LEGAL DOCTRINE AND SELF IMPOSED NORMS: EXAMINING THE POLITICS OF STARE DECISIS

A Dissertation

by

MCKINZIE CECILIA CRAIG

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

August 2012

Major Subject: Political Science

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Approved by:

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ABSTRACT

Legal Doctrine and Self Imposed Norms: Examining the Politics of Stare Decisis.

(August 2012)

McKinzie Cecilia Craig, B.A., University of North Texas; M.S., University of North Texas

Chair of Advisory Committee: Dr. James R. Rogers

The "law versus politics" debate is central in the study of the Supreme Court's institutional role in US democracy and law making. Research has sought to determine if the Supreme Court is an unconstrained political actor or if it is constrained by precedent. This dissertation contributes to this debate by theorizing that there is not a direct tradeoff; instead, even a politically motivated Court can be constrained by precedent. Given precedent is an internally imposed norm, what incentive does a politically motivated Supreme Court have to adhere to precedent when it results in outcomes that deviate from the Court's most preferred ideological outcome?

There has been a lack of theoretical development and empirical testing that would explain the Court's incentive to adhere to precedent. I argue that even a politically motivated Supreme Court has an interest in adhering to precedent as a means of control over the lower courts. The Court has a role as a principal with the Courts of Appeals acting as an agent. The Supreme Court uses precedent as a standard that guides lower court decision-making in thousands of cases that the Court will never hear. The Supreme Court is willing to sacrifice the dispositional outcome (who wins and who loses) in a given case to issue or adhere to a precedent that will better guide lower court decision-making in a given area.

To test this theory, this project will construct an original data set using a new measure of precedent. Specifically, "the law" and "precedent" for a case will be

coded in terms of the standard of review. The standard of review can be understood as a precise legal statement of which party has the burden of proof or justification in a given case and the nature of that burden. This is an ordinal measure (coded 0-4) based on the Court's finite legal rules in a given area of law (rational basis, heightened rational basis, intermediate, heightened intermediate and strict). This novel understanding better captures the legal content of court opinions.

DEDICATION

To my family for all their love and laughter... so much laughter.

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The undertaking of a project such as this could not succeed without extensive support. I know anything I write here will not exhaustively list, nor convey the depth of my gratitude to, those who contributed to my scholarly development. That being said, I want to acknowledge some of those who have been a critical part of this process.

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1 INTRODUCTION

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body. (*Federalist Number 78* 1788)

Even at the founding, there was concern about the the judiciary substituting its own will for the appropriate judgement. For Alexander Hamilton in *Federalist 78*, this concern was minimized because "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." Despite this limited power, the concern of the rule of law is central to any discussion on the judiciary. The American legal system is rooted in the English Common law. In this tradition, jurists formulate their decisions using many sources including statutes, the constitution and the norm of *stare decisis*. *Stare decisis*is "the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation," (Garner 2009). Present day decisions are to be guided by previous rulings.

Chief Justice Rehnquist explains the norm and the potential difficulties arising from it. Specifically "[stare decisis] is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process... Nevertheless, when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent,' *Smith*

This dissertation follows the style of the *American Political Science Review*.

vs. Allwright (321 U. S. 649, 665, 1944). Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision,' *Helvering vs. Hallock*, (309 U. S. 106, 119, 1940)," *Payne vs. Tennessee*, (501 US 808 at 828, 1991).

Under Chief Justice Rehnquist's view, the Supreme Court is benefited by using stare decisis but there is no reason for the Court to feel "constrained" by precedent. Extensive research on Supreme Court decision-making maintains the Court is most likely to follow its own political preferences (its will) rather than precedent (judgement) (Segal & Spaeth 2002). Despite these concerns, recent research has demonstrated that the Supreme Court's decision-making fundamentally changes after precedent changes (Bailey & Maltzman 2012, Kritzer & Richards 2010). Specifically, outcomes change when the Supreme Court issues a new precedent. This indicates that the Court is allowing itself to be constrained by precedent.

This new empirical finding has been difficult to justify in the face of 60 years of research demonstrating that a justice's ideology consistently predicts her voting behavior. As Chief Justice Rehnquist explains, precedent is "not an inexorable command." A justice may choose to follow a particular precedent or may choose to change that precedent. It would be irrational for a Supreme Court justice to follow precedent (or judgement) when that would require the justice to vote for her less preferred political outcome. Generally speaking, there are minimal external costs to changing precedent, so it would seem most politically profitable for a justice to change precedent and follow her most preferred political outcome.

Yet, legal realists and recent political science research questions this conclusion, by demonstrating that justices do change their voting behavior after a new legal rule is issued. One glaring omission from this research is a compelling explanation of *why* justices would follow precedent. From the recent developments in this debate, the following critical puzzle presents itself: given precedent is an internally imposed norm, what incentive does a politically motivated Supreme Court have to adhere to

precedent when it results in outcomes that deviate from the Court's most preferred ideological outcome?

In this dissertation, I revisit this fundamental debate by offering a new interpretation on the role of personal preferences in the decision-making process and reconceptualizing the notion of precedent. First, if personal preferences enter into the Court's calculus, these preferences will be inherent in the legal justification for a given decision, rather than just in the outcome of a particular case. For this project, it is the nature of the Court's legal justifications that warrants further inquiry.

It is the nature of this justification that can explain the purpose of the law and the constraint the law exerts over the Court. If the Court's justification is merely a post hoc explanation for the Court's desired policy outcome, then we can conclude that the Court only requires an appearance of adhering to the law. If the Court's justification demonstrates a consistent application of the law, then it may be the case that the law does restrain the Court from deciding cases based solely on its desired policy outcomes.

I argue that the law the Court chooses to apply dictates the outcome both at the Supreme Court level and in other courts as well. This is a subtle yet notable distinction from previous research on Supreme Court decision-making. Much of the past research is concerned with the outcome of a given case. For the present project, the law becomes the central focus, and the factors which explain that choice of law can explain the causal relationship between the law and decision-making. More specifically, the Court has a interest in applying a particular precedent in a given case, even when that precedent results in a less preferred outcome, because that legal rule will be used by other courts deciding similar cases. In those cases, the precedent applied by the Supreme Court may be more likely to achieve the Court's most preferred outcome. Thus, if the Supreme Court is only focused on its most preferred outcome, the Court receives a political payoff in one case. However, if the Supreme Court is focused on the outcomes that result from its most preferred legal

rule, the Court receives a political payoff in every other future case from every other court.

While existing research focuses on the Court's preference over which party wins in a case, I argue that the Court's view of a decision is much broader than that.Cases before the Supreme Court are typically representative of an entire legal area. I argue that rather than only deciding a particular case, the Supreme Court sees any given decision as a decision that will decide an entire *class of cases*. For example, in *Texas vs. Johnson*, (491 U.S. 397, 1989), the Supreme Court struck down Texas's anti-flag burning statute. The Court ruled that Mr. Johnson's conviction for flag burning was a violation of his First Amendment right to free speech. In my view, the Supreme Court was not particularly concerned with Mr. Johnson's specific situation, but rather used this case as a vehicle to argue that flag burning was symbolic speech and legislation that banned flag burning needed to be justified by a compelling government interest. This case, and the legal rule used here, would be used to adjudicate all other future flag burning cases (including the Supreme Court's decision on the federal flag burning law in *United States vs Eichman* (496 U.S. 310, 1990) the following year).

Second, in order to understand the role of the law, it is necessary to define precedent and the law. A major difficulty for investigating the role of the law in judicial decision-making is that that precedent is a difficult concept to discuss and measure. Precedent is fungible and the Court is not bound by any specific rules that dictate which precedent it should follow. Different cases in the same area of law reach different conclusions. There are often cases on both sides of an issue which could be applied by the Court when answering a given question.

To give clarity to this discussion, I define "the law" as the standard of review used by the Court in a given case. I define "precedent" as the standard of review used by the Court in previous cases in the same substantive area as a given case. The standard of review is the burden the Court uses when adjudicating cases. The

standard of review is a relatively easy way to identify how the law is used in a given case.

In the next section, I more fully explore the debate concerning precedent versus politics. In the third section, I provide a decision theory and a formal model to explain the conditions under which the Supreme Court adheres to a precedent which may result in a less preferred political outcome. In the fourth section, I examine the evolution of the law in gender equal protection cases. Through this analysis, I demonstrate that Supreme Court views a given case it decides as an exemplar for a class of cases, underscoring the value of precedent over the value of a particular outcome. The fifth section introduces a novel measure for precedent, which captures the content of legal rules and overcomes some limitations of existing measures. This section also provides an empirical assessment of the theoretical argument. The sixth section offers conclusions in light of this new research.

2 THE LAW VS. POLITICS: A FALSE DICHOTOMY

2.1 Introduction

The "law versus politics" debate has been central in the study of the Supreme Court's institutional role in US democracy and law making. This research asks if the Supreme Court makes decisions following the law or following its own political preferences. On one hand, the Court is seen as a legal body functioning above the fray of politics, blindly applying and interpreting the law to arrive at a particular outcome. Under this view, the Court is constrained by precedent and the law as it decides cases. On the other hand, like all other political actors, justices have ideological preferences and they pursue those preferences from the bench and there is no incentive to sacrifice political preferences and follow the law. Under this view, the Court is an unconstrained political actor. This work furthers this debate by theorizing that there is not a direct tradeoff between the law and politics; instead, even a politically motivated Court has an interest in adhering to precedent. The tradeoff I will explore in this work is between the outcome in a particular case and pursing a legal rule that will guide all future cases.

This section highlights the origins of the tradeoff between politics and the law and explores recent developments. This recent work lays the foundation for the idea that the law and politics are not mutually exclusive pursuits of the Court. Empirical research in political science has consistently shown a link between the ideology of Supreme Court justices and the decisions made by the Court. In the face of these conclusions, why would scholarly work suggest that the law matters? There is no institutional requirement that the Court follow the law so it would seem that politics should win out. Through the course of this section, I demonstrate the problems associated with this "politics only" approach. Then, focusing on work that has also abandoned the purely political view of the Supreme Court, I underscore the

lack of theoretical development to explain why the Court would sacrifice political preferences for legal rules.

Finally, to theorize about the role of precedent, it is important to define precedent conceptually. To empirically test the theory about precedent, it is necessary to provide a measure of this concept. Previous work in this area fails to capture the legal rules used by the Court. Taking issue with both structural break techniques and citation based analysis, I demonstrate the need for a measurement of the content of legal rules.

2.2 Models of Judicial Decision-Making

The law versus politics debate grew out of two conflicting models of judicial decision making: the legal model and the attitudinal model. The legal model originates in the Nineteenth Century and maintains that justices use the law, including statutes, the Constitution and relevant precedent to make their decisions. For legal realists, the law, not political preferences, guides decision-making and is paramount for jurists (e.g. Shapiro (1987), Markovits (1998), Gillman (2001)). While humans may make mistakes, generally an even application of the law results in "internally-right answers to all or virtually all legal-rights questions," (Markovits 1998, pg 17). For legal scholars, justices are not only able to leave their personal preferences out of their decision-making but this is a necessary norm of the legal system which ensures the protection of rights and liberties.

Precedent is important because it provides uniform interpretation of the law as facts change. The American legal system is based on common law and traces its roots back to the English Common Law. When a judge hears a case, she is expected to rely on previous cases to guide her decision. This norm to "let the previous decision stand" (or *"stare decisis"*) is the foundation of our judicial process. If judges do not adhere to this norm, the entire judicial structure may suffer because the same law will be interpreted in different ways. This means that a given law is being applied to

citizens in different ways, eroding fundamental principals of equality and due process. However, there is no exact guide for how this norm should work in practice. The judges are under no obligation to apply specific cases in a particular way. To that end, this model has had difficulty explaining why judges would adhere to precedent, leaving their political preferences aside, particularly for the Supreme Court where there is virtually no formal constraint by other actors. Instead of being a model to explain judicial decision-making, the legal approach may actually be the goal of a "good" jurist but decisions may always be tempered by politics (Brisbin 1996).

The attitudinal model maintains that the Supreme Court has no reason to adhere to precedent and disregard personal preferences. Given life tenure and little institutional control via other branches, there is little incentive for the Court to vote against its personal preferences. This research concludes that Supreme Court justices vote based only upon their attitudes toward the policy outcome in a given case.

The behavioral approach and the attitudinal model offer strong theoretical and empirical explanations of judicial decision-making, arguing that each justice votes for her most preferred ideological outcome and the Court's outcomes are an aggregation of these ideological preferences (Baum 1988, Segal & Cover 1989, Segal, Epstein, Cameron & Spaeth 1995, Segal & Spaeth 1996, Segal & Spaeth 2002).

The attitudinal model, and the modern study of judicial politics more generally, finds its roots in the work of C. Herman Pritchett (1941, 1948). He argued that personal attitudes have an impact on judicial decisions. He was among the first to draw a connection between the political preferences of the President who appointed a particular justice and the way that justice voted. Departing from the legal traditionalist and legal realists, Pritchett argued that precedent is simply "the private attitudes of the majority of the Court," (1941). He notes that the vast majority of Supreme Court decisions are unanimous. Yet, there is a significant portion of cases that are not (89 out of about 300 in 1939 and 1940). In these 89 cases, justices were working with the same facts, the same legal issues and comparable legal training, but they

arrived at different conclusions. These differences "grow out of the conscious or unconscious preferences and prejudices of the justices," (Pritchett 1941, pg 890). While Pritchett ultimately tempered this attitudinal conclusion by stating that justices may also be concerned by other factors (other branches, institutional dynamics etc), the finding that judicial decision-making could be explained by personal attitudes laid the foundation for the attitudinal model.

To scientifically test the attitudinal model, Supreme Court decisions are located in an ideological space (Pritchett 1941, Schubert 1962, Schubert 1965, Rohde & Spaeth 1976). The idea of an ideological space was developed through cumulative scaling based on how justices voted. Scholars placed the justices who voted for different outcomes with the greatest frequency the greatest distance apart on a policy continuum. The justices who voted for the same outcomes with the greatest frequency were placed the closest together. This meant the justices in the middle voted with different justices in different cases. The justices in the center are the "moderates" voting with liberal justices in some cases and voting with conservative justices in other cases. These justices can be thought of as the "median" voters. The justices on the left vote together and the justices on the right vote together. Scholars then classified the underlying policy choices inherent in judicial outcomes.

According to attitudinal scholars, for each legal issue, there is a liberal direction and a conservative direction (see the United States Supreme Court Judicial Database for an extended discussion of these coding rules). For example, when the Court hears a Fourth Amendment search and seizure case challenging the government's authority to seize something, if a justice votes for the government, that is a "conservative" decision and if a justice votes for the defendant, that is a "liberal" decision. Thus, a liberal justice will vote for the defendant because that is her most preferred policy outcome. A conservative justice will vote for the government because that is her most preferred policy outcome.

Throughout the behavioralist revolution, judicial scholars have demonstrated that the Court's outcomes are inextricably linked to justices' perceived policy preferences (see for example Pritchett (1948) and Segal & Spaeth (2002)). This attitudinal model generally concludes that decision-making is purely a function of preferences. This model is the most stark application of rationality in the study of judicial decision-making. In short, all justices are rational actors who singly pursue their most preferred policy outcome. The Court's reliance on precedent is merely an attempt to justify the Court's most preferred ideological outcome. In terms of the law versus politics view, the law is irrelevant and the pursuit of policy is paramount.

This model is theoretically compelling, particularly for the Supreme Court (relative to other courts). Essentially, Supreme Court justices are unconstrained political actors (Rohde & Spaeth 1976, Segal & Spaeth 2002). They do not face pressures from the public as they are unelected. They do not face pressure from other courts, as they are at the top of the "judicial pyramid", and there is no higher court to reverse them (Baum 1997). They do not face pressure from other institutions, as they have a lifetime appointment (for "good behavior") and threats of punishment for unsatisfactory decisions carry no weight because these threats are almost never carried out (Whittington 2007).

For attiudinalists, the absence of formal institutional constraint leaves the justices free to pursue their most preferred policy outcome in the cases they decide. A justice is thus "writing his personal preferences into law," (Pritchett 1948, pg 67). Under this model of decision-making, the contents of the case or relevant precedent have no bearing on the decision. Instead, the opinion and reliance on precedent are merely a rationalization to support the justices' desired outcome (Segal & Spaeth 2002).

This theoretical argument has ample empirical support (Gibson 1983, Goldman & Jahnige 1985, Baum 1988, Segal & Cover 1989, Segal et al. 1995, Segal & Spaeth 1996, Goldman 1997, Spaeth & Segal 1999, Segal & Spaeth 2002). Justices who are

conservative vote for the conservative outcome in a case and justices who are liberal vote for the liberal outcome in a case.

In the most comprehensive study of judicial decision-making on the Supreme Court, Segal & Spaeth (2002) have data on the ideological preferences and the voting behavior of Supreme Court justices across time. They compiled over 30,000 cases from 1946 to 2000. They consistently find support for preferential (attitudinal) decision-making (as opposed to precedential, or legally constrained, decision-making). For example, they demonstrate that the attitudinal model correctly predicts justices' votes 71 percent of the time (Segal & Spaeth 2002, 325). This means that justices vote with their personal policy preferences as opposed to with precedent, particularly on civil rights and civil liberties cases. Additionally, they argue that they find support for a purely attitudinal model (based on personal policy preferences) over the strategic choice model (based on a combination of personal preferences and strategic behavior employed by justices when seeking their preferred policy outcome).

Various questions have been asked about the cases included in empirical tests of the attitudinal model. First, critics of the pure attitudinal model argue that other circumstances limit attitudinal voting behavior, such as case facts, public opinion, strategic interaction to build a majority and pressure from Congress or the President (Bentler & Speckart 1979, Davidson & Jaccard 1979, Brenner & Stier 1996, Songer & Lindquist 1996). However, even the most conservative reconsideration of the attitudinal model could only marginally reduce the role of ideology as a predictor of justice votes (Songer & Lindquist 1996). The empirical connection between ideology and justice votes has been difficult to refute, with ideology successfully predicting justice votes with a high degree of accuracy (between 70 and 90 percent of the time), in the face of controls for separation of powers concerns, legal factors, institutional design and collegiality. Scholars agree that this model is sensitive to specification but have generally concluded that attitudes still matter more than precedent.

Second, in response to criticism from legal realists (see for example Brisbin (1996)), Segal and Spaeth specifically test if precedent impacts justices' behavior. They evaluate the justices' propensity to change their votes when the Court changes precedent. If a justice dissented in a case viewed as a "landmark" case but changed her voting behavior to follow precedent in subsequent cases, this justice is adhering to precedent. If this justice continued to dissent in future cases, she is not adhering to precedent. Their results show that justices who dissent generally continue to dissent despite the new "landmark" precedent. (Segal & Spaeth 1996, Spaeth & Segal 1999).

Another struggle with the attitudinal approach is the want for a ideology that is not based on the justices' votes. Supreme Court justices are not especially forthcoming about their political views, particularly since the nomination of Robert Bork (Epstein & Segal 2005). Briefly, Bork was a conservative jurist who wrote reviews voicing opinions about the Constitution. He was nominated by President Reagan but, after much criticism about his conservative writings and statements, the Senate did not confirm him.

A common proxy of justice ideology is the preferences of the President. Justices nominated by a Republican are considered "conservative" and justices nominated by a Democrat are considered "liberal". There are several problems associated with this approach. First, there is no way of knowing if a nominee shares the President's views on particular issues. For example, while Justice Sandra Day O'Connor was appointed by Ronald Reagan, her voting behavior was significantly more moderate than President Reagan's ideological preferences (Bailey & Chang 2001). Equally problematic is the fact that recent research has demonstrated that judicial votes (and in this interpretation, justice ideology) drift over time (Epstein, Hoekstra, Segal & Spaeth 1998, Martin & Quinn 2007, Epstein, Martin, Quinn & Segal 2007), a change which Presidential preferences cannot reflect.

Segal & Cover (1989) (see also Segal et al. (1995)) developed an ideological measure based on newspaper editorials published about the justices before confirmation

by the Senate. This measure is free from the bias associated with votes cast by justices. The Segal/Cover scores have been tested and deemed by the scholarly community as both reliable and valid across a few issue areas (i.e. civil liberties). Using these scores outside of the issue areas for which they were intended can bias statistical results (Epstein & Mershon 1996). Additionally, these scores are a static measure taken before a justice takes the bench and fails to capture changes in the justice's preferences or drift.

Justices ideology can be measured using the justices' votes as an indicator of the justice' ideology (Martin & Quinn 2007). This approach begins with the assumption that voting behavior reveals ideological preferences. A measure of ideology that is based on justices past votes cannot be used to predict ideological voting in future cases, as this violates empirical assumptions (Segal & Cover 1989, Epstein & Mershon 1996).

Finally, in the attitudnalist approach, scholars focus only on the outcome in a particular case. I argue this unrealistically ignores the substance of legal rules and the importance of precedent. Attiudinalist portray Supreme Court justices as single-minded seekers of particular outcomes. Both the strategic choice approach (discussed below) and my work here question this vein. The attiudinalists maintain they have tested for the justices strategic concerns and determined that the empirical results still overwhelming support the attitudinal model (Brenner & Stier 1996, Songer & Lindquist 1996, Segal & Spaeth 2002).

