

POSITIVE POLITICAL THEORY AND THE STUDY OF U.S. SUPREME COURT DECISION MAKING: UNDERSTANDING THE SEX DISCRIMINATION CASES*

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How do justices of the U.S. Supreme Court reach decisions? To answer this question, social scientists have invoked an increasingly sophisticated set of statistical tools. While in yesteryears simple counts of, say, the number of dissents cast by justices would have sufficed,¹ in today's academic marketplace analytic models that permit the consideration of more than one factor at a time are omnipresent.²

That the statistical tool chest of social scientists has expanded substantially over the last half century or so is not all that surprising. After all, scholars working in so many of the social sciences — from psychology to sociology to political science — have become adept methodologists. Almost all graduate programs require their students to take at least one course in statistics — as well they should. It would be nearly impossible to read the various disciplinary journals without a working knowledge of, at the very least, multiple regression analysis.³

* We could not have written this article without access to the Papers of Justice William J. Brennan, Jr. We are thus grateful to Justice Brennan for allowing us to use his collection and to Mary Wolfskill and David Wigdor of the Library of Congress for easing considerably the data compilation process. We also thank the National Science Foundation (SBR-9320284) and the Center for Business, Law, and Economics at Washington University for the support of this work. Finally, we appreciate the helpful comments provided by Charles Cameron, Jack Knight, and Jeffrey A. Segal.

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¹ See, e.g., C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947* (1948).

² J.A. SEGAL & H.J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL 72* (1993).

³ In its simplest form, regression analysis assumes that the relationship between a dependent variable (say the number of cases decided by the Supreme Court over the past 50 years) and an independent variable (say the number of lawyers in the United States) is linear. Multivariate regression models allow researchers to consider more than one independent variable (e.g., perhaps the number of lawyers and the number of laws passed by Congress) when they seek to explain a phenomenon (e.g., the

And, yet, while those of us who study courts — like most other social scientists — occasionally invoke the tools of statisticians to conduct our research, we have often looked toward lawyers for our theoretical grounding. When law schools were advocating positivist (or analytical) jurisprudence, our writings followed suit.⁴ When the legal realists of the 1920s and 1930s rejected positivism for sociological jurisprudence, many social scientists too abandoned analytical approaches and began to develop more “realistic” models of judicial decision making.

Now that a new movement — called positive political theory (PPT) — has emerged from the halls of the nation’s law schools, a natural question emerges: Will social scientists adapt its theoretical premises to their work? We argue that the answer is yes, for PPT provides a good deal of leverage to answer perennial and central questions concerning U.S. Supreme Court decision making.

We develop this argument in four steps. In the first step we provide a brief overview of the relationship between political science theories of judicial decision making and those that have been offered by law professors. Our goal here is to explain how and why social scientists adapted sociological jurisprudence to their research. In the second step, we turn to the PPT movement. We explore the central assumptions on which PPT accounts of courts rest and argue that PPT will make some inroads into the social science literature if it can help analysts to unravel the complexities of decision making — just as legal realism did. The third step demonstrates that PPT can, in fact, meet this goal. We accomplish this by exploring the development of constitutional standards for the adjudication of sex discrimination claims. Finally, we summarize our results and underscore the contribution PPT can make to the study of judicial decision making.

I. LAWYERS AND SOCIAL SCIENTISTS: DEVELOPING MODELS OF DECISION MAKING

One of the central themes of this article is that social scientists have a long history of adapting theories articulated by law school professors to their work. In this section, we briefly consider two major examples of this phenomenon: positivist jurisprudence (the legal model) and sociological jurisprudence (the attitudinal

growth in the Court’s caseload). For an introduction to regression analyses, see M. LEWIS-BECK, *APPLIED REGRESSION — AN INTRODUCTION* (1980).

⁴ Robert E. Cushman, *Constitutional Law in 1927-28*, 23 AM. POL. SCI. REV. 78 (1929).

model). We place emphasis on why this "borrowing" occurred so that we may be able to understand whether or not positive political theory will have an equally important impact on the direction of future social science research.

A. *Positivist Jurisprudence (The Legal Model)*⁵

Whether termed *positivist jurisprudence* (as lawyers often refer to it⁶) or *the legal model* (as it is commonly called by political scientists⁷), this school of thought centers on a rather simple assumption about judicial decision making: legal doctrine, generated by past cases, is the primary determinant of case outcomes. This model views judges as constrained decision makers who will base their decisions on precedent and "will adhere to the doctrine of *stare decisis* . . ."⁸ Some scholars label this *mechanical jurisprudence* because the process by which judges reach decisions is highly structured. As Rogat described it, "[t]he judge's techniques were socially neutral, his private views irrelevant: judging was more like finding than making, a matter of necessity rather than choice."⁹ Levi was more specific about this basic pattern of legal reasoning — reasoning by example — for which this approach calls: the judge (1) observes a similarity between cases, (2) announces the rule of law inherent in the first case, and (3) applies that rule to the second case.¹⁰

Legal education and scholarship adopted "reasoning by example" — the process by which judges and lawyers should proceed. Eschewing normative approaches, political scientists (at least through the 1950s) instead viewed "reasoning by example" as the way judges do proceed. Cushman,¹¹ Corwin,¹² and many others centered their work on the notion that previously announced legal doctrine provides the single best predictor of Court decisions.

How positivism became so entrenched in the social science

⁵ The material in this section and part I.B. Sociological Jurisprudence, *infra*, comes from George & Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324 (1992).

⁶ See JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (1904).

⁷ See SEGAL & SPAETH, *supra* note 2, at 65.

⁸ STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 264-65 (1988).

⁹ SEGAL & SPAETH, *supra* note 2, at 65.

¹⁰ EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4-5 (1949).

¹¹ Cushman, *supra* note 4, at 78.

¹² Edward S. Corwin, *Constitutional Law in 1922-23*, 18 AM. POL. SCI. REV. 49 (1924).

literature is not difficult to discern. Many scholars reasoned that judges (all schooled in the approach) would naturally gravitate to it upon their ascension to the bench. After all, how else would judges approach decision making? So too, the case studies of the day reinforced the positivist approach's value. Articles published in political science journals summarized the reasoning used and the precedents set by the justices, disregarding any other factors contributing to outcomes. Cushman's examination of the 1936-37 term (one of the most volatile in Supreme Court history) provides an example. After acknowledging that the "1936 term . . . will probably be rated as notable," he enumerated some of the facts "one should bear in mind"¹³ — Roosevelt had won a landslide reelection and had submitted his Court-packing plan. Rather than demonstrate how those "facts" might have affected Court decisions, however, Cushman simply noted that "no suggestion is made as to what inferences, if any, might be drawn from them."¹⁴ He then proceeded to analyze the New Deal cases via existing precedent — a difficult task indeed.

In other words, although Cushman published his work in a premiere political science journal (the *American Political Science Review*), it could have appeared in any law review of the day. For both the theory he adopted — positivist jurisprudence — and his analytic approach — the examination of precedent — had originated in the nation's law schools.

B. *Sociological Jurisprudence (The Attitudinal Model)*

While the legal model was predominating political science thinking about the Court, new perspectives emerged from the ranks of the nation's judiciary and from its law schools. In general, these thinkers denounced legalism as mechanical jurisprudence,¹⁵ and they beckoned judges to consider more dynamic factors as bases for decisions. Many credit Holmes's *The Common Law*¹⁶ with initiating this plea. Students of this school often cite as exemplary his remark that "[t]he life of the law has not been logic: it has been experience. . . . [I]t cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."¹⁷ Illus-

¹³ Robert E. Cushman, *Constitutional Law in 1936-37*, 32 AM. POL. SCI. REV. 278, 278 (1938).

¹⁴ *Id.*

¹⁵ See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

¹⁶ OLIVER W. HOLMES, JR., *THE COMMON LAW* (1881).

¹⁷ *Id.* at 1-2.

trative, too, is Louis Brandeis's famous brief in *Muller v. Oregon*,¹⁸ containing 113 pages of sociological data but only two of legal argument. It was Pound,¹⁹ however, who catalyzed the first strain of extrajudicialism, sometimes called sociological jurisprudence. In his seminal *Harvard Law Review* article, Pound drew his now-famous distinction between "law in books" and "law in action," behooving judges to adopt the latter, without necessarily abandoning the former. Cardozo and many others followed suit.

Later adapters of sociological jurisprudence — the realists of the 1930s — though were far more radical in orientation, maintaining that rules based on precedents were nothing more than smokescreens²⁰ or "myths, clung to by man out of a childish need for sureness and security. A mature jurisprudence recognizes that there is no certainty in law. . . ." ²¹

So began a long line of thinkers who harshly critiqued legal reasoning for its inadequacy as a basis for judicial decision making, an inadequacy stemming from various considerations. From a normative standpoint, many followed Brandeis's lead, arguing that extra-legal factors should enter judicial deliberations. After all, if judges were constrained by precedent, law would remain static when it should reflect changing morals and values. Additionally, critics asserted that values and attitudes developed during childhood certainly influence justices, just as they do all other people.²² It would be extraordinary, they claimed, to think that judges, just because they don black robes, were any less susceptible to such influences. Indeed, justices may be even more vulnerable than other decision makers because the rules of law are "typically available to support either side."²³ In making choices between competing precedents, then, other factors are bound to come into play.

Although legal realism gained a strong following within the nation's leading law schools during the 1930s, political scientists were reluctant adherents. It was not until the publication of Pritchett's *The Roosevelt Court* ²⁴ in 1948 that students began to abandon a positivist approach and view Court decisions more critically and an-

¹⁸ 208 U.S. 412 (1908).

¹⁹ Pound, *supra* note 15, at 697.

²⁰ See JEROME FRANK, *LAW AND THE MODERN MIND* (1930); JEROME N. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1950); KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1951).

²¹ HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 16 (1988).

²² See, e.g., FRANK, *supra* note 20.

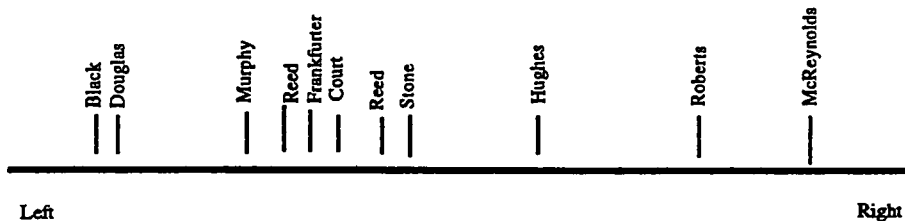
²³ C. Herman Pritchett, *The Development of Judicial Research*, in *FRONTIERS OF JUDICIAL RESEARCH* 31 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

²⁴ PRITCHETT, *supra* note 1.

alytically. In essence, Pritchett brought legal realism to political science. More specifically, Pritchett observed that dissents accompany many decisions.²⁵ If precedent drove Court rulings, Pritchett asked, then why did various justices in interpreting the same legal provisions consistently reach different conclusions on the important questions of the day? He concluded that the law was unable to explain why the justices voted the way they did; rather, he argued that justices were "motivated by their own preferences," just as Frank and the other legal realists maintained.²⁶

Pritchett's work, however, did more than simply adapt legal realism to political science. It also equipped scholars with the tools necessary to estimate and evaluate its propositions. For it was Pritchett who first systematically examined dissents and voting blocs on the Court; he was also the first to invoke left-right voting continuums to study ideological behavior. That Pritchett was able to place justices of the Roosevelt Court on continuums, such as the one depicted in Figure 1, helped him to substantiate his conclusion that political attitudes have a strong influence on judicial decisions.

FIGURE 1. PRITCHETT'S LEFT-RIGHT CONTINUUM OF JUSTICES SERVING BETWEEN 1939 AND 1941*



* C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 894 (1941).

Note: Reed appears twice because his dissents were "equally divided" between the liberal and conservative wings of the Court.

Finally, Pritchett's work provided the fodder for development of the contemporary version of legal realism in the form of the attitudinal model — a development more fully stylized and realized by Schubert,²⁷ Spaeth,²⁸ and Ulmer,²⁹ who incorporated the

²⁵ PRITCHETT, *supra* note 1.

²⁶ PRITCHETT, *supra* note 1, at xiii.

²⁷ See GLENDON SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963* (1965).

assumptions of legal realism into their models of decision making. Like Frank, they viewed the Court's environment as one that provided the justices with "great freedom to base their decisions solely upon the personal policy preferences."³⁰ But, unlike the realists, Schubert and the others proceeded to define and to test systematically attitudinal models of judicial behavior.

