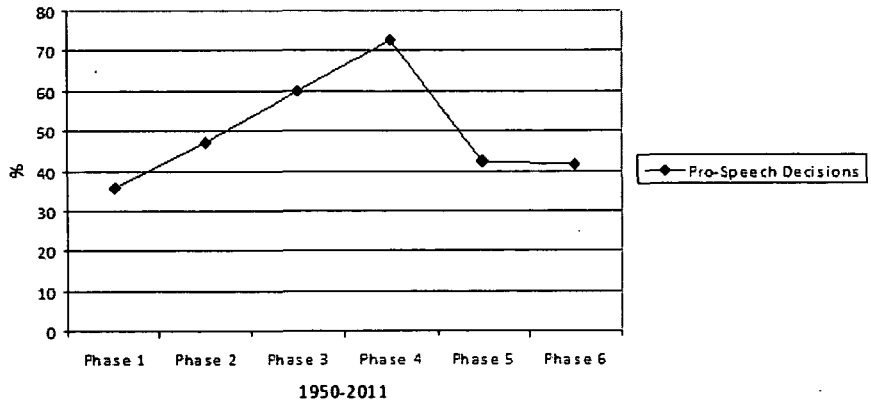
More than half of the speech cases that came to the court in the last two decades came by way of appeal. Generally, appeals have been on the rise,

except in the 1970s (Phase 3) and 1980s (Phase 4). The decade of the 1980s also witnessed the highest proportion of reversals of High Court decisions in speech cases.

A logistic regression revealed a strong statistically significant correlation (p-value 0.003) between appeal cases and reversals by the Supreme Court.[112] The data seem to indicate that a High Court decision in a speech case is likely to be reversed by the Supreme Court.

D. Pro-speech or Anti-speech?

Table 8
Proportion of Pro-speech Cases



Between 1950 and 2011, the Supreme Court's decisions were anti-speech, or against the claimant, in speech cases 48.5% of the time. This figure did not remain constant over the years. The proportion of cases decided in favor of free speech went up with each passing decade for the first four decades of the court's existence (Phases 1–4), and started falling in the last two decades (Phases 5-6). In the 1970s and 1980s, more speech cases were decided in favor of free speech than against. The 1980s were particularly marked by attempts by the court to atone[113] for its wrongs during the political emergency, and by

[112] The following independent variables were added to this logistic regression: (1) whether the case involved speech by government employees (variable 15), (2) whether the case involved obscenity (variable 18), and (3) whether the High Court's decision had been in favor of or against free speech (variable 22). Variables 15 and 18 were removed for the purposes of this regression.

[113] *See* ABHINAV CHANDRACHUD, DUE PROCESS OF LAW 206 (2011); Sathe, *supra* note 37; Jayanth K. Krishnan, *Scholarly Discourse and the Cementing of Norms: The Case of the Indian Supreme Court—And a Plea for Research*, 9 J. APP. PRAC. & PROCESS 255, 273–74 (2007).

holding against the government in free speech cases, the court may have been furthering its pro-liberty approach in that era."[114]

I ran a logistic regression to determine whether there were any statistically significant correlations between the outcome in a case (either pro-speech or anti-speech) and, in addition to the same independent variables as before, the following independent variables: (1) whether the Chief Justice of India was present on the bench (variable 2), (2) whether the Chief Justice of India had formerly been a government lawyer (variable 3), (3) whether the Chief Justice of India had studied abroad (variable 4), (4) whether the number of judges on the bench who were "junior" outnumbered those who were "senior" judges (variable 5), (5) whether the number of judges on the bench who had not studied abroad outnumbered those who had studied abroad (variable 7), (6) Whether the number of judges on the bench who had served as government lawyers outnumbered those who had not served as government lawyers (variable 9), (7) whether the case involved contempt of court (variable 11), (8) Whether the case involved religious hate speech (variable 12), (9) whether the case involved a non-speech, government infringement of a press right (variable 13), (10) whether the case involved elections in some form (variable 14), (11) whether the case involved speech by government employees (variable 15), (12) whether the case involved speech with elements of communism or overthrow of the state (variable 16), (13) whether the case involved obscenity (variable 18), and (14) whether the case came to the court under its original jurisdiction as distinguished from its appellate jurisdiction (variable 21). Once again, all the independent variables were dummy variables. If the answer to the foregoing question was positive, the variable took the value of 1, and otherwise it was 0.

There was a statistically significant positive correlation (p-value 0.05) between variable 2 and the dependent variable. In other words, where the Chief Justice of India was present on the bench, the case was more likely to have been decided against free speech. On one hand, this phenomenon could have existed because the Chief Justice of India was more attuned to the government's point of view, being the judiciary's prime point of interface with the government, and was more susceptible of guiding the bench to deciding the case in favor of the government. On the other hand, it could also have been because the Chief Justice of India delegated cases to smaller benches more as the years went by, and did not participate in speech cases, especially in the 1980s, when the largest proportion of pro-speech decisions were issued.