A strategic account of judicial behavior grew out of the attitudinal model. Strategic choice work focuses on the importance of the institutional environment surrounding justices, suggesting that justices strategically choose the best way to pursue their most preferred ideological outcome (e.g. Calderia & Wright (1988), Knight & Epstein (1996), Maltzman, Spriggs & Wahlbeck (2000), Hammond, Bonneau & Sheehan (2005)). Specifically, scholars question the causal connection between judicial behavior and policy preferences. Their work has departed from the idea that ju-

dicial decision-making is solely a function of judicial policy preferences. Instead, justices behave strategically, paying attention to their colleagues and other factors when making their decisions.

Strategic behavior modifies the basic assumptions of the behavioral approach (Maltzman, Spriggs & Wahlbeck 2000). Rather than being focused on the behavior of individual people, the strategic approach first looks to the constraints created by the institution in which justices make decisions. Justices act within the bounds prescribed by both the formal rules of the Court and the informal norms of the Court, while still seeking to optimize their goals (Knight 1992, Knight & Epstein 1996, Epstein & Knight 1998, Maltzman, Spriggs & Wahlbeck 2000). As mentioned above, for attitudinal scholars these factors are of no concern for the Supreme Court because there are very few formal rules limiting their policy pursuits, but for strategic choice scholars, there are formal rules that dictate how the Court functions. There may also be informal norms or expectations acting on the justices as they make decisions. The strategic approach acknowledges the interaction that occurs between justices within the institution as the Court's opinion is formed. For example, if a justice wants her opinion to be the Court's majority opinion, she has to gain support from at least four other members of the Court. The justice may have to appease other justices when writing that opinion. For the attitudnalists, this consideration is irrelevant. In the strategic model, however, justices recognize "that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choice they expect others to make, and the institutional context in which they act,"(Epstein & Knight 1998, 10). A combination of the justices' strategic interaction *and* the justices' preferences explains the Court's outcomes, rather than the simple aggregation of individual political preferences.

The idea that justices behave strategically in their decision-making can be traced to the 1960s. Murphy (1964) agrees that justices have policy preferences but also contends that the justices use strategic interaction and the constraints of their in-

stitution to attain policy goals. While the attitudinal approach argues that the law is an aggregation of the preferences of a majority of the justices, Murphy views the Court's outputs as a function of the interaction that occurs between justices. Under the strategic model of judicial behavior, justices prefer judicial outcomes that reflect their policy preferences and justices interact with other members of the Court to reach outcomes that are as close as possible to those preferences (Maltzman, Spriggs & Wahlbeck 2000).

Early tests of the strategic hypotheses utilized historical case studies and research on a small number of decisions (Murphy 1964, Schubert 1965, Ulmer 1965, Woodward & Armstrong 1979, Cooper 1995). This research was problematic because it was difficult to generate a generalizable account of strategic behavior. Moreover, when faced with the systematic empirical conclusions forwarded by the behavioral approach, strategic scholarship had little counter evidence to offer (Epstein & Knight 2000).

Studies in judicial politics face a difficult measurement hurdle because the concepts we seek to understand are ambiguous and scholars are not given direct access to their object of interest (Epstein 1995). This problem is particularly rampant in the study of strategic behavior because scholars can only readily access the end product (the opinion) and are not privy to the bargaining and internal considerations that went into the construction of that opinion (Tate 1983, Maltzman, Spriggs & Wahlbeck 2000).

There is a notable exception from this dearth of empirical research on strategic interaction. Scholars have used "opinion fluidity" to test hypotheses of strategic behavior and to challenge the assumptions of the attitudinal model. "Opinion fluidity" occurs when justices change their votes from the initial conference to the final opinion (Howard 1968, Brenner 1980, Maltzman & Wahlbeck 1996). When a justice changes his vote, it demonstrates that he is not a single minded seeker of his most preferred policy, but rather that he is engaged in interaction with his fellow justices and the Court's opinion flows from that interaction. Despite Howard's (1968) con-

clusion that position changes happened with a high level of frequency, subsequent research demonstrated that this was a much rarer phenomenon happening between eight (Maltzman & Wahlbeck 1996) and fifteen percent of the time (Brenner 1980).

Additionally, the work of Epstein & Knight (1998) paved the way for modern empirical studies of the strategic behavior approach. Specifically, they discuss the interaction between justices, justices' awareness of the positions of other branches on a given issue, and justices' desire to adhere to the norm of stare decisis. Epstein and Knight exhaustively explore the potential avenues for strategic behavior on the Supreme Court.

In 2000, Maltzman, Spriggs and Wahlbeck revolutionized the study of strategic choice and judicial behavior on the Supreme Court by providing empirically rigorous scientific tests of a model of strategic behavior. Maltzman et al. provided ways to empirically measure the concepts associated with strategic behavior, which had been largely absent from previous work (but see Epstein and Knight 1998).

While this work is most applicable to studies of strategic choice, it makes a few key contributions that lay the ground work for the theory discussed in this work. First, the authors develop a fully specified theoretical model of judicial strategy and constraint. Secondly, the authors forward a viable research design which presents the first multivariate tests of the strategic hypotheses. Finally, the authors shift the focus of future research away from focusing only on the liberal/conservative voting direction of justices and the Court and toward an analysis of the content of opinions and the political process associated with the development of those opinions.

Strategic choice models of judicial behavior take into account both precedent and preferences. The law acts as a constraint that the Court must consider when making decisions and issuing opinions, because justices strategically choose to adhere to a norm of stare decisis. Understanding precedent in terms of a norm casts justices as strategic actors within an institution. When deciding a case, "justices have a preferred rule that they would like to establish... but they strategically modify their

position to take account of normative constraint in order to produce a decision as close as is possible to their preferred outcome," (Knight & Epstein 1996, pg 1021).

The constraints on judicial behavior exist as part of the institutional design of the Court and also in a normative desire to adhere to precedent. When considering institutional design, justices make decisions in a collegial environment. The majority decision of the Court must be agreed upon by at least five members. If justices are pure seekers of personal preferences, they may alienate the other members of their brethren, losing the necessary votes for an opinion to carry the weight of law (Maltzman, Spriggs & Wahlbeck 2000). Justices are pressured to act strategically when issuing opinions to ensure their opinion gains and maintains a majority. This strategic process of opinion writing and vote coalition formation has been evaluated in depth, demonstrating that sincere preferences are often sacrificed for a more preferred outcome (Maltzman, Spriggs & Wahlbeck 2000, pg 152).

The norm of stare decisis may also control the strategic behavior of justices. Justices have a vested interest in adhering to precedent (Knight & Epstein 1996, Bueno De Mesquita & Stephenson 2002). Knight & Epstein (1996) identify a "prudential" and a "normative" reason for following the norm. Stare decisis creates and maintains expectations for the legal community. If the Court is going to expect its decisions to be followed, it must enact changes "to which the members of the community can adapt," (Knight & Epstein 1996, 1022). If the changes are too sudden, unexpected, or unfeasible, the new standards will not be followed. If the new standard are unclear or if other actors lack information, the new standards will not be followed (Bueno De Mesquita & Stephenson 2002, Clark & Carrubba 2012). This understanding of stare decisis returns us to the discussion of legitimacy. The Court must behave strategically if it is to preserve legitimacy and if its decisions are to be followed by other actors. In this view, creating and adhering to a law that can be followed is as central to judicial decision-making as personal preferences are. Still, in this approach, the adherence to precedent requires the justices limit their pursuit of their

policy preferences. Here, the justices must sacrifice their most preferred political preference because there is need to adhere to precedent.

When discussing the constraining norm of stare decisis Knight and Epstein admit their presentation is "modest and indirect," lacking the means to proceed with a direct discussion of the law. To evaluate the role of the law as a strategic consideration one must offer "a detailed analysis of the evolution of the law in various substantive areas," (Knight & Epstein 1996, 1032).

Even with the strategic choice approach, scholars tend to focus on how the Supreme Court arrives at a particular outcome and evaluates how the law and politics influence that outcome. For example, investigation into the opinion authorship process has produced few conclusions which take into account more than the case disposition. While Maltzman et al indicate that the content of the opinion is as important as (if not more than) the votes on the outcome, it has been difficult for scholars to investigate the role of the constraint of collegiality on the legal rules produced by the Court. Notable exceptions include Carrubba, Friedman, Vanberg & Martin (2007) and Cameron & Kornhauser (2008). These models attempt to determine if the median justice's preferences are catered to in the dispositional outcome and the content of the legal rule. These authors demonstrate that the median justice does not exert total control over the outcome as similar legislative models would suggest. The difficulty that arises from this work is there is no comprehensive way to substantively discuss the content of legal policy and provide clear empirical tests of these theoretical models. While these models do question common assumptions about the strategic interactions of justices, they are difficult to translate to the actual workings of the Supreme Court.

Recently empirical work has shown, despite the strength of political preferences, precedent affects the Court's outcomes (Richards & Kritzer 2002, Bailey & Maltzman 2008, Bartels 2009, Bailey & Maltzman 2012). This research shows that prece-

dent constrains decision-making separate from ideology, revealing a shift in decision-making after the Court issues a new controlling precedent.

Richards & Kritzer (2002) offer a first look at the constraint of law in different substantive areas. They describe changes in precedent as creating new "jurisprudential regimes," which the Court then follows for future decision-making. They posit the law as an intervening factor through which personal preferences are filtered. They show how outcomes are changed after the Court enters a new regime. While outcomes may be different, it is less clear if the content of legal doctrine has changed in the face of these new jurisprudential regimes. It is unclear if the type of cases that are brought before the Court are changing as a response to the new regime. The Court's role in these changing outcomes is difficult to discern from Richards and Kritzer's analysis.

Even as research has advanced to include legal concerns, there is no explanation as to *why* politically oriented justices would choose the law or precedent over their personal policy preferences. While this work references the strength of the norm of stare decisis and demonstrates precedent's constraint empirically, they do not test a theory of constraint. There has been little theoretical development to counter the attitdunalist's conclusion that Supreme Court justices are primarily interested in the outcome of a case. Precedent is not a formal rule that requires justices to adhere to precedent and therefore it seems irrational for justices to choose the informal norm of stare decisis over the pursuit of their own personal preferences.

Bartels (2009) is a notable exception because he illustrates "how legal doctrine permits varying degrees of ideological discretion," (489). Still, the theoretical focus of this discussion is the ideological direction of votes in a given case. Recent work has made noticeable strides in understanding judicial behavior in a more complex theoretical framework than merely justices as singleminded seekers of policy outcomes. However, it is still difficult to determine why the Court would allow itself to be constrained by the norm of stare decisis. This is driven in part by our inability to

measure precedent. As I will discuss in the subsequent subsection, measurement issues can be tackled if we capture these legal rules and take into account the strategic interests of the justices. Specifically, I build off of Bartels's work by looking at the Supreme Court's use of legal rules in light of the features of the judicial hierarchy.

2.3 Measuring Precedent

In the study of judicial politics the development of measures that are both reliable and valid proves to be very difficult because actors are reluctant to discuss factors that are not contained in the official record. Epstein (1995) stresses that studies in judicial politics face a difficult measurement hurdle because the concepts we are seeking to measure are ambiguous and scholars are not given direct access to their object of interest. Thus, scholars must use measurement proxies for the concepts they are interested in. Adopting a particular measure should be done with caution to ensure the strongest connection between what one seeks to study and what one is actually studying. Gates & Johnson (1991) explains that scholars must create measurement rules that allow other scholars to replicate their data. Classifying judicial opinions can be especially difficult. Judges may use vagueness to cloak their political intent for strategic purposes when authoring their opinions. This makes it difficult to isolate the legal factors and the personal preferences that influence a judge's decision in a particular case. Scholars should include systemic content analysis to measure opinions (Gates & Johnson 1991). This may create a more reliable measure to help reproduce similar results across different contexts or systems.

Wahlbeck (1997) develops one of the first reliable measures of legal change. His measure of legal change is rooted in previously accepted conceptual definitions. His measure introduces a particularly unique understanding of legal change because he extends beyond instances where courts merely overturn previous precedent to include more subtle instances of change. However, this measurement may prove to be more difficult to replicate because it centers on changes made with more attention to "case-

specific factual circumstances." Within the original study inter-coder reliability was only 68 percent.

Maltzman, Spriggs & Wahlbeck (2000) provide the first multidimensional empirical tests of strategic interactions between justices. For example, they demonstrate the importance of the conference majority justices' first responses to the circulation of the majority opinion. This action initiates the strategic interaction between justices. Their model, which includes variables for policy preferences, strategic interaction and case context, correctly predicts judicial behavior in 80 percent of cases. A key conclusion from this model is that justices' behavior depends on their expectations from their colleagues, and not just their own ideology. This directly departs from the attitudinal approach, which would argue that justices only react based on their personal policy preferences.

This contribution underscores the importance of measurement and research design in the development of a theoretical revolution. Previous scholarship has supported the importance of the strategy employed by justices and yet these theoretical conclusions could not undergo sufficient scholarly development. The empirical work of the behavioral paradigm was difficult to refute without engaging in similar research. That is not to say that the historical and case study evidence did not provide valuable theoretical insight. However, theoretical development stalled in the absence of a way to translate this evidence into more generalizable hypotheses and conclusions.

From the groundwork laid by Maltzman, Spriggs & Wahlbeck (2000), recent work has been able to develop empirical models of the precedent. To measure precedent, scholars evaluate a time series of the Court's outputs and determine where we should see significant breaks (Richards & Kritzer 2002) or cast precedent in terms of citations (Hansford & Spriggs 2006, Fowler, Johnson, Spriggs, Jeon & Wahlbeck 2007, Clark & Lauderdale 2010). The time series analyses rely on our existing knowledge of key cases.

Richards & Kritzer (2002) looks to where we would expect to see a shift in decision-making because the Court issued a new precedent. When the Supreme Court issues a new landmark ruling, we should see a structural break in the decision-making in the period after the new precedent, relative to the period before. The problems with the structural break analysis is two fold. First, the statistical conclusions of the time-series analyses is problematic because the structural breaks, which had been attributed to changes in precedent, may actually occur by random chance (Lax & Rader 2010). While we see a statistically significant break when comparing Supreme Court decision-making before and after a particular event, we also see similar statistically significant breaks where there is no substantively significant event. In response to this critique, the authors conclude that some of their original conclusions hold but others are questionable (Kritzer & Richards 2010).

Second, this analysis only evaluates "landmark cases" and does not capture any more subtle evolution of legal rules. In a given area of law there may be reinterpretation of legal rules and changes in legal language that serve as an update to precedent that is not a "landmark" as expected by the authors. In their response, Kritzer & Richards (2010) conclude that there is more subtlety in decision-making and that by focusing only on the outcome of statistical tests, "we miss some of the nuance and complexity of jurisprudential regime theory, such as using interpretive methods to trace the origins of the regimes and looking to legal scholars for confirmation of our hypotheses about the parameters of the regimes,"(Kritzer & Richards 2010, 288). It is my goal to provide an opportunity for rigorous statistical testing, while still interpreting the legal concepts in the opinions in a way that relates to how legal rules are actually used in practice. However, actually capturing the content of legal opinions has been difficult.

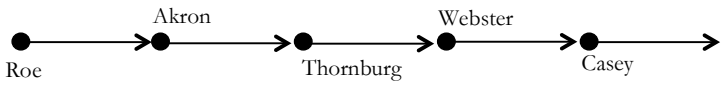
Hansford & Spriggs (2006) develop a theory to explain how justices interact with the law and evaluate the content of legal opinions. They evaluate the Court's propensity to treat previous precedent positively or negatively in a given decision. Their

work gives a strategic theoretical account of how justices choose to use precedent, concluding that justices are still ultimately driven by their own policy preferences and that these preferences drive a justice's citations of precedent. This is an important contribution because the authors indicate that the justices do think critically about the law.

This model is does not control how previous precedent is built or changed after it is cited in a subsequent case. For example, when the Court applies an existing legal rule to a new fact scenario, the substance of that precedent changes even if the Court does not specifically articulate that change. This will effect how the Supreme Court and other courts apply that precedent. How the law is used can change the Court's understanding of that law. Additionally, positive and negative treatment of a particular citation does not fully capture the dynamics of the actual opinions. There are instances where two judges may positively cite the same case and use that case to explain different legal outcomes. For example, we can look to the Court's opinions citing *Roe vs Wade* (410 U.S. 113, 1973), the landmark case striking down Texas's ban on abortion. The subsequent rulings on abortion law cite *Roe*, but even though the majority uses a positive citation of *Roe* in *Planned Parenthood vs Casey* (505 U.S. 833, 1992), the legal rule from *Casey* actually expanded the government's authority to restrict abortion access. This content is not taken into account under this kind of measurement technique.

Fowler et al. (2007) and Fowler & Jeon (2008) use a network analysis of case citations to demonstrate how the Court uses precedent, connecting decisions from one case to the next. These data connect over 30,000 Supreme Court decisions from 1754-2002 based on the previous decisions each opinion cites. They use the example of *Roe vs Wade* and how it connects to abortion cases including *Akron vs. Akron Center for Reproductive Health* (462 U.S. 416, 1983), *Thornburgh vs American College of Obstetricians*, *Webster vs Reproductive Health Services* (492 U.S. 490, 1989) and *Planned Parenthood vs Casey.* This complex network declares that *Roe* has "four

Figure 2.1: Roe and Progeny: A Line of Cases



inward citations and zero outward citations", while *Casey* has "zero inward citations and four outward citations."(Fowler & Jeon 2008, 18). Essentially, *Roe* is cited by the four subsequent cases in the example and does not cite to any of those cases (because they were decided after *Roe*). As the most recent in the nextwork, *Casey* cites all of the previous cases (outward citations) but none of the cases cite *Casey* (inward citations) as it was the last decided. *Webster* falls in between the two and has both inward and outward citations. While the authors present these cases as a complex network with nodes spreading out over time and space, we could better depict these cases as a line, with each case relying on all of those before it.

Each abortion case after *Roe* cites back to *Roe* and all of the progeny that come from it. When writing an opinion, justices will rely on all of the cases that are in that particular legal area. Unsurprisingly, the justices identify the evolution of case law in a given area as "lines of decisions" (*Planned Parenthood vs Casey* 505 at 857). Still, as mentioned before, while *Casey* cites *Roe* and does not overturn it, the legal rule from *Casey* is substantially different from the legal rule in *Roe*. As Kritzer & Richards (2010) note, there is more complexity to the content of the opinions than just the cases they cite.

Clark & Lauderdale (2010) build off of Hansford and Spriggs and refine the structure of citation analysis to a case space for precedent. Rather than talking only terms of an aggregation of positive and negative citation, these authors discuss the probability of citation from a particular direction. They argue that cases that are *ideologically* closer have a higher propensity to be cited by each other. Thus, we can determine where cases (and therefore the law) exist together in a common space. Underpinning this measure is the notion that a legal rules is "conceptualized as a

k-dimensional surface that divided all points into dichotomous outcomes," (Clark & Lauderdale 2010, 875).

The citation based analyses rely on the treatment of citations in a given opinion. This work has advanced in our understanding of how the Court strategically uses citations in an opinion but it still does not evaluate the actual legal content of opinions. While citations to specific cases in opinions has a certain meaning for legal policy, it is less clear what these citations mean in terms of the nature of the rules used by the Court.

Evaluating the dispositional outcome (who wins and who loses), or the particular citations in a given opinion, does not capture the complex nature of precedent and the legal rule in an opinion. Thus, existing data sources are insufficient for measuring the legal rules produced by the Supreme Court and the implementation of these rules by the Courts of Appeals. This makes it difficult to understand and explain precedent causally. For example, compare the US Supreme Court's decisions in *Reed vs. Reed* (404 US 71, 1971), *Craig vs. Boren* (429 US 190, 1976) and *US vs. Virginia* (518 US 515, 1996). In each case the outcome favored the individual challenging state actions, claiming unconstitutional gender based classifications. In terms of the outcome, these are all treated the same. In terms of citation analysis, each of these cases positively cited the cases that came before it in a given legal area. These would all be treated similarly in terms of the citation network analysis and the case space analyses. Nevertheless, the legal content of these decisions is very different.

In *Reed*, the Court applied a rational basis standard, putting the burden on the individual to demonstrate that the state's actions were not legitimate. In *Craig*, the Court applied an intermediate standard, placing the burden on the government but maintaining a relatively low standard. In *US vs. VA*, the Court raised the burden on the government again to a heightened intermediate standard. Measures related to ideological outcomes, including citation based measures, fail to capture this evolution in the legal standard. *US vs. VA* departs from the standard from *Craig* but does

not negatively cite this standard. The case space analysis may move *US vs. VA* into a more "liberal" place within the case space, but moving in a more liberal direction does not encompass the change in the burden on the government.