The refinement of the attitudinal model since the 1960s is a story that has been well-told elsewhere.³¹ It is enough to note here that this model — which follows legal realism to the extent that it views justices as "single-minded seekers of legal policy,"³² whose votes depend solely on the facts of cases vis-à-vis their attitudes and values — predominates the empirical political science literature. Why? Two answers come to mind. First, beginning with Schubert³³ and culminating with Segal and Spaeth,³⁴ attitudinalists have claimed to gather a tremendous amount of systematic support for their theory that unconstrained attitudes largely determine votes. To test this view, contemporary political scientists usually begin with a measure of political preferences — a measure that is independent of the vote. In Table 1, we depict such a measure. It was formulated by analyzing the comments of editorial writers on Supreme Court nominees, and it ranges from -1 (extremely conservative) to 1 (extremely liberal).³⁵ Attitudinalists then correlate this measure with aggregated voting behavior (see Table 1) to determine the degree to which they are related. Their results are quite robust; for example, one can predict nearly 70% of the civil liberties votes based solely on the policy preferences (as measured by the editorial scores) of the justices. It is just this sort of prediction accuracy that political scientists find especially attractive.³⁶

But there is a second reason for the attitudinal model's domination. Just as scholars were claiming that the key premise of the attitudinal model held up against systematic, data-intensive investigations,

²⁸ See Harold J. Spaeth, *An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behavior*, 6 *MIDWEST J. POL. SCI.* 54 (1961).

²⁹ See S. Sidney Ulmer, *The Analysis of Behavior Patterns in the Supreme Court of the United States*, 22 *J. POL.* 629 (1960).

³⁰ DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 22 (1976).

³¹ See generally SEGAL & SPAETH, *supra* note 2, at 73.

³² George & Epstein, *supra* note 5, at 325.

³³ See SCHUBERT, *THE JUDICIAL MIND*, *supra* note 27.

³⁴ See SEGAL & SPAETH, *supra* note 2, at 73.

³⁵ For more details on this measure, see Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 *J. POL.* 812, 813 (1995).

³⁶ See, e.g., SEGAL & SPAETH, *supra* note 2.

TABLE 1. JUSTICES' VALUES AND VOTES*

Justice	Appointing President	Ideological Value	Civil Liberties Vote	Economics Vote
Black	Roosevelt	.75	73.9	81.7
Reed	Roosevelt	.45	35.1	54.0
Frankfurter	Roosevelt	.33	53.8	39.9
Douglas	Roosevelt	.46	88.4	79.4
Murphy	Roosevelt	1.00	80.0	77.9
Jackson	Roosevelt	1.00	40.4	40.4
Rutledge	Roosevelt	1.00	77.2	80.0
Burton	Truman	-.44	38.9	50.0
Vinson	Truman	.50	36.7	50.2
Clark	Truman	.00	43.8	69.7
Minton	Truman	.44	36.8	59.5
Warren	Eisenhower	.50	78.5	79.8
Harlan	Eisenhower	.75	43.7	42.0
Brennan	Eisenhower	1.00	79.5	70.5
Whittaker	Eisenhower	.00	43.3	34.6
Stewart	Eisenhower	.50	51.3	47.7
White	Kennedy	.00	42.4	59.2
Goldberg	Kennedy	.50	88.9	65.4
Fortas	Johnson	1.00	81.0	67.4
Marshall	Johnson	1.00	81.4	65.9
Burger	Nixon	-.77	29.6	42.8
Blackmun	Nixon	-.77	52.3	55.0
Powell	Nixon	-.67	37.4	46.0
Rehnquist ^a	Nixon	-.91	19.8	42.0
Stevens	Ford	-.50	62.0	58.0
O'Connor	Reagan	-.17	34.1	43.2
Rehnquist ^b	Reagan	-.91	22.5	44.8
Scalia	Reagan	-1.00	30.2	44.5
Kennedy	Reagan	-.27	35.1	45.6
Souter	Bush	-.34	47.6	50.0
Thomas	Bush	-.68	28.3	41.3
Ginsburg	Clinton	.36	—	—
Breyer	Clinton	-.05	—	—

Note: Ideological Value is derived from content analyses of newspaper editorials. It ranges from -1.00 (extremely conservative) to 1.00 (extremely liberal). Civil Liberties Vote and Economics Vote represent percent liberal votes in those issue areas during the 1946-1992 terms.

* Segal et al., *supra* note 35, at 816.

^aValues and votes as a Nixon appointee

^bValues and votes as a Reagan appointee

they were also arguing that other perspectives — especially approaches grounded in positivist jurisprudence — could not withstand similar scrutiny. In one particularly interesting study, Segal and Spaeth examined whether justices follow previously established legal

rules even when they disagree with them. They found that the vast majority of justices who dissented from precedents set in landmark cases were not influenced by those precedents in subsequent decisions.³⁷

In short, it is easy to see why legal realism, in the form of the attitudinal model, has come to dominate the way many social scientists — particularly political scientists — think about judicial decision making. Its ability to account for votes is quite high and it seems to provide a more robust explanation for judicial behavior than other existing approaches, particularly positivism.

II. POSITIVE POLITICAL THEORY

Despite the attitudinal model's domination, it is not without its problems. Two points of critique are particularly relevant here. The first deficiency is that the attitudinal model does not admit strategic behavior on the part of the justices in their voting on the merits of cases. That is, it assumes that justices reach decisions without regard to the preferences of other relevant actors (their colleagues, the public, Congress, and so forth) and the actions they expect them to take. In this model, justices are naive actors, who simply and always vote their sincere preferences into law. To put it another way, attitudinalists believe that "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."³⁸

Yet, there is substantial evidence that this is not always the case, that, in fact, an interdependent (or strategic) component exists in Supreme Court decision making. Eskridge, for example, has shown that justices driven by policy goals do not vote their sincere preferences when they are interpreting civil rights laws if they believe that Congress desires to and has the wherewithal to overturn their decisions.³⁹ By the same token, Murphy⁴⁰ and Howard⁴¹ have demonstrated that justices are open to persuasion from their colleagues; in fact, justices often change their votes sometime between conference (when the initial vote is taken) and opinion

³⁷ Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices*, AM. J. POL. SCI. (forthcoming 1996) (manuscript at 14-16, on file with the authors and the *New York City Law Review*).

³⁸ SEGAL & SPAETH, *supra* note 2, at 65.

³⁹ See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

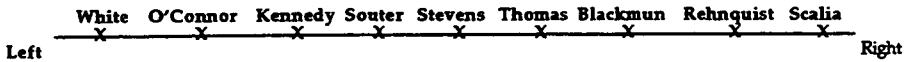
⁴⁰ See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

⁴¹ J. Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968).

publication.⁴²

The second and related deficiency of the attitudinal approach is that it gives us little leverage on understanding Court policies and the process that generates them because it focuses exclusively on votes. To see this, consider the simple example depicted in Figure 2. There, we use the editorial scores (see Table 1) to align the justices on a left-right scale. Now suppose we wanted to use these scores to tell us about the law generated by an abortion case, say, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴³ in which the Court, among other things, struck down a spousal notification provision by a 5-4 vote. Using the continuum depicted in Figure 2, the attitudinal model would predict that Scalia, Rehnquist, Thomas, and Blackmun dissented. But that prediction would be wrong: Blackmun voted to strike the spousal consent requirement; it was White who voted with the dissenters to uphold it. Yet, even if the prediction were correct, how much would the attitudinal model tell us about the policy resulting from the Court's decision? Would it give us any information about the standard the plurality adopted to adjudicate future abortion cases? The answer is no: it would simply attempt to predict the votes in the case.

FIGURE 2. ORDINAL RANKINGS OF JUSTICES BASED ON EDITORIAL SCORES*



* Constructed by the authors with scores derived from Ideological Values in Segal et al., *supra* note 35, at 816.

It is these shortcomings of the attitudinal model that may attract social scientists to positive political theory (PPT). For (1) the assumption of strategic interaction is central to many of these PPT models and (2) the goal of PPT, in an important sense, is to understand the law, not just votes. Let us elaborate.

A. *Positive Political Theory: An Overview*

The application of positive political theory to judicial decisions is a relatively recent phenomenon. Although some scholars

⁴² Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526, 530 (1980) (shows that at least one Justice changed his vote in sixty-one percent of cases decided during the 1946, 1947, 1949, 1950, 1954, and 1955 terms of the Supreme Court).

⁴³ 505 U.S. 833 (1992).

invoked the intuitions of this approach as early as 1958,⁴⁴ contemporary usage has its genesis in a 1989 dissertation by Brian Marks, a student of economics at Washington University.⁴⁵ In that work, Marks set out to understand why Congress did not overturn the U.S. Supreme Court's decision in *Grove City College v. Bell*.⁴⁶

Since Marks's work, numerous analysts (who generally refer to themselves as positive political theorists) have set out to build on it. The list of PPTheorists is long, with some of its most important practitioners⁴⁷ coming from the ranks of the nation's law schools. And their numbers are growing, as is their influence.

But what does PPT entail? As with most emerging research programs, there is some dispute among practitioners over the precise meaning of the enterprise. Still, most seem to agree that "PPT consists of non-normative, rational-choice theories of political institutions."⁴⁸ So, at the very least, PPTheorists promote a particular kind of rational choice account of judicial decisions — an account we shall call strategic rationality. We can state that account in the following terms: U.S. Supreme Court justices are strategic single-minded seekers of legal policy, who realize that their ability to achieve policy goals depends on the preferences of others, on the choices the justices expect others to make, and on the institutional

⁴⁴ See Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958).

⁴⁵ Marks, *A Model of Judicial Influence on Congressional Policymaking: Grove City College v. Bell*, Ph.D. diss., Washington University (1989) (on file with the authors).

⁴⁶ 465 U.S. 555 (1984).

⁴⁷ Some of the more prominent scholars include: William Eskridge of the Georgetown University Law Center (see, e.g., Eskridge, *supra* note 39; W.N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 417 (1991); W.N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)); Daniel Farber of the University of Minnesota School of Law (see, e.g., D.A. FARBER & P.P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991)); Daniel Rodriguez of the Boalt Hall School of Law (at the University of California at Berkeley) (see, e.g., Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. LAW Q. 1 (1994)); and Matthew Spitzer of the University of Southern California Law Center (see, e.g., Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994)).

Should anyone doubt the growing influence of this group, note the foreword to the Harvard Law Review's examination of the Supreme Court's 1993 term. It was co-authored by Eskridge, one of the leaders of the PPT movement. Also consider that important law reviews and journals have dedicated volumes to PPT (e.g., GEO. L.J. and LAW & CONTEMP. PROBS.). Finally, several influential university presses, including Harvard (D.G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994)) and Chicago (D.A. FARBER & P.P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991)) have put their imprint on this work.

⁴⁸ See Farber & Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 467 (1992) (contains the results of a survey of Positive Political Theorists).

context.⁴⁹

This account contains three important ideas: (1) justices' actions are directed toward the attainment of goals (primarily they are "single-minded seekers of policy"⁵⁰); (2) justices are strategic (they "realize that their ability to achieve their goals depends on the preferences of others" and "on the choices they expect others to make"); and (3) institutions ("the institutional context") structure justices' interactions.⁵¹ Each of these components deserves some attention.

B. Justices as Single-Minded Seekers of Legal Policy

A key assumption of strategic rationality is that actors make decisions consistent with their goals and interests. Indeed, we say that a "rational" decision occurs when an actor takes a course of action (makes a decision) that satisfies her desires most efficiently. This means that when a political actor selects, say, between two alternative courses of action, she will choose the one that she thinks is most likely to help her attain her goals; all we need to assume is that she acts "intentionally and optimally" toward some specific objective.⁵²

Rational choice accounts further suggest that an actor can order her desires on a scale — called "utility" — based on the "pleasures" she will obtain by satisfying them. Once the actor orders her desires, she can compare the relative degree of satisfaction (utility) generated by each decision and, in turn, act so as to maximize her utility.⁵³ To put this in terms of a concrete example, consider Figure 3 below. Here, we show the choices confronting a justice over which standard of review to apply in abortion cases. Now suppose Justice X sincerely prefers "compelling interest" to "undue burden" to "rational basis." If that were the case, then we would say that X assigns a higher utility to "compelling" than to

⁴⁹ LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (forthcoming 1997) (on file with the authors).

⁵⁰ Typically, rational choice theorists assume that justices are "single-minded seekers of policy," George & Epstein, *supra* note 5, at 325, but that need not be the case. As we discuss below, it is up to the researcher to specify the content of actors' goals.