There was also a statistically significant negative correlation (p-value 0.08) between variable 18 and the dependent variable. In other words, obscenity cases were more likely to have been decided in favor of free speech by the Supreme Court. This is perhaps the most interesting finding of this study; following the Supreme Court's conservative decision in the *Lady Chatterley's*

[114] CHANDRACHUD, *supra* note 114, at 206. *See also* Francis Coralie Mullin v. Union Territory of Delhi, A.I.R. 1981 S.C. 746; Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789.

Lover case,[115] the Court has been perceived as a conservative institution unwilling to permit "obscenity" into Indian society. However, on the contrary, the court has been quite liberal, and the next four obscenity cases[116] were all decided in favor of free speech. These observations must be qualified by noting that there were only 5 cases out of the 107 cases that dealt with obscenity.

Logistic regression
Number of observations = 105
Prob > chi2 = 0.4248
Pseudo R2 = 0.0985

Dependent Variable	Coefficient	Std. Error	Z-statistic	P-value
Variable 2	1.146423	0.583741	1.96	0.05
Variable 3	-0.00366	0.499084	-0.01	0.994
Variable 4	0.074597	0.540679	0.14	0.89
Variable 5	-0.79449	0.4928	-1.61	0.107
Variable 7	0.487696	0.742768	0.66	0.511
Variable 9	0.140497	0.499781	0.28	0.779
Variable 11	0.44967	0.653924	0.69	0.492
Variable 12	-0.3853	0.76084	-0.51	0.613
Variable 13	-0.3794	0.835657	-0.45	0.65
Variable 14	0.0795	0.770183	0.1	0.918
Variable 15	0.295288	0.790236	0.37	0.709
Variable 16	-1.29439	1.1469	-1.13	0.259
Variable 18	-2.17995	1.245738	-1.75	0.08
Variable 21	-0.55499	0.481021	-1.15	0.249
_cons	-0.15053	1.024884	-0.15	0.883

E. Types of Cases

Over 60% of the speech cases that came to the court fell neatly within nine types of issues. Of these, interestingly, contempt of court cases constituted the highest proportion of classifiable speech cases that the Supreme Court decided, accounting for 15.8% of the court's speech docket. In

[115] Ranjit Udeshi v. Maharashtra, A.I.R. 1965 S.C. 881.

[116] Khushboo v. Kanniamal, A.I.R. 2010 S.C. 3196; Ajay Goswami v. Union of India, A.I.R. 2007 S.C. 493; Bobby Art v. Om Pal Singh, A.I.R. 1996 S.C. 1846; K.A. Abbas v. Union of India, A.I.R. 1971 S.C. 481.

these decisions, the Court took an anti-speech position 58.8% of the time, 10.3% more than its general anti-speech position in speech cases. However, under a regression test this figure did not prove to be statistically significant.

Next, 9.3% of the court's speech docket was represented by cases involving religious hate speech, speech by government employees, and non-speech related issues involving the press, each. Election cases (8.4%) came next, followed by obscenity (4.6%), communism (4.6%), commercial speech (3.7%), and speech by workers (e.g., workers' right to strike) (3.7%). The remaining proportion of cases raised numerous other issues that could not easily be slotted within any broader category.

CONCLUSION

If sixty years of decision-making in speech cases on the Supreme Court of India were viewed as a seamless narrative, one could conclude that the Court has been ambivalent towards speech, harboring neither a clear bias in favor of nor against speech. Of course, ambivalence could also point to fairness, demonstrating that the court has harbored no clear institutional bias in favor of one outcome or another. This lack of a clear trend might suggest that it has preferred to decide each case on its merits.

At the same time, however, this Article demonstrates that speech does not have high priority status on the docket of the Supreme Court of India, a worrying signal in a liberal democracy.[117] The Chief Justice of India participates less often in these cases now than he once did, and assigns these cases to smaller panels. Speech cases generate less debate and deliberation than before and engender fewer dissents and concurring opinions. The proportion of speech cases relative to the size of the court's docket is also troublingly small. The speech cases also offer a valuable insight into the importance of "seniority" on the court—senior judges monopolize decision-making on the Supreme Court of India.

The findings of this study have policy implications for the decision-making process on the Supreme Court of India and deserve further analysis. For example, it may be that the Chief Justice of India participates less frequently not merely in speech cases, but in all "fundamental rights" cases under the Constitution, involving individual liberty and freedom. If so, what does this say about the value of individual rights in Indian society? The fact that the Chief Justice of India participates less in speech decisions than he used to, despite having the ability to assign such cases to himself, potentially means that there are other more pressing issues to which the Chief Justice finds he needs to devote his time. Speech may not score highly on the Court's list of priorities.

[117] The term "liberal democracy" is borrowed from Larry Diamond. *See* LARRY DIAMOND, THE SPIRIT OF DEMOCRACY 23 (2008).