As I will discuss in the subsequent section, each of these decisions sends a different signal to the lower courts and should result in different aggregate outcomes from the lower courts. We need to be able to distinguish the legal rules in the Court's decisions. Furthermore, to understand the decision-making of the Supreme Court, it is necessary to capture the payoff from precedent in terms of these aggregate outcomes. Additionally, the ideological measures which lay the foundation for the existing studies of the constraint of precedent may be biased because of problems related to the coding of the issues and outcomes in the Spaeth data (Harvey & Woodruff 2011).

Existing work studying the constraint of precedent do not bring the actual content of the opinion into the picture. Previous work which attempts to take the law seriously has not yet be able to discuss the legal concept that is rooted in an opinion or a citation. What is noticeably absent from these studies is a concise way to discuss the legal rules that are applied and changed by the Court. While citations to specific cases in opinions has a certain meaning for legal policy, it is less clear what these citations mean in terms of the nature of the rules used by the Court. To understand the application of law by the judiciary, we must capture the law as it is understood by the judiciary. Judges evaluate a precedent in terms of the content of the opinion. They review the legal rules, which articulate which party has the burden when bringing a challenge and the nature of that burden. When the Supreme Court changes the burden associated with a particular type of challenge, the dispositional outcome and even the citations in the opinion may be the same.

If we are to substantively discuss the constraint precedent has on the actual behavior of the Court, we need a unified way of discussing precedent. In the subsequent sections I argue that the standard of review can help understand precedent and de-

scribe the content of the law issued by the Court. Once on a firm foundation of what constitutes the law and precedent, it is possible to test theories of strategic behavior which may drive legal content of the Court's opinions. It also becomes possible to attempt to untangle the separate effects of precedent and of preferences on development of the law and outcomes produced by the Court.

2.4 Conclusion

The tension between policy outcomes and legal rulings is ripe for theoretical development. Decades of research shows us that there is a strong connection between justices' policy preferences and Supreme Court outcomes. Still, many scholars believe that justices use the law when deciding cases and that future research should make an effort to "take the law seriously," (Friedman 2006). Recent work has demonstrated that precedent may exert some constraint on judicial behavior, meaning justices do not always only adhere to their political preferences but may also follow the dictates of past Supreme Court decisions.

Still, it has been difficult to develop a theoretical argument that explains why the Court would follow precedent and under what conditions the Court chooses to change precedent. It would seem that justices are free to pursue their own preferences in any given case and receive no benefit from following precedent. As I will discuss in future sections, the Supreme Court does not specifically trade off following the law or following precedent. Instead, a politically-motivated Court can use precedent to pursue future political outcomes.

Furthermore, existing measures of precedent do not actually capture the content of the legal rules used by the Court. Thus, existing measures are insufficient to determine how subtle changes in the legal rules applied to the Court can lead to future political gains. In Section Five, I provide a novel measure of Supreme Court precedent and demonstrate how that measure makes a "serious" attempt to capture the law.

3 A POLITICALLY MOTIVATED SUPREME COURT AND THE LAW: A UNIFIED APPROACH

3.1 The Aggregate Value of Precedent

"Precedent" and "the law" are important concepts if we are to understand how the Supreme Court uses precedent in decision-making. Because previous research has remained focused on dispostional, policy outcomes, our understanding of legal rules as a tool for Supreme Court to guide lower courts has been limited. An opinion in any given court cases consists of two components: the dispositional outcome and the statement of law or legal reasoning that justifies the outcome (Schwartz 1992, Tiller & Cross 2005, Carrubba et al. 2007, Cameron & Kornhauser 2008, Clark & Lauderdale 2010). The legal reason that justify the outcome are based on previous decisions made by the Supreme Court. Scholars have ordered all of these legal reasons together into continuous case space for each legal area, and all cases fall relative to one another in that space (Bueno De Mesquita & Stephenson 2002, Hansford & Spriggs 2006, Bailey & Maltzman 2008, Clark & Lauderdale 2010).

Cases, their outcomes, and precedent are not isolated points within a single space. Outcomes may be ideologically linked and therefore can be defined in their ideological proximity to other cases. However, precedent and legal rules are not treated by justices as existing relative to one another. As I discussed in the previous section, precedent is a line of cases, which apply the same legal rules to different fact patterns. From a legal point of view, precedent is a vehicle or a tool for the Court to guide outcomes for an entire class of cases. Precedent should be evaluated in terms of the aggregate outcome it produces from all decisions made by all courts.

With this in mind, we can see that legal rules do not sit relative to one another in a single ideological space. The Court guides the outcome using carefully defined legal standards. These legal standards can be thought of as cut points which divide

the ideological case space discussed above. Within a particular region of the case space, the Supreme Court is most likely to use a particular legal standard. This is an important distinction from existing conceptualizations and data sources. The legal policy of a given case does not exist across a continuous spectrum. Instead, the legal standards that the Court uses breaks this "space" into a small number of definitive groups. The "means-ends" inquiry the justices apply to evaluate constitutional cases is an example of non-continuous "lexicographic" preferences in which a higher payoff on one dimension cannot be explicitly traded off against a lower payoff on the other dimension (Rogers 1999). If judicial preferences are lexicographic, however, then the standard spatial setup for policy preferences - which assumes continuous preferences - is inappropriate to represent judicial preferences.

These legal standards can be understood in terms of the constituent parts of the standards. Based on a set of criteria by which a given standard is "triggered" (see, *United States vs. Carolene Products Company*, 304 U.S. 144 (1938), footnote 4), the standard of review typically entails an ends inquiry, a means inquiry, and the allocation of the burden of proof. This is a relatively straightforward way to identify how the law is used in a given case and how the Court reviews a specific question (Bartels 2009). There are generally three types of review: rational basis, intermediate review, and strict scrutiny[1]. Rational basis is the "lowest standard" in that it offers the greatest deference to the government in constitutional cases. Under rationality review, the actor challenging a law has the burden of establishing there is no legitimate purpose for the law or that the statutory means has no rational relationship to a conceivably legitimate statutory purpose. In contrast, under "strict scrutiny," the government has the burden of proving that the challenged statute has a "compelling" purpose and that the statute is necessary to obtain that purpose. The intermediate standard exists between these two, which somewhat lowers burden

[1]These classifications are the judicial standards for review in constitutional cases. While I am not proposing it in this specific project, this intuition of determining the party with the burden and the nature of that burden, can be used to define categories for most cases heard by the Court.

of proof on the government, although the burden of proof remains on the government rather than on the litigant challenging the law.

A court arrives at a determination of who wins and who loses by evaluating the facts of the case under these standards. The standards of review effectively "sort" entire sets of legal cases. It is at this point that we can see why thinking of precedent as the disposition of specific cases can lead scholars awry. Standards of review apply to clusters of cases. This means that in articulating standards of review, justices do not merely dispose of one case; rather they dispose of entire sets of cases.

To motivate the theoretical insight here, let's take an extreme example (again, only for the purpose of illustration). Let's say that there are 100 cases in a particular area, each with two policy outcomes, "A" or "B." Precedent says that cases in this area should be resolved in direction "A" and Justice Whiteacre's policy preferences prefer that cases generally be resolved in direction "A." It just so happens that the 100^{th} case is the only case on the docket and that 100^{th} case would be resolved in direction "B" using precedent. The other 99 cases will be resolved by the lower federal courts, depending on the precedent established by the Supreme Court in this case. Justice Whiteacre then uses that existing legal rule in the 100^{th} to case arrive at outcome "B" but maintains legal rule "A." All of the other 99 cases will use precedent to arrive at outcome "A." An outside observer may be tempted to conclude that Justice Whiteacre followed precedent *over* policy preferences, and therefore behaved in a manner inconsistent with the strategic model. But that conclusion is incorrect. Whiteacre voted to optimize outcomes over the entire class of cases that will be disposed by the articulated standard of review. Focusing on individual case outcomes - and identifying "precedent" as the disposition of the particular case rather than as the standard of review adopted in a case - misses the larger policy domain over which rational justices optimize achievement of their policy goals. A similar story can be told with respect to the change of precedent or the establishment of new precedent.

Research assumes that all courts select the proper standard and adjudicate accordingly. Any divergence, whether between the Supreme Court and the lower courts or between a Supreme Court decision at t and t+1 is seen as ideologically driven and convergence is driven by an application of precedent. Because we have not actually measured the legal rule applied in each case, we cannot determine what is driven by ideology and what is driven by precedent.

The content of legal policy for both the Supreme Court and the Courts of Appeals is essential part of understanding the politics of precedent. Beyond making a unique empirical contribution, this project proposes an innovative theoretical explanation for the norm of stare decisis. To explore the justices' incentive to adhere to precedent and the conditions under which the Court will change precedent, I forward two key theoretical claims. First, justices tend to be more interested in the legal rule in a given case than in the particular outcome in a given case. Second, the Supreme Court uses precedent to guide other courts and achieve optimal outcomes in all of those decisions.

First, justices are not typically concerned with the specific outcome in a case. Rather, the Court is focused on the broader legal implications of its decision. For example, when the Court decided *Craig vs. Boren*, the standard used by the Court in that case would subsequently influence all other gender classification cases decided there after. The government lost in this case, but the Court did not send a signal that the government should never be allowed to use gender classifications. By setting an intermediate standard, the Court signaled that the government has the burden to demonstrate a governmental interest in legislation with gender classifications, but that the government should be granted some discretion. Additionally, in Craig the Court struck down legislation which was aimed at restricting men's rights relative to women. Specifically, by Oklahoma law, men were not allowed to purchase 3.2 beer until they were 21, while women could purchase 3.2 beer at age 18. This law was struck down because the government did not have a sufficiently important

government interest in making this restriction. While the facts of this case were focused on equal protection for men, the aggregate effect of this precedent effected all gender based classifications.

Second, the Court uses precedent and the law to ensure the agents in the judicial hierarchy decide cases closest to the Court's most preferred outcome. Previous work has defined the interaction between the Supreme Court and the Courts of Appeals in terms of a principal-agent relationship (Songer & Sheehan 1990, Songer, Segal & Cameron 1994, Segal 1997, Lindquist & Haire 2006, Clark 2008, Zorn & Bowie 2010). Thus far, this research has also remained focused on explaining dispotional outcomes at the lower court level, rather than the application and effects of legal standards. When we discuss this interaction in terms of precedent, the principal-agent relationship gives the Supreme Court an incentive to adhere to precedent; by setting a consistent legal standard, the lower courts are better able to arrive at the Supreme Court's most preferred outcome (Bueno De Mesquita & Stephenson 2002).

To refine this intuition to include my more concise conceptualization of precedent as the articulation of legal standards that allocate the burden of proof and means-ends thresholds, the remainder of this section discusses the basic principal-agent model in terms of the interaction between the Supreme Court and the lower federal courts and then demonstrates the decision theory that is derived from this understanding.

The Supreme Court is the principal at the top of the judicial hierarchy (Baum 1997). The Supreme Court has the responsibility of overseeing the lower courts, while the lower courts act as agents, implementing Supreme Court decisions. The specific interaction I focus on here is between the Supreme Court and the Courts of Appeals. This hierarchical arrangement lends itself well to the principal-agent framework. The Supreme Court has preferences over the outcomes in all cases but must rely on the Courts of Appeals to determine the actual outcome in most cases. The Supreme Court faces difficulties in this agency situation because of information asymmetry

and preference divergence, which are foundational assumptions in classic principal-agent models (Wood & Waterman 1994). Informational asymmetry occurs because the Supreme Court does not observe the facts and application of the legal standard that results in a particular outcome in all cases. Instead the Supreme Court must delegate to the Courts of Appeals and can only review a small number of cases, which generates an agency control problem (Cameron, Segal & Songer 2000, Clark 2008).

The second assumption is preference divergence. We can assume that the Supreme Court and the Courts of Appeals have divergent preferences. While this assumption is not always the case, this divergence is the root of the theoretical explanation for the critical puzzle of the constraint of precedent. This divergence creates a problem of agency loss (the outcomes implemented by the agent diverge from the outcomes preferred by the principal) and the Supreme Court uses precedent to reduce that loss.

Divergent outcomes may be an indication of a rogue agent or of an incoherent or unclear standard. The informational component in precedent is important in the principal-agent relationship (Bueno De Mesquita & Stephenson 2002). If the Court observes a large quantity of divergent outcomes, it may be the case that the Court's original standard does not clearly apply to the facts in a given area of law or the lower court is unclear as to which standard should apply. The Court may take an additional case to clarify the information component of a standard. In this situation, the Court may issue an opinion that results in an outcome that diverges from the Court's most ideal point but that ultimately results in needed clarification to guide the lower court.

3.2 Establishing a New Precedent

In this section, I develop a model which demonstrates the conditions under which the Supreme Court would establish a new precedent, even when that precedent results in its less preferred ideological outcome. Essentially, the Supreme Court's interest

in precedent stems from the decisions that are made by other courts in the judicial hierarchy. Recall, for each Supreme Court decision there is a dispositional outcome (who wins and who loses) and a statement of precedent, which guides future outcomes by all other courts. In short, the value of a particular precedent is a collection of outcomes. When the Court is deciding a case, it weighs the value of precedent against the value of a specific outcome. There may be some cases in which the outcome in that specific case is greater than any legal statement. For example, in the case of *Bush vs. Gore*, the choice of the winning party had more value than the precedential statement made by the Court. In another case, the Court may place a higher value on on the precedential statement. The Court will have less interest in the particular winner and more interest in the legal rule and how that legal rule will help adjudicate all other cases in that legal area. So, the value of a precedent is the sum of all future decisions that will be guided by that precedent.

Value of precedent is Π_P.

$$\Pi_P = \sum \Pi_1 + \Pi_2 + \Pi_3 + ... + \Pi_n - C_1 - C_2 - C_3 - ... - C_n$$
$$\Pi_P = \sum_N \Pi_i - \sum_M C_j$$

The payoff from precedent is based on all the outcomes that will be decided in that legal area. Π_i are cases where the precedent results in the Court's preferred outcome. C_j are cases where the precedent results in an outcome that is inconsistent with the preferred outcome. For simplicity, Table 1 presents the notation that is used in the remainder of this subsection.

To further explore the decision rules employed by the Court, I outline the other payoffs and costs the Court may incur. I use the following notation to construct a decision space as seen in Figures One through Five. The Court receives a payoff from resolving the dispositional outcome. Π_C is the payoff of deciding "this case" consistent with the Court's preference. For example, if the Court is ideologically pro-

Table 3.1: Notation for Propositions

Π_P	$\sum(\Pi_1 + \Pi_2 + \Pi_3 + ... + \Pi_n) - \sum(C_1 - C_2 - ... - C_m)$
Π_P	$\sum_N \Pi_n - \sum_M C_m$
Π_i	precedent results in the preferred outcome
C_j	precedent results in less preferred outcome
Π_C	payoff of deciding "this case" consistent with preference
C_C	loss of deciding "this case" inconsistent preferenece
C_U	cost of changing precedent
q	probability of a more preferred case next term, where $q \in [0, 1]$

defendant's rights, and the Court votes in favor of the defendant and against the state in a criminal procedure, the Court receives some positive payoff from that outcome. C_C is the cost of deciding "this case" inconsistent with the preferred outcome. C_U is the cost associated with a new precedent. This includes the uncertainty which is generated by a new precedent as well as public opinion backlash or institutional losses that may be incurred by overturning past precedent. q represents the probability of a "better case" next year. The "better case" captures the idea that the Court may have a chance to issue a decision in the next term which yields both a new precedent and allows the Court to issue its most preferred outcome. The Court is uncertain if it will have the opportunity to hear such a case in the future but if the value of the precedent and the outcome are high enough, the Court may wait until the following term. The q term helps explain why the Supreme Court chooses to change precedent now rather than waiting until sometime in the future.

So, when does the Court establish a new precedent, even when they oppose the outcome in a particular case? The Court will establish a new precedent when two propositions are met.

Proposition one: the Court will change current precedent when the value of the new precedent is greater than the value of maintaining precedent and deciding the outcome. The value of the change in precedent is the value of the precedent minus the

cost of a less preferred outcome and the cost of changing precedent. This is weighed against the payoff of deciding the case in favor of the Court's preferred party.

Proposition two: the Court will change this term if the value of the new precedent is greater than the probability that there will be a case next term which will allow the Court to enact the preferred precedent *and* decide its most preferred outcome. The value of the change in precedent this year is the same as the value of the change in precedent in proposition one. The value of waiting until next term is the probability of a ripe case times the value of precedent *and* the value of the Court's most preferred outcome, minus the costs associated with changing precedent.

$$\text{Proposition One: } \Pi_P - C_C - C_U \geq \Pi_C$$

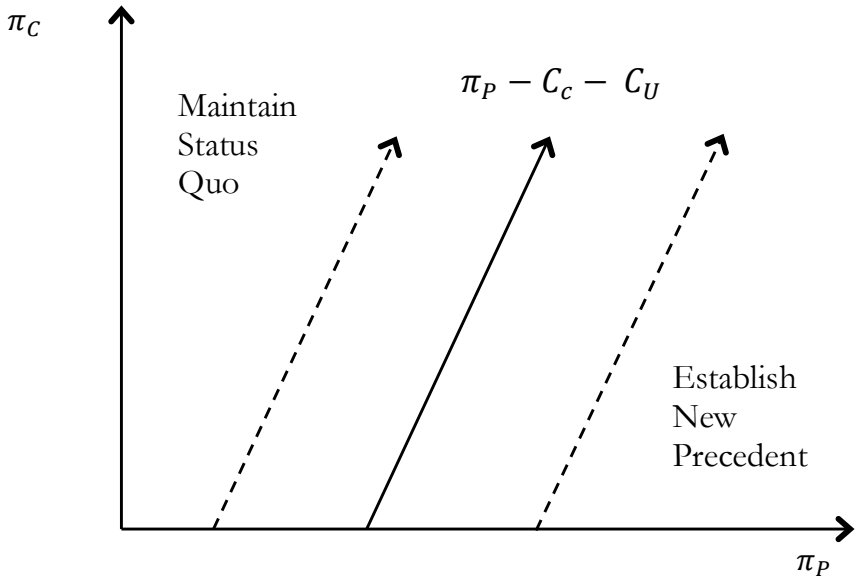
$$\text{Proposition Two: } \Pi_P - C_C - C_U \geq q(\Pi_P + \Pi_C - C_U)$$

$$(\frac{1}{q} - 1)(\Pi_P - C_U) - \frac{1}{q}(C_C \geq \Pi_C$$

To explore the implication of these decision rules, I have graphed the propositions. Proposition one asserts when the Court will maintain the status quo and when the Court will issue a new precedent. Figure 3.1 illustrates this proposition. In this figure (as with the other figures in this section), the x axis is Π_P or the aggregate value the Supreme Court derives from a particular precedent. In this figure (as with the other figures in this section), the y axis is Π_C or the value the Supreme Court derives from a particular outcome. In each decision the Supreme Court makes, there is a particular dispositional outcome and a legal statement. Thus, these two values (the value of the outcome and the aggregate value of precedent) can be taken together to represent the value of a particular case to the Supreme Court.

The dotted lines in Figure 3.1 demonstrate the effect of an increase or decrease in C_C,C_U. When C_C,C_U increases, this moves the cut point to the right. This means that, holding the value of precedent constant, when the costs C_C,C_U increases, the Court is less likely to establish a new precedent. The zone in which the Court will

Figure 3.1: Proposition One with change in C_C,C_U



maintain the status quo increases, while the zone in which the Court will establish a new precedent decreases. The converse is true when the costs decrease. When C_C,C_U decreases, this moves the cut point to the left. This means that, holding the value of precedent constant, when the costs C_C,C_U decreases, the Court is more likely to establish new precedent. The zone in which the Court will maintain the status quo decreases, while the zone in which the Court will establish a new precedent increases. An increase in the costs associated with the new precedent (especially when that new precedent would result in a particular dispositional outcome that the Court does not prefer) will decrease the value of that precedent relative to a particular outcome. When these costs are sufficiently high, the aggregate outcome from the lower courts

is no longer sufficient to justify the Court selecting its less preferred outcome in a particular case.

Figure 3.2: Proposition Two with change in C_C,C_U

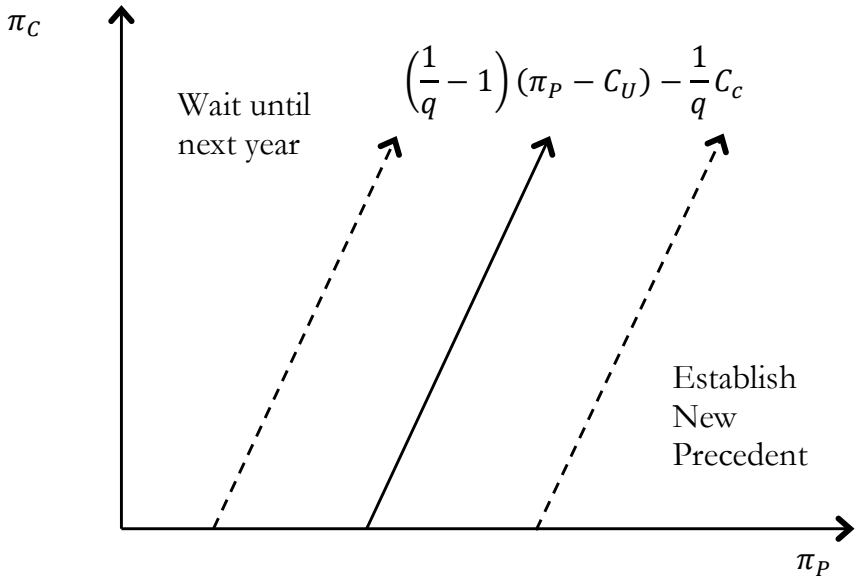


Figure 3.2 illustrates how changes in the costs effects proposition two. This shows when the Court will decide to issue a new precedent this term and when the Court will wait to issue a new precedent next term. When C_C,C_U increases, the Court is more likely to wait until next term to issue a new precedent. When C_C,C_U decreases, the Court is more likely to issue a new precedent this term. Similar to proposition one, here the costs may decrease the value of implementing a new precedent this term. When those costs are sufficiently high, the Court will wait for an opportunity for change to present itself in a subsequent term. When those costs are low, the Court will issue a new precedent, even when that precedent results in

a less preferred ideological outcome. Again, the value of precedent is determined by all other decisions that are made using that precedent.