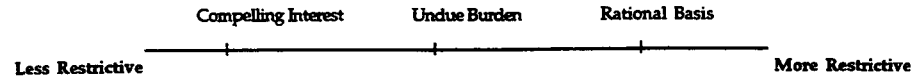
⁵¹ We adopt Knight's working definition of a social institution. First, "an institution is a set of rules that structure social interactions in particular ways." Second, "for a set of rules to be an institution, knowledge of these rules must be shared by members of the relevant community." See J. KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* 2-3 (1992).

⁵² *Id.* at 17.

⁵³ SHAUN HARGREAVES HEAP ET AL., *THE THEORY OF CHOICE: A CRITICAL GUIDE* 5 (1992).

“undue burden” than to “rational basis” and that *X* will take actions (that is, make choices) to maximize the chances of obtaining “compelling.”

FIGURE 3. CHOICES OF LEGAL STANDARD IN ABORTION CASES*



* Constructed by the authors.

To give meaning to the assumption that people are “utility maximizers,” however, analysts must specify the content of actors’ goals.⁵⁴ And that is where the notion of justices as “single minded seekers of legal policy”⁵⁵ comes in. On many PPT accounts, the primary goal of all justices is to see the *law* reflect their preferred policy positions, and that they will take actions to advance this objective.

In so arguing, though, most PPT theorists recognize that policy is not the only goal justices pursue. In some of this work, in fact, scholars explore another important goal: to establish and retain the legitimacy of the Court.⁵⁶ For, as PPT advocates realize, the Court must possess some level of respect before it can make authoritative policy — policy that other institutions, the public, and states will view as binding on them.

Still, readers should not lose sight of the general point: legitimacy, like most other goals scholars ascribe to justices, is a means to an end — and that end is policy.⁵⁷ This is not a particularly controversial claim. Justices may have goals other than policy, but no serious scholar of the Court would claim that policy is not prime among them. Indeed, this is perhaps one of the few things

⁵⁴ If they do not, then resulting explanations take on a tautological quality, “since we can always assert that person’s goal is to do precisely what we observe him or her to be doing.” PETER C. ORDESHOOK, *A POLITICAL THEORY PRIMER* 10-11 (1992).

⁵⁵ George & Epstein, *supra* note 5, at 325.

⁵⁶ Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, *LAW & SOC’Y REV.* (forthcoming 1996) (manuscript on file with the authors and the *New York City Law Review*).

⁵⁷ For example, in a particularly thoughtful essay, Baum suggests that some members of the Court desire to interpret the law in a principled, consistent, and accurate fashion. He calls this a “legal” goal, as it typically entails adhering to precedent. See Lawrence Baum, *What Judges Want: Judges’ Goals and Judicial Behavior*, 47 *POL. RESEARCH Q.* 749 (1994). As Segal and Spaeth (1996) demonstrate, however, most justices take this route only when the existing precedent favors their particular policy position. In other words, precedent is a means to a policy end. See SEGAL & SPAETH, *supra* note 37 (manuscript at 1-7, on file with the authors and the *New York City Law Review*).

over which almost all students of the judicial process — legal realists and positive political theorists alike — agree.

C. *Strategic Justices*

The second part of the PPT account ties back to the first: for justices to maximize their utility, they must act strategically in making their choices. By “strategic,” as we suggested above, PPTheorists mean that judicial decision making is interdependent. It is not enough to say, as the attitudinal model does, that Justice *X* chose action 1 over 2 because she preferred 1 to 2. Rather, interdependency suggests the following proposition: Justice *X* chose 1 because *X* believed that the other relevant actors — perhaps Justice *Y* or Senator *Z* — would choose 2, 3, etc., and given these choices, action 1 led to a better outcome for Justice *X* than did the other alternative actions.⁵⁸ To put it more plainly, a justice acts strategically when she realizes that her fate depends on the preferences of the other actors and the actions she expects them to take (not just on her own preferences and actions).⁵⁹

Occasionally, strategic calculations lead justices to vote their sincere preferences or sign opinions that reflect them. Suppose, in our example, all of the other justices agreed that “compelling interest” was the appropriate standard to use in abortion cases and that they knew that they all agreed. If this were the case, then our Justice *X* (who, recall, sincerely prefers the compelling interest test) may feel free to write an opinion that reflects her sincere preferences, for they are the same as everyone else’s.

In other instances, strategic calculations lead justices to act in a sophisticated fashion (that is, in a way that does not reflect their sincere or true preferences) so that they can avoid seeing their most preferred policy rejected by, say, their colleagues in favor of their least preferred one.⁶⁰ To see why, reconsider Figure 3. Again, suppose that Justice *X* was to select among three possible standards in an abortion case; further suppose that Justice *X* was, in fact, a single-minded seeker of legal policy. While the attitudinal Justice *X* would vote her unconstrained preference of “compelling interest,” the strategic Justice *X* might choose undue burden if — depending on, say, the preferences of the other justices — that

⁵⁸ See ORDESHOOK, *supra* note 54, at 7-56.

⁵⁹ Charles Cameron, *Decision-Making and Positive Political Theory (Or Using Game Theory to Study Judicial Politics)* 2-3 (Nov. 11-12, 1994) (position paper prepared for the 1994 Columbus Conference, Columbus, OH) (on file with the authors).

⁶⁰ See MURPHY, *supra* note 40; Rodriguez, *supra* note 47.

would allow her to avoid “rational basis,” her least preferred position. In so doing, Justice X would be choosing the course of action that any rational actor, concerned with maximizing policy preferences, would take. That is, for Justice X to set policy as close as possible to her ideal point — which, recall, is the goal most PPTheorists ascribe to all justices — strategic behavior is essential. In this instance, she would need to act in a sophisticated fashion, given her beliefs about the preferences of the other justices and the choices she expected them to make.

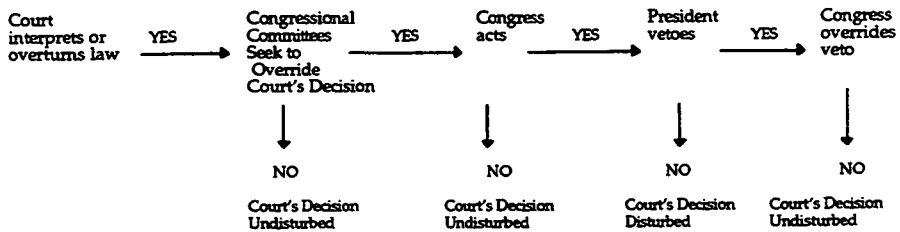
But, as the work of PPTheorists makes abundantly clear, strategic considerations do not simply involve calculations over what colleagues will do. Justices must also consider the preferences of other key political actors, including Congress, the President, and even the public. The logic here is as follows.⁶¹ As all students of American politics know, two key concepts undergird our constitutional system. The first concept is the separation of powers doctrine, under which each of the branches of government has distinct functions: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second concept is the notion of checks and balances: each branch of government imposes limits on the primary function of the others. For example, as Figure 4 shows, the judiciary may interpret laws and even strike them down as being in violation of the Constitution. Congressional committees, however, can introduce legislation to override the Court’s decision; if they do, Congress must act by adopting the committees’ recommendation, adopting a different version of it, or rejecting it. If Congress takes action, then the President has the option of vetoing the law. In this depiction, the last “move” rests again with Congress, which must decide whether to override the President’s veto.⁶²

⁶¹ We adopt this discussion from LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS* 49-50 (2d ed. 1995).

⁶² In this figure, we depict a sequence in which the Court makes the first “move” and Congress the last. Of course, it is possible to lay out other sequences and to include other (or different) actors (see Christopher J. Zorn, *Congress and the Supreme Court: Reevaluating the “Interest Group Perspective”* (April 1995) (paper presented at the 1995 annual meeting of the Midwest Political Science Association) (on file with the authors). For example, we could construct a scenario in which the Court moves first; congressional committees and Congress again go next but, this time, they propose a constitutional amendment (rather than a law); and the states (not the President) have the last turn by deciding whether or not to ratify the amendment.

It is also worth noting that such a reconstruction might make more sense for cases, such as *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that involve constitutional questions. Our reasoning here is as follows: Although Congress can pass leg-

FIGURE 4. THE SEPARATION OF POWERS/CHECKS AND BALANCES SYSTEM IN ACTION: AN EXAMPLE*



* Adapted from: Eskridge, *supra* note 39, at 644 (1991).

It is just these kinds of checks that lead policy-oriented justices to concern themselves with the positions of Congress, the President, and even the public. For if their objective is to see their favored policies become the ultimate law of the land, then they must take into account the preferences of the key actors and the actions they expect them to take. Otherwise, they run the risk of seeing, say, Congress replace their most preferred position with their least, or of massive non-compliance with their rulings in which case their policy fails to take on the force of "law."⁶³

To see these points, consider Figure 5, which we adopt from Eskridge's work on the Court's interpretation of civil rights legislation.⁶⁴ On the horizontal line — which represents the possible interpretations the Court could give to, for example, a civil rights statute ordered from most liberal to most conservative — we place the preferences of several key political actors. We denote the Court's and the President's most preferred positions as "J" and "P," respectively. "M" signifies the preferred position of the median member of Congress and "C" of the congressional committees with jurisdiction over civil rights bills.⁶⁵ "C(M)" represents the commit-

islation to alter the course of future constitutional rulings (*see e.g.*, the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993)), the more commonly-discussed route is through the proposal of a constitutional amendment. If this is so, then we might want to reconstruct the sequence in a way that would allow the Court to consider whether Congress has the requisite numbers (two-thirds of both Houses) to propose an amendment and whether three-fourths of the states would support ratification — and not whether Congress and the President would overturn its decision through legislation.

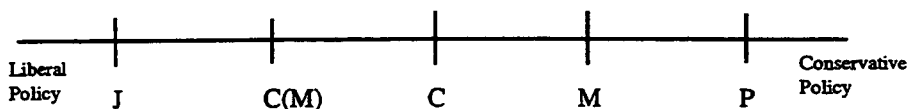
⁶³ They also open themselves up for other forms of retaliation on the part of Congress and the President: legislation removing their jurisdiction to hear certain kinds of cases and impeachment, to name just two. *See* MURPHY, *supra* note 40.

⁶⁴ LEE EPSTEIN & THOMAS G. WALKER, *THE ROLE OF THE SUPREME COURT IN AMERICAN SOCIETY: PLAYING THE RECONSTRUCTION GAME*, in *CONTEMPLATING COURTS* 321-324 (Lee Epstein ed., 1995).

⁶⁵ In denoting these preferred points of J, M, P, and C, we assume that the actors

tee's indifference point "where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber."⁶⁶ To put it another way, because C(M) and M are equidistant from C, the committee likes C(M) as much as it likes M; it is indifferent between the two.

FIGURE 5. HYPOTHETICAL DISTRIBUTION OF PREFERENCES*



* Adapted from Eskridge, *supra* note 39, at 613 and Eskridge, *supra* note 47, at 417. Note: J=majority of Supreme Court; C(M)=committees' indifference point; C=relevant committees; M=median member of Congress; P=President.

As we can see, the Court is to the left of Congress, the key committees, and the President. This means, in this illustration, that the Court favors a more liberal policy than do the other institutions. Now suppose that the Court has a civil rights case before it, one involving the claim of a woman who says that she has been sexually harassed at her place of employment in violation of federal law.

How would the Court decide this case on its merits? Under the logic of the "attitudinal" approach the justices would vote exactly the position shown on the line; they would set the policy at J. The PPT account suggests a different response: given the distribution of the most preferred positions of the actors in Figure 5, strategic justices would not be willing to take the risk and vote their sincere preferences. They would see that Congress could easily override the Court's position and that the President would support Congress. That is because the policy sincerely desired by the Court would be to the left of the indifference point of the relevant committees, giving them every incentive to introduce legislation lying at their preferred point of C. Congress would support such legislation because it would prefer C to J and the President would sign it as he too likes C better than J. So, in this instance, the rational course of action — the best choice for justices interested in policy

prefer an outcome that is nearer to that point than one that is further away. Or, to put it more technically, "beginning at [the actor's] ideal point, utility always declines monotonically in any direction. This feature is known as single-peakedness of preferences." See Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUDIES Q. 259, 263 (1988).

⁶⁶ Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 47, at 381.

— is to place the policy near C(M). The reason is simple: since the committees are indifferent between C(M) and M, they would have no incentive to introduce legislation to overturn a policy set at C(M). Thus, the Court would end up with a policy close to, but not exactly on, their ideal point without risking congressional reaction.