This Article finds, consistently with the findings of Nick Robinson and his coauthors,[118] that two-judge panels have increasingly dominated the structure of the court in speech cases as well. What does this mean for speech cases, or constitutional decisions in general? Two judge benches may not accurately reflect the viewpoints of the court. Further, the increasing use of two-judge benches in speech cases means that such cases perhaps do not get the treatment they deserve—the discussion and deliberation of a larger body of judges and an attempt to build consensus. The decline of dissenting and concurring opinions in such cases perhaps indicates that speech cases do not generate as much debate on the Supreme Court as they once did, which may be a function of the smaller bench size. More importantly, smaller panels threaten to make the Supreme Court of India less coherent or predictable as an institution. It is possible that the cultivation of speech specialists is an attempt to overcome this problem. The use of smaller panels increases the risk that the numerous panels on the Supreme Court will not articulate rules consistently or predictably and will create randomness in constitutional adjudication.

At a broader level, if the court has decided only 107 speech cases between 1950 and 2011, the proportion of speech cases in the court's docket seems incredibly small. Vijay Gupta has found that between 1973 and 1981 alone, the court decided 4,025 cases.[119] However, assuming that the Manupatra database only provides a random sample of the court's speech decisions, as opposed to a census, the fact that nearly half of these decisions came out in favor of or against speech points to the ambivalence of the court towards speech cases. Overall, although there may have been temporal fluctuations, the court's decisions are neither pro-speech nor anti-speech, indicating that the court is neither clearly biased in favor of nor against speech. Further, the high rate at which High Court decisions are reversed by the Supreme Court indicates its suspicion and distrust of the "lower" judiciary, and signals the fact that the Supreme Court of India perhaps views itself as discharging an appellate function rather than a constitutional or policy-oriented one.

Finally, the dominance of contempt of court cases on the court's speech docket is disturbing. Such cases have the potential of being misused against genuine critics of the system by political rivals. Recently, a former Supreme Court justice called the law of contempt a "great silencer,"[120] acknowledging that any "public discussion" on the "injudicious conduct" of judges is suppressed through contempt law. Contempt cases are at times even used against conscientious police constables who dare to hold up judges' cars while controlling the flow of traffic.[121] In this study, contempt cases were the single largest identifiable body of cases on the Supreme Court's speech docket. This

[118] Robinson et al., *supra* note 7.

[119] Gupta, *supra* note 2, at 134.

[120] Justice Ruma Pal, *An Independent Judiciary*, Tarkunde Memorial Lecture (Nov. 10, 2011).

[121] *Id.*

trend portends troubling consequences for India's democracy. It would be more becoming for the court to apply the same standards to itself as it does to "other" public officials.[122]

[122] *See* Abhinav Chandrachud, *The Insulation of India's Constitutional Judiciary*, 13 ECON. & POL. WKLY. 38 (2010).

APPENDIX

A. Speech Cases Decided by the Supreme Court of India (1950–2011)

No.	Name of Case	Date	Names of Judges
1.	Brij Bhushan v. Delhi 1950 Supp. S.C.R. 245	Mar. 2, 1950	Fazl Ali, Sastri, Mahajan, Mukherjea, Das
2.	A.K. Gopalan v. Madras, A.I.R. 1950 S.C. 27	May 19, 1950	Kania, Fazl Ali, Sastri, Mahajan, Mukherjea, Das
3.	Brij Bhushan v. Delhi, (1950) 1 S.C.R. 605	May 26, 1950	Kania, Fazl Ali, Sastri, Mahajan, Mukherjea, Das
4.	Romesh Thapar v. Madras (1950) 1 S.C.R. 594	May 26, 1950	Kania, Fazl Ali, Sastri, Mahajan, Mukherjea, Das
5.	Keshava Madhava Menon v. Bombay, (1951) 2 S.C.R. 228	Jan. 22, 1951	Kania, Fazl Ali, Sastri, Mahajan, Mukherjea, Das, Aiyar
6.	Ram Singh v. Delhi, A.I.R. 1951 S.C. 270	Apr. 6, 1951	Kania, Sastri, Mahajan, Das, Bose
7.	Bihar v. Shailabala Devi (1952) 1 S.C.R. 654	May 26, 1952	Sastri CJI, Mahajan, Mukherjea, Das, Vivian Bose
8.	Raja Kulkarni v. Bombay, (1954) 1 S.C.R. 384	Nov. 24, 1953	Sastri, Mahajan, Das, Bose, Hasan
9.	Jamuna Prasad v. Lacchi Ram, A.I.R. 1954 S.C. 686	Sept. 28, 1954	Mahajan, Mukherjea, Das, Bose, Hasan
10.	R.M. Seshadri v. Dist. Magistrate, A.I.R. 1954 S.C. 747	Oct. 1, 1954	Mahajan, Mukherjea, Das, Bose, Hasan
11.	Ramji Lal Modi v. Uttar Pradesh A.I.R. 1957 S.C. 620	Apr. 5, 1957	Das CJI, Imam, SK Das, Menon, Sarkar
12.	Virendra v. Punjab, A.I.R. 1957 S.C. 896	Sept. 6, 1957	Das CJI, Aiyar, B.P. Sinha, Kapur, Sarkar
13.	Express Newspapers v. Union of India, A.I.R. 1958 S.C. 578	Mar. 19, 1958	Bhagwati, Sinha, Imam, Kapur, Gajendragadkar
14.	M.S.M. Sharma v. Krishna Sinha, A.I.R. 1959 S.C. 395	Dec. 12, 1958	Das CJI, Bhagwati, Sinha, Subba Rao, Wanchoo
15.	Hamdard Dawakhana v. Union of India, A.I.R. 1960 S.C. 554	Dec. 18, 1959	Sinha CJI, Imam, Kapur, Wanchoo, Das Gupta
16.	Superintendent v. Ram Manohar Lohia, A.I.R. 1960 S.C. 633	Jan. 21, 1960	Sinha CJI, Gajendragadkar, Subba Rao, Das Gupta, Shah