Figure 3.3: Proposition Two with change in q

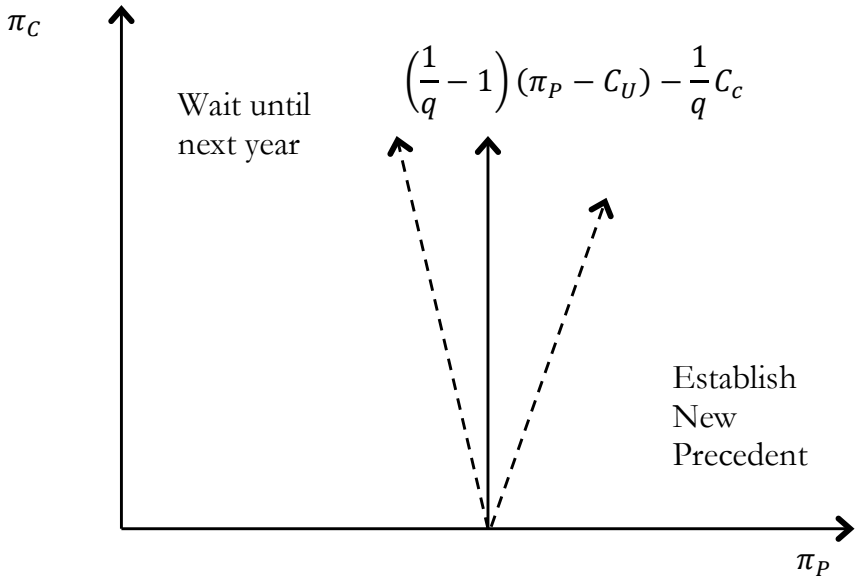


Figure 3.3 demonstrates how changes in q effect proposition two. This changes the slope of the line, demonstrating that as q increases, the Court is more likely to change precedent this year. As q decreases, the Court is more likely to wait until next term to try and change precedent. If the Supreme Court believes that it will have a case which better fits its preferences next year, it will wait until the next term to change precedent.

Next, I take propositions one and two together to determine when the Court will establish a new precedent, even when that precedent will result in a dispositional outcome that the Court does not prefer. For the purposes of this discussion, the

values of C_C and C_U remain unchanged while q increases and decreases. Figure 3.4 illustrates proposition one and two, where q is less than $\frac{C_U - C_C}{C_U}$. The Supreme Court's belief of the probability for q is derived from proposition two. Essentially, proposition two intersects proposition one. Thus, there are spaces that show the Court will establish a new precedent this term, the Court will wait until next term but is still inclined to change precedent and where the Court will maintain the status quo. These spaces still turn on the value of precedent and the payoff associated with a specific dispositional outcome from the Court.

Figure 3.4: Proposition 1 and 2 with $q > \frac{C_U - C_C}{C_U}$

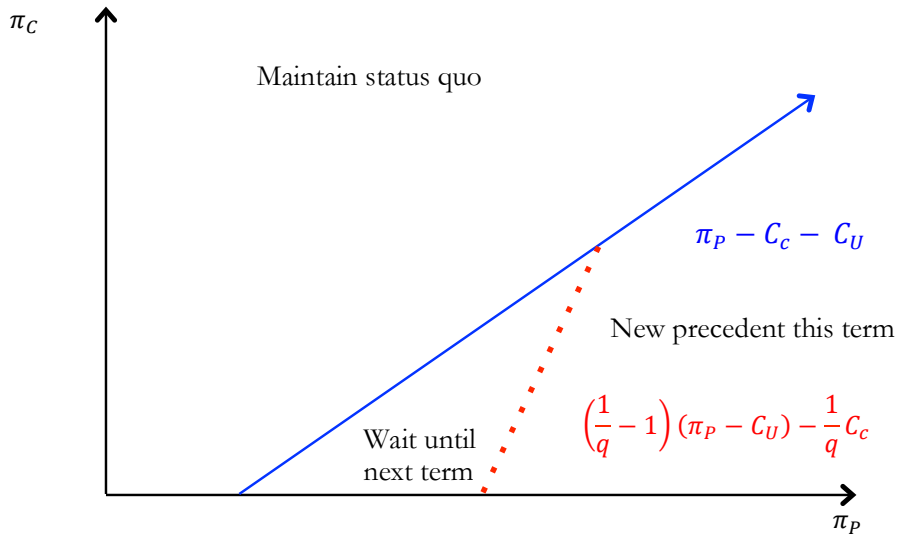
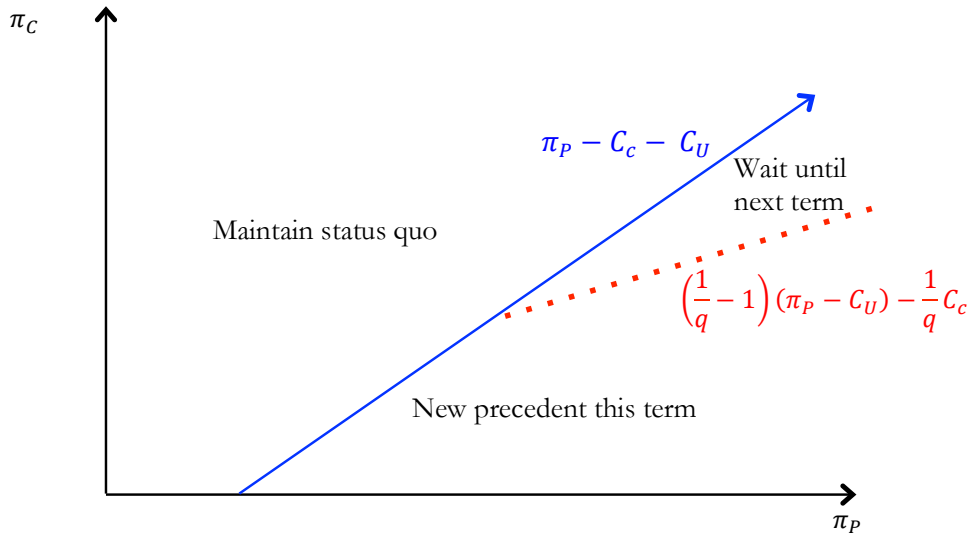


Figure 3.5 illustrates propositions one and two, where $q < \frac{C_U - C_C}{C_U}$. This changes the intersect between these propositions. When the intersect changes, this also changes the Court's decision of whether to change precedent this term or not.

Specifically, when q is high relative to the costs, as Π_P increases, the Court is more likely to issue a precedent this term (Figure 3.4). As Π_P decreases, the Court is

Figure 3.5: Proposition 1 and 2 with $q < \frac{C_U - C_C}{C_U}$



more likely to wait until next term, with the intent of changing precedent next term. When Π_P is sufficiently low, relative to Π_C, the Court will continue to maintain the status quo and will not intend on changing precedent next term.

When q is low relative to the costs, as Π_P increases, the Court is more likely to issue a new precedent this term (Figure 3.5). As Π_C increases relative to Π_P, the Court is likely to wait until next term, with the intent of changing precedent next term. When Π_P is sufficiently low, the Court will continue to maintain the status quo and will not intend on changing precedent next term. This provides some insight into the decision-making calculus that would explain why the Supreme Court may value a new precedent in a given case over selecting its most preferred outcome in a given case.

From this, I draw three distinct theoretical conclusions. The first two derive from proposition two and concern the Supreme Court's assessment of the costs and benefits

associated with a particular precedent. One, as the Supreme Court's assessed value of a new precedent increases, the Supreme Court is more likely to change precedent. This means that as the aggregate value of existing precedent is decreasing or as Π_P increases, the Court is more likely to change precedent. Recall from the figures above, Π_P represents the aggregate value of precedent and is the value of the point on the x-axis. Thus, as this value decreases, the case moves toward the left in the decision space. This means it is becoming more likely the case moves into the "change precedent" area in the figure.

This section operationalizes the value of Π_P in terms of lower court divergence. Essentially, the more the lower court diverges, the lower the value of existing precedent is and the higher the value of changing to a new precedent is. Thus, this generates a testable hypothesis:

Hypothesis 1: When lower court divergence increases, the Supreme Court is more likely to change precedent.

The second conclusion from proposition one is that as the costs associated with the precedent increases, the Court is less likely to establish a new precedent. Formally, this means that as C_C and C_U increase, the Court is less likely to establish a new precedent. This was illustrated with Figure 3.2. Conceptually, this captures the informational costs of precedent (Bueno De Mesquita & Stephenson 2002) and separation of powers costs that the Court faces given Congress's authority over the Court (Ferejohn 1999). In short, if the Supreme Court will not be able to effectively communicate a new precedent to the lower court, this increases the costs associated with a new precedent. If Congress will retaliate against the Court for the new precedent, this also increases the costs associated with a new precedent. These considerations would decrease the the likelihood that the Supreme Court would establish a new precedent.

The third conclusion concerns the Supreme Court's interest in looking to the future. Essentially, from Figures four and five, we saw that as the Supreme Court's

belief that it would get a better case to issue its decision next term increases, the Court is more likely to wait until next term to establish a new precedent (thus explaining why the Supreme Court will adhere to existing precedent this term). Formally, this statement is as q increases, the Court is more likely to wait until next term to change precedent.

This conclusion is not empirically assessed in this paper, but we can think about this concept in terms external and internal responses that a given decision is expected to have. The Supreme Court will have some expectation about how potential litigants and judges will respond to the Supreme Court's decision this term. The belief that litigants and judges will give the Court a better opportunity to change precedent next term reduces the likelihood that the Court will issue a new precedent this term. Additionally, this concept also captures internal responses. The Supreme Court may be more likely to take a case in a similar legal area and try to change precedent next term if the Court maintains precedent this term.

3.3 The Value of a Divergent Outcome

This section explores the circumstances under which the Court will adopt its least preferred ideological outcome. In particular, I demonstrate the Supreme Court's value associated with pursuing an ideal legal rule instead of an ideal legal outcome. Under certain circumstances, a legal rule can be more valuable to the Court than a particular outcome. I present a formal model to illustrate the strategic interaction between the Supreme Court and the lower courts, which facilitates the tradeoff between a rule and an outcome. First, I begin by identifying the relevant players, their strategies and their payoff functions. Next, I provide an illustration of those steps (see Figure 1). Then I identify the relevant equilibria and discuss the relevance of this solution. I run through multiple iterations of this model to demonstrate the implications of different assumptions regarding the Supreme Court's preferences.

The interaction between the Supreme Court and lower court is illustrated with a Supreme Court player (denoted SC) and two lower court players (denoted L_1 and L_2). This model uses two lower courts to represent all of the lower courts that the Supreme Court presides over. In the federal judicial hierarchy, there are certainly more than two courts beneath the Supreme Court, which interpret the Court's rulings and apply them to new cases. There are eleven regional Federal Circuit Courts, a circuit court for the District of Columbia and the Federal Circuit, and 94 Federal District Courts. The Supreme Court is also the final arbiter of questions of federal statutory or constitutional law that may arise in state court, thus there are 50 state supreme courts may apply the Supreme Court's rulings. Two lower courts are merely a representation of those acting beneath the Supreme Court. These two courts are sufficient to capture the dynamics that the Supreme Court can expect to encounter. With only two lower courts, we can illustrate the interaction if there is resounding support from the lower courts in one direction and the effects of whether those lower courts are supportive in the same direction as the Supreme Court or not. We can also illustrate the decision-making by the Supreme Court in a situation where a portion of those courts (thus one of the lower courts) is supportive in the same direction as the Supreme Court, while another portion is not. Adding additional lower courts would be a more accurate representation of the judicial hierarchy, but the added complexity would only contribute marginally to understanding the phenomena explored here.

In any given legal area, the lower courts begin the strategic interaction by deciding a case.[2] The lower courts decide between party a and party b (a or b). In this analysis, the lower courts are deciding different cases in the same legal area at the same time. The lower courts do not interact strategically with each other. Because this analysis is primarily concerned with the strategic concerns of the Supreme Court,

[2]Because of the nature of the judiciary, no decision can be rendered until a party brings a case, thus no court moves until after a party moves. There is certainly strategic behavior on the part of the litigants, however, that behavior is not explored here.

it is not necessary to also depict the strategic interactions that the lower courts engage in with one another.

After the lower courts decide cases in a given legal area, the Supreme Court decides whether or not to hear a case in that area. The Supreme Court either grants or denies certiorari (G or D). If the Supreme Court denies cert, the decisions made by the lower courts stand and the interaction ends. If the Supreme Court grants cert, the Court then makes a decision over the outcome (does party A win or does party B win) and a legal rule (what level of scrutiny is applied to the parties). Thus, the Supreme Court decides A or B. The Supreme Court also invokes a legal rule A' or B'. The legal rule either puts a high burden on party B, making it easier for party A to win (A') or puts a high burden on party A, making it easier for party B to win (B').

In the first iteration of the model, I use the assumptions from the attitudinal model. If we use the attitudinal model to inform the payoffs, the Supreme Court values the outcome in a particular case and the legal rule is only an ad hoc justification of the Court's most preferred outcome. The Supreme Court sees no additional value in a particular legal rule. Additionally, the Supreme Court does not value the outcomes of other cases heard in other courts. The Supreme Court values those outcomes that result in it choosing its most preferred outcome (party A) no matter what the other players do or what the Court's other actions are. More formally, the Supreme Court's preferences can be specified thus:

$$\begin{aligned} GAA'|(a,a) = GAA'|(a,b) = GAA'|(b,a) = GAA'|(b,b) = \\ GAB'|(a,a) = GAB'|(a,b) = GAB'|(b,a) = GAB'|(b,b) > \\ GBA'|(a,a) = GBA'|(a,b) = GBA'|(b,a) = GBA'|(b,b) = \\ GBB'|(a,a) = GBB'|(a,b) = GBB'|(b,a) = GBB'|(b,b) = \\ D|(a,a) = D|(a,b) = D|(b,a) = D|(b,b) \end{aligned}$$

In short, the Supreme Court prefers all of those strategies where the outcome at the Supreme Court is party A, regardless of the legal rule employed and the actions from the lower court, to all other strategies. The Supreme Court is also indifferent between granting cert to decide in favor of party B and denying cert. This is because the Court sees all outcomes that do not result in the Court deciding in favor of party A as suboptimal.

Even under the attitudinal model, lower courts fear reversal so they are more likely to adhere to the legal rules imposed by the Supreme Court (see Segal and Spaeth 2002). For the purposes of this discussion, we are going to assume L_1 has an ideological preference as party a and L_2 has an ideological preference of party b. The parties involved in each case are not actually the same parties but they are of from the same class of litigants. We do not need to assume each court is hearing the exact same case. Instead, we can assume that the courts are deciding substantively similar cases in the same area of law. We can think of party a (and party A) as being an individual challenging an act of the government and party b (and party B) as being the government responsible for answering the challenge.

If the Supreme Court denies cert (D), the lower courts' receive payoffs based on how they voted in the case. Thus, L_1 receives a higher payoff from voting for party a and L_2 receives a higher pay off from voting for party b. This implies all of the equilibria discussed in this decision will be couched in terms of a partially divergent lower court (rather than an entirely divergent or entirely convergent lower court). Recall from the previous section, the Supreme Court's behavior changes depending on the relative divergence of the lower court. For the purposes of this project, I will not formally depict alternate compositions of the lower court. Suffice to say, using the previous logic, as lower court divergence increases, the costs associated with a particular legal rule will increase. As the lower court divergence decreases, the costs

associated with a particular legal rule will decrease. The preferences of the lower court can be specified as:

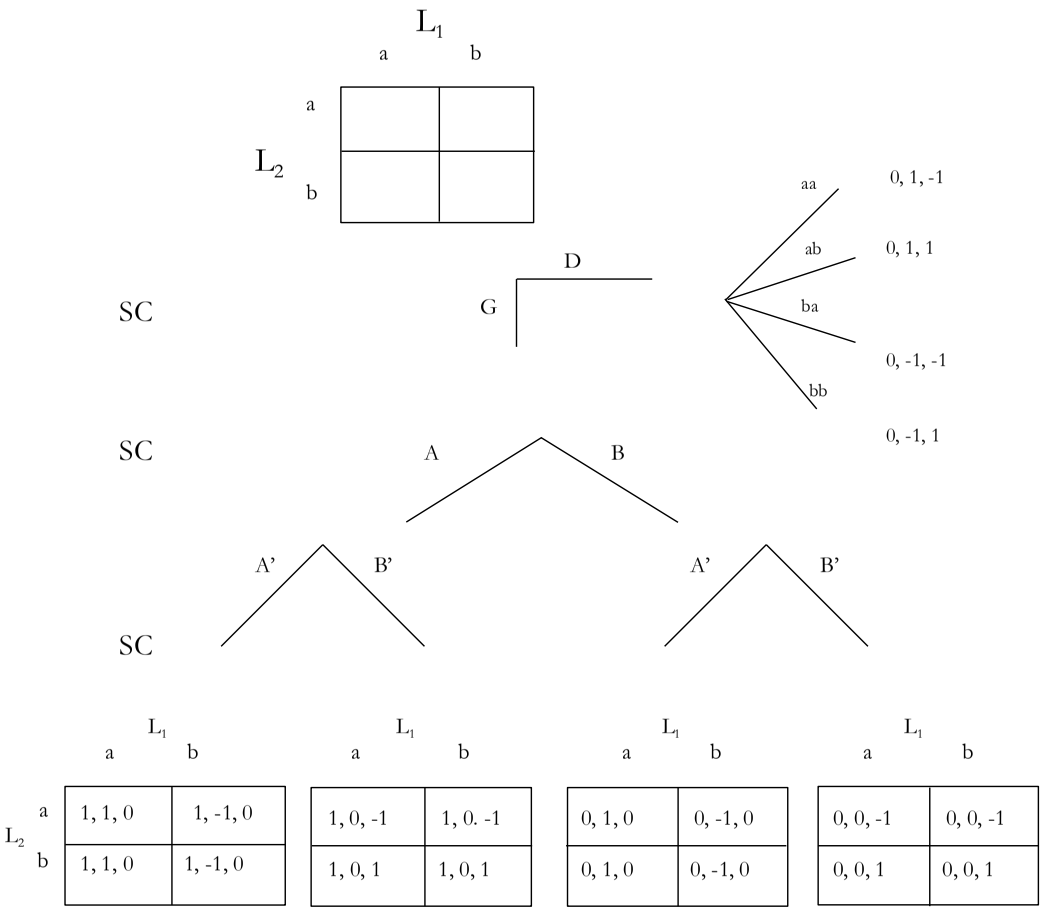
$$L_1 : a > b$$

$$L_2 : b > a$$

If the Supreme Court grants cert, the lower courts incur costs based on how they vote after the Supreme Court issues its ruling. These costs are mainly a function of the lower court's divergence and are determined by the moves made by the Supreme Court. If the lower court selects an outcome that diverges from the legal rule set by the Supreme Court (ie. the Supreme Court issues rule B' and the lower court decides a), the lower court incurs a cost. Presumably, writing an opinion justifying an outcome that diverges from the legal rule requires more work. Additionally, there is a greater risk of reversal by the high court in future cases if the lower court diverges. It is more costly to write an opinion favoring party b under legal rule A'. It is equally costly to write an opinion favoring party a under legal rule B'. This cost is denoted C_D.