Of course, by acting in a sophisticated fashion, the Court's majority would neither see its most preferred position nor its least preferred position written into law. Yet, this course of action — the rational course of action under the circumstances — may lead to the best possible outcome for the majority.

D. *Institutions*

The PPT account of decision making suggests that we cannot fully understand the courses of action justices take unless we consider the institutional context under which they operate. By institutions, PPTheorists mean sets of rules that "structure social interactions in particular ways." Under this definition, institutions can be formal (such as laws) or informal (such as norms and conventions). For laws, norms, and conventions to be institutions, however, members of the relevant community must share knowledge of them.⁶⁷

For example, it is hard to imagine a plausible story of judicial decision making that did not consider the norm governing the creation of precedent: that a majority of justices must sign an opinion for it to become the law of the land. Consider the following: suppose our Justice X knew that four other justices shared her preference for "compelling interest" over "undue burden" over "rational basis" and further suppose that X was to write the opinion for the Court. Surely, under those circumstances, she would feel freer to adopt the compelling interest standard than she would be if only three others were squarely in her camp. Indeed, if less than four others were firmly behind her, she might be willing to consider "undue burden" if that was the best she thought she could do. This is why the rule for the establishment of precedent is so important; if only four justices' "signatures" were required for precedent, then our opinion writer would be in a far better position.

Another institution of some significance is the constitutional "rule" that justices "hold their Offices during good Behaviour."⁶⁸ In other words, barring an impeachment by Congress, justices have

⁶⁷ See KNIGHT, *supra* note 51, at 2-3.

⁶⁸ U.S. CONST. art. III, § 1.

life tenure. In contrast to members of legislatures and even to judges in many states, justices do not have to face the voters to retain their positions. This lack of an electoral connection — the institution of life tenure — speaks to the goals justices possess: instead of acting to maximize their chances for reelection (as do members of Congress⁶⁹), justices act to maximize policy.⁷⁰ To see just how consequential the institution of life tenure can be, one only has to think about the kinds of activities in which an electorally-oriented (as opposed to a policy-oriented) justice would engage. For example, instead of considering the preferences of her colleagues and Congress over what test to use in an abortion case, our Justice *X* would be tapping the pulse of her “constituents,” talking with lobbyists, holding press conferences and otherwise behaving in the ways we associate with members of Congress, not justices of the Supreme Court.

These are but two examples. On the PPT account, institutions governing the opinion assignment process,⁷¹ certiorari decisions,⁷² and conference discussion,⁷³ are equally as central to understanding judicial decisions.

E. Discussion

As our discussion above suggests, PPTheorists and Legal Realists agree on some fundamental aspects of judicial decision making. First, both schools typically suggest that justices are driven by policy in that they desire to etch their preferences into law. Second, both agree on the importance of institutions, though they interpret their effects somewhat differently. For attitudinalists, the institution of life tenure frees justices to vote their sincere preferences. For PPTheorists, it does no such thing; in other words, if justices behave in ways that accord with their unconstrained preferences, it is not necessarily because they lack an electoral connection.

It is this last issue that brings us to the major points of disagreement between the two approaches. First, and most obvious, is

⁶⁹ See D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

⁷⁰ See SEGAL & SPAETH, *supra* note 2, at 69-72.

⁷¹ *E.g.*, that the Chief Justice assigns the opinion if he is in the majority; if he is not, the most senior associate member of the majority coalition assigns the opinion. See SEGAL & SPAETH, *supra* note 2, at 262.

⁷² *E.g.*, that four justices of the nine justices must want to hear a case (“the Rule of Four”). See SEGAL & SPAETH *supra* note 2, at 180.

⁷³ *E.g.*, that conference discussion begins with the Chief Justice and moves in order of seniority. See SEGAL & SPAETH, *supra* note 2, at 210-211.

that attitudinalists take issue with the PPT characterization of justices as strategic actors. They claim that justices, unlike members of Congress and the President, are free to vote their unconstrained preferences largely because they have no fear of electoral defeat. Proponents of the attitudinal school, Segal and Spaeth, put it this way, "Members of the Supreme Court further their policy goals because they lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction. Although the absence of these factors may hinder the personal policy-making capabilities of lower court judges, their presence enables justices to vote as they individually see fit."⁷⁴

However, PPT suggests that this argument is both misguided and internally inconsistent. It may be misguided because justices do not need an electoral connection to act strategically. They know that the other institutions wield an impressive array of weapons — weapons that range from overturning judicial decisions through legislation to holding judicial salaries constant to impeaching justices and that can be deployed to move policy away from their preferred positions or threaten their institutional power in other ways. To argue that justices do not consider the preferences of other institutions is to argue that justices do not care very much about what happens to policy after a case leaves their chambers. This makes little sense, especially since the justices know that Congress quite often reviews their decisions.⁷⁵

It is also possible that when attitudinalists characterize justices as "naive" actors, they are making a claim that is inconsistent with their own theory. Consider how two attitudinalists, Rohde and Spaeth, describe their perspective: "[T]he primary goals of Supreme Court justices in the decision-process are policy goals. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences."⁷⁶ Herein lies the inconsistency: if justices are the policy maximizers that Rohde and Spaeth make them out to be, then at the very least they must be concerned with the positions of their colleagues. For they know that their colleagues can make credible threats to abandon a majority coalition, to write separately, to switch their votes, and, generally, to move policy far from

⁷⁴ SEGAL & SPAETH, *supra* note 2, at 69.

⁷⁵ Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 47, at 331.

⁷⁶ ROHDE & SPAETH, *supra* note 30, at 72.

their preferred positions. How can justices possibly achieve their policy goals if they vote naively?

By the same token, PPTheorists suggest that it is only common sensical to believe that collegial court decision making is an inherently strategic situation. One scholar remarks on the context of U.S. Court of Appeals decision making in this way: "the outcomes of cases in federal appellate courts depend on the individual votes of several judges sitting as a panel. Plausibly, the judges care about the outcome of cases, and they certainly recognize that outcomes depend on collective behavior."⁷⁷ The same, of course, is true of U.S. Supreme Court justices.

A second point of disagreement between PPTheorists and attitudinalists, as we have already described, concerns the emphasis of their studies. While attitudinalists seek to explain the vote on the merits of cases, a goal that seems to be quite narrow in scope, PPTheorists attempt to understand "law" and the process by which law is made.

Although this aim is admirable, PPTheorists are only beginning to sustain their position. Thus, in the remainder of the article, we consider this question: does PPT provide us with leverage to understand the law and the process by which the Court develops it? This is obviously a crucial question to raise, for if we answer it in the affirmative, we suspect that social scientists may begin to adopt its premises to their research. On the other hand, if PPT fails to provide a useful framework to study the development of the law, it is likely that the tenets of legal realism will continue to dominate contemporary research.

III. CONSTITUTIONAL STANDARDS FOR ADJUDICATING SEX DISCRIMINATION CLAIMS

To answer this question, we apply the PPT account of judicial decisions to the development of constitutional standards for adjudicating sex discrimination claims. We describe and analyze the events surrounding two cases which were critical to that development: *Frontiero v. Richardson*⁷⁸ and *Craig v. Boren*.⁷⁹ Our specific interest is in using PPT to explain the courses of action taken by Justice William J. Brennan, Jr., the opinion writer in both cases.

⁷⁷ Cameron, *supra* note 59, at 3.

⁷⁸ 411 U.S. 577 (1973).

⁷⁹ 429 U.S. 190 (1976).

A. *From Reed v. Reed to Frontiero v. Richardson*

Although *Frontiero* is of immense significance, it is not the starting point for most modern-day discussions of tests governing sex discrimination claims. That distinction belongs to *Reed v. Reed*⁸⁰ in which the Court struck down an Idaho law that gave preference to men over women as estate administrators. In so doing, the justices seemed to apply a rational basis standard, even though attorneys for the appellant Sally Reed (including Ruth Bader Ginsburg) had urged the Court to find sex a suspect class and had only offered the traditional approach as an alternative.⁸¹ As Chief Justice Burger's unanimous opinion indicates: "[t]he question presented by this case. . . is whether a difference in the sex of competing applicants for letters of administration bears a *rational relationship to a state objective that is sought to be advanced by the operation of [the law]*."⁸²

The answer, according to the Court, was that it did not. In particular, the justices rejected Idaho's two major justifications for the law: that it would reduce the workload of probate courts and that men had more education and experience in financial matters than women. Both justifications, according to Burger, constituted precisely the kinds of arbitrary legislative choices and overbroad assumptions that the Equal Protection Clause was designed to prevent.

From the time the Court handed down *Reed*, analysts and practitioners have disagreed over whether the ruling hindered or helped the plight of women. Hordes, for example, was critical of Burger's application of the rational basis standard:

[T]here is a real danger that *Reed* will be used in the future to deny the claims of women plaintiffs. For *Reed* reaffirms the heavy burden of proof that the plaintiff must meet, and may well demonstrate that only in the most blatant of cases will relief be granted. The Court specifically refused — although urged — to hold that classification by sex is inherently suspect.⁸³

⁸⁰ 404 U.S. 71 (1971).

⁸¹ More accurately, the attorneys offered an "intermediate" standard — what attorneys called a "reasonable-relationship test" as an alternative. As the brief put it, "If the Court concludes that sex is not a suspect classification, appellant urges application of an intermediate test." Under this test, the Court would ask if the law was "arbitrary and capricious and bears no rational relationship to a legitimate legislative purpose." Brief for Appellants at 60, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4). It is worth emphasizing, however, that this truly was a back-up position; the brief indeed stressed the suspect classification route.

⁸² *Reed*, 404 U.S. at 76 (emphasis added).

⁸³ W. William Hodes, *A Disgruntled Look at Reed v. Reed*, *From the Vantage Point of the*

Hordes is correct to the extent that invocation of a traditional rational basis standard probably would have spelled trouble for future litigation efforts. After all, under this standard, at least as the Court applies it to economic legislation, the justices typically uphold laws. This is true even for laws that they think are "needless and wasteful" or "unwise, improvident, or out of harmony with a particular school of thought."⁸⁴ In short, while the Idaho law at issue in *Reed* was sufficiently arbitrary to fail the rational basis test, other laws and policies might well survive it. Or at least that was Hordes's view.

Other scholars, however, were quite encouraged by the *Reed* decision. They argued that, although Burger claimed to be applying a rational basis standard to the law, this was hardly the case. As Gunther put it: "It is difficult to understand the result [in *Reed*] without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means . . . can the result be made entirely persuasive."⁸⁵ *Reed* was, in other words, a departure from the "traditional deferential approach" inherent in the rational basis standard.

Goldstein agreed with this analysis. She called *Reed* "enforcement of the reasonableness standard with bite."⁸⁶ Mezey too wrote that

The statute under attack in *Reed* was based on the reasonable (and accurate) assumption that men generally had more business experience than women. And although the law was more defensible than others that had survived judicial scrutiny in the past, the Supreme Court invalidated it. Perhaps signaling its desire to enter a new phase of sex discrimination law, the Court cited no sex discrimination case in its opinion.⁸⁷

This last point is especially important. For, regardless of whether one agrees with Hordes or Gunther, *Reed* constituted a major break with the past. It was the first time the Court had ever invalidated a law on the grounds that it constituted sex discrimination. The very fact that the Court took this step surprised even Sally Reed's lawyers, including Ginsburg. After all, *Reed* came just ten years after the Court, in *Hoyt v. Florida*,⁸⁸ declared:

Nineteenth Amendment, 2 WOMEN'S RTS. L. REP. 9, 12 (1972), reprinted in H.H. KAY, SEX-BASED DISCRIMINATION 38 (1981).

⁸⁴ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955).

⁸⁵ Gerald Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972).

⁸⁶ LESLIE FRIEDMAN GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN* 112 (1988).

⁸⁷ SUSAN GLUCK MEZEY, *IN PURSUIT OF EQUALITY* 18 (1992).

⁸⁸ 368 U.S. 57 (1961) (upholding a Florida law that automatically exempted wo-

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.⁸⁹

So it is hardly surprising that Ginsburg assessed her chances of winning *Reed* as "nil."⁹⁰ But win she did. At least on the merits of the case, the Court held for Sally Reed. Still, the decision left open a number of questions, with the most important one centering on the classification for sex: would the Court continue to apply the rational basis standard? If so, would it take the tack it did in *Reed* and apply the test with a "bite"? Or would it revert to a more traditional approach? *Frontiero* provided some answers to these questions and that, at least in part, is what makes it such an important ruling.