No.	Name of Case	Date	Names of Judges
17.	M.S.M. Sharma v. Krishna Sinha, A.I.R. 1960 S.C. 1186	Aug. 1, 1960	Sinha CJI, Imam, Gajendragadkar, Sarkar, Subba Rao, Wanchoo, Das Gupta, JC Shah
18.	Babulal Parate v. Maharashtra, A.I.R. 1961 S.C. 884	Jan. 12, 1961	Sinha CJI, SK Das, Sarkar, Ayyangar, Mudholkar
19.	V.K. Javali v. Mysore, A.I.R. 1966 S.C. 1387	Aug. 7, 1961	Gajendragadkar, Subba Rao, Hidayatullah, JC Shah, Dayal
20.	Sakal Papers v. Union of India, A.I.R. 1962 S.C. 305	Sept. 25, 1961	Sinha, Sarkar, Das Gupta, Ayyangar, Mudholkar
21.	Kedar Nath v. Bihar, A.I.R. 1962 S.C. 955	Jan. 20, 1962	Sinha, S.K. Das, Sarkar, Ayyangar, Mudholkar
22.	Dalbir Singh v. Punjab, A.I.R. 1962 S.C. 1106	Feb. 6, 1962	Sinha, Subba Rao, Ayyangar, Mudholkar, Ayyar
23.	Kameshwar Prasad v. Bihar, A.I.R. 1962 S.C. 1166	Feb. 22, 1962	Gajendragadkar, Sarkar, Wanchoo, Das Gupta, Ayyangar
24.	O.K. Ghosh v. E.X. Joseph, A.I.R. 1963 S.C. 812	Oct. 30, 1962	Sinha, Gajendragadkar, Wanchoo, Das Gupta, Shah
25.	Radhey Shyam v. Post Master General, A.I.R. 1965 S.C. 311	Mar. 23, 1964	Gajendragadkar, Wanchoo, Shah, Ayyangar, Sikri
26.	Ranjit Udeshi v. Maharashtra, A.I.R. 1965 S.C. 881	Aug. 19, 1964	Gajendragadkar, Wanchoo, Hidayatullah, Shah, Ayyangar
27.	Ry. Bd. v. Niranjan Singh, A.I.R. 1969 S.C. 966	Feb. 4, 1969	Sikri, Bachawat, Hegde
28.	Namboodripad v. Nambiar, A.I.R. 1970 S.C. 2015	Jul. 31, 1970	Hidayatullah, Mitter, Ray
29.	K.A. Abbas v. Union of India, A.I.R. 1971 S.C. 481	Sept. 24, 1970	Hidayatullah, Shelat, Mitter, Vaidialingam, Ray
30.	Madhu Limaye v. Sub-Divisional Magistrate, A.I.R. 1971 S.C. 2486	Oct. 28, 1970	Hidayatullah, Shelat, Bhargava, Mitter, Vaidialingam, Ray, Dua
31.	West Bengal v. Bata Krishna Burman, A.I.R. 1971 S.C. 156	Nov. 17, 1970	Shelat, Vaidialingam
32.	C.K. Daphtary v. O.P. Gupta, A.I.R. 1971 S.C. 1132	Mar. 19, 1971	Sikri, Shelat, Vaidialingam, Grover, Ray
33.	Himat Lal v. Comm'r of Police, A.I.R. 1973 S.C. 87	Sept. 15, 1972	Sikri, Ray, Reddy, Mathew, Beg
34.	Bennet Coleman v. Union of India, A.I.R. 1973 S.C. 106	Oct. 30, 1972	Sikri, Ray, Reddy, Mathew, Beg