Figure 3.6: Attitudinal Model

Payoffs written SC, L_1, L_2



For the purposes of exploring the Supreme Court's behavior, these costs are greater than zero and greater than the costs of writing an opinion favoring party a under rule A' (and the same for party b under rule B').[3] The costs associated with the various strategies can be expressed as:

$$C_D(b|A') = C_D(a|B') > C_D(a|A') = C_D(b|B') = 0$$

Maintaining the ideological preferences assumed above and using the cost structure from C_D, the lower courts' preferences, give the behavior of the Supreme Court are:

$$\begin{aligned}
L_1 :& a|(D) = a|(GAA') = a|(GBA') > b|(D) = a|(GAB') = \\
& a|(GBB') = b|(GBB') = b|(GAB') > b|(GBA') = b|(GAA') \\
L_2 :& b|(D) = b|(AB') = b|(BB') > a|(D) = b|(BA') = \\
& b|(AA') = a|(AA') = a|(BA') > a|(AB') = a|(BB')
\end{aligned}$$

These payoffs are in Figure 3.6. From this, the fully stated pure strategy equilibrium for the attitudinal model is:

$$\begin{aligned}
L_1 :& (a|GAA'), ((a,b)|GAB'), (a|GBA'), ((a,b)|GBB'), (a|D) \\
L_2 :& ((a,b)|GAA'), (b|GAB'), ((a,b)|GBA'), (b|GBB'), (b|D) \\
SC :& \{(GAA'), (GAB')\}
\end{aligned}$$

For lower court one (L_1), when the legal rule is A', this lower court will decide a. When the legal rule is B', this lower court is indifferent between a and b. Before a legal rule is set (at node D), this lower court will decide a. For lower court two (L_2),

[3]For future research interested in making predictions about the lower court's behavior, it would be prudent to explore other iterations of the model where the costs are greater than the outcome, encouraging the lower court to adhere to the high courts legal rules with greater frequency. Also, it could be the case where there is no cost of divergence so C_D=0. Because this is primarily focused on explaining the trade off between a legal rule and a particular outcome for the Supreme Court, I will not explore the strategies of the lower court here.

when the legal rule is A', this lower court is indifferent between a and b. When the legal rule is B', this lower court will decide b. Before a legal rule is set (at node D), this lower court will decide b.

Given the strategies of the lower courts, the Supreme Court's best response is to grant cert and choose its most preferred outcome. The Supreme Court gets no value from the lower courts outcomes so granting cert dominates denying cert. The Supreme Court is indifferent between legal rule A' and legal rule B', but when selecting the outcome, A dominates B. With this in mind, we can state the sub game perfect, pure strategy equilibrium as:

$$L_1 : (a|GAA'), ((a,b)|GAB')$$
$$L_2 : ((a,b)|GAA'), (b|GAB')$$
$$SC : \{(GAA'), (GAB')\}$$

We can now generate a legal hypothesis from the assumptions from the attitudinal model. The Supreme Court is only interested in the outcome in a given cases and receives no additional benefit from a particular legal rule. The Court is equally likely to employ a legal rule favoring party A or party B.

Hypothesis Two: The Supreme Court is indifferent between various legal rules in a particular legal area.

The assumptions of the attitudinal model may be short sighted. Recall from above, the Supreme Court may have interests beyond the outcome in a given case it decides. For example, we can consider a situation where the Supreme Court is also interested in the outcomes decided by other courts. For the purposes of this analysis, the Supreme Court would prefer that the lower courts also choose outcomes that favor party a. The Supreme Court's payoffs then become a function of the legal rule the Court decides because the legal rule (rather than the outcome) induces the lower courts to behave a certain way, and the Supreme Court's decision regarding the outcome. Assuming that the Supreme Court prefers that other courts also de-

cide cases in line with its most preferred outcome, the Supreme Court's preference ordering becomes:

$$GAA'|aa = GAB'|aa > GAA'|ab = GAA'|ba = GAB'|ab = GBA'|aa = GBB'|aa = D|aa > GAA'|bb = GAB'|bb = GBA'|ab = GBA'|ba = GBB'|ab = GBB'|ba = D|ab = D|ba > GBA'|bb = GBB'|bb = D|bb$$

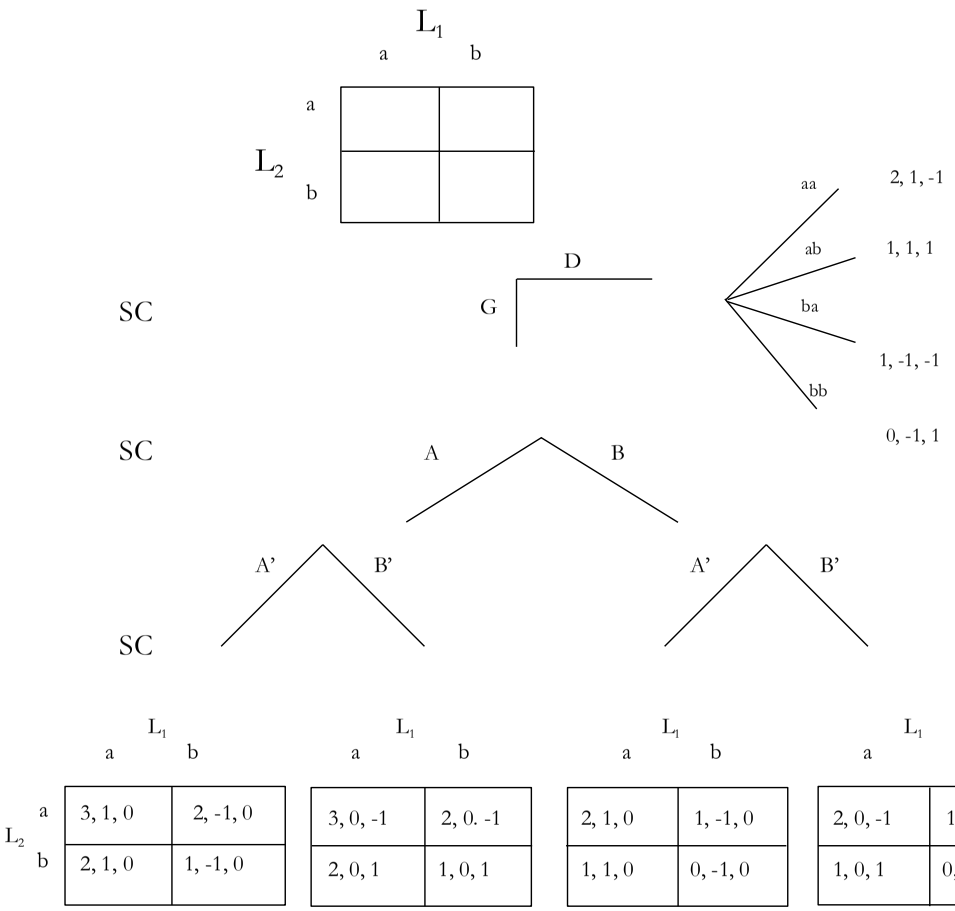
This subtle expansion of the Supreme Court's preferences generates a different equilibrium and shows that even this small change indicates that the Supreme Court has an interest in legal rules. Figure 3.7 shows the model with the payoffs reflecting these new preferences.

With these new preferences, the new pure strategy equilibrium is:

$$L_1 : (a|GAA'), ((a,b)|GAB'), (a|GBA'), ((a,b)|GBB'), (a|D)$$
$$L_2 : ((a,b)|GAA'), (b|GAB'), ((a,b)|GBA'), (b|GBB'), (b|D)$$
$$SC : GAA'$$

Figure 3.7: Expanding Preferences

Payoffs written SC, L_1, L_2



L_2 \ L_1	a	b
a	3, 1, 0	2, -1, 0
b	2, 1, 0	1, -1, 0

L_2 \ L_1	a	b
a	3, 0, -1	2, 0. -1
b	2, 0, 1	1, 0, 1

L_2 \ L_1	a	b
a	2, 1, 0	1, -1, 0
b	1, 1, 0	0, -1, 0

L_2 \ L_1	a	b
a	2, 0, -1	1, 0, -1
b	1, 0, 1	0, 0, 1

Given the strategies of the lower courts, the Supreme Court has a strictly dominate strategy to grant cert and decide in favor of party A using legal rule A'. Given the strategy of the Supreme Court, lower court one has a dominate strategy to decide in favor of party a and lower court two is indifferent between party a and b. The implications of this model indicate that after the Supreme Court issues legal rule A', we should see party a winning at the lower court level with greater frequency. If the lower courts do allow themselves to be constrained by legal rules, this should increase the Supreme Court's interest in legal rules.

Hypothesis 3: The Supreme Court is more likely to pursue a legal rule that will favor its most preferred party in future cases.

Hypothesis 4: After the Supreme Court issues a legal rule favoring a particular party, the lower courts are more likely to find in favor of that party in future cases.

Finally, to fully evaluate the role of precedent as a constraint, I generalize this model to illustrate the tradeoff between precedent and a particular outcome. The legal rule in a case guides decisions made by other courts. Recall from the decision theory in section 3.2, the Supreme Court's interest in precedent stems from the decisions that are made by other courts in the judicial hierarchy. The Supreme Court also has an interest in the outcome. I do not maintain that case outcomes are irrelevant. The crux of my argument is that there are situations in which a particular precedent is more valuable than an ideological outcome and the Court may receive a positive net benefit from an opinion where the outcome diverges from the Court's most preferred dispositional outcome.

The value of any decision by the Supreme Court is a combination of the value of precedent (denoted $P_{i'}$, where i' is either legal rule A' or legal rule B') and the value of the outcome (denoted M_j, where j is either outcome A or outcome B). Using the same logic as section 3.2, the value of precedent is the sum of the direction of all future outcomes under that legal rule. A particular legal rule establishes the burdens the parties must meet in a given dispute. For the purposes of this discussion, SC

prefers A' to B'. Rule A' generally favors party A and rule B' generally favors party B. When Supreme Court writes an opinion using rule A', this can be thought of as a legal rule that puts the burden on the government and is more advantageous to the individual. When the Supreme Court writes an opinion using rule B', this can be thought of as a legal rule that puts the burden on the individual and is more advantageous to the government.

Here I assume the Supreme Court prefers party A; however, the purpose of this model to explore the situations under which the Court will sill rule in favor of party B. In terms of the outcome in a particular case, there is no guarantee that if a rule generally favors a class, that class always wins. Instead, a rule favoring a class makes it more likely that class wins. Because the value of precedent is the sum of all outcomes from that rule, if the Court rules in favor of party A, that outcome is assigned a positive value (denoted M_A); however, if the Court rules in favor of party B, that outcome is assigned a negative value (denoted $-M_B$).

There are costs associated with both a particular precedent (denoted $C_{i'}$, where i' is the costs associated with legal rule A' or legal rule B') and a particular outcome (denoted C_j, where j is the outcome favoring party A or B). First, with $C_{i'}$, this is an aggregation of all of the costs associated with a legal rule. Those costs include writing the opinion, detracting from other areas and potential agency loss. Writing an opinion articulating a legal rule requires time and effort on the part of the author (Clark & Carrubba 2012, Maltzman, Spriggs & Wahlbeck 2000). Any time the author spends on writing this given opinion is time the author cannot spend on another opinion in a different legal area. The author may also need to put in more time and effort (and therefore increase costs) if the author wants a high quality legal rule; however, a vague or low quality legal rule also decreases compliance by other courts (Clark & Carrubba 2012, Bueno De Mesquita & Stephenson 2002, Staton & Vanberg 2008).

Second, with C_j, this is the cost associated with selecting a particular legal outcome. This cost includes time and effort involved in using a legal rule to justify the outcome, potential agency loss and potential backlash and legitimacy costs. The legal rule is used to explain why a particular outcome is the legally appropriate outcome. If the judge favors an outcome that is not easily justified by the legal rule the judge uses, this increases the cost of writing the opinion. The judge will have to exert more effort to make the opinion sound coherent and well reasoned. The judge may also have to exert more effort to make the inconsistent combination of precedent and outcome a ruling that can be implemented by other courts.

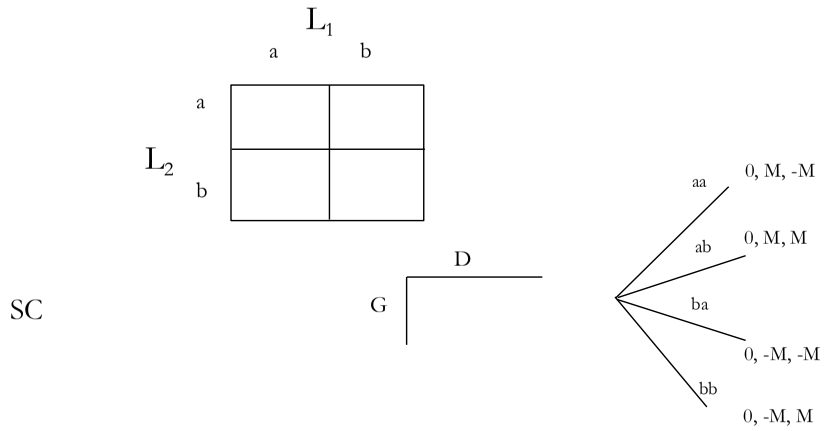
We can think about this discontinuity by turning to the Supreme Court's decision in *Korematsu vs. United States*, (323 U.S. 214, 1944). In *Korematsu*, the Court upheld the exclusion of Japanese American citizens from the west coast during World War II. The Court argued that the exclusion had a "a definite and close relationship to the prevention of espionage and sabotage," and was therefore justified. (323 at 218). While upholding Korematsu's exclusion, the Court maintained he "was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily," (323 at 223). Even in its explanation that Korematsu was not targeted because of his race, the Court concedes that all citizens of "Japanese ancestry be segregated." This discontinuity underscores how difficult it is to justify an outcome that does not immediately follow from the legal rule.

Therefore the value of any opinion is:

$$(P_{i'} - C_{i'}) + (M_j - C_j)$$

Figure 3.8: Precedent versus Outcome

Payoffs written SC, L_1, L_2



L_2 \ L_1	a	b	a	b	a	b	a	b
a	$(P_{A'}\text{-}C_{A'})$ $+(M_A\text{-}C_A)$, M, -M	$(P_{A'}\text{-}C_{A'})$ $+(M_A\text{-}C_A)$, -M- C_d, -M	$(P_{B'}\text{-}C_{B'})$ $+(M_A\text{-}C_A)$, M-C_d, -M-C_d	$(P_{B'}\text{-}C_{B'})$ $+(M_A\text{-}C_A)$, -M, -M-C_d	$(P_{A'}\text{-}C_{A'})$ $-(M_B\text{-}C_B)$, M, -M	$(P_A\text{-}C_{A'})$ $-(M_B\text{-}C_B)$, -M-C_d, -M	$(P_{B'}\text{-}C_{B'})$ $-(M_B\text{-}C_B)$, M-C_d, -M-C_d	$(P_{B'}\text{-}C_{B'})$ $-(M_B\text{-}C_B)$, -M-C_d, -M
b	$(P_{A'}\text{-}C_{A'})$ $+(M_A\text{-}C_A)$, M, M- C_d,	$(P_{A'}\text{-}C_{A'})$ $+(M_A\text{-}C_A)$, -M-C_d, M-C_d	$(P_{B'}\text{-}C_{B'})$ $+(M_A\text{-}C_A)$, M- C_d, M	$(P_{B'}\text{-}C_{B'})$ $+(M_A\text{-}C_A)$, -M, M	$(P_{A'}\text{-}C_{A'})$ $-(M_B\text{-}C_B)$, M- C_d, M	$(P_A\text{-}C_{A'})$ $-(M_B\text{-}C_B)$, -M-C_d, M-C_d	$(P_{B'}\text{-}C_{B'})$ $-(M_B\text{-}C_B)$, M-C_d, M	$(P_{B'}\text{-}C_{B'})$ $-(M_B\text{-}C_B)$, -M, M

To compare the value of different opinions, we can use the rules above to generate payoffs for various opinions:

For rule A' and outcome A, the payoff is: $(P_{A'} - C_{A'}) + (M_A - C_A)$

For rule A' and outcome B, the payoff is: $(P_{A'} - C_{A'}) + (-M_B - C_B)$

For rule B' and outcome A, the payoff is: $(P_{B'} - C_{B'}) + (M_A - C_A)$

For rule B' and outcome B, the payoff is: $(P_{B'} - C_{B'}) + (-M_B - C_B)$

If the SC chooses G, it has the opportunity to write a new opinion with a legal rule and outcome of its choosing. If the SC chooses D, the existing precedent (or lack of precedent) is maintained. For convenience, I have normalized the model such that the payoff for the SC at D is zero. However, we could also think of the payoff at this point as P_{t-1}. Note that for all equilibria discussed below, the value of the SC's new opinion must be greater than zero or else granting cert (G) is not a best response relative to denying cert (D).

To generalize the payoffs for the lower courts, we can use the same structure as before, where the value of the lower court's decision is the value of the outcome (denoted M) and minus any costs for deviating from the legal rule from SC (denoted C_d). So the payoffs for the lower courts are:

$$M - C_d$$

We can apply the same assumptions for the lower courts' preferences from the previous sections, meaning L_1 prefers party a and L_2 prefers party b. Also for this model, I assume the value of the outcome is greater than or equal to the costs of divergence [4]. Therefore, if SC decides rule A', the payoff for L_1 is M and $-M - C_d$ if it plays b. The same logic is applied to L_2.

[4]Future iterations of this model will relax this assumption. See footnote three for a full explanation of this assumption and its implications.

Figure 3.8 shows the extensive form game. From Figure 3.8, the equilibria for the generalized model can be derived (see appendix one for the full derivation). The formal statement of the equilibria are as follows:

Equilibrium 1

Given: $P_{A'} \geq P_{B'} - C_{B'} + C_{A'}$

Given: $M_A \geq C_A - C_B - M_B$

Given: $(P_A - C_{A'}) + (M_A - C_A) \geq 0$

$L_1 : \{a, a\}, L_2 : \{b, b\}$

$SC : \{G, A, A'\}$

Equilibrium 2

Given: $P_{A'} \geq P_{B'} - C_{B'} + C_{A'}$

Given: $M_A < C_A - C_B - M_B$

Given: $(P_A - C_{A'}) + (M_A - C_A) \geq 0$

$L_1 : \{a, a\}, L_2 : \{b, b\}$

$SC : \{G, B, A'\}$

Equilibrium 3

Given: $P_{A'} < P_{B'} - C_{B'} + C_{A'}$

Given: $M_A \geq C_A - C_B - M_B$

Given: $(P_A - C_{A'}) + (M_A - C_A) \geq 0$

$L_1 : \{a, a\}, L_2 : \{b, b\}$

$SC : \{G, A, B'\}$

Equilibrium 4

Given: $P_{A'} < P_{B'} - C_{B'} + C_{A'}$

Given: $M_A < C_A - C_B - M_B$

Given: $(P_A - C_{A'}) + (M_A - C_A) \geq 0$

$L_1 : \{a, a\}, L_2 : \{b, b\}$

$SC : \{G, B, B'\}$

Equilibrium 5

Given: $(P_A - C_{A'}) + (M_A - C_A) < 0$

$L_1 : \{a, a\}, L_2 : \{b, b\}$

$SC : D$

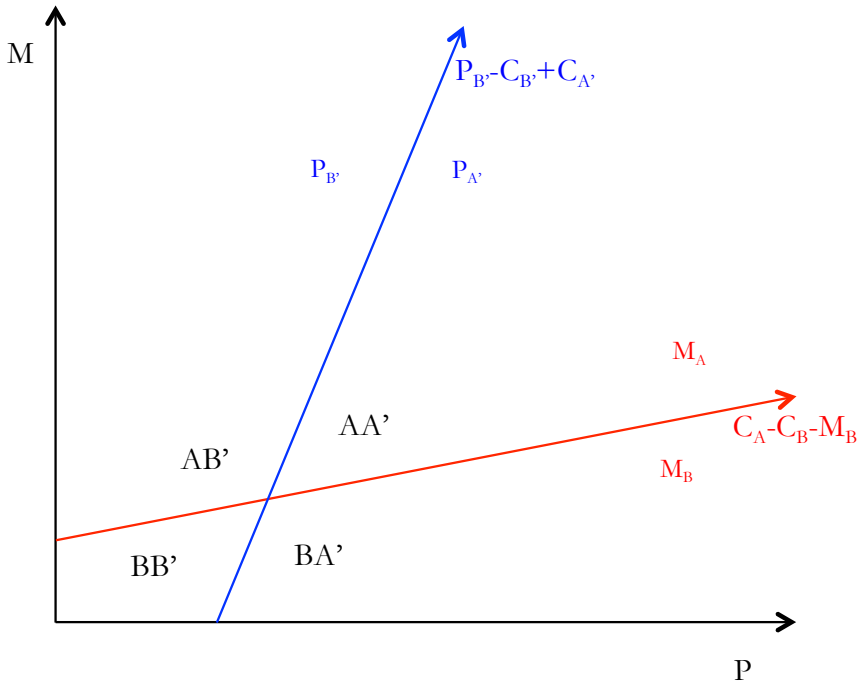
The Supreme Court will apply a legal rule A' when the value of that rule is greater than the value of a legal rule B' minus any costs associated with rule A' (see equilibrium 1 and 2). If the value of legal rule A' is less than the value of rule B' minus the costs of rule A', the Supreme Court will apply legal rule B' (see equilibrium 3 and 4). The Supreme Court will choose outcome A if the value of outcome A is greater than the costs minus the value of outcome B (see equilibrium 1 and 3). If the value of outcome A is less than the costs minus the value of outcome B, the Court will play outcome B (see equilibrium 2 and 4).

