SUPPORTING INFORMATION, SECTION A
Further Justification for Analyzing Case Outcomes over Justices' Votes

JRT research has analyzed *justices' votes* in cases for a given issue area. While it is important to explain how jurisprudential factors influence justices' votes, and particularly to control for ideological preferences (a justice-level characteristic), we have argued that it is ultimately most important to explain the *Court's rulings in particular cases* across time periods.

Unless the analyst examines how jurisprudential factors interact with ideological preferences and therefore influence ideological voting (a task undertaken by Bartels 2009), employing justice-votes as units of analysis assumes that jurisprudential factors have uniform effects across the ideological range of justices. There is little value added to using justice-votes over case outcomes as the level of analysis. Since jurisprudential factors are measured at the case-level and therefore do not vary across justices within a given case, the effects of these factors in a justice-vote analysis are akin to case-level effects.

More seriously, using justice-votes instead of case outcomes in this context may provide a biased estimate of Supreme Court policymaking due to variation in vote splits across cases. Consider an example where the Court produces 3 liberal case outcomes and 7 conservative outcomes, such that the Court's percent liberal rating is 30%. If all of these decisions were decided unanimously, the percent liberal rating using justice-votes as units of analysis would also be 30% (i.e., 27/90). However, if all cases were decided by a 5-4 margin, the percent liberal rating using justice-votes would be 47.8%, i.e., [(5 x 3) + (4 x 7)] / 90 = 43/90. If all cases were decided by a 6-3 margin, 43.3% of justices' votes would be liberal. Variation in vote splits exists, of course, within both liberal and conservative case outcomes. *The closer the vote splits are on average, the greater the extent to which the percent liberal rating using justice-votes will be attenuated toward 50% (compared to using case outcomes).*[1] Using justice-votes as units of analysis produces an overly *moderate* portrayal of policymaking on the Court and may obfuscate the actual policymaking signal provided by case outcomes, which has implications for the inferences one makes about JRT and legal dynamics.

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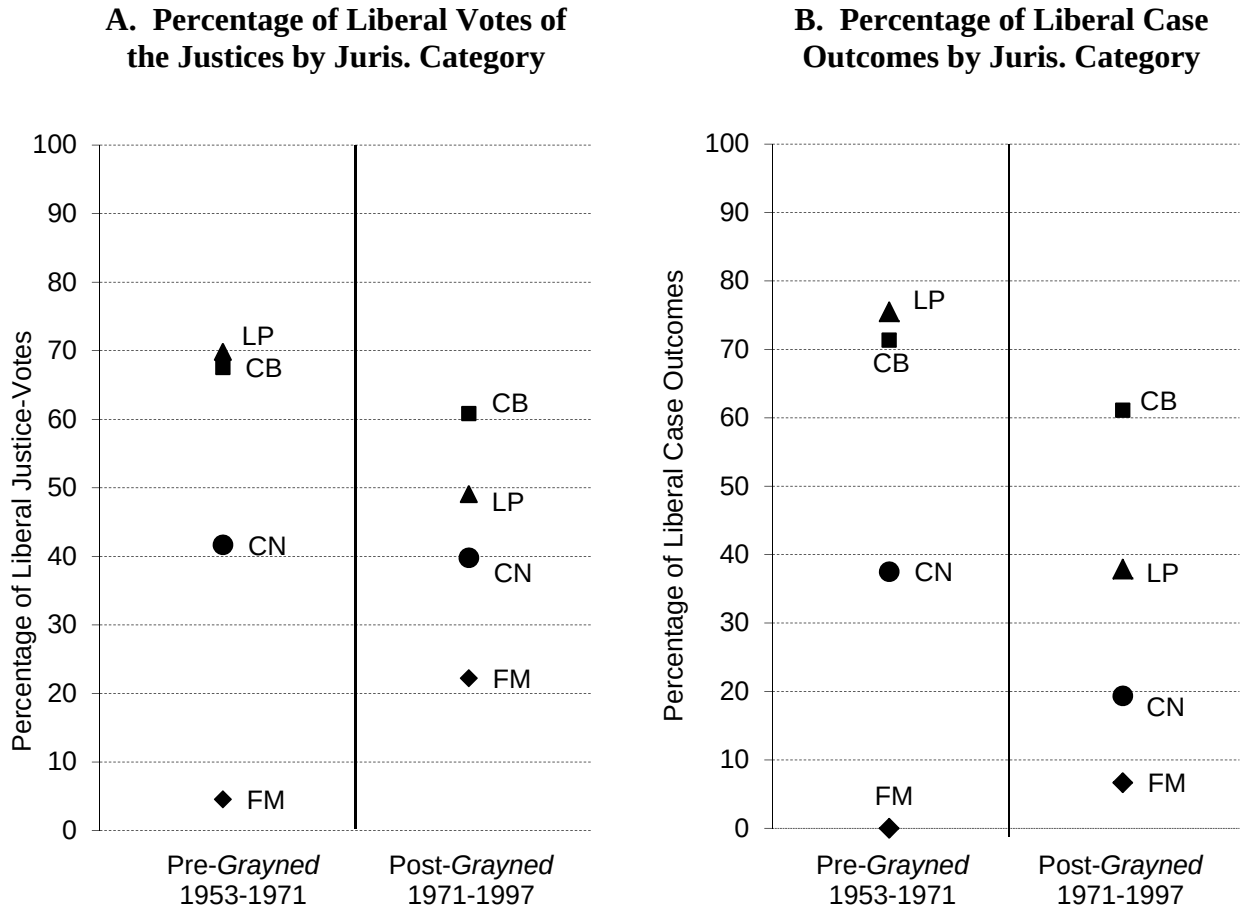
[1] Symmetry exists, of course, if case outcomes are greater than 50% liberal, where using justice-votes instead of case outcomes leads to an attenuation toward 50% (therefore underestimating the degree of liberalism in the Court's policymaking).