Sharron Frontiero was a lieutenant in the U.S. Air Force, and her husband, Joseph, was a full-time student at Huntingdon College in Mobile, Alabama.⁹¹ Sharron applied for certain dependent benefits for her husband, including medical and housing allowances. These benefits were part of the package the military offered to be competitive with private employers. To receive the benefits for her spouse, Sharron had to prove that Joseph was financially dependent upon her, which meant that she provided at least half of her husband's support. Male officers, however, were not required to provide evidence that their wives were dependent upon them. Air Force regulations presumed such financial dependence.

According to the facts to which both parties agreed, Joseph's expenditures amounted to \$354 per month. He received \$205 (58% of his monthly expenses) from his own veterans' benefits. Consequently, Joseph was not considered financially dependent on his wife, and the benefits were denied.

When the case reached the U.S. Supreme Court, attorneys for the Frontieros made the following claim: "Although *Reed v. Reed* em-

men from jury service unless they asked to serve), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁸⁹ *Hoyt*, 368 U.S. at 61-62.

⁹⁰ Ruth B. Cowan, *Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 COLUM. HUM. RTS. L. REV. 378 (1977).

⁹¹ We draw these facts from LEE EPSTEIN & THOMAS WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE* 692 (1995).

ployed the rational basis test to judge a sex classification, the Court apparently left open the prospect that stricter review could be applied in an appropriate case. This is such a case.⁹² Clearly, then, the *Frontiero*'s attorneys were pushing the suspect class approach; yet they provided the Court with an alternative, albeit with some reluctance: "Despite our position that the instant burdensome classification by sex is suspect, and therefore subject to strict scrutiny, the plaintiffs submit that the challenged statutes fail even to meet the traditional reasonableness test."⁹³

In an *amicus curiae* brief, attorneys for the Women's Rights Project of the ACLU (again, including Ginsburg) approached the case somewhat differently. They too urged the justices to find sex a suspect class, but they were less circumspect about offering an alternative:

With respect to the standard of review in this case, our position is three-fold: (1) [the challenged provisions] establish a suspect classification for which no compelling justification can be shown; alternatively, (2) the classification at issue, closely scrutinized, is not reasonably necessary to the accomplishment of any legitimate legislative objective; and, finally, (3) without regard to the suspect or invidious nature of the classification, the line drawn by Congress, distinguishing between married servicemen and married servicewomen for purposes of fringe benefits, lacks the constitutionally required fair and reasonable relation to a permissible legislative objective.⁹⁴

What would the Court do? Justices William J. Brennan, Jr.'s and William O. Douglas's notes from conference discussion are partially revealing.⁹⁵ They suggest that five of the justices (Douglas, Brennan, Stewart, White and Powell) strongly believed, as Stewart put it, that the policy "on its face grossly discriminates against a readily identifiable class in a basically fundamental role of life."⁹⁶ Two others (Blackmun and Marshall) cast tentative votes to reverse, while Burger and Rehnquist thought the decision should be affirmed. In Burger's mind, *Reed* had "nothing to do" with the case, a position with which

⁹² Brief for Appellants at 10-11, *Frontiero v. Laird*, 409 U.S. 840 (1972) (No. 71-1694).

⁹³ *Id.* at 33.

⁹⁴ Brief for the American Civil Liberties Unions, *amicus curiae* at 23, *Frontiero v. Laird*, 409 U.S. 840 (No. 71-1694).

⁹⁵ We draw the following discussion from Brennan's and Douglas's notes from the Court's conference on *Frontiero v. Richardson*. Letter from William O. Douglas, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (March 3, 1973) (on file with the authors and the *New York City Law Review*).

⁹⁶ *Id.*

Brennan took issue noting that he could not distinguish the two. Burger also said that he thought *Frontiero* was a "tempest in a teapot," with "enormous" implications. These factors led Burger (and Rehnquist) to conclude that the military had the right to draw the lines it did.⁹⁷

The conference majority also, apparently, agreed that the Court could dispose of the case without stating a specific standard of review. For, on February 14, 1973, Brennan circulated the following memo, along with the first draft of his majority opinion:

As you will note, I have structured this opinion along the lines which reflect what I understood was our agreement at conference. That is, without reaching the question whether sex constitutes a "suspect criterion" calling for "strict scrutiny," the challenged provisions must fall for the reasons stated in *Reed*. I do feel however that this case would provide an appropriate vehicle for us to recognize sex as a "suspect criterion." And in light of Potter [Stewart's] "Equal Protection Memo" circulated last week,⁹⁸ perhaps there is a Court for such an approach. If so, I'd have no difficulty in writing the opinion along those lines.⁹⁹

In other words, the first draft of Brennan's *Frontiero* opinion sidestepped the classification issue and, instead, invoked a *Reed* approach to dispose of the case. As he put it in his initial circulation:

At the outset, appellants contend that sex, like race, alienage, and national origin, constitutes a "suspect criterion," and that a classification based upon sex must therefore be deemed uncon-

⁹⁷ *Id.*

⁹⁸ Apparently, Brennan is referring here to a memo Stewart wrote to Powell on February 8, 1973. In that memo, Stewart wrote: "Application of the so-called 'compelling state interest' test automatically results, of course, in striking down the statute under attack. . . . There is hardly a statute on the books that does not result in treating some people differently from others. There is hardly a statute on the books, therefore, that an ingenious lawyer cannot attack under the Equal Protection Clause. If he can persuade a court that [a fundamental interest] is involved, then the state cannot possibly meet its resulting burden of proving that there was a compelling state interest in enacting the statute exactly as it was written." BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 220 (1990)

Stewart went on to say that the strict scrutiny approach could be dangerous because it would "return this Court, and all federal courts, to the heyday of the Nine Old Men, who felt that the Constitution enabled them to invalidate almost any state laws they thought unwise." Still, Stewart wrote in the memo that he thought "some few classifications are suspect, notably and primarily race, but also others, including alienage, perhaps sex, perhaps illegitimacy, and indigency." *Id.* at 220-221.

Despite these words — and they were tentative — Stewart never again took the position that sex should be a suspect class.

⁹⁹ Memoranda from William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, to the Conference, Supreme Court of the United States (Feb. 14, 1973) (on file with the authors and the *New York City Law Review*).

stitutional unless necessary to promote a compelling interest. We need not, and therefore do not, decide this question, however, for we conclude that the instant statutes cannot pass constitutional muster under even the more 'lenient' standard of review implicit in our unanimous decision only last Term in *Reed v. Reed*.¹⁰⁰

Brennan went on to echo his conference position, namely, "[i]n terms of the constitutional challenge, the situation here is virtually identical to *Reed*,"¹⁰¹ and to reverse the lower court judgment.

The draft drew immediate responses from several members of the Court. Powell quickly joined the opinion,¹⁰² and took the opportunity to state his opposition to considering the classification issue by stating:

"I see no reason to consider whether sex is a 'suspect' classification in this case. Perhaps we can avoid confronting that issue until we know the outcome of the Equal Rights Amendment."¹⁰³

Stewart agreed with Powell but went one step further:

I see no need to decide in this case whether sex is a "suspect" criterion, and I would not mention the question in the opinion. I would, therefore, eliminate the first full paragraph on page 5 [this is the paragraph excerpted above], and substitute a statement that we find that the classification effected by the statute is invidiously discriminatory. (I should suppose that "invidious discrimination" is an equal protection *standard* to which all could repair, even though the dissenters would not find such discrimination in this case.)¹⁰⁴

White, Douglas, and apparently Marshall, though, felt quite differently. In a short note to Brennan, penned on the bottom of Brennan's memo of February 14, Douglas said that he preferred the suspect class approach. Marshall, who Douglas recorded as "tentative"

¹⁰⁰ Draft opinion by Associate Justice William J. Brennan, Jr., Supreme Court of the United States, at 5 (Feb. 14, 1973) (on file with the authors and the *New York City Law Review*).

¹⁰¹ *Id.* at 7.

¹⁰² When justices agree to sign on to an opinion draft, they typically write a memo to the writer saying that they "join" the opinion. Many simply write "I join" or "Join me."

¹⁰³ Letter from Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Feb. 15, 1973) (on file with the authors and the *New York City Law Review*) (At the time Powell wrote this memo, 22 states had ratified the ERA; in fact, during January, February, and March of 1973 alone, 8 states had approved it. It was not until after March 1973 that the ratification pace slowed considerably.).

¹⁰⁴ Letter from Potter Stewart, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Feb. 16, 1973) (on file with the authors and the *New York City Law Review*).

at the justices' conference, had apparently solidified his views. In a typed note, he wrote:

I share Bill Brennan's view that this case would provide an appropriate vehicle for recognizing sex as a suspect criterion calling for stricter review of the challenged class. Indeed, I would have difficulty joining an opinion invalidating this classification under a "rational relationship" test; and might ultimately be forced to concur separately.¹⁰⁵

Whether Marshall circulated this note is unclear. But he apparently made his views known to some members of the Court — as the following memo from White to Brennan reveals:

I think *Reed v. Reed* applied more than a rational basis test. Thurgood is right about this. If moving beyond the lesser test means that there is a suspect classification, then *Reed* has already determined that. In any event, I would think that sex is a suspect classification, if for no other reason than the fact that Congress has submitted a constitutional amendment making sex discrimination unconstitutional. I would remain of the same view whether the amendment is adopted or not. Whether it follows from the existence of a suspect classification that "compelling interest" is the equal protection standard is another matter. I agree with Thurgood that we actually have a spectrum of standards. Rather than talking of a compelling interest, it would be more accurate to say that there will be times — when there is a suspect classification or when the classification impinges on a constitutional right — that we will balance or weigh competing interests. Of course, the more of this we do on the basis of suspect classifications not rooted in the Constitution, the more we approximate the old substantive due process approach.¹⁰⁶

So, by the end of February, the justices — while remaining of the opinion that the lower court should be reversed — disagreed over the appropriate standard of review. As Table 2 depicts, four justices (White, Douglas, Marshall, and Brennan) thought the Court should apply the suspect class approach and reverse; at least two others wanted to reverse but on the *Reed* rational basis standard (Powell and Stewart); and three remained silent during this initial circulation period (Burger and Rehnquist who voted in conference to affirm and Blackmun who had tentatively voted to reverse).

¹⁰⁵ Thurgood Marshall, Note on *Frontiero v. Laird*, Feb.-Mar. 1993, located in Box 100 of the Thurgood Marshall collection at the Library of Congress (on file with the authors and the *New York City Law Review*).

¹⁰⁶ Letter from Byron R. White, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Feb. 15, 1973) (on file with the authors and the *New York City Law Review*).

TABLE 2. PREFERENCES IN *FRONTIERO V. RICHARDSON*: CONFERENCE VOTES AND POSITIONS AFTER BRENNAN CIRCULATED HIS FIRST DRAFT*

Justice	Conference Vote	Position on Standard of Review: Reactions to Brennan's First Draft
Burger	Against <i>Frontiero</i>	No reaction
Douglas	For <i>Frontiero</i>	Preferred Suspect Class
Brennan	For <i>Frontiero</i>	Preferred Suspect Class
Stewart	For <i>Frontiero</i>	Preferred Draft as is (Rational Basis)
White	For <i>Frontiero</i>	Preferred Suspect Class
Marshall	For <i>Frontiero</i> (tentative)	Preferred Suspect Class
Powell	For <i>Frontiero</i>	Preferred Draft as is (Rational Basis)
Blackmun	For <i>Frontiero</i> (tentative)	No reaction
Rehnquist	Against <i>Frontiero</i>	No reaction

* Data collected by the authors.

This preference configuration created something of a quandary for Brennan. When Douglas assigned the opinion to him,¹⁰⁷ Brennan knew, as do all justices, that he needed to obtain the signatures of at least four others if his opinion was to become the law of the land. If he failed to get a majority to agree to its contents, his opinion would become a "judgment of the Court," and would lack precedential value.

The "majority" requirement for precedent is another of the Court's many norms and, in *Frontiero*, a seemingly imposing one. For, from Brennan's perspective, only three other justices (Marshall, White, and Douglas) agreed with his most preferred positions in the case: reversal of the lower court decision and application of a strict scrutiny standard. From where would the fourth vote come? Rehnquist and Burger were out of the question. Not only did they disagree with Brennan over the appropriate standard of review (they favored rational basis), but they even disagreed over the disposition of the case (they favored affirmation). Powell and Stewart were closer to Brennan — at least they wanted to reverse — but they made it crystal

¹⁰⁷ Douglas, as the senior member of the majority, assigned the opinion to Brennan.

clear that they wanted to use the *Reed* rationale. If Brennan failed to do so, they might pull their support.