Recall from Figure 3.6 (based on the assumption of the attitudinal model) and Figure 3.7 (relaxing the assumptions of the attitudinal model), the Supreme Court could always benefit from choosing legal rule A' and outcome A. In Figure 3.6, the Court has benefits equally from either rule as long as the Court plays outcome A and in Figure 3.7, the Court strictly chooses legal rule A' and outcome A. Under the assumptions of the earlier models, the Court's best response is to always choose its most preferred legal rule. The equilibria from Figure 3.8 demonstrate that there are conditions when the Court will benefit by deviating from its most preferred ideological outcome. Figure 3.9 illustrates the decision space formed by these equilibria.

From Figure 3.9, M is the value of a particular outcome (the y-axis) and P is the value of the legal rule (the x-axis). There are two lines bisecting the space. The first (labeled $P_{B'} - C_{B'} + C_{A'}$) illustrates the conditions under which the Court will choose B' versus A'. To the left of the line, the Court chooses B' and to the right of the line, the Court chooses A'. The Court may believe other institutions will refuse to follow or implement rule A', which would threaten the overall legitimacy of the Supreme Court. This calculation of the costs would result in the Court choosing B' instead.

The second line (labeled $C_A - C_B - M_B$) illustrates the conditions under which the Court will be more likely to choose outcome B versus outcome A. This cut point is derived from the payoffs above. When M_A is greater than the costs of A minus the

Figure 3.9: Equilibrium of Precedent versus Outcome

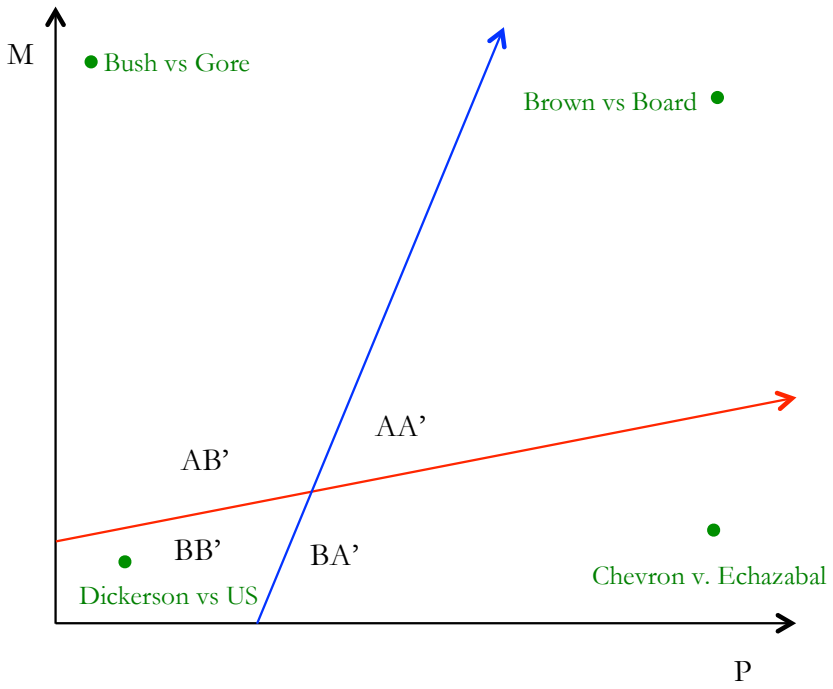


costs and value of B, the Supreme Court will choose outcome A (the area above the line). If the costs of outcome A are too high relative to the value of the particular outcomes, the Court will depart from its preferred outcome and decide for party B. In Figure 9, we can see there are zones for each of the Supreme Court's action profiles after granting cert (A,A'; B,A'; A,B'; B,B').

We can think of each of these zones as representing a type of opinion the Court writes. Each zone demonstrates whether the Supreme Court pursued its most preferred legal rule or not and if the Court pursued its most preferred outcome or not. For the zone labeled AA', the conditions are such that the Court pursues its most preferred outcome and its most preferred legal rule. The value of precedent (P) and the value of the outcome (M) are sufficiently high relative to the costs. For the zone labeled AB', the Court relies on a less preferred legal rule but finds in favor of its most preferred party for the outcome. For BA', the Court relies on its most preferred legal rule, even though that leads to a less preferred ideological outcome. Finally, BB' is the zone where the Court applies a less favorable legal rule and arrives at a less favorable outcome.

To further illustrate the intuition of the tradeoffs that may occur between outcomes and precedent, Figure 3.10 shows where various cases may fall in the decision space. *Bush vs. Gore* (531 US 98, 2000) is an example where the majority on the Supreme Court used a less favorable legal rule (B') but pursued its most preferred political outcome (A). *Bush vs Gore* concerned the Florida recount in the 2000 election. There were questions concerning the machine counts of the ballots cast in the presidential election. The Florida Supreme Court ordered a hasty manual recount but did not give specific standards by which precincts should determine how votes should be recounted. Additionally, the Florida Supreme Court held that the partial recounts, which had started but were not completed by the deadline to submit results, should be added to the vote total. In a 5-4 *per curiam* opinion, the Court concluded the recount violated the Equal Protection Clause of the Fourteenth

Figure 3.10: Cases in the Space



Amendment. The Court argued the recount process "is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter," (531 at 109). Despite relying on past precedent, even the majority distances itself from the legal rule that led to this outcome by explaining this "consideration is limited to the present circumstances" (531 at 109). The five justices who joined this opinion (Rehnquist, O'Connor, Scalia, Kennedy and Thomas) were those on the bench who were nominated by Republican presidents. When evaluating this legal rule "one could see *Bush vs. Gore* as a further extension of federal constitutional principles into a once-sovereign prerogative of the states. It is ironic that the extension is being carried out by the justices most committed to protecting state sovereign prerogatives

against federal intrusion," (Balkin 2001, 1426). The Court used a less preferred legal rule to arrive at the most preferred outcome because the outcome was more valuable than the legal rule.

The outcome in this case effectively decided the 2000 election in favor of the Republican nominee George W. Bush. The Spaeth Database codes this decision as a "conservative" decision, despite the fact that the legal rule expands equal protection analysis to include the idea that individuals have equal rights in how their votes are counted. This is because the outcome favored the conservative party. Moreover, this case is not an exemplar from a class of cases. The Court recognizes these circumstances are unlikely to repeat themselves. When asked about this case, the justices do not entertain the discussion, with Justice Scalia stating "Come on, get over it," (Cohen 2006). The Supreme Court has yet to rely on this case as precedent (Smith 2011)[5]. This is an example of a case where the Court does have an interest in which party wins because the outcome in this single case has a large substantive impact. The particular outcome in this case was very valuable (the M is very high) but the value of the legal rule was low (the P is low).

Brown vs. Board of Education of Topeka (347 US 483, 1954) is a case where the outcome *and* the legal rule were of high import to the Court. The legal ruling in *Brown* centered on the "separate but equal" doctrine from *Plessy vs. Ferguson* (163 US 537, 1896). *Plessy* affirmed the practice of segregation stating that "the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment," (163 at 548). The constitutionality of segregation had been affirmed by the Court until *Brown*.

Chief Justice Earl Warren had just joined the Court when they heard the re-argument of *Brown*. When he addressed the justices in conference following the

[5]Interestingly, lower courts are citing to *Bush vs Gore* with increasing frequency, despite the High Court's attempt to limit the case's influence (Smith 2011)

oral arguments he maintained that segregation could not be justified in light of the Thirteenth, Fourteenth and Fifteenth Amendments. For Warren, segregation could only be justified if one viewed minorities as "less human" than whites. However, he believed the Court faced a challenge in abolishing "segregation with minimal upheaval and strife. He particularly stressed that *how* segregation was abolished was important,"(Ulmer 1971, 693).

After the initial conference it appeared that there was a 6 to 3 majority in favor of desegregation but Warren pursued a unanimous opinion of the Court through the end of the term. Warren wanted a unified Court to reject segregation on the grounds that it violated the constitution. His memorandum opinion takes care to not explicitly overrule *Plessy* but instead concludes that the Court's finding is "amply supported by modern authority. Any language in *Plessy* contrary to this finding is rejected. We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate education facilities are inherently unequal," (347 US 495). The legal rule that held separate but equal was unconstitutional was more valuable to the Court than the costs of this rule combined with the value of the alternative (maintaining separate but equal).

Beyond merely rejecting the separate but equal doctrine from *Plessy*, the particular outcome, supporting the admission of these African-American children to all white schools, was equally important to the Court's decision. The costs of inconsistency in writing an opinion that rejected separate but equal and yet simultaneously upheld segregation was too high. This would errode the legal rule the Court was seeking to put into place. Moreover, the Court was not going to tolerate segregation in public schools anymore so there was no reason for the Court to support the alternative outcome. As noted above, Warren was aware of the "upheaval and strife" that would result from desegregation but the Court's most preferred outcome (voting in favor of Brown rather than the school) was more valuable than the costs the Court faced.

Next, we can examine a case where the particular outcome may be the less preferred option but it is upheld in light of a particular rule. In *Chevron U.S.A., Inc. vs. Echazabal* (536 U.S. 73, 2002), the respondent was laid off after a physical showed he had a liver condition and the corporate office had requested he be sent to work somewhere away from hazardous chemicals. Echazabal argued this violated the Americans with Disabilities Act. Chevron responded using the Equal Employment Opportunity Commission (EEOC) regulations, which allows an employer to use a defense based on the fact that the employee's disability would pose a direct threat to his or her health. In this case the Court's decision was 9-0 and upheld the EEOC regulations. The Court relied on the standard from *Chevron U. S. A. Inc. vs. Natural Resources Defense Council, Inc.,* (467 U. S. 837, 1984), which lays out a two part test for determining statutory and agency deference. The Court first determines if Congress addresses the issue in the statute. If there is no direction from Congress, the Court then asks if the agency's decision is reasonable. When the Court applied this so called *Chevron* deference to the case at bar, they found that the EEOC regulation was reasonable.

In this unanimous decision, there could be examples where this outcome was not the most preferred for certain justices. For example, the Spaeth Database codes this case as having a "conservative" outcome. Under outcome focused models, Justices Stevens, Ginsburg, Souter (who wrote the opinion in this cases) and Bryer voted against their ideological preferences. However, under my model, these justices simply derive a greater benefit from the legal rule (applying *Chevron* deference to the EEOC regulations). EEOC is responsible for enforcing Title VII, which prohibits discrimination in the work place based on race, color, religion, sex, national origin, age or disability (White 1995). The EEOC investigates and sues on behalf of employees who allege discrimination in the workplace. Thus, the legal rule, which requires the Court defer to the regulations of the agency, may be more beneficial to these justices to resolve future challenges of workplace discrimination in favor of the employee (a

"liberal" outcome). This is an instance where the legal rule may be more valuable for resolving future challenges even though using that legal rule in the case before the Court results in a less optimal outcome.

Finally, we can evaluate an opinion where there is a less optimal legal rule *and* a less optimal outcome. Due to the nature of the Supreme Court's discretionary docket, these cases will be rare. The Court will not generally select cases that require it to pursue rules and outcomes it does not prefer. However, Chief Justice Rehnquist's majority opinion in *Dickerson vs. United States* (530 U.S. 428, 2000) demonstrates an instance where the costs of pursuing a more preferred legal rule and outcome would have been significant and thus the decision was constrained by past precedent. *Dickerson* deals with the reaffirmation of *Miranda vs. Arizona* (384 U.S. 436, 1966). *Miranda* requires that individuals who are in a custodial interrogation must be informed of their constitutional rights. Specifically, the Court ruled that an individual must "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation," (384 at 479). The Court goes on to state that if legislators find a superior or more flexible way to inform individuals of their rights, a legislative solution can replace the Court's opinion.

Following *Miranda*, Congress passed 18 USC §3501, which rejected the requirement from *Miranda* that an individual be informed of her rights prior to taking her statement. The statute requires that the statement be made voluntarily and that there is no other statement of rights needed for the statement of be admissible. While the statute was passed in 1968, it was rarely used by federal prosecutors. Then in *Dickerson*, the FBI allegedly failed to properly inform Dickerson of his Miranda rights and a trial judge ruled his statement inadmissible. The government appealed relying

on §3501 and the Court's acknowledgment in *Miranda* that legislators may arrive at a different solution from the one in the opinion. The Fourth Circuit overruled the trial judge's ruling of admissibility, holding that under §3501, the statement need only be made voluntarily and the *Miranda* warning was unnecessary.

The majority in *Dickerson* strikes down §3501 for violating the constitution and the core of the *Miranda* decision. This decision is a "liberal" outcome and maintains a "liberal" precedent, which protects the rights of the accused against encroachment by the government. Chief Justice Rehnquist wrote the majority opinion in this case and other theories of judicial decision-making do not explain why he would write this opinion, when he is thought of to be a conservative jurist. For attitudnalists and even strategic choice scholars, there is no reason for Rehnquist to write the opinion in *Dickerson*. There is no policy payoff from this opinion for a conservative justice. Even in earlier decisions authored by Rehnquist, he argues that informing an individual of his rights is not a constitutional guarantee in and of itself "but rather to provide practical reinforcement for the right against compulsory self-incrimination," (*Michigan vs Tucker*, 417 U.S. 433 at 444 (1974)). Despite his overall skepticism of the constitutional requirement of *Miranda* warnings, in *Dickerson*, Rehnquist argues that the precedent in *Miranda* should not be overruled at this point.

> "Whether or not we would agree with Miranda's reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now. While " 'stare decisis is not an inexorable command,' " (quoting *Payne vs. Tennessee*, 501 U. S. 808, 828 (1991)), particularly when we are interpreting the Constitution, *Agostini vs. Felton*, 521 U. S. 203, 235 (1997), "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *United States vs. International Business Machines Corp.*, 517 U. S. 843, 856 (1996) (quoting *Payne*, at 842 (Souter, J., concurring), in turn quoting *Arizona vs. Rumsey*, 467 U. S. 203, 212 (1984). We do not think there is such justification for overruling Miranda. Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.

> While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, see, e. g., *Patterson vs. McLean Credit Union*, 491 U. S. 164, 173 (1989), we do not believe that this has happened to the Miranda decision," (530 US at 443).

Here Rehnquist's view underscores the notion that implementing a new legal rule has implications beyond just changing Supreme Court jurisprudence. Making citizens aware of their rights during custodial interrogation is "routine police practice." To depart from the legal rule in *Miranda*, even if Rehnquist might prefer to, requires "special justification," and there is no such justification at this point (i.e. the costs of A' are too high relative to the value of B'). After explaining the applicability of *Miranda*, Rehnquist reverses the appellate decision, which reversed the suppression. This means the outcome supported Dickerson. Ideologically, Rehnquist tends to support the government in criminal cases. However, given the legal rule he articulates supporting *Miranda*, he cannot disregard the fact that the individual was never read his *Miranda* rights. This does not mean Rehnquist expects the government to lose in every future *Miranda case*. In this case, however, it would have been too costly to pursue his most preferred political outcome.

3.4 Conclusions

This section illustrates the potential value in legal standards for the Supreme Court. First, precedent is defined as a particular legal rule and the value of that precedent is determined by the outcomes that are derived from all other future cases using that legal rule. Precedent is an aggregation of all of the cases that precedent is used in. Thus, even a politically motivated Supreme Court can find precedent to be valuable. In the second part of this section, I explore the conditions under which the Supreme Court will issue a new precedent. The Supreme Court will issue a new precedent in a given term, even if that precedent results in a less preferred outcome at the Supreme Court level, when the value of the precedent is greater than the

outcome. Furthermore, the Supreme Court's decision to implement a new precedent is tempered by its belief of the probability that a more preferable case for issuing the new precedent will be on the docket next year. Finally, in the third part of this section, I explore the strategic concerns the Supreme Court considers when issuing a new precedent. I begin with the assumptions of the attitudinal model and then relax the attitudinal assumptions to consider the value of legal rules. Through this strategic game, it becomes clear that even if the Court issues a decision that deviates from its most preferred outcome, this is not necessarily a net loss for the Court. The Court receives a benefit from the legal rule, which may be more valuable than the particular outcome. I explore the tradeoffs between the legal rules and politics by placing actual Supreme Court cases in this space. I continue in this vein in the next section, where I give an extended discussion of the evolution of the Supreme Court's legal rule in gender equal protection jurisprudence.

4 LEGAL EVOLUTION AND A RIGHTS REVOLUTION

4.1 Introduction

> "New value perceptions will generate pressures for changes and demands that those changes be supported by reasons will be heard. The Burger Court's capacity to emulate the most admirable features of earlier eras of change will turn... on its doctrinal and human resources: the availability of doctrinal materials that can be refashioned to reflect altered values; the availability of justices with the talents adequate to the task." (Gunther 1972, pg 7)

Gunther's notable law review recapped the 1971 term and predicted the potential for future doctrinal change. Gunther's point underscores the mailability of legal doctrine. In the hands of clever justices, legal doctrine may be manipulated to produce the Court's desired outcomes and justices can use the law to "reflect altered values." As Gunther discusses refashioning the law, it becomes clear there is an apparent tension between following "the law" and following "values" or preferences. If the Court is to be a blind arbiter, applying the law with no eye to preferences, then there should be no need to "refashion" the law as values change.

In the previous chapter, I presented a theoretical argument that demonstrates the law plays a vital role in Supreme Court decision making and proposes that even a court with specific political preferences will adhere to precedent under some conditions. In this chapter I provide narrative support for this argument by exploring the evolution of the Equal Protection Clause, with particular attention paid to the Court's decisions in several key gender classification cases. I highlight the importance of legal rules and call into question the traditional notion that the Supreme Court is a single minded ideological seeker of outcomes.

The remainder of this chapter provides an introduction to constitutional standards of review, the origins and application of the Equal Protection Clause and the evolution of the Court's gender jurisprudence.

4.2 Standards of Review

While I have discussed different constitutional standards previously, in this section I expand that discussion and highlight the origins of the notion of different levels of legal scrutiny. First, it is important to note these constitutional standards are different than the appellate standards used by the Court when determining the nature of a review. This work does not address the appellate standards of review (i.e. clearly erroneous, de novo etc), which determine how an appellate court is to review the work of a lower court.

This work focuses on the constitutional standards of review. Constitutional standards of review help jurists determine how a claim of constitutional infringement is to be evaluated. Some actions or laws are presumed to violate the constitution. It is then the responsibility of the government to explain why the law in question does not violate the constitution or why the the need for the law outweighs the harm caused by the constitutional infringement. Other actions or laws are presumed constitutional and it is the burden of the individual alleging the harm to demonstrate that the law is not sufficiently related to an appropriate government end. This "tiered" system of review traces its roots to footnote four in Justice Stone's opinion in *US vs Caroline Products Co* (304 US 144, 1938).

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg vs. California, 283 U.S. 359, 369-370; Lovell vs. Griffin, 303 U.S. 444, 452.

In Justice Stone's view, when a party claims a law or action is in violation of the constitution, the court must evaluate the nature of the right that is allegedly violated. Certain rights entail a certain type of constitutional evaluation. If the right is considered to be a fundamental right, this entails an evaluation that places

a high presumption on the unconstitutionality of the law or action. If the right is considered to not be a fundamental right, this lowers the presumption of unconstitutionality. For example, when considering "purely economic matters" the courts should be deferential to legislators but when reviewing "laws touching on personal or civil liberties" courts should be less deferential and more rigorous in their review (Rogers 1999, 1097).

The government "is free to regulate...in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder vs. Massachusetts*, 291 U.S. 97 at 105 (1934). But those rights that are deemed to be "the very essence of a scheme of ordered liberty," or fundamental rights, should be evaluated with the utmost skepticism, *Palko vs. Connecticut*, 302 U.S. 319 at 325 (1937). These rights "embrace 'nearly every civil right for the establishment and protection of which organized government is instituted,' and 'to be the class of rights which the state governments were created to establish and secure."' *Twinning vs. New Jersey*, 211 U.S. 78 at 94 (1908), quoting *Corfield vs. Coryell*, 4 Wash. C.C. 371 (1823). In short, fundamental rights lay the foundation for all other rights that follow. In Justice Stone's view, acts which purport to infringe on the Bill of Rights, concomitant with the Fourteenth Amendment, should be reviewed with the presumption of unconstitutionality.

The strict scrutiny standard is the "highest" standard of review in the sense that it places the highest burden on the government to demonstrate its actions are justified. The standard can be seen in *US v Carolene Products Co* (304 US 144 ,1938). It is a two pronged standard that requires a law be narrowly tailored and serve a compelling government interest. It is generally assumed that this standard is " 'strict' in theory and fatal in fact," (Gunther 1972), with government action almost always failing. As would be expected, recent research demonstrates that state laws

are only upheld under strict scrutiny about 29 percent of the time and the district courts are most likely to strike down legislation under strict scrutiny (Winkler 2006).

The other standards of judicial review include intermediate and rational basis review. These standards lower the government's burden. For example, *US vs Virginia*, (518 U.S. 515, 1996) applies an intermediate standard in a sexual discrimination challenge. THe Court explains that the state must provide an "exceedingly persuasive justification" for its policy and that policy must be "substantially related to the achievement of [the government's] objectives." The Court sees this standard as lower than the "compelling government interest" entailed by strict scrutiny, but the burden to justify the policy still falls on the government.