Figure SI-1: Percent Liberal at the Justice-Vote Level (A) and Case Level (B), Free Expression Data, 1953-1997 Terms



Note: CB=Content-based; CN=Content-neutral; LP=Less Protected; FM=Fails to meet threshold.

Descriptive statistics from Richards and Kritzer's (2002) free expression data (1953-1997 terms) illustrate this result. Figure 1 presents the percentage of liberal (pro-expression) votes of the justices (Figure SI-1A) and case outcomes (Figure SI-1B) by jurisprudential category for both the pre- and post-*Grayned* eras. Recall that the four jurisprudential categories are content-based regulations of expression (hereinafter, **CB**), content-neutral regulations (**CN**), traditionally less protected expression (**LP**), and expression that fails to meet the standard of First Amendment protection (**FM**). In the pre-*Grayned* period, the percent liberal figures for each jurisprudential category are fairly similar, with only the LP category generating a slightly more extreme percent liberal value for case outcomes (75%) relative to justice-votes (70%). Given that the median voting margin—i.e., number of majority votes minus minority votes—is five (as in a

7-2 outcome) in the pre-*Grayned* period, the results showing a congruence in percent liberal figures using both justice-votes and case outcomes is intuitive.

The consequences of using justice-votes over case outcomes are more serious in the post-*Grayned* period, which will have consequences for modeling behavioral differences across legal categories. The percent liberal figures across levels of analysis are fairly similar (about 60%) for the CB category in the post-*Grayned* period. The median vote margin is five, so that the average degree of consensus gives rise to this congruence between justice-votes and case outcomes. However, the story is not the same for the remaining categories. For the LP category, the percentage of liberal justice-votes is 49%, while the percentage of liberal case outcomes is just 38%. The median vote margin is three for LP cases, which explains why the percent liberal figure using justice-votes is greatly attenuated toward 50% and why such attenuation occurs for the LP category much more than the CB category.

An even stronger attenuation toward 50% occurs for CN cases, where the percent liberal rating goes from 40% using justice-votes to just 19% using case outcomes. The median vote margin for this category is just 3, which again explains the difference using different levels of analysis.[2] In FM cases, only 1 case out of just 15 was decided liberally post-*Grayned*. While only 5/15 had vote margins of 3 or less, that is enough to produce the difference we see from case outcomes to justice-votes, where the percentage of liberal justice-votes is 21%.

In sum, using justice-votes instead of case outcomes can have significant consequences for understanding the extent to which Supreme Court decision making is influenced by jurisprudential regimes. Using justice-votes instead of case outcomes will provide a more moderate depiction of judicial policymaking the more divided vote splits are, which will potentially produce different inferences regarding how legal categories are differentially decided upon.

[2] There is a greater degree of attenuation in CN cases relative to LP cases because a greater share of cases are decided by vote margins of 3 or less (i.e., 6-3 or closer) in CN cases (61%) than in LP cases (54%).

SUPPORTING INFORMATION, SECTION B
Coding Rules for Updating and Backdating Data from Richards and Kritzer (2002)

To update and backdate the data we relied on the coding rules outlined in detail in the appendix to Richards & Kritzer's (2002) article on jurisprudential regimes in free-expression law. We coded each new case, pursuant to the scheme outlined by Richards & Kritzer, as falling into one of four jurisprudential categories: content based regulation, content neutral regulation, less protected, and threshold of protection not met. We also coded specific case facts. Facts were coded using a series of dummy variables in one of three categories: (1) the type of action taken against the speaker, (2) the level of government acting against the speaker, and (3) the identity of the speaking party. See Richards & Kritzer (2002, 317-319) for a detailed list of all relevant variables and their specific coding rules. Below we outline the four jurisprudential categories and use an example case in each to highlight the case fact coding.