No.	Name of Case	Date	Names of Judges
35.	Santokh Singh v. Delhi Admin., A.I.R. 1973 S.C. 1091	Feb. 20, 1973	Vaidialingam, Dua, Alagiriswami
36.	Sambhu Nath Sarkar v. W. Bengal, A.I.R. 1973 S.C. 1425	Apr. 19, 1973	Shelat, Hegde, Ray, Reddy, Khanna, Mukherjee, Chandrachud
37.	Baradakanta v. Orissa High Court, A.I.R. 1974 S.C. 710	Nov. 19, 1973	Ray, Palekar, Chandrachud, Bhagwati, Krishna Iyer
38.	Press Trust of India v. Union of India, A.I.R. 1974 S.C. 1044	Apr. 23, 1974	Reddy, Dwivedi
39.	Ram Bahadur Rai v. Bihar, A.I.R. 1975 S.C. 223	Nov. 12, 1974	Chandrachud, Bhagwati
40.	Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597	Jan. 25, 1978	Beg, Chandrachud, Bhagwati, Krishna Iyer, Untwalia, Fazal Ali, Kailasam
41.	*In re* S. Mulgaokar, (1978)3 S.C. C339	Feb. 21, 1978	Beg, Krishna Iyer, Kailasam
42.	Rama Dayal Markarha v. Madhya Pradesh, A.I.R. 1978 S.C. 921	Mar. 14, 1978	Fazal Ali, Desai
43.	Ebrahim Suleiman Sait v. M.C. Mohammed, A.I.R. 1980 S.C. 354	Nov. 7, 1979	Gupta, Kailsam
44.	Prabha Dutt v. Union of India, A.I.R. 1982 S.C. 6	Nov. 7, 1981	Chandrachud, Baharul Islam, A.N. Sen
45.	Balmer Lawrie v. Balmer Lawrie, A.I.R. 1985 S.C. 311	Dec. 21, 1984	Desai, Khalid
46.	Express Newspapers v. Union of India, A.I.R. 1986 S.C. 872	Oct. 7, 1985	Venkataramiah, A.N. Sen, R.B. Misra
47.	Bijoe Emanuel v. Kerala, A.I.R. 1987 S.C. 748	Aug. 11, 1986	Chinappa Reddy, MM Dutt
48.	Sheela Barse v. Maharashtra, (1987) 4 S.C.C. 373	Sept. 18, 1987	Ranganath Misra, MM Dutt
49.	P.N. Dua v. P. Shiv Shankar, A.I.R. 1988 S.C. 1208	Apr. 15, 1988	Sabyasachi Mukherjee, Ranganath Misra
50.	Odyssey Commc'ns v. Lokvidayan, A.I.R. 1988 S.C. 1642	July 19, 1988	Venkataramiah, ND Ojha
51.	Reliance Petrochemicals v. Indian Express, A.I.R. 1989 S.C. 190	Sept. 23, 1988	Sabyasachi Mukherjee, Ranganath Misra
52.	S. Rangarajan v. P. Jagjevan Ram, (1989) 2 S.C.C. 574	Mar. 30, 1989	K.N. Singh, Jagannath Shetty, Kuldip Singh

No.	Name of Case	Date	Names of Judges
53.	Life Ins. Corp. of India v. Manubhai Shah, A.I.R. 1993 S.C. 171	July 22, 1992	Ahmadi, Punchhi
54.	Rama Kant Pandey v. Union of India, A.I.R. 1993 S.C. 1766	Feb. 5, 1993	L.M. Sharma, S. Mohan, S.P. Bharucha
55.	Printers (Mysore) v. Assistant Comm'r, (1994) 2 S.C.C. 434	Feb. 7, 1994	Jeevan Reddy, Hansaria
56.	Gajanan Visheshar v. Union of India, (1994) 5 S.C.C. 550	July 12, 1994	SC Agrawal, Jeevan Reddy
57.	Indian Express v. Union of India, A.I.R. 1995 S.C. 965	Sept. 23, 1994	Kuldip Singh, P.B. Sawant, N.P. Singh
58.	R. Rajagopal v. Tamil Nadu, A.I.R. 1995 S.C. 264	Oct. 7, 1994	Jeevan Reddy, SC Sen
59.	Sec'y, Ministry of Broad. v. Cricket Ass'n of Bengal, A.I.R. 1995 S.C. 1236	Feb. 9, 1995	P.B. Sawant, S. Mohan, Jeevan Reddy
60.	*In re* Vinay Chandra Mishra, A.I.R. 1995 S.C. 2348	Mar. 10, 1995	Kuldip Singh, Verma, Sawant
61.	Das Rao Deshmukh v. Kamal Kishore, A.I.R. 1996 S.C. 391	July 14, 1995	G.N. Ray, Faizanuddin
62.	Tata Press v. Mahanagar Tel. Nigam Ltd., A.I.R. 1995 S.C. 2438	Aug. 3, 1995	Kuldip Singh, Hansaria, Majumdar
63.	Ravichandran Iyer v. A.M. Bhattacharjee, (1995) 5 S.C.C. 457	Sept. 5, 1995	K. Ramaswamy, Hansaria
64.	Ramesh Yashwant Prabhoo v. Prabhakar, A.I.R. 1996 S.C. 1113	Dec. 11, 1995	Verma, NP Singh, Venkataswamy
65.	Bobby Art v. Om Pal Singh, A.I.R. 1996 S.C. 1846	May 1, 1996	Ahmadi, Bharucha, Kirpal
66.	D.C. Saxena v. Chief Justice of India, A.I.R. 1996 S.C. 2481	July 19, 1996	K. Ramaswamy, N.P. Singh, S.P. Bharucha
67.	*In re* Harijai Singh & Another, A.I.R. 1997 S.C. 73	Sept. 17, 1996	Kuldip Singh, Faizanuddin
68.	A. Suresh v. Tamil Nadu, A.I.R. 1997 S.C. 1889	Nov. 21, 1996	Jeevan Reddy, Paripoornan
69.	People's Union for Civil Liberties v. Union of India, A.I.R. 1997 S.C. 568	Dec. 18, 1996	Kuldip Singh, Saghir Ahmed