The rationality review is deemed the "lowest" standard of review. Essentially, the government need only show that the law is rationally related to a legitimate government end (see for example *Williamson vs Lee Optical Co.*, 348 U.S. 483, 1955). The Court has gone so far as to say if "there is any conceivable state of facts that could provide a rational basis for the classification," the legislation "must" be upheld (*Federal Communications Commission vs. Beach Communications*, 508 U.S. 307 at 313, 1993). This seems to shift the burden to the plaintiff, requiring they demonstrate a lack of a rational relation between the government's policy and the government's desired ends.

Stearns (2000) provides unique insight into the development and application of constitutional law in terms of the standard of review. His book underscores that defining constitutional law by the standard used by the Court can help scholars gain more insight into the behavior of the Court.

Stearns evaluates each issue decided by the Court and the Court's decision on the appropriate doctrine to be applied. Additionally, Stearns demonstrates that his analysis can often simplify multiple decisions across several issues. For example, when discussing the Court's decision in *Miller vs. Albright*, 523 U.S. 420 (1998), (see table 3.2 on page 108), he demonstrates that reading each of the opinions, the

decision the justices made was between applying a low level of scrutiny or heightened scrutiny. Ultimately "the decision to apply the laxer test was equivalent to holding that the test was met, while the decision to apply heightened scrutiny was equivalent to holding that the test was not met," (Stearns 2000, 107). Once the justices choose a particular standard, the outcome decision followed from that test.

Stearns' analysis underscores the idea the standard of review employed is the superior way to understand the ambiguous concept of "the law." Still, Stearns' analysis fails to adequately explain why or under what conditions the Court seeks to employ a particular standard of review. More generally, Stearns' work does not actually unpack the role of the law in judicial decision-making or determine how ideology may explain the selection of a particular standard.

To understand the effect of different standards of review, it may be helpful to consider for example the evolution of the "undue burden" standard, which is now the controlling standard in abortion jurisprudence. The "undue burden" standard simply states that before the pregnancy reaches viability, the state cannot impose an undue burden on a woman seeking an abortion.

When the Court issued its opinion in *Roe vs Wade* (410 US 113, 1973), it used a "trimester approach" where the standard of review differed by the trimester of pregnancy to which a given statue applied. Essentially, for a state to enact a law which restricted access during the first trimester of pregnancy, the state must have met the strict scrutiny burden. Laws effecting the second trimester must meet an intermediate standard, and for the third trimester, the law only had to be rationally related to the government interest. In her dissent in *Akron vs. Akron Center for Reproductive Health* (462 US 416, 1983), Sandra Day O'Connor criticized the "trimester framework" and first used the "undue burden" standard language. It was not until *Planned Parenthood vs. Casey* (505 US 833, 1992) that the Court adopted this lower standard.

When the Court employed the trimester approach in *Akron*, the Court concluded that a 24 hour waiting period was unconstitutional. However, when the Court majority adopted the undue burden standard as the appropriate standard of review in *Casey*, the Court then concluded that the 24 hour waiting period was constitutional. To justify this change in outcome, the Court also changed the standard of review that was used. This demonstrates the strength of understanding precedent and the law in terms of the standard of review.

4.3 The Equal Protection Clause

Justice Stone's footnote argues that rights that are "held to be embraced within the Fourteenth [Amendment]" are considered fundamental and therefore infringements on these rights are presumed unconstitutional. Important rights for women and other protected groups grew out of Section One of the Fourteenth Amendment. It states

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment was passed by Congress in 1866 and ratified by the states in 1868. It is one of the three so-called "Civil War" Amendments, encompassing the Thirteenth, Fourteenth and Fifteenth Amendments. Historians and legal scholars debate the framers intent of these Amendments, but generally they are seen as an attempt to solidify the national government as the sovereign over the state governments, subject the states to the prohibitions in the Bill of Rights and provide the newly freed slaves with rights originally denied to them (Nelson 1988).

There are three distinct clauses in section one: the privileges and immunities clause, the due process clause, and the equal protection clause. The Equal Protection Clause explicitly forbids states from denying citizens equal treatment. The Court has also rules that the Fifth Amendment Due Process Clause requires equal treatment by the federal government (e.g. *Frontiero vs Richardson*, 411 U.S. 677, 1973). The Equal Protection clause is the first explicit recognition of equality in the Constitution. The Supreme Court scrutinizes legislation for violation of this clause.

The nature of most legislation is aimed at classification. A particular group is restricted from or required to engage in a particular act. At the same time, no person can be denied equal protection under the laws. It falls to the Court to determine if the classification in a particular law is appropriate in light of the Equal Protection Clause. The most basic formulation is that the Court must determine if the legislation treats similarly situated individuals differently (Sunstein 1982). If the statute is found to engage in disparate treatment, the Court then engages in a means-ends analysis, using the standards of review discussed in the previous section. Thus, the a integral part of Equal Protection jurisprudence is determining which standard of review should be used in a particular case.

The standard of review to be used by the Court when deciding equal protection cases has evolved dramatically. A complete analysis of the standards employed in equal protection cases will include decisions related to race and gender. From *Plessy v. Ferguson* (163 U.S. 537, 1896) to *Korematsu v. United States* (323 U.S. 214, 1944) and *Brown v. Board of Education of Topeka*, (347 U.S. 483, 1954) the standard applied to race restrictions has evolved to require strict scrutiny.

Among the first cases to discuss disparate treatment of the races was *Strauder vs. West Virginia*, (100 U.S. 303, 1880) and *Ex Parte Virginia*, (100 U.S. 339, 1880). These cases dealt with excluding African Americans from jury service. In both opinions, the Court stressed the intention of the Civil War Amendments, which was to ensure equality of a previously enslaved race. These amendments sought to

bring the rights of African Americans "into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color," (100 at 345). In *Ex Parte Virginia*, the petitioner, a Virginia state judge, sought habeus relief after he had been arrested under federal anti-discrimination laws for excluding blacks from jury service. Virginia maintained that the federal statute was beyond the scope of the Civil Rights Amendments. The Supreme Court concluded the Fourteenth Amendment was an expansion of Congressional power and allowed Congress to enact "[whatever] legislation is appropriate... to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is... within the domain of Congressional power." (100 at 346).

Despite this initial stance on equality between the races, the Supreme Court upheld segregation based on race in cases such as *The Civil Rights Cases* (holding Congress could not extend prohibitions against discrimination in the Fourteenth Amendment to private businesses, 109 U.S. 3, 1883), *Plessy vs. Ferguson* (upholding segregated railway cars) and *Cumming vs. Richmond County Bd. of Ed.* (upholding a whites only school and county tax paid by all residents of the county, including blacks, to fund that school, 175 U.S. 528, 1899). The Supreme Court argued in favor of the rights of states and private individuals to be free from federal and judicial intrusion into state police powers. In *Plessy* the Court distinguished between "social" and "political" equality. The Fourteenth Amendment was intended to ensure "political" equality but could not do anything to eliminate social distinctions between the races. For the Supreme Court, segregation laws "in places where [blacks and whites] are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power,"

(163 at 544). The Court concluded that the state could allow segregation so long as the accommodations were "separate but equal."

The separate but equal doctrine stood until *Brown vs. Board of Education* in 1954, but the Supreme Court used language similar to modern strict scrutiny analysis when considering equal protection based on race in *Korematsu vs. US* in 1944. *Korematsu* upheld the exclusion (and by extension, the internment) of Japanese Americans during World War II. The petitioner alleged that his exclusion from the west coast was justified only because of his race. When evaluating the equal protection claim, an exclusion order is, "except under circumstances of direct emergency and peril, inconsistent with our basic governmental institutions," (323 at 220). Only a threat "of the gravest imminent danger to the public safety can constitutionally justify [exclusion]. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage," (323 at 218). Here the Court engages in a two part analysis to justify the exclusion. The "gravest imminent danger" provides a compelling government interest to justify the exclusion, while the "definite and close relationship" of the means to the ends demonstrates that the action is narrowly tailored. The Court concluded that he was "not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures," (323 at 223). Through this analysis, the Court allows for the government action but also lays the groundwork for future cases that will use strict scrutiny analysis to prohibit race based restrictions.

Next, in *Brown vs. Board of Education*, the Supreme Court concludes that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal," (347 at 495), effectively, though not explicitly, overruling *Plessy*. Additionally, in the companion case of *Bowling vs. Sharpe*, the Court argues that "[classifications] based solely upon race must be

scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect," (347 U.S. 497 at 499). Thus, racial classifications are inherently "suspect" and legislation that makes classifications based on race is subject to strict scrutiny.

Race based distinctions are "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, (*McLaughlin vs Florida*, (379 U.S. 184 at 192, 1964) quoting *Hirabayashi vs. United States*, (320 U. S. 81 at 100, 1942). In modern jurisprudence, classifications based on race are generally unacceptable because these distinctions can only be justified using stereotypes or prejudices about differences between the races (see *Brown vs. Board*). However, jurisprudence maintains situations in which gender based classifications can be justified and thus gender classifications are less suspect (or "quasi-suspect). As I will show in the remaining sections, restrictions based on gender have been carved out to require a different standard of review. Similar to cases concerning race, gender classifications have undergone changes from being generally acceptable to requiring higher constitutional scrutiny. The legal rules have evolved from a rational basis standard in *Reed vs. Reed* (404 U.S. 71, 1971) to a heightened intermediate standard in *US vs. Virginia* (518 US 515, 1996). The subsequent section explores the evolution of the standard of review in this legal area. For the sake of clarity, this table lists the relevant cases and the legal standards discussed in the remainder of the chapter.

4.4 The Road to *Reed*

Despite the gender neutrality of the language in the Equal Protection Clause and the suffrage movement, leading to the ratification of the Nineteenth Amendment, the Supreme Court was slow to recognize constitutional protection for women. In fact, in the first half of the Twentieth Century, the few cases that did review legislation with gender classifications did so as part of business decisions during the Lochner Era.

Table 4.1: Gender Equal Protection Decisions by the Supreme Court

Case Name	Year	Legal Standard
Muller vs OR	1909	Rational Basis
Goesaert vs Cleary	1948	Rational Basis
Hoyt vs FL	1961	Rational Basis
Reed vs Reed	1971	Heightened Rational Basis
Frontiero vs Richardson	1973	Strict Scrutiny
Craig vs Boren	1976	Intermediate
Orr vs Orr	1979	Intermediate
Michael M vs Superior Court	1981	Intermediate
Mississippi Univ vs Hogan	1982	Heightened Intermediate
JEB vs Alabama	1994	Intermediate
US vs Virginia	1996	Intermediate

The Lochner Era is a group of Supreme Court's business decisions from the late 1800s until 1936 and typified by *Lochner vs. New York*, (198 U.S. 45, 1905). In this case, the Court invalidated a law prohibiting bakery workers from working more than 60 hours per week or 10 hours in one day. The Court found this law to be "an unreasonable, unnecessary and arbitrary interference" with an individual's liberty of contract. The Court decided the first gendered labor case in *Muller vs. Oregon*, (208 U.S. 412, 1908), which evaluated a similar law. This was only three years after the Court's decision in Lochner, and yet the Court upheld the restrictions. The Court emphasized the physical differences between men and women.

In *Muller*, the state of Oregon made it illegal for women to be "employed in any mechanical establishment, or factory, or laundry... more than 10 hours during any one day," (Session Laws of Oregon, 1903). The petitioner required a woman to work more than ten hours per day and was charged with a violation of the statute. He alleged that, like in Lochner, the law violated the Fourteenth Amendment grantees of liberty of contract. The Court concluded that wile the Fourteenth Amendment does protect individuals from many government restrictions, this right, is not absolute.

In this case, the Court applies the simple rationality standard from *Lochner*, the rationality standard used in all Fourteenth Amendment cases that do not involve a fundamental right or a suspect class. The unique physical limitations of women are sufficient to satisfy the low rational basis standard. The Court laid out several arguments to explain why the government restrictions in this case were justified. Specifically, the fact "that woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious... and... history discloses the fact that woman has always been dependent upon man," 208 at 421. For the Court, even in an era of minimal support for government regulations of business, the government can impose "legislation designed for protection even when like legislation is not necessary for men and could not be sustained," 208 at 422. The Court found that the nature and habits of women require protective legislation "necessary to secure a real equality of right." This decision emphasized the difference between the sexes and used those differences to satisfy the rationality review.

The same logic was used in *Goesaert vs. Cleary* (335 U.S. 464, 1948), upholding a Michigan law that forbid females to be licensed as bartenders unless they were working in an establishment owned by their husbands or fathers. The State argued that it had an interest in protecting women from the social and moral problems associated with bars and that only those women working in establishments with male family members could be suitably protected. The Court argued the Fourteenth Amendment and the Equal Protection Clause "precludes irrational discrimination as between persons or groups of persons in the incidence of a law." The State provided a "rational" explanation for the law and that was sufficient to justify the distinction.

The Court continued to apply this low rationality standard through the middle of the Twentieth Century. In *Hoyt vs. Florida* (368 U.S. 57, 1961) a woman challenged her conviction for killing her husband on the grounds that she was tried before an all male jury. By Florida law, women were permitted, but not required, to sign up

for jury duty. Thus, women were systematically excluded from the jury pool. The Court analyzes this statute by asking "whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation," (368 at 61). Given women are "regarded as the center of home and family life," this restriction is rational and reasonable as a means to pursue the general welfare (368 US at 62). Moreover, the Court concludes since many women will have an automatic exemption based on their role at home, it would be "inefficient" to require them to all show up for jury duty only to then be excluded.

These cases exemplify the early jurisprudence concerning gender and the Equal Protection Clause. The Supreme Court consistently applied a very low standard to gender based classifications and any justification, including stereotypes and administrative connivence, seemed sufficient to justify legislation. During the 1970s, the Supreme Court begins to take a closer look at the acceptable means that would justify gender restrictions.

4.5 Rationality with Bite: *Reed* and the Fall of the ERA

In 1971 the Court invalidated a gender based restriction for the first time since *Adkins* almost half a century earlier (Baer 2002). The Court proposed using rationality review but, by rejecting the state's interest, the Court added "bite" to the previously weak standard. This demonstrated even under the low standard, the government would lose if the law used gender restrictions in a way that was arbitrary or illogical.

In *Reed*, the Court evaluated the constitutionality of an Idaho law that gave preference to men over women as the executors of estates. Specifically, the mother of a minor child sought to be appointed administratrix of her son's estate after his death. The father of the child, who was separated from the child's mother also filed a petition to be appointed administrator. The Probate Court did not determine the administrative capability of either parent but appointed the father as administrator.

The Probate judge relied on the Probate Code of the state of Idaho which stated "of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood" (Idaho Code §15-314). Thus the father was appointed administrator.

The mother appealed this decision and the state district court found that §15-314 violated the Equal Protection Clause of the Fourteenth Amendment of the US Constitution. The Idaho State Supreme Court reversed, finding the statute's mandatory preference of males to females did not violate the constitution[1] (93 Idaho 511).

When the Supreme Court reviewed this case, Justice Burger began the Court's unanimous opinion by conceding the Idaho law in question does not deny women the rights of administrators all together. Thus, this case was similar to previous cases in which the Court had recognized different treatment for men and women under certain circumstances. Recall in cases like *Goesaert* and *Hoyt*, the restrictions based on gender were deemed reasonable because of a need to protect women from exposure to unseemly conduct. The Court's analysis in this case diverged from those early cases, sending a new signal to law makers and other judges.

The Court acknowledges that even under the Equal Protection Clause, the states have some power to enact legislation that treats different classes of people differently. However, a "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,' " 404 US 71 at 74, quoting *Royster Guano Co vs Virginia* (253 U.S. 412, 1920).

The state of Idaho argued that the law was a logical and non arbitrary means of reducing petitions in probate court. The Supreme Court concluded that while this argument may have some legitimacy, giving a "mandatory preference to members of either sex... merely to accomplish the elimination of hearings on the merits, is to

[1]The state district court also found the law violated Article 1 §1 of the Idaho State Constitution. The state supreme court also reversed this decision.

make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause," 404 at 76.

Critics of the Court's decision point out that using a rationality was tantamount to allowing gender based legislation to be routinely upheld (Gunther 1972, Engles 1985). But this decision can be seen as an important step for women's rights. In *Reed* "the Burger Court's scrutiny of means had begun to accomplish change that had been beyond the reach of the Warren Court's commitment to individual rights," (Baer 2002, 32).

While the Court does use a rational basis approach, the Court signals to state legislators and other courts that simply stating a means-ends relationship would not be sufficient to pass constitutional scrutiny. For gender based restrictions to be constitutional, the means must have a "fair and substantial relation" to the legislation's goal. By acknowledging that the goal of reducing the probate court's work load is "legitimate" but still not sufficient to satisfy the gender based restriction, the Court requires states meet a more rigorous standard than rationality review implied previously.

In the term immediately following *Reed*, the Court evaluated another case alleging unconstitutional treatment of females relative to males. In *Frontiero vs Richardson* (411 US 677, 1973), female military personnel challenged 37 USC §401 and 10 USC §1072, which automatically provided dependent benefits for wives of male members of the uniformed services but required husbands of female personnel demonstrate "he is in fact dependent on the member... for over one-half of his support."

A married service woman sought dependent benefits for her husband and was denied for failure to demonstrate dependance. The servicewoman and her husband challenged the finding in Federal District Court, citing the relevant sections of federal law violated the Due Process Clause of the Fifth Amendment. The District Court rejected this claim and the Supreme Court reversed.

The Court's plurality opinion, authored by Justice Brennan, agreed with the appellants "that classifications based upon sex, like classifications based upon race, alienage and national origin are inherently suspect and must therefore be subjected to close judicial scrutiny," 411 at 682. In short, the Court required gender based legislation the same exacting standards as race based classifications used in cases such as *Loving vs Virginia* and *Bolling vs Sharpe* discussed above. The Court finds "at least implicit support for such an approach in our unanimous decision only last Term in *Reed*," (411 at 682).

Critics of this decision, including those justices on the Court, whom concurred with the majority in judgement but wrote a separate opinion, contend this is an inappropriate departure from the Court's ruling in *Reed*. Justice Powell's concurring opinion, joined by Chief Justice Burger and Justice Blackmun, contends that the federal laws in question are unconstitutional discrimination toward servicewomen. However, they depart from the majority, claiming it "is unnecessary for the Court in this case to characterize sex as a suspect classification... *Reed*, which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect" 411 at 691.

This disagreement between the plurality opinion and the concurring opinion provides insight into two key thoughts about the role of the standard of review in judicial decision making. I will demonstrate how this disagreement highlights the importance of suspect classification analysis versus a means-ends based analysis. Second, I argue this disagreement supports my overall contention that legal reasoning and its application provides more meaningful analysis of judicial behavior than the traditional outcome based focus employed by political scientists.

First, the justices' reliance on *Reed* in their differing opinions in *Frontiero* shows us that legal evolution in gender cases was predicated on both the Court's view of gender as a suspect class and how the means-ends analysis is applied when determining if a particular government action is unconstitutional. The Court had conflicting

opinions on whether gender should be considered a suspect class. The plurality viewed sex as "an immutable characteristic determined solely by the accident of birth... and... that the sex characteristic frequently bears no relation to ability to perform or contribute to society," 411 at 686.

For the concurring opinion, the Court should "reserve for the future any expansion of [*Reed's*] rationale," 411 at 692. The concurring opinion saw it unnecessary to declare sex a suspect class because the means-ends analysis is sufficient to render the statute in question unconstitutional. These justices are hesitant to add an additional group to the suspect classification list. They do not conclude that gender should *never* be considered as suspect; only that the Court should reserve this for the future. Justice Powell asserts that the decision to make gender a suspect class should be deferred while the nation was considering the Equal Rights Amendment.

The Equal Rights Amendment (ERA) was a notion that had been part of the political landscape since the women's suffrage movement and the adoption of the Nineteenth Amendment in the 1920s. The first attempt at a constitutional amendment mandating equal treatment for men and women was proposed in 1923 (McGlen, O'Connor, van Assendeleft & Gunther-Canada 2011). An equal rights amendment was controversial and did not even garner universal support from women's groups. Proposals for such an amendment came in and out of Congressional politics through much of the twentieth century. One such proposal stalled in the House Judiciary Committee for 20 years until it was pushed from committee to the floor for a vote in 1970. By 1972, both the House and the Senate passed the ERA, which stated:

> **Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> **Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

> **Section 3.** This amendment shall take effect two years after the date of ratification.

The ERA was sent to the states for ratification in March, 1972. The was ratified by 28 states in the first year. This bolstered ERA supporters and the ratification battle raged on. After the initial positive response, the ERA would be approved by only seven more states, failing to meet the required 38 states needed for ratification. The initial proposal gave the states until 1979 to ratify the amendment. In 1978, Congress extended the deadline until 1982, but the extension was found to violate Article Five of the US Constitution and the Amendment still failed to garner support enough states to be ratified.