Content Based Regulations: In line with the strategy outlined by Richards & Kritzer, we asked if "the regulation of expression [was] justified by or focused on the communicative impact of the expression." (317) For example, the Court's decision in *Harisiades v. Shaughnessy* 342 U.S. 580 (1951) was coded as falling into the content-based category because it involved review of a portion of the Alien Registration Act which required deportation of any alien who was a member of any organization that advocated the violent overthrow of the government, either at the time of their arrival in the U.S. or "at any time thereafter" (8 U.S.C. 137).

The action taken against the speaker was coded as "criminal" because the action, deportation, was taken pursuant to a criminal law. The level of government was coded as "Federal" because the federal government was acting against the speaker. The identity of the speaking party was coded as "Alleged communist" because the speaker was deported for membership in the Communist Party.

Content Neutral Regulations: These are time, place, and manner regulations that "do not focus on, and are not justified by, the content or communicative impact of expression." (Richards & Kritzer 2002, 318) For example, the Court's decision in *Clingman v. Beaver* 544 U.S. 581 (2004) was coded as involving a content-neutral regulation because it involved the State of Oklahoma's requirement of semi-closed primary elections. The law in question was not focused

on the content or impact of expression but was instead an attempt by the state to regulate the time, place, and manner of elections.

The action taken against the speaker was coded as "Deny benefit" because the action against the speaker was to deny them the ability to vote in the primary election of their choosing. The level of government was coded as "State" because the state government was acting against the speaker. The identity of the speaking party was coded as "Other" because the speaker's identity did not fall into any of the other categories.

Less Protected: Richards & Kritzer (2002, 318) identify 8 categories of cases that represent expression that has been traditionally less protected by the First Amendment. These include:

1. Regulation of expression in a private forum against the will of the owner of that forum.
2. Regulations of expression that is obscene or alleged to be obscene.
3. Libel suits by private figures no suing for presumed or punitive damages.
4. Content-based, but no viewpoint-based regulations of speech in nonpublic forums.
5. Regulation of commercial expression.
6. Content-based regulations of the broadcast media.
7. Regulations of expression in schools.
8. Regulations of picketing of secondary sites by labor unions.

Eldred v. Aschcroft 537 U.S. 186 (2002) was a case involving a suit by individuals and business against the U.S. Attorney General alleging that the Copyright Term Extension Act violated the First Amendment. This case was coded as involving a less protected type of speech because it involved commercial expression.

The action taken against the speaker was coded as "Regulation" because the action was a regulation without a clearly stated civil or criminal penalty. The level of government was coded "Federal" because the federal government was acting against the speaker(s). The identity of the speaker was coded as "Business" because the speaker was speaking as a member of, or for, a corporation or business.

Threshold Not Met: These are cases wherein the traditional threshold of First Amendment protection is not met. "Cases in which there is no government action or there is no abridgement of speech do not invoke the protection of the First Amendment." (Richards & Kritzer 2002, 317)

The Court's decision in *Donaldson v. Read Magazine, Inc.* 333 U.S. 178 (1947) involved a challenge to an order by the Postmaster General stopping mail delivery and payment of money orders for Read Magazine because it was found that the puzzle contest in the magazine was fraudulent. This case was coded as not meeting the threshold for First Amendment protection because the protections of the Amendment do not typically extend to fraudulent speech.

The action taken against the speaker was coded as "criminal" because the action was taken pursuant to a criminal law. The level of government was coded as "Federal" because the federal government was acting against the speaker. The identity of the speaking party was coded as "Print Media" because the speaker was print media.