No.	Name of Case	Date	Names of Judges
70.	M.H. Devendrappa v. Karnataka State Small Indus. Dev. Corp., A.I.R. 1998 S.C. 1064	Feb. 17, 1998	Sujata Manohar, Wadhwa
71.	State Bank of India v. Union of India, (1998) 3 S.C.C. 506	Mar. 20, 1998	Sujata Manohar, Wadhwa
72.	P.V. Narasimha Rao v. State, A.I.R. 1998 S.C. 2120	Apr. 17, 1998	Agrawal, GN Ray, Anand, Bharucha, Babu
73.	Living Media India v. Union of India, A.I.R. 1999 S.C. 3461	Oct. 28, 1998	K. Venkataswami, Rajendra Babu
74.	Superintendent, Central Jail v. Charulata, A.I.R. 1999 S.C. 1379	Apr. 13, 1999	G.B. Pattnaik, MB Shah
75.	Union of India v. Motion Picture Ass'n, A.I.R. 1999 S.C. 2334	July 15, 1999	Sujata Manohar, Venkataswami, Lahoti
76.	Church of God v. K.K.R. Majestic, A.I.R. 2000 S.C. 2773	Aug. 30, 2000	MB Shah, SN Phukan
77.	P. Narayana Bhat v. Tamil Nadu, A.I.R. 2001 S.C. 1736	Apr. 16, 2001	VN Khare, Santosh Hegde
78.	J.R. Parashar v. Prashant Bhushan, A.I.R. 2001 S.C. 3395	Aug. 28, 2001	G.B. Pattnaik, Ruma Pal
79.	Baldev Singh v. State of Punjab, A.I.R. 2002 S.C. 1124	Feb. 14, 2002	Khare, Bhan
80.	*In re* Arundhati Roy, A.I.R. 2002 S.C. 1375	Mar. 6, 2002	Pattnaik, RP Sethi
81.	Union of India v. Ass'n for Democratic Reforms, A.I.R. 2002 S.C. 2112	May 2, 2002	MB Shah, BP Singh, HK Sema
82.	Chairman, State Bank of India v. All Orissa Officers Ass'n, A.I.R. 2002 S.C. 2279	May 6, 2002	D.P. Mohapatra, KG Balakrishnan
83.	Indian Nat'l Congress (I) v. Inst. of Social Welfare, A.I.R. 2002 S.C. 2158	May 10, 2002	Khare, Bhan
84.	Hindustan Times v. UP, A.I.R. 2003 S.C. 250	Nov. 1, 2002	Khare, Sinha
85.	Harish Uppal v. Union of India, (2003)2 S.C.C. 45	Dec. 17, 2002	Pattnaik, MB Shah, Raju, Variava, Dharmadhikari
86.	People's Union for Civil Liberties v. Union of India, A.I.R. 2003 S.C. 2363	Mar. 13, 2003	MB Shah, Reddi, Dharmadhikari
87.	T.K. Rangaraj v. Tamil Nadu, A.I.R. 2003 S.C. 3032	Aug. 6, 2003	MB Shah, AR Lakshmanan

No.	Name of Case	Date	Names of Judges
88.	People's Union for Civil Liberties v. Union of India, A.I.R. 2004 S.C. 1442	Jan. 6, 2004	Khare, Sinha
89.	Union of India v. Naveen Jindal, A.I.R. 2004 S.C. 1559	Jan. 23, 2004	Khare, Brijesh Kumar, Sinha
90.	Express Publ'ns v. Union of India, A.I.R. 2004 S.C. 1950	Mar. 11, 2004	YK Sabharwal, Dharmadhikari
91.	Bar Council of India v. High Court of Kerala, A.I.R. 2004 S.C. 2227	Apr. 27, 2004	Khare, Brijesh Kumar, Sinha
92.	Usha Mehta v. Maharashtra, (2004) 6 S.C.C. 264	May 5, 2004	Babu, Lakshmanan, GP Mathur
93.	*In re* Noise Pollution, A.I.R. 2005 S.C. 3136	July 18, 2005	Lahoti, Bhan
94.	Akhil Bharat Gosewa Sangh v. AP, (2006) 4 S.C.C. 162	Mar. 29, 2006	Sabharwal, Chatterji
95.	Kuldip Nayar v. Union of India, A.I.R. 2006 S.C. 3127	Aug. 22, 2006	Sabharwal, Balakrishnan, Kapadia, Thakker, Balasubramanian
96.	Dir. Gen. v. Anand Patwardhan, A.I.R. 2006 S.C. 3346	Aug. 25, 2006	Lakshmanan, Panta
97.	Ajay Goswami v. Union of India, A.I.R. 2007 S.C. 493	Dec. 12, 2006	Lakshmanan, Tarun Chatterjee
98.	Directorate of Film Festivals v. Gaurav Ashwin, A.I.R. 2007 S.C. 1640	Apr. 11, 2007	Tarun Chatterjee, Raveendran
99.	Sri Baragur Ramachandrappa v. Karnataka, (2007) 5 S.C.C. 11	May 2, 2007	BP Singh, HS Bedi
100.	Novva A.D.S. v. Sec'y, Dep't of Mun. Admin. & Water Supply, A.I.R. 2008 S.C. 2941	Apr. 9, 2008	Arijit Passayat, Kapadia
101.	Lokprakashan v. Kanchanbhai, (2009) 9 S.C.C. 43	Aug. 27, 2009	Bhandari, Bedi
102.	Khushboo v. Kanniamal, A.I.R. 2010 S.C. 3196	Apr. 28, 2010	Balakrishnan, Deepak Verma, Chauhan
103.	Maharashtra v. Sanhgaraj, (2010) 7 S.C.C. 398	July 9, 2010	DK Jain, HL Dattu
104.	Hari Singh v. Kapil Sibal, (2010) 7 S.C.C. 502	July 15, 2010	Panchal, Patnaik

No.	Name of Case	Date	Names of Judges
105.	Indirect Tax Practitioners Ass'n v. R.K. Jain, A.I.R. 2011 S.C. 2234	Aug. 13, 2010	Singhvi, Ganguly
106.	Vikram Singh Raghubanshi v. Uttar Pradesh, A.I.R. 2011 S.C. 2275	June 15, 2011	Chauhan, S Kumar
107.	Sanjoy Narayan v. Allahabad, 2011 S.C.A.L.E. 532	Aug. 30, 2011	Sharma, Dave

B. List of 196 Supreme Court Judges (Including 38 Chief Justices) and Their Voting Behavior in Speech Cases

S.No.	Name of Judge	Participation	Majority Opinion	Concurring	Dissent
1.	H.J. Kania	5		1	
2.	Syed Fazl Ali	5			5
3.	Patanjali Sastri	8	4	1	
4.	Mehr Chand Mahajan	10	1	1	2
5.	B.K. Mukherjea	8		2	1
6.	S.R. Das	13	4	2	
7.	N. Chandrasekhara Aiyar	2			
8.	Vivian Bose	5	1		1
9.	Ghulam Hasan	3	2		
10.	N.H. Bhagwati	2	1		
11.	B. Jagannadhadas				
12.	T.L. Venkatarama Ayyar	1			
13.	B.P. Sinha	11	2		
14.	Syed Jaffer Imam	4			
15.	S.K. Das	3			
16.	Govinda Menon	1			
17.	J.L. Kapur	3	1		
18.	P.B. Gajendragadkar	8	3		
19.	A.K. Sarkar	7			
20.	K. Subba Rao	5	1		1
21.	K.N. Wanchoo	7			
22.	M. Hidayatullah	5	4		
23.	K.C. Das Gupta	6			
24.	J.C. Shah	6			
25.	Raghubar Dayal	1			
26.	N. Rajagopala Ayyangar	7	2		
27.	J.R. Mudholkar	4	2		
28.	S.M. Sikri	5	2		
29.	R.S. Bachawat	1			
30.	V. Ramaswami				
31.	P. Satyanarayana Raju				
32.	J.M. Shelat	5	2		
33.	Vashishtha Bhargava	1		1	
34.	G.K. Mitter	3			
35.	C.A. Vaidialingam	5			
36.	K.S. Hegde	2			

S.No.	Name of Judge	Participation	Majority Opinion	Concurring	Dissent
37.	A.N. Grover	1			
38.	A.N. Ray	8	1		
39.	Jaganmohan Reddy	4			
40.	I.D. Dua	2	1		
41.	S. Chandra Roy				
42.	D.G. Palekar	1	1		
43.	H.R. Khanna	1			
44.	K.K. Mathew	2		1	1
45.	M.H. Beg	4	1	2	1
46.	S.N. Dwivedi	1			
47.	A.K. Mukherjea	1			
48.	Y.V. Chandrachud	5	2	1	
49.	A. Alagiriswami	1			
50.	P.N. Bhagwati, CJI	3	1		
51.	V.R. Krishna Iyer	3		3	
52.	P.K. Goswami				
53.	R.S. Sarkaria				
54.	A.C. Gupta	1	1		
55.	N.L. Untwalia	1			
56.	Murtaza Fazal Ali	2			
57.	P.N. Shingal				
58.	Jaswant Singh				
59.	P.S. Kailsam	3		2	
60.	V.D. Tulzapurkar				
61.	D.A. Desai	1	1		
62.	R.S. Pathak, CJI				
63.	A.D. Koshal				
64.	O. Chinappa Reddy	1	1		
65.	A.P. Sen				
66.	E.S. Venkataramiah	2		1	
67.	Baharul Islam	1			
68.	Appajee Vardarajan				
69.	Amarendra Nath Sen	2		1	
70.	V. Balakrishna Eradi				
71.	R.B. Misra	1		1	
72.	D.P. Madon				
73.	Sabyasachi Mukharji	2		2	
74.	M.P. Thakkar				
75.	Ranganath Misra, CJI	3	1	2	
76.	V. Khalid	1			
77.	G.L. Oza				