Thus, when Powell wrote his concurrence in *Frontiero*, announced in 1973, it appeared that the ERA could resolve this conflict, without the Supreme Court's move to declare gender classifications suspect. In Powell's view, any move to protect women with a suspect classification would be seen as a judicial attempt to pre-empt a major political decision. Specifically, "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes," 411 at 692. Powell does not deny that there may come a time for the Court to review such a decision, but simply insists that the Court must show restraint while the political process works through the particular issue.

This analysis underscores the importance of declaring women a suspect class. Powell's concurring opinion does not speak to the means-ends analysis used by the majority. Both opinions find that a gender based classification is not justified by the government's interest. Thus, determining a group's status as suspect or not does not dispositively determine if the government's legislation will pass the means-ends analysis. As noted previously, many scholars conclude that if strict scrutiny is applied, that is tantamount to declaring something unconstitutional, while if rational

basis is applied, that is tantamount to declaring something constitutional. Because the concurring opinion does *not* use strict scrutiny, or declare gender a suspect class, but still finds the government's legislation unconstitutional, this indicates a flaw in that conventional wisdom. This indicates that the substance of the means-ends analysis is as important to the judicial decision-making process, as the determination of the presence or absence of suspect class status.

Second, comparing both cases use of *Reed* highlights the failings with other political science research in this area. Eight of the nine justices concurred in the judgement in this case, with Justice Rehnquist dissenting "for the reasons stated in the District Court's opinion." Attitudnalists would show that the eight justices whom supported the appellant's challenge of the federal government's legislation all voted together in the liberal direction (e.g. Segal & Spaeth (2002)). For this school of thought, the only difference from *Reed* (a unanimous decision striking down a gender based restriction) to *Frontiero* (an 8 to 1 decision striking down a gender based restriction) is that Justice Rehnquist joined the Court after *Reed* was decided and he voted against the appellant because he was conservative. This clearly fails to capture the nature of the debate and the Court's application of *Reed*.

Other political science scholars use citation analysis to determine the application of precedent (e.g. Hansford & Spriggs (2006)). As noted above, both the plurality opinion and the concurring opinion in *Frontiero* relied extensively on *Reed*. Both opinions used *Reed* positively to demonstrate to guide their means-ends analysis to deem the government's legislation unconstitutional. In the citation based analysis, both opinions would appear to be supporting and applying the same precedent. However, this ignores the importance of the particulars of the legal rules. The plurality and the concurring opinion rely on substantively different legal rules and thus send substantively different signals to other courts. As I will demonstrate in the next section, the lower courts respond differently to these different legal rules.

It should be noted that while this section has made much of the difference between the plurality opinion and the concurring opinion, some scholars would argue that because the plurality opinion only has the support of five justices (not four), the plurality cannot be seen as establishing a particular precedent. While this convention may be generally true, the empirical section does not impose this assumption and does demonstrate that lower courts will take direction and apply legal rules from a plurality opinion, even though that opinion lacks the support of a five justice majority.

With its decision in *Reed* and the plurality opinion in *Frontiero*, the Burger Court makes a significant contribution to the evolution of the equal protection rights for women. In the subsequent section, I evaluate how this area of jurisprudence continues to evolve, even when most of cases the Court decides for the rest of the 1970s and through the 1980s focus on constitutionality of gender restrictions aimed at men. As discussed briefly in the previous chapters, the Supreme Court's application of legal rules for legislation favoring women over men demonstrates how the Court is less interested in particular outcome in a particular case, and is more interested in how the particular legal rule will be used by other courts in other cases.

4.6 *Craig vs Borne*: Where the Boys Are

Just three years after *Frontiero*, the Supreme Court revisited the issue of gender classifications. In *Craig vs Borne* (492 US 190, 1976), the Court reviewed the constitutionality of an Oklahoma statute. The law prohibited the sale of 3.2 percent beer to males under the age of 21 and females under the age of 18 (Ok. Stat. 37 §241, 245). The challenge was brought by a male between the age of 18 to 20 and an alcohol vendor. The Federal District Court dismissed the action and the Supreme Court reversed.

The majority opinion in *Craig* was written by Justice Brennan and joined by Justices White, Marshall, Powell, Stevens and Blackmun [2]. The Court concluded that *Reed* was the controlling precedent, but the actual legal rule the Court applies is different than that in *Reed*. Specifically, in *Craig*, "[to] withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives," 429 at 198. Recall from above, *Reed* rested on whether the statute appeared arbitrary and illogical. Here, the Court requires an "important" government interest and that the gender classification be "substantially related" to that interest. In his dissent, Justice Rehnquist points out that this language is not derived from any previous case and the Court has applied an "elevated or 'intermediate' level scrutiny."

By using this new legal rule, the Court changes both the means and the ends that are required for gender based legislation to withstand a challenge on equal protection grounds. Even though the state's use of a gender classification was invalidated in *Reed*, the Court still relied on rationality review. To require that the state provide an important government interest, the Court narrows the range of interest that will be accepted by the Court.

In *Craig*, the government argued it had an interest in protecting the health and safety of its citizens and the gender-based classification was used to achieve that interest. The state of Oklahoma provided statistics that demonstrated males ages 18-20 were arrested for driving under the influence and public drunkenness at a rate that was substantially higher than females ages 18-20. Oklahoma argued that by restricting the sale of 3.2 percent beer to males, they were regulating driving under the influence of alcohol.

The Court agreed that protecting the public from the dangers of drunk driving is an important government interest. The Court went on to conclude that the connec-

[2]Blackmun did not join the Court's majority as it related to the analysis under the Twenty First Amendment

tion between gender and driving under the influence of alcohol "must be considered an unduly tenuous 'fit"'. The legislation fails to satisfy the principles inherent in the Equal Protection Clause and further fails to justify a need for such legislation that would warrant disregarding those constitutional principles. This decision exemplifies gender decisions made in this era in two ways: first, in the nature of the means-ends analysis employed by the Court and second, in evaluating legislation that is discriminatory toward men.

First, while the government satisfies the "important government interest" prong of intermediate scrutiny, the government's means (gender classifications) are not "substantially related" to the government's ends (decreasing drunk driving). When interpreting the link between the government's means and ends, the Court seems skeptical toward legislation that treats men and women differently, when a gender neutral alternative would suffice. In *Craig*, there is nothing to indicate that sex is an "accurate proxy for the regulation of drinking and driving," (429 at 204). While males may have higher instances of drunk driving, being male is not a significant predictor of one's likelihood to engage in drunk driving. Thus, reducing the incidents of drunk driving could be accomplished using a gender neutral statute. The Court also points out that men ages 18-20 are only restricted from buying 3.2 beer and not from consuming 3.2 beer purchased by others (including their female companions ages 18-20). At that point, the connection between the means and the ends is too distant to be maintained.

The Court relied on similar analysis in *Orr vs. Orr* (440 U.S. 268, 1979), which evaluated an Alabama statute that stated, in the event of divorce, husbands may be required to pay alimony but did not make the same requirement for wives. Again, the Court evaluated the government's use of gender as a "proxy" for an underlying characteristic. Gender was a proxy for need, as women are more likely to be dependent on their spouses for financial support than their male counterparts. Using gender as a proxy was not sufficient to meet the substantial relation element of inter-

mediate scrutiny. The state would not be overly burdened if the statute was gender neutral and alimony was determined based on need. The government's means are not "substantially related" to the government's ends.

The lingering question is if this is actually a means-ends analysis? Is the Court actually examining the relationship between the government's action and the government's goal to determine if they are sufficiently close to survive scrutiny under the equal protection clause? This does seem to depart from the means-ends analysis used in other areas. For example, when the Court evaluates a challenge under the Commerce Clause, it also reviews the relationship between the means (the legislation in question) and the ends (interstate commerce). If one is required to pile "inference upon inference" to explain that relationship, the legislation will not pass constitutional scrutiny (see for example *US vs. Lopez*, 514 U.S. 549, 1995). In the gender based challenges, the Court does not seem to be asking how close is the means to the ends but rather, the Court is evaluating if the ends be accomplished using a gender neutral means.

This notion is further illustrated in *Michael M. vs. Superior Court of Sanoma County* (450 U.S. 464, 1981). The state of California made men criminally liable for sexual intercourse with a female under the age of 18. The male petitioner was charged with violating this statute and alleged it was unconstitutional. He argued that it discriminated against men because only males could be punished for the unlawful intercourse even when both parties were under 18, and therefore the female should be charged as well. The state contended this law was aimed at reducing teenage pregnancies, while held a host of costs including medical risks, abortions and social issues arising in connection with teenage motherhood. The Court agreed that "the State has a strong interest in preventing such pregnancy," (450 at 471).

Furthermore, the plurality of the Court agreed that a gender-neutral statute may not be as effective as a statute aimed only at men. In Justice Rehnquist's plurality opinion and Justice Stewart's concurring opinion, the Justice's adopt the state's

analysis. Essentially, a gender neutral statute would deter females from reporting statutory rape. One "can plausibly [argue] that a gender-neutral statute would produce fewer prosecutions than the statute at issue here," (450 at footnote 9). The Court concludes the California statute is constitutional.

In this case, the Court stressed that men and women are not similarly situated concerning the risks and enduring effects of sexual intercourse. While in *Craig* and *Orr*, it was unlikely but possible that men and women would be similarly situated, in *Michael M.*, men and women cannot be similarly situated. Men may be dependent on their wives for financial support (*Orr*) but men cannot get pregnant (*Michael M.*). The Court maintains that women "suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity," (450 at 471). Because of the unique role of women as child-bearers, the state may use legislation with a gender classification that is aimed at protecting them under these circumstances.

When the Court applies a gender-neutral means-ends analysis, it would seem that the constitutionality of legislation turns on the physical or physiological differences between males and females. If the ends are not aimed at something caused by these differences, then a gender based classification in the legislation is likely to be found in violation of the Equal Protection Clause. However, when the ends are aimed something caused by the inherent differences between males and females, then legislation is not required to be gender-neutral. In this case, a gender based classification in the legislation is likely to survive an equal protection challenge.

This nuanced means-ends analysis underscores the differences between the standard of review applied in the *Reed* era and the standard in the *Craig* era. In *Reed*, the government interest was insufficient to justify a gender based classification. The government claimed preferring men to women was an administrative connivence. Here, the Court maintained a gender-neutral approach would not overly burden probate courts and thus the goal was insufficient to justify the classification. In *Craig*, the goal was sufficient but a gender-neutral law could also meet this goal, thus the means

were insufficient to justify the classification. This is a subtle distinction but these different legal rules send different signals about the appropriate analysis for gender based equal protection challenges.

These signals are sent to legislators, lower courts and other litigants. Legislators would be expected to provide an justification for why a gender-neutral statute would be insufficient and lower courts could accept those justifications, applying *Craig* and its progeny. This could lead to legislators looking to the physical and physiological differences between men and women to justify legislation. As we will see in subsequent section, this is precisely the position the legislators took in *VMI* to justify single sex education. It was ultimately rejected by the Supreme Court in 1996, which ushered in a new standard of review, but the District Court accepted the argument from Virginia, maintaining the unique physically demanding and adversarial nature of the Virginia Military Institute would have to be altered to admit women; thus a gender-neutral approach would not be possible (*US vs VA*, 766 F. Supp 1407 (1991)). The Court's subtle change from *Reed* to *Craig* in the means-ends analysis employed had a substantive impact on other courts and legislators.

Second, as I have alluded to previously, in the *Craig* era, men brought nearly all gender discrimination challenges adjudicated by the Supreme Court. Numbers quote Baer. On its face, the purpose of the Equal Protection Clause is to insure all citizens are treated alike under the law. The Court's jurisprudence acknowledges that there are instances where citizens are treated differently by the law and this is acceptable under the constitution. The Court also stresses, due to a history of discrimination, if legislation is aimed at a group who has been the target of discrimination in the past, it will be more suspicious of that legislation. In those instances, the State will have to provide a good reason for the classification in the legislation. With that in mind, it seems surprising that men would be a group that would warrant special protection. This pattern has two implications: first, it underscores the importance

of understanding the legal rule as applied to a class of cases and second, it lends credence to the idea of the Supreme Court as a strategic institution.

First, the Court's review of gender discrimination cases with male challengers illustrates the importance of evaluating precedent in terms of particular legal rules as applied to a class of cases. I have indicated that previous research remains focused on the case outcome, which obscures the Supreme Court's legal narrative. From *Craig* forward, the Supreme Court rejects justifications based on stereotypes for males and females. For example, in *Craig*, the Court questions the role society and stereotypes have played in the disparity between the precent of young males arrested for drinking and driving and the precent of young females arrested on the same charge. The same social stereotypes that drive the passage of legislation like in *Craig* contribute to the observed statistical differences in arrest rates for males and females. It is the " 'reckless" young men" that are included in the arrest statistics, while "their female counterparts are chivalrously escorted home," (429 at footnote 14).

Even stereotypes that may facially seem to benefit women are rejected by the Court as baseless. Here the Supreme Court takes a meaningful step toward rejecting traditional gender roles, which is essential to gender equality. While the Supreme Court is deciding a case that expands the rights of men relative to women, the scrutiny employed and the Court's rejection of antiquated gender stereotypes as justification for gender classifications establishes a legal rule that can be employed in all gender discrimination cases.

This argument can be illustrated more fully with cases like *Mississippi University for Women vs. Hogan*, (458 U.S. 718, 1982) and *J.E.B. vs. Alabama*, (511 U.S. 127, 1994). In *Mississippi University*, a man challenged his rejection from the university's nursing school on equal protection grounds. MUW was a state university and it limited its enrollment to only women. Hogan met all of the School of Nursing's qualifications but he was rejected solely because of his sex. This fact was not disputed by MUW and the School of Nursing informed him that he was welcome to audit

courses, but could not enroll for credit. The Court applied an intermediate standard of review and the state failed to provide a sufficient justification for this gender classification.[3]

The state argued MUW's females only policy was intended to counteract the past discrimination women faced. The Court rejects this justification for two reasons. First, unlike previous cases where past discrimination was sufficient to justify classification, here the state is unable to provide any indication that women suffered discrimination in the field of nursing. Second, the Court continues that restricting admission to only women "tends to perpetrate the stereotyped view of nursing as an exclusively woman's job... [it] lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy," (458 at 729). The Court is rejecting a justification build on a gender stereotype. A narrow reading of this case may indicate this is only a rejection of stereotypes of men. However, when the Supreme Court rejects the stereotype that nursing is a "woman's job" the legal interpretation for an entire class of cases is changed. Stereotypes are not a sufficient justification for a gender classification. The Court specifically points out a discriminatory stereotype and this is a crucial part of the evolution of this type of jurisprudence. The Supreme Court played a role in the evolution of equal protection for racial minorities and it rejected stated legislative purposes that relied on racial stereotypes (see for example *Loving vs. Virginia* (388 U.S. 1, 1967) and *Powers vs. Ohio* (499 U.S. 400, 1991)). Additionally, as I will explore in the subsequent parts of this section, rejecting stereotypes to justify legislation also plays a crucial role in the evolution of equal protection based on sexual orientation.

[3]I will argue in the subsequent part of this section that, while the Supreme Court applies an intermediate scrutiny standard by name, the standard in *Mississippi University* is in fact the same heightened intermediate standard as scholars credit as originating in *VMI*. Specifically, I will argue that Justice O'Connor's requirement that the state provide an "exceedingly persuasive justification" for the legislation is a different legal rule, which sends a different signal to lower courts and changes the adjudication of the entire class of cases.

In *J.E.B. vs Alabama*, the Supreme Court also rejected stereotypes of male behavior because it is reminiscent of stereotypes used to bar female participation in politics and the criminal justice system. In *JEB*, the petitioner owed back child support and Alabama brought the issue to a trial before a jury. The State used all of its strikes to remove male jurors from consideration. The male petitioner ended up with an all female jury. Note, the male defendant with a female jury is the reverse of the circumstances the Supreme Court allowed in Hoyt, discussed above. Here, the state attempts to justify striking men from the jury because there is a perception that men would be more sympathetic to a father's refusal to pay child support than similarly situated women. The Court rejects this argument equating this logic to the "stereotypes that justified the wholesale exclusion of women from juries and the ballot box," (511 at 139).

The Court cites a prosecutors manual used in Dallas, TX, which "provided the following advice: 'I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their 'women's intuition' can help you if you can't win your case with the facts,' " (511 at footnote 10). Relying on these kind of gender stereotypes to justify peremptory challenges reinforces "prejudicial views of the relative abilities of men and women," (511 at 140).

Looking only at the facts, a man wins an equal protection challenge. However, the entire basis for gender stereotypes is rejected. The Supreme Court's analysis relies on the rejection of stereotypes that justified states barring women and racial minorities from political participation. Moreover, the Court's harm analysis takes issue with stereotypes in gender. Rather than explaining why male stereotypes are problematic, the Court argues that society is "harmed by the state's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders," (511 at 140). The problem is not excluding men. The problem is the

state relied on stereotypes to exclude men. Stereotypes do not provide sufficient justification of state action that violates the Equal Protection Clause.

On its face, this era in decision-making seems to be defined by the Supreme Court's attempt to protect men from gender discrimination. A closer investigation of the Court's analysis demonstrates a broad rejection of gender classifications based on stereotypes in general. The Supreme Court may have actually placed gender discrimination jurisprudence on firmer ground by primarily focusing on cases where men were the victim of discrimination. By protecting a group that is not traditionally seen as being in need of special protection, the underlying argument rejecting these classifications is even stronger. If stereotypes cannot justify the exclusion of a group that is traditionally accepted, then under the Equal Protection Clause, it certainly will not justify the exclusion of a group that has suffered from discrimination.

This also illustrates my second contention that the Supreme Court is a strategic actor. It is not mere happenstance that through the 1970s and 1980s the Court focused on challenges brought by men. As I will explore in the empirical section, the lower courts were adjudicating challenges from men and women but the high court was only choosing challenges from men. The Court's docket is primarily composed of discretionary cases. This means the Court has almost compete control over the cases it chooses to hear. If the Court was purely interested in political outcomes, we would only see it select cases that give it an opportunity to pursue its political goals. It is difficult to see how the justices would have a vested interest in the outcome of *Craig vs Borne*. Striking down Oklahoma's 3.2 percent beer law does not seem to be particularly ideologically charged. However, the change in the standard of review was of distinct importance legally and politically. The Supreme Court appears to have strategically selected cases where the facts were relatively benign.

This behavior calls into question rational choice models where the Court focuses only on their preferred ideological model ((either in the attitudinal approach and the strategic choice approach). The Supreme Court has a broader view of the importance

of any single case as a representative of any area of law. This is not inconsistent with the idea that the Supreme Court pursues particular political preferences. The Court has interest beyond a particular outcome. The Court uses legal rules to guide an entire area of jurisprudence. The Court has an ideological preference over the entire area and it uses rules in a particular case to pursue that outcome. By selecting cases where men are challenging gender discrimination, the Supreme Court demonstrates that gender classification is not simply a "women's issue."

4.7 *VMI*: A New Regime?

In 1996, the Supreme Court decided *US vs Virginia* (the Virginia Military Institute (VMI) case). This decision is heralded as a "landmark victory for the women's legal movement," (Brake 1996). Scholars and Justice Scalia in his dissent view the legal rule applied in VMI as a move to "heighten the level of scrutiny and bring it closer to strict scrutiny," (Sunstein 1996). However, I argue the legal rule in VMI was not the Court's first attempt to use this higher standard. Instead, the victory was that the Supreme Court applied this heightened legal rule in a case where women were making allegations of gender discrimination, rather than men making the allegations. Because the Court had already applied this heightened intermediate scrutiny in other cases, the Court had already sent the signal to other courts and legislators. The VMI case was a symbolic victory for women's equality and for women who wanted to attend the Virginia Military Institute, but the legal victory had occurred over ten years earlier.

In *VMI*, the Supreme Court evaluated the constitutionality of the male only admission policy and the Virginia Military Institute. VMI is a public institution, funded by the state of Virginia, and was the only single-sex public school in the state. VMI is also unique because, in addition to offering a host of academic pursuits, this university uses an "adversative model" of education to produce "citizen-soldiers". This program uses extreme physical and mental stress, pushing and punishing cadets to

bond them together and instill expectations of behavior and values. The United States sued Virginia alleging the exclusion of women from VMI violated the Equal Protection Clause of the Fourteenth Amendment. The District Court initially ruled that Virginia had a sufficient government interest in maintaining a single-sex institution. Primarily, the inclusion of women would fundamentally change the program at VMI. They would have to give cadets privacy, which the program denied as part of the extreme physical and mental training. Also, including women would lower the high physical standards. The Fourth Circuit over ruled, concluding that the state failed to provide "any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not women," (976 F.2d 890 at 892, 1992). The Circuit Court did find, however, that VMI would have to make substantial changes if it were to admit women. To that end, the Circuit Court suggested if VMI did not admit women, the state of Virginia could rescind its monetary support, making VMI a private institution, free to pursue its own admission objectives regardless of the Equal Protection Clause, or Virginia could open a comparable institution for women. The state proposed the latter accommodation, agreeing to open a women's leadership program at Mary Baldwin College.

The state developed a curriculum for the Virginia Women's Institute for Leadership (VWIL). This women's only program would allow women to pursue an educational experience that Virginia