Additional Case Facts

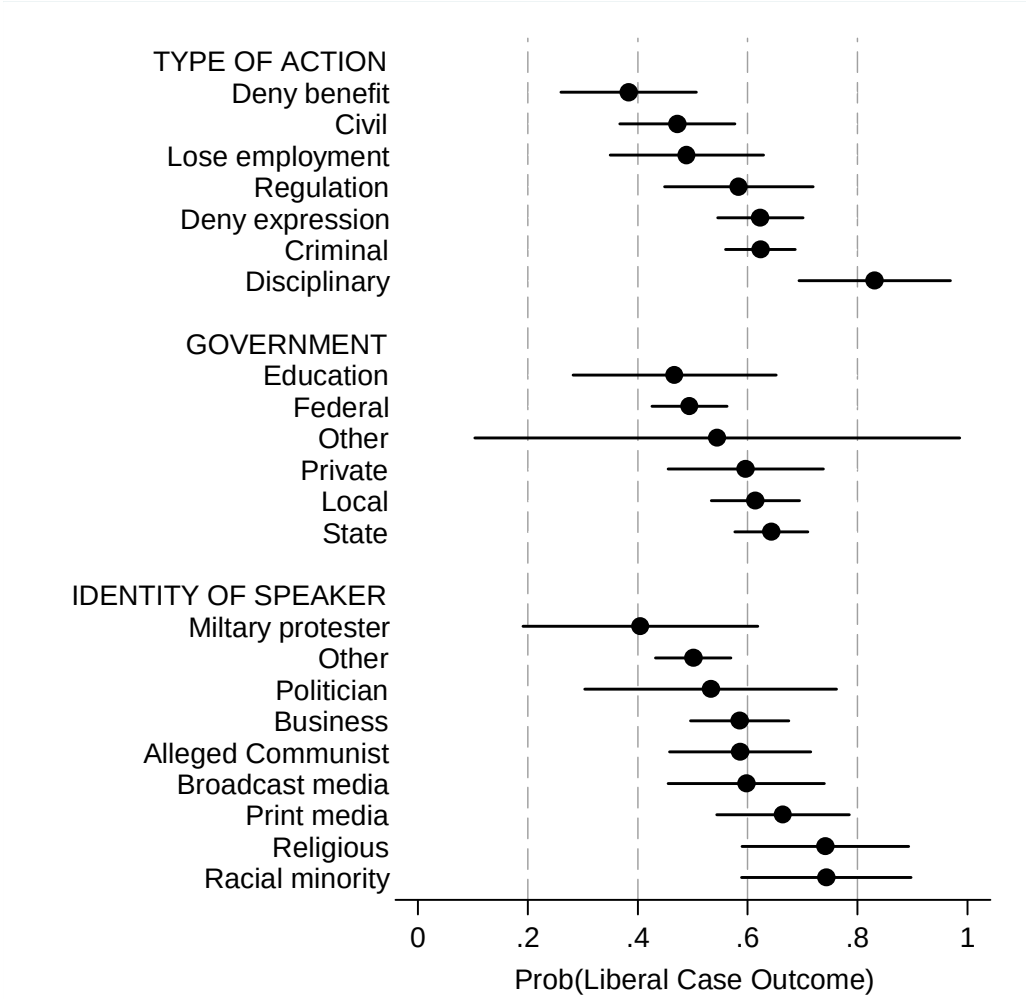
As we note above, all models include controls for specific case facts. The list of relevant facts comes directly from Richards and Kritzer (2002) and consists of three broad categories: (1) the type of action taken by the government against the speaker, (2) the level of government acting against the speaker, and (3) the identity of the speaker. Figure SI-2 below lists the individual case facts by category and displays the model's predicted probability of a liberal case outcome when that given condition is present, while averaging over other variables in the model.

As is clear from the figure, the Court's treatment of speakers varies, with racial minorities and religious speakers garnering the most protection. In terms of the level of government involved in the case, the Court is most likely to rule against state and local governments. The probability of a liberal outcome when the Federal government is acting against the speaker is about 50%. Finally, the Court is most likely to issue a liberal ruling when the "the action taken against the speaker is to discipline the speaker, such as a bar association disciplinary committee's public reprimand of a lawyer." (Richards and Kritzer 2002, 318).

One potential critique of our findings is that any stability in outcomes, in the face of membership change, is simply a function of litigants bringing (and the justices preferring) different *types* of cases. For instance, conservative Courts might be more interested in protecting commercial speech by business. Whereas liberal Courts may be more interested in protecting the speech of marginal groups in society. Thus, stable outcomes are less about doctrinal dynamics and more about the endogeneity of preferences and the Court's agenda. It may also be the case that ideological changes on the Court induce lower courts toward what they perceive to be the

Court's preferred position. Legal stability may be the Court's way of correcting overeager lower courts. The inclusion of case fact controls in the model allows us to partially address these concern because we are able to account for the potential impact of case characteristics on outcomes. So, our finding that outcomes can be stable in certain jurisprudential categories – even in the face of ideological and membership change – is supported by the fact that we are controlling for potentially confounding factors like the identity of the speaker or the level of government involved in the case.

Figure SI-2: Effects of Additional Case Facts on Probability of Liberal Case Outcome



Note: Dots represent the predicted probability of a liberal case outcome when a given condition is present, while averaging over other variables and unobserved year-level heterogeneity. The horizontal lines through each dot represent 95% confidence intervals. For example, the predicted probability of a liberal case outcome is 0.38 when type of action=deny benefit (i.e., the deny benefit dummy=1 and the remaining action dummies=0), while controlling for (or averaging over) all other variables in the model.