S.No.	Name of Judge	Participation	Majority Opinion	Concurring	Dissent
78.	B.C. Ray				
79.	Murli Mohan Dutt	2			
80.	K.N. Singh, CJI	1			
81.	Sivasankar Natarajan				
82.	M.H. Kania				
83.	K. Jagannatha Shetty	1	1		
84.	L.M. Sharma, CJI	1			
85.	M.N. Venkatachaliah				
86.	S. Ranganathan				
87.	N.D. Ojha	1			
88.	S. Ratnavel Pandian				
89.	T.K. Thommen				
90.	A.M. Ahmadi, CJI	2			
91.	K.N. Saikia				
92.	Kuldip Singh	6	2		
93.	J.S. Verma, CJI	2	1		
94.	V. Ramaswamy				
95.	P.B. Sawant	3	3		
96.	N.M. Kasliwal				
97.	MM Punchhi, CJI	1			
98.	K. Ramaswamy	1	1	1	
99.	M. Fathima Beevi				
100.	K.J. Reddy				
101.	S.C. Agrawal	2			1
102.	R.M. Sahai				
103.	Yogeshwar Dayal				
104.	S. Mohan	2			
105.	B.P. Jeevan Reddy	5	3	1	
106.	G.N. Ray	3	1	1	
107.	A.S. Anand, CJI	1			1
108.	R.C. Patnaik				
109.	N.P. Singh	3			
110.	S.P. Bharucha, CJI	4	2	1	
111.	N.G. Venkatachala				
112.	M.K. Mukherjee				
113.	Faizanuddin	2	1		
114.	B.L. Hansaria	3			
115.	S.C. Sen	1			
116.	K.S. Paripoornan	1			
117.	S.B. Majmudar	1			
118.	Sujata Manohar	3	3		
119.	GT Nanavati				

S.No.	Name of Judge	Participation	Majority Opinion	Concurring	Dissent
120.	Saghir Ahmed	1			
121.	K. Venkataswami	4	1		
122.	B.N. Kirpal CJI	1			
123.	G.B. Pattanaik CJI	4	1		
124.	S.P. Kurdukar				
125.	K.T. Thomas				
126.	Jagannada Rao				
127.	V.N. Khare CJI	7	3		
128.	D.P. Wadhwa	2			
129.	M. Srinivasan				
130.	Rajendra Babu	3	1		
131.	A.P. Misra				
132.	Syed Shah Mohd Quadri				
133.	M.B. Shah	6	4	1	
134.	D.P. Mohapatra	1	1		
135.	U.C. Banerjee				
136.	R.C. Lahoti CJI	2	1		
137.	Santosh Hegde	1	1		
138.	R.P. Sethi	1	1		
139.	S.N. Phukan	1			
140.	Y.K. Sabharwal CJI	3	2		
141.	Doraiswamy Raju	1			
142.	Ruma Pal	1	1		
143.	S.N. Variava	1	1		
144.	bShivaraj Patil				
145.	K.G. Balakrishnan CJI	3			
146.	Brijesh Kumar	2			
147.	B.N. Agrawal				
148.	Ashok Bhan	3			
149.	Venkatarama Reddi	1			1
150.	Arijit Pasayat	1	1		
151.	B.P. Singh	2			
152.	D.M. Dharmadhikari	3		1	
153.	H.K. Sema	1			
154.	S.B. Sinha	4	3		
155.	Arun Kumar				
156.	B.N. Srikrishna				
157.	A.R. Lakshmanan	4	2		
158.	G.P. Mathur	1			
159.	S.H. Kapadia CJI	2			
160.	A.K. Mathur				

S.No.	Name of Judge	Participation	Majority Opinion	Concurring	Dissent
161.	C.K. Thakker	1			
162.	P.P. Naolekar				
163.	Tarun Chatterjee	3			
164.	P.K. Balasubramanyan	1			
165.	Altamas Kabir				
166.	R.V. Raveendran	1	1		
167.	Dalveer Bhandari	1	1		
168.	L.S. Panta	1			
169.	D.K. Jain	1	1		
170.	Markandey Katju				
171.	H.S. Bedi	2	1		
172.	V.S. Sirpurkar				
173.	B Sudarshan Reddy				
174.	P. Sathasivam				
175.	G.S. Singhvi	1	1		
176.	Aftab Alam				
177.	J.M. Panchal	1	1		
178.	Mukundakam Sharma	1			
179.	Cyriac Joseph				
180.	Asok Kumar Ganguly	1			
181.	R.M. Lodha				
182.	H.L. Dattu	1			
183.	Deepak Verma	1			
184.	B.S. Chauhan	2	2		
185.	A.K. Patnaik	1			
186.	T.S. Thakur				
187.	K.S. Radhakrishnan				
188.	S.S. Nijjar				
189.	Swatanter Kumar	1			
190.	C.K. Prasad				
191.	H.L. Gokhale				
192.	Gyan Sudha Misra				
193.	A.R. Dave	1			
194.	S.J. Mukhopadhaya				
195.	Ranjana P. Desai				
196.	J.S. Khehar				