That left Blackmun. He had several feasible courses of action, which Table 3 depicts: join the majority opinion, concur "regularly," concur "specially," or dissent. Based on his conference position — an inclination to reverse without providing a clear statement of the standard — it was possible that Blackmun (as well as Powell and Stewart) might join Brennan's disposition of the case (that *Frontiero* should win), but disagree with the standard the opinion articulated (strict scrutiny). This would not be propitious from Brennan's perspective because such disagreement — called a "special" concurrence — would mean that Blackmun would fail to provide the crucial fifth signature. On the other hand, Blackmun might simply join the majority opinion coalition while writing a "regular" concurrence. Since a regular concurrence, in contrast to a special concurrence, counts as joining the majority opinion, Brennan would have his fifth vote.

If Brennan is a rational actor, whose goal is to set policy as close as possible to his ideal point (in this instance, a suspect classification for sex), what would PPT predict Brennan would do? Stick with his first opinion draft which adopted the rational basis approach or circulate a new draft which would apply strict scrutiny? To address this question, we begin by conceptualizing Brennan's situation as a "game"¹⁰⁸ — one pitting him (as an advocate of suspect class) against Powell/Stewart¹⁰⁹ (as justices content with the rational basis approach). Moreover, based on the memoranda we have compiled, it seems reasonable to assume that both "players" — Brennan and Powell/Stewart — shared the following beliefs about their *Frontiero* interaction. First, both players believed that, regardless of whether Brennan adopted a rational basis standard or a suspect class standard, the majority of the justices would agree to reverse the lower court's decision. Given the conference vote (7-2) and the memoranda of the justices, this seems like a reasonable assumption and one that Brennan and Powell/Stewart probably took as a given. The choice for the

¹⁰⁸ In game theoretic terms, a game is a strategic situation. As Cameron puts it, "Technically, this means that the fate of each actor must depend on the decisions of other actors (not just his or her own actions), and the actors must realize their interdependence. For example, the outcome of cases in federal appellate courts depend on the individual votes of several judges sitting as a panel. Plausibly, the judges care about the outcome of cases, and they certainly recognize that outcomes depend on their collective behavior. Hence, voting in appellate adjudication is technically a game." Cameron, *supra* note 59, at 2-3.

¹⁰⁹ Since Powell and Stewart agreed on the desirable outcome — a victory for *Frontiero* — and on the standard of law to obtain that outcome — a rational basis test — we treat them as one player.

TABLE 3. MAJOR VOTING AND OPINION OPTIONS AVAILABLE TO THE JUSTICES*

<i>Option</i>	<i>Meaning</i>
1. Join Majority ^a	The justice is a "voiceless" member of the majority ^a . That is, the justice writes no opinion but simply agrees with the opinion ^b of the Court.
2. Write or Join ^c a Regular Concurrence	The justice writes (or joins) an opinion and is also a member of the majority ^a opinion coalition.
3. Write or Join ^c a Special Concurrence ^d	The justice agrees with the disposition made by the majority ^a but disagrees with the reasons contained in the opinion. The justice is not a member of the majority ^a opinion coalition. ^e
4. Write or Join ^c a Dissent ^f	The justice disagrees with the disposition made by the majority ^a . The justice is not a member of the majority ^a opinion coalition.

^aOr the plurality, if the opinion writer can't get a majority of justices to agree to the opinion's contents.

^bOr the judgment of the Court. A judgment of the Court results when the opinion writer can't get a majority of the participating justices to agree to the opinion's contents.

^cTo join is to sign on to an opinion.

^dOr simply note such a concurrence, as in "Justice Stewart concurs in the judgment of the Court."

^eThus, at least one justice must cast such a concurrence to produce a Judgment of the Court.

^fOr simply note such dissent, as in "Justice Stewart dissents."

* *Adopted from: SEGAL AND SPAETH, supra note 2, at 276.*

two players, then, boiled down to the choice of a legal standard — suspect class or rational basis. Second, both players knew with a good deal of certainty their opponent's preferences. That is, Brennan wanted a suspect class, while Powell/Stewart desired a rational basis standard. Although there are several ways we could set out those preferences, let us suppose that both players cared more about policy than about marshaling a Court behind a particular approach, and that they believed the other knew this. In other words, Brennan preferred a suspect class majority opinion to a suspect class judgment to a rational basis opinion; Powell/Stewart's preferences were precisely the opposite. Third, both players were uncertain about Blackmun's position in the case. Recall that Blackmun's conference vote was tentative and that he had not circulated any response to Brennan's first draft.

With these preferences and beliefs in mind, we can now turn to the key question: what are the rational courses of action for these actors? The answer is straightforward enough: Given Brennan's preferences (he preferred a suspect majority opinion to a suspect judgment to a rational basis opinion), his beliefs about the preferences of the other actors and the actions he expected them to take (he knew Powell/Stewart preferred rational basis), and the context (he was uncertain about Blackmun's position), we might hypothesize that Brennan would recraft his opinion to adopt a suspect class for sex, and that Powell/Stewart would take the rational basis route — and concur in judgment. The justices would make these decisions regardless of what they thought Blackmun would do.

To see this, readers need only put themselves in the actors' positions and believe, for example, that there was a 95% chance that Blackmun would choose the suspect classification. If that were the case, then surely Brennan would choose the suspect class route (for the chances of obtaining a Court behind a suspect class opinion would be quite high) and Powell/Stewart would choose the rational basis path (even though they would know that the odds of obtaining a rational basis opinion or a judgment were quite small). If we reversed the situation and posited that there was only a .5 probability of Blackmun going suspect, the same results would be obtained. For, if Brennan continued to embrace the rational choice standard under these circumstances, then surely Blackmun, Stewart, and Powell would have rallied around his opinion. Burger and Rehnquist, though disagreeing with the use of the standard to reverse, would also have articulated a rational basis approach. This would have created a Court behind the rational basis approach — Brennan's least preferred standard.

Thus, it is not so surprising that Brennan, on February 28, 1973, took the rational course of action and circulated a new draft of his opinion with a memo attached stating: “[s]ince the previous circulation attracted only Lewis’s full agreement and Potter’s partial agreement, and since Bill Douglas and Byron have indicated a preference for the “suspect criterion” approach, the attached new circulation embodies the latter approach (which is also my own preference).”¹¹⁰ Indeed, this draft (which resembles the final, published version) explicitly held that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying

¹¹⁰ Memoranda from William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, to the Conference, Supreme Court of the United States (Feb. 28, 1973) (on file with the authors and the *New York City Law Review*).

the analysis mandated by that stricter standard of review, we can only conclude that the statutory scheme now before us is constitutionally invalid."¹¹¹

The reactions were predictable. White, Douglas, and Marshall immediately joined the new draft. Powell, however, refused to do so. In a March 2, 1973, memorandum to Brennan, Powell wrote:

This refers to your . . . draft opinion in the above case, in which you have now gone all the way in holding that sex is a "suspect classification."

My principal concern about going this far at this time, as indicated in my earlier letter, is that it places the Court in the position of preempting the amendatory process initiated by Congress. If the Equal Rights Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. If, on the other hand, this Court puts "sex" in the same category as "race" we will have assumed a decisional responsibility (not within the democratic process) unnecessary to the decision of this case, and at the very time that legislatures around the country are debating the genuine pros and cons of how far it is wise, fair and prudent to subject both sexes to identical responsibilities as well as rights.

The point of this letter is not to debate the merits of the Equal Rights Amendment, as to which reasonable persons obviously may differ. Rather, it is to question the desirability of this Court reaching out to anticipate a major political decision which is currently in process of resolution by the duly prescribed constitutional process.

I joined your opinion in its original draft on the authority of *Reed v. Reed*. This is as far as we need go in the case now before us. If and when it becomes necessary to consider whether sex is a suspect classification, I will find the issue a difficult one. Women certainly have not been treated as being fungible with men (thank God!). Yet, the reasons for different treatment have in no way resembled the purposeful and invidious discrimination directed against blacks and aliens. Nor may it be said any longer that, as a class, women are a discrete minority barred from effective participation in the political process.

For these reasons, I cannot join your new opinion and will await further circulations.¹¹²

¹¹¹ Draft opinion by Associate Justice William J. Brennan, Jr., Supreme Court of the United States, at 11 (Feb. 28, 1973) (on file with the authors and the *New York City Law Review*).

¹¹² Letter from Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Mar. 2, 1973) (on file with the authors and the *New York City Law Review*).

Stewart immediately told Brennan that he agreed with Powell.

That left Blackmun, who had not expressed an opinion on either of Brennan's drafts. So whatever hopes Brennan had for marshaling a Court hung on him. But Blackmun did not leave Brennan hanging for long. In a March 5 memo, Blackmun wrote:

This case has afforded me a good bit of difficulty. After some struggle, I have now concluded that it is not advisable, and certainly not necessary, for us to reach out in this case to hold that sex, like race and national origin and alienage, is a suspect classification. It seems to me that *Reed v. Reed* is ample precedent here and is all we need and that we should not, by this case, enter the arena of the proposed Equal Rights Amendment. This places me, I believe, essentially where Lewis and Potter are as reflected by their respective letters of March 2 and February 16.¹¹³

Brennan tried to salvage the situation. The day after he heard from Blackmun, he wrote to Powell:

You make a strong argument and I have given it much thought. I come out however still of the view that the "suspect" approach is the proper one and, further, that now is the time, and this is the case, to make that clear. Two reasons primarily underlie my feeling. First, Thurgood's discussion of *Reed* in his dissent to your *Rodriguez* convinces me that the only rational explication of *Reed* is that it rests upon the "suspect" approach. Second, we cannot count on the Equal Rights Amendment to make the Equal Protection issue go away. Eleven states have now voted against ratification (Arkansas, Connecticut, Illinois, Louisiana, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Utah and Virginia). And within the next month or two, at least two, and probably four, more states (Arizona, Mississippi, Missouri and Georgia) are expected to vote against ratification. Since rejection in 13 states is sufficient to kill the Amendment it looks like a lost cause. Although rejections may be rescinded at any time before March 1979, the trend is rather to rescind ratification in some states that have approved it. I therefore don't see that we gain anything by awaiting what is at best an uncertain outcome. Moreover, whether or not the Equal Rights Amendment eventually is ratified, we cannot ignore the fact that Congress and the legislatures of more than half the States have already determined that classifications based upon sex are inherently suspect.¹¹⁴

¹¹³ Letter from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Mar. 5, 1973) (on file with the authors and the *New York City Law Review*).

¹¹⁴ Letter from William J. Brennan, Jr., Associate Justice, Supreme Court of the

This was insufficient, however, to persuade Powell to change his mind. At the end of the day, Brennan failed to bring a Court together (i.e., his writing was a judgment, not a majority opinion). As Table 4 shows, only four justices supported the strict scrutiny standard, with the rest advocating rational basis.

TABLE 4. FINAL VOTES CAST IN AND TESTS ADOPTED BY JUSTICES IN *FRONTIERO**

Justice	Final Vote	Position on Standard of Review: Reactions to Brennan's Final Draft
Burger	For <i>Frontiero</i> ^a	Rational Basis
Douglas	For <i>Frontiero</i>	Suspect Class
Brennan	For <i>Frontiero</i>	Suspect Class
Stewart	For <i>Frontiero</i>	Undeclared
White	For <i>Frontiero</i>	Suspect Class
Marshall	For <i>Frontiero</i>	Suspect Class
Powell	For <i>Frontiero</i>	Rational Basis
Blackmun	For <i>Frontiero</i>	Rational Basis
Rehnquist	Against <i>Frontiero</i>	Rational Basis

^aVoted against *Frontiero* at conference.

* Data collected by the authors.

B. *From Frontiero v. Richardson to Craig v. Boren*

Despite his failure to forge a majority in *Frontiero*, Brennan, given his beliefs, preferences, and the context of the decision, took the rational course of action when he rewrote the first draft to adopt a strict scrutiny standard. As such, we think Brennan's decision provides an interesting example of the utility of the strategic rationality approach.

The decision also kept the hopes of women's rights litigators alive. As Schwartz put it, "[h]ad the Brennan [first draft] come down as the *Frontiero* opinion, it might well have aborted the substantial development of sex discrimination law that occurred in the Burger Court. The use of the rational-basis test in both *Reed* and *Frontiero* would probably have meant its adoption for all cases involving sexual classification."¹¹⁵ But, because *Frontiero* did not decisively reject or accept the suspect class test, several women's rights groups continued their efforts to convince the Court to adopt the higher level of scrutiny, and the Court continued to decide such

United States, to Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States (Mar. 6, 1973) (on file with the authors and the *New York City Law Review*).

¹¹⁵ SCHWARTZ, *supra* note 98, at 223.

disputes. Between 1973 (*Frontiero*) and 1976 (*Craig*), as Table 5 shows, the Court resolved, with a signed opinion, ten cases involving sex discrimination, with the litigant claiming discrimination prevailing in six of the cases.

TABLE 5. SEX DISCRIMINATION CASES DECIDED BY THE COURT BETWEEN *FRONTIERO* AND *CRAIG**

Case	Vote	Outcome
<i>Pittsburgh Press v. Pittsburgh Commission on Human Relations</i> , 413 U.S. 376 (1973)	5-4	+
<i>Cleveland Board of Education v. La Fleur</i> , 414 U.S. 632 (1974)	7-2	+
<i>Kahn v. Shevin</i> , 416 U.S. 351 (1974)	6-3	-
<i>Corning Glass v. Brennan</i> , 417 U.S. 188 (1974)	5-3	+
<i>Geduldig v. Aiello</i> , 417 U.S. 484 (1974)	6-3	-
<i>Schlesinger v. Ballard</i> , 419 U.S. 498 (1975)	5-4	-
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975)	8-1	+
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975)	8-0	+
<i>Stanton v. Stanton</i> , 421 U.S. 7 (1975)	8-1	+
<i>General Electric v. Gilbert</i> , 429 U.S. 125 (1976)	6-3	-

Note: + = Court struck down sex-based classification; - = Court upheld sex-based classification.

* MEZEY, *supra* note 87, at 22-23; O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 96-97 (1980).

Still, the Court apparently could not agree over the legal standard by which to adjudicate constitutional cases. Indeed, in *Stanton v. Stanton*,¹¹⁶ a case quite proximate to *Craig*, the Court seemed to give up the search for an appropriate test. At issue in *Stanton* was a Utah law which specified that, for purposes of child support payments, men reach adulthood at age 21 and women at 18. Writing for the Court, Justice Blackmun held that the law constituted impermissible sex discrimination, but it failed to articulate a standard of review. Instead, the majority opinion noted: "[w]e . . . conclude that under any test — compelling state interest, rational basis, or something in between — [the Utah law] . . . does not survive . . . attack."¹¹⁷

Such rulings sent mixed signals to the legal community. As one federal district court judge put it, "lower courts searching for guidance in the 1970s Supreme Court sex discrimination precedents [prior to *Craig*] have 'an uncomfortable feeling' — like players at a

¹¹⁶ 421 U.S. 7 (1975).

¹¹⁷ *Id.* at 17.

shell game who are 'not absolutely sure there is a pea.'¹¹⁸ Attorneys working in this area of the law found themselves in much the same boat. At the very least, though, women's rights attorneys and organizations knew, as Table 5 shows, that they had five justices on whose votes they could generally (but not always) count: Brennan, White, Douglas, Marshall, and Stewart. But the potential for change was in the wind when Douglas retired and President Ford replaced him with John Paul Stevens. Would Stevens support women's right claims? What classification would he favor?

These questions loomed large when the Court agreed to decide *Craig v. Boren*. At issue in *Craig* was an "equalization" statute passed by Oklahoma in 1972.¹¹⁹ This law set the age of the legal majority for both males and females at eighteen.¹²⁰ Before then, females reached legal age at eighteen and males at twenty-one.¹²¹ The statute, however, contained one exception. The law prohibited men from purchasing beer until they reached the age of 21, but allowed women to buy (low-alcohol content) beer at 18.¹²² The state differentiated between the sexes in response to statistical evidence indicating a greater tendency for males in the eighteen to twenty-one age bracket to be involved in alcohol-related traffic accidents, including fatalities.¹²³

Even so, Curtis Craig, a 20 year-old male who wanted to buy beer and Carolyn Whitener, a beer vendor who wanted to sell it, viewed the law as a form of sex discrimination and brought suit in a federal district court.¹²⁴ At the district court level one of the arguments the plaintiffs made was that under *Frontiero*, laws discriminating on the basis of sex should be, at least according to the U.S. Supreme Court, subject to the "strict scrutiny" test.¹²⁵ The plaintiffs contended that under this standard the Oklahoma law could not stand because compelling governmental interest was not achieved by establishing different drinking ages for men and women.¹²⁶

In response, the state argued that the U.S. Supreme Court had never explicitly applied the strict scrutiny test to laws discriminating

¹¹⁸ KAY, *supra* note 83, at 70.

¹¹⁹ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹²⁰ *Id.* at 192.

¹²¹ *Id.* at 200-01.

¹²² *Id.* at 192.

¹²³ *Id.* at 200-01.

¹²⁴ *Id.* at 192.

¹²⁵ *Walker v. Hall*, 399 F. Supp. 1304, 1307 (W.D. Okla. 1975), *rev'd sub nom.* *Craig v. Boren*, 429 U.S. 190 (1976).

¹²⁶ *Id.*

on the basis of sex.¹²⁷ Rather, the only test that a majority of the justices had ever applied was the *Reed* rational basis approach.¹²⁸ Surely, Oklahoma contended, its law met this standard because statistical studies indicated that men "drive more, drink more, and commit more alcohol-related offenses."¹²⁹

A three-judge district court held for the state, upholding the constitutionality of the statute.¹³⁰ While the court acknowledged that existing U.S. Supreme Court decisions were murky, it felt that the weight of the case law supported the state's reliance on the lower-level standard.¹³¹ Furthermore, the court held that the state had met its obligation of establishing a "rational basis" for the law: given the statistical evidence, Oklahoma's goal of reducing drunk-driving incidents seemed a reasonable one.¹³²

At the U.S. Supreme Court, Craig and Whitener continued to press the same claims that they had at trial (with Craig and Whitener arguing for strict scrutiny and the state advocating rational basis), but a third party advanced a somewhat different approach. Entering the case as an *amicus curiae* on behalf of Craig, ACLU attorneys Ruth Bader Ginsburg and Melvin Wulf argued that the Oklahoma law "could not survive review whatever the appropriate test: strict scrutiny or rational basis or "something in between."¹³³ This was an argument drawn directly from the Court's indecisiveness in *Stanton*,¹³⁴ and it was interesting in two regards: it suggested that (1) the Court could apply the lower rational basis standard and still hold for Craig or (2) the Court might consider developing a standard "in between" strict scrutiny and rational basis.

What would the Supreme Court do?

That question was initially answered at the justices' conference, held a few days after oral arguments.¹³⁵ As is the Court's tradition, the Chief Justice led off the discussion. Burger asserted that *Craig* was an "isolated case" which the Court should dismiss on procedural grounds. The problem was that since Curtis Craig had turned 21 after

¹²⁷ Brief for Appellees at 3-4, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628).

¹²⁸ *Id.*

¹²⁹ *Walker*, 399 F. Supp. at 1309.

¹³⁰ *Id.* at 1314.

¹³¹ *Id.* at 1308.

¹³² *Id.* at 1311.

¹³³ Brief for the American Civil Liberties Unions, *amicus curiae* at 15-17, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628).

¹³⁴ *Id.*

¹³⁵ The next few paragraphs draw on the case files and docket books (which include notes of conference discussion) of Justices William J. Brennan, Jr. and Thurgood Marshall (on file with the authors and the *New York City Law Review*).

the Court agreed to hear the case, his claim was moot. Thus, the dispositive issue, to Burger, was whether or not "the saloon keeper" Whitener had standing to bring the suit.¹³⁶ Burger thought that she did not. But, if his colleagues disagreed (that is, they thought Whitener had standing), Burger said he was willing to find for Craig providing that the majority opinion was narrowly written.¹³⁷

After Burger spoke, the other justices presented their views. They were, as Table 6 illustrates, all over the map. Powell and Blackmun agreed with the Chief Justice in that they both would dismiss on the standing issue, and they both thought that they could find for Craig. Rehnquist also wanted to dismiss on the standing issue but would hold for Oklahoma should the Court resolve the dispute. The remaining five justices would rule in Craig's favor but disagreed on the appropriate standard. Marshall clearly favored strict scrutiny, as did William Brennan, but Brennan suggested that a standard in between rational and strict might be viable;¹³⁸ White seemed to go along with Brennan; Stewart seemed to suggest that the Court need only apply the rational basis test to find in Craig's favor; Stevens argued that some "level of scrutiny above mere rationality has to be applied," but he was not clear on what that standard should be.

After the conference, it was Brennan who decided to write the opinion for the Court.¹³⁹ Again, this was a rather daunting task, for, from Brennan's perspective, at most only three other justices (Marshall and, possibly, White and Stevens) tended to agree with his most preferred positions in the case: (1) Whitener had standing (2) a strict scrutiny standard should be used, and (3) the Court should rule in Craig's favor. From where would the fourth vote come? Not from Rehnquist, as his position was diametrically opposed to Brennan's on all the key points and, thus, he would surely dissent. The sentiments

¹³⁶ The doctrine of "standing" prohibits the Court from resolving a dispute if the party bringing the litigation is not the appropriate one. In other words, Article III of the U.S. Constitution requires that the litigants demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

In *Craig v. Boren*, Burger felt that Whitener, being over the age of 21 and female, did not have the requisite personal stake. Again, this was a dispositive point for Burger since Craig's claim was moot. *Craig*, 429 U.S. at 190.

¹³⁷ Letter from Warren E. Burger, Chief Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Nov. 15, 1976) (on file with the authors and the *New York City Law Review*).

¹³⁸ SCHWARTZ, *supra* note 98, at 226.

¹³⁹ Letter from William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, to Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States (Nov. 16, 1976) (on file with the authors and the *New York City Law Review*).

TABLE 6. JUSTICES' CONFERENCE POSITIONS ON THE KEY ISSUES OF
CRAIG V. BOREN

Justice	Conference Position		
	<i>Standing</i>	<i>Standard</i>	<i>Disposition</i>
Burger	No	Rational?	Dismiss/Lean toward Craig if decided on merits
Brennan	Yes	Strict/In-Between*	Craig
Stewart	Yes	Rational	Craig
White	Yes	Strict/In-Between?	Craig
Marshall	Yes	Strict	Craig
Blackmun	No	Undeclared	Dismiss/Lean toward Craig if decided on merits
Powell	No	Rational?	Dismiss/Lean toward Craig if decided on merits
Rehnquist	No	Rational	Dismiss/Lean toward Oklahoma if decided on merits
Stevens	Yes	Above Rational	Craig

?=Implicit but not explicit from conference discussion.

* Typically, Brennan's case files contain memos of the remarks he made at conferences. Unfortunately, his *Craig* conference memo was missing. So we rely on SCHWARTZ, *supra* note 98, at 226, who writes that Brennan, of course, wanted to adopt the strict scrutiny approach but offered the "in between" standard as a compromise. For now, the important point is that "strict" represented Brennan's most preferred position.

of Blackmun, Powell, and Burger too favored dismissal, but were closer to Brennan on point (3).

That left Stewart, who was in the same "make-or-break" position in which Blackmun found himself in *Frontiero* and who had the same feasible courses of action: join the majority opinion, concur "regularly," concur "specially," or dissent. Based on his conference position (he had voted in favor of standing and for Craig but was not keen on the strict scrutiny approach) and on the memorandum he circulated in *Frontiero*, it was possible that Stewart (as well as Blackmun, Powell and Burger) might join Brennan's disposition of the case (that Craig should win), but disagree with the standard the opinion articulated (strict scrutiny or, even, something "in between"). If this occurred, then once again Brennan would end up issuing a judgment in the case, rather than a majority opinion. On the other hand, Stewart might simply join the majority opinion coalition while writing a "regular" concurrence. Since a regular concurrence (in contrast to a special concurrence) includes agreement with the majority opinion, Brennan would have his fifth vote in Stewart.

After several opinion drafts, revised to accommodate the many suggestions of his colleagues, Brennan accomplished what he could not in *Frontiero*. He succeeded in marshaling a majority behind his *Craig* opinion. The final version incorporated the ACLU's suggestion (and Brennan's own conference alternative), and articulated a test for sex discrimination cases, called "heightened" (or mid-level) scrutiny, that fell somewhere between strict scrutiny and rational basis.¹⁴⁰ From there, the votes and positions fell out as Table 7 indicates. Note that neither Powell nor Burger nor Blackmun joined opinions that followed from their conference votes and that Marshall signed an opinion advocating a standard that was less than ideal from his point of view, and that Brennan's writing advanced a sex discrimination test that fell short of his most preferred standard. Even the votes of certain justices changed. Powell, Blackmun and Burger switched their positions, though in different directions.

In the end, thus, *Craig* leaves us with many unanswered questions. Why did Powell, Blackmun, and Burger switch their votes? Why did Brennan advance the "heightened scrutiny" test when he clearly favored "strict scrutiny"? Why did Marshall join Brennan's opinion, when it adopted a standard he found less-than-appealing? More generally, why did *Craig* come out the way it did?

Here we concentrate primarily on one of these questions — Brennan's decision to advance heightened scrutiny over a suspect classification — because its answer gives us some insight into the last and most important question of why *Craig* came out the way it did. In response, we argue that PPT provides us with leverage to address both questions. For we believe that, given his preferences, his beliefs about the preferences of others, and the institutional context, Brennan took the course of action in *Craig* that any rational actor, concerned with policy, would have taken.

Let us begin with Brennan's preferences and his beliefs about the preferences of other Court members. Suppose, in *Craig*, that all of the justices agreed on all of the key issues: (1) Whitener had standing, (2) a strict scrutiny standard should be used, and (3) the Court should rule in *Craig*'s favor. If this were the case, then Brennan would have been free to write an opinion that reflected his sincere preferences,

¹⁴⁰ Brennan outlined the heightened scrutiny approach as follows: "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Under this approach the Court sometimes strikes down sex-based classifications (such as establishing different drinking ages for men and women, *Craig v. Boren*, 429 U.S. at 192) and occasionally upholds them (such as limiting the military draft to men, *Rostker v. Goldberg*, 453 U.S. 57 (1981)).

TABLE 7. POSITIONS OF THE SUPREME COURT JUSTICES ON THE KEY ISSUES OF *CRAIG V. BOREN*

Justice	Conference Position			Final Position		
	<i>Standing</i>	<i>Standard</i>	<i>Disposition</i>	<i>Standing</i>	<i>Standard</i>	<i>Disposition</i>
Burger	No	Rational?	Dismiss/ Craig	No	Rational	OK ^a
Brennan	Yes	Strict/In- Between*	Craig	Yes	Heightened	Craig
Stewart	Yes	Rational	Craig	Yes	Rational	Craig ^b
White	Yes	Strict/In- Between?	Craig	Yes	Heightened	Craig
Marshall	Yes	Strict	Craig	Yes	Heightened	Craig
Blackmun	No	Undeclared	Dismiss/ Craig	Yes	Heightened	Craig ^c
Powell	No	Rational?	Dismiss/ Craig	Yes	Heightened**	Craig ^d
Rehnquist	No	Rational	Dismiss/OK	No	Rational	OK ^a
Stevens	Yes	Above Rational	Craig	Yes	Heightened**	Craig ^d

?= Implicit but not explicit from conference discussion.

*See note on Table 6.

**With reservations or qualifications

^a=Wrote dissenting opinion

^b=Wrote opinion concurring in judgment (special concurrence)

^c=Wrote opinion concurring in part

^d=Wrote concurring opinion (regular concurrence)

for they were the same as the Court's. However, that was not the case in *Craig*. As we know, Brennan had to choose among three possible standards and that he preferred strict scrutiny over heightened scrutiny over rational basis. Yet, he did not select his most preferred standard, opting instead for his second choice. Why? A real possibility is that Brennan knew from the confabs over *Frontiero* that an opinion advancing strict scrutiny would have proven to be too much for certain members of the Court to handle — and that they would have pushed for a rational basis standard. Even more pointedly, he may have even thought that situation had worsened since *Frontiero*: a clear suspect class supporter (Douglas) had been replaced by a justice (Stevens) with less certain predilections. Thus, Brennan may have chosen heightened scrutiny because, based on his knowledge of the preferences of other justices, it allowed him to avoid his least preferred position (rational basis), and not because it was his first choice. Seen in this light, strategic calculations led Brennan to act in a sophisticated fashion so as to avoid the possibility of seeing his most preferred policy (suspect) rejected by his colleagues in favor of his least preferred policy (rational).

In so doing and to reiterate, Brennan took the rational course of action. In other words, for Brennan to set policy as close as possible to

his ideal point, which, recall, is the primary goal most PPTheorists ascribe to all justices, strategic behavior was essential. Moreover, in this instance, Brennan needed to act in a sophisticated fashion, given his beliefs about the preferences of the other actors and the choices he expected them to make.

Under the PPT framework, though, strategic considerations do not simply involve calculations over what colleagues will do. For reasons considered earlier in this article, justices also consider the preferences of other key political actors, including Congress, the President, and even the public. We think these considerations may have played a role in Brennan's ultimate decision to adopt the heightened scrutiny approach in *Craig*. Recall that at the time the Court was deciding the case (1976), it believed that Congress favored a strict-scrutiny approach to sex-based classifications.¹⁴¹ Brennan said as much in *Frontiero*:

[O]ver the past decade, Congress itself has manifested an increasing sensitivity to sex-based classifications [T]he Equal Pay Act of 1963 provides that no employer covered by the Act 'shall discriminate . . . between employees on the basis of sex.' And Section 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that '[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.' Thus, Congress itself has concluded that classifications based upon sex are inherently invidious¹⁴²

The Court had little reason, in 1976, to think that Congress's preferences had changed. In fact, both Houses continued to support the ERA and, thus (under Brennan's logic), a strict-scrutiny approach to sex-based classifications.

Let us assume that at the time the Court was deciding *Craig*, a majority of justices viewed the political situation in the way we have described it, that is, the Court favored a lower level of scrutiny than the other branches of government.¹⁴³ What standard would a strategic policy-maximizing Court advance? Under these circumstances, it would have been unwise for the Court to vote its sincere preferences. If the Court articulated a rational basis standard, Congress may have attempted to override its decision by writing a "strict scrutiny" test into

¹⁴¹ See GOLDSTEIN, *supra* note 86.

¹⁴² *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (emphasis added).

¹⁴³ Recall that after a conference discussion of *Craig*, a majority of justices wanted to dismiss the case (Blackmun, Burger, Powell, and Rehnquist) or apply a rational basis test (Stewart). See *Craig v. Boren*, 429 U.S. 190 (1976).

law.¹⁴⁴ As a result, the Court had a “strong incentive” to compromise its preferences and adopt some kind of a mid-level approach (e.g., heightened scrutiny) — or, at least, one that Congress believed was the best it could do under the circumstances and, accordingly, would have left undisturbed.

Of course, and once again, by acting in this sort of sophisticated fashion the Court would neither see its most preferred position (rational basis) nor its least preferred position (strict scrutiny) written into law. Yet, this course of action, the rational course of action under the circumstances, would lead to the best possible outcome for the majority, heightened scrutiny. This was something Justice Brennan, as the opinion writer, seemed to understand.

Finally, just as PPT suggests, it is difficult to understand the Court’s opinion in *Craig* without taking into account a key institution — the norm governing the creation of precedent. If Brennan believed that four other justices shared his preference for strict scrutiny over rational basis, then surely he would have written an opinion adopting the strict standard. But that was not the case. Only three justices (at the very most) were firmly behind him. This, as we suggested earlier, may explain why he was willing to consider the heightened standard. Given the norm for precedent, he thought “heightened” was the best he could do.

IV. CONCLUSION

William J. Brennan, Jr. played a crucial role in the development of contemporary sex discrimination law. From the time of the *Reed* decision in 1971 until *Craig* in 1976 the Court was sharply divided over the appropriate standard to apply in sex-based claims. If the justices voted on the basis of their sincere preferences the

¹⁴⁴ Those readers who doubt that Congress would pass legislation directing the Court to apply a particular standard of law need only consider the Religious Freedom Restoration Act of 1993. Passed to undercut the Court’s decision in *Oregon v. Smith*, 494 U.S. 872 (1990) (in which the Court ruled that Oregon could deny unemployment benefits to individuals fired from their jobs for ingesting peyote at a religious ceremony), the Act implicitly directed the Court to use a compelling interest standard to adjudicate First Amendment Free Exercise claims.

Still our discussion of *Craig* oversimplifies (1) the politics of the day (for example, by the time the Court decided *Craig* the drive to ratify the ERA had slowed considerably, even though Congress continued to back the amendment — as its extension of the ratification deadline attests) and (2) the separation of powers system as it pertains to constitutional interpretation. We use it here to make a basic point, namely that policy-oriented justices need consider the preferences of other political actors and the choices they expect them to make.

Court would remain deadlocked, unable to achieve majority support for any particular standard.

Throughout this period Brennan carried a strong preference for the application of a strict scrutiny standard to sex discrimination cases. Yet, he found himself without sufficient support from his colleagues to realize his policy goal. While his sincere preference never changed, he successfully adapted to conditions inside the Court. By acting strategically, he was able to prevent the majority from etching into law his least preferred outcome (rational basis). Although he never saw his most preferred position become the law of the land, he was able to set law as close as was possible to his ideal point by articulating an "in between" approach that continues to be used in sex discrimination cases.

Brennan's advancement and the Court's ultimate adoption of the heightened scrutiny standard — and this is a key point — cannot be adequately explained by existing models of Supreme Court decision making. To see why, reconsider the events leading up to *Craig*. Having been assigned the task of writing for the majority in *Frontiero*, Brennan faced a difficult situation. Although a clear majority supported the position that the Air Force regulations violated the Constitution, the justices apparently agreed to base the decision on an application of *Reed*, preferring not to use the case as a vehicle for articulating a particular standard.

Brennan's first draft was true to this position, but he openly declared in a memorandum that he supported the suspect class approach. When White, Douglas, and Marshall echoed his sentiment, Brennan reassessed his initial circulation. He now had four votes in support of strict scrutiny, but could he attract a fifth? With Rehnquist and Burger in dissent, and Powell and Stewart preferring that the Court avoid the issue, the spotlight inside the Court fell on Blackmun, who had not declared a position. With this voting alignment, Brennan took the rational course of action — he scrapped his *Reed*-based draft and circulated an opinion embracing strict scrutiny. Doing so carried little risk and the potential for significant reward. If he attracted Blackmun to his camp, he would have won a major policy victory; if Blackmun could not be swayed (which proved to be the case), Brennan would still block adoption of the rational choice approach and keep the legal debate alive.

In *Craig*, Brennan faced an altered social context. Majority support for strict scrutiny seemed beyond reach. With the retirement of Douglas and Blackmun's rejection of the approach, Bren-

nan had no hope of gaining support for his sincerely preferred position.

Apparently aware of this changed context, Brennan again acted strategically. He took advantage of the Court's rules by assigning *Craig* to himself. Then, he carefully crafted a new standard of review — a standard that he thought would allow him to maintain the support of White and Marshall and would attract others who generally favored *Craig*, but were not necessarily strict scrutiny advocates. Brennan's approach was successful: a majority of the justices signed his opinion.

By now, it should be clear why existing theories of decision making cannot account for the development of sex discrimination standards. Surely the intra-court negotiations in *Frontiero* and *Craig* bear no resemblance to the kinds of behavior suggested by purely legal models of decision making. At the very least, Justice Owen Roberts's classic articulation of the legal approach ("the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former"¹⁴⁵) does not describe what occurred in these cases. Similarly, the attitudinal approach, which assumes that justices always vote (on the merits of cases) in accord with their sincere preferences, cannot (nor does it attempt to) account for the outcomes we have described.

Positive political theory, in contrast, does provide a reasonable framework for understanding why justices act in particular ways. Here, we have highlighted the actions of Justice Brennan, who — in *Frontiero* — wrote an opinion endorsing strict scrutiny because there was a distinct possibility of attracting a fifth vote for that approach. Even if he failed to obtain a majority, he knew that he could block Court acceptance of his least preferred position. In *Craig*, faced with no possibility of majority support for strict scrutiny, Brennan acted in a sophisticated fashion, abandoning his sincerely preferred position and gathering a majority behind an acceptable alternative.

Just as positive political theory sheds light on this fascinating episode of constitutional law, it also reminds social scientists of things that law professors have never forgotten: judges and justices care about the substance of the law, they are concerned with appropriate standards, and they believe that words carry important

¹⁴⁵ United States v. Butler, 297 U.S. 1, 62 (1936).

meaning. As a consequence, many of the most important battles inside the Court are not over which litigant prevails, but over how the case is decided. The sex discrimination cases we have discussed dramatically illustrate this point. There were clear majorities in favor of the claimants; yet members of those majority coalitions disagreed vehemently over the appropriate legal standard to employ. The legal and attitudinal approach, for different reasons, are unable to capture these crucial aspects of the process by which justices reach collegial decisions. Positive political theory, however, directs our attention toward these stages and, in so doing, carries enormous potential for helping us unravel the complexities of judicial decision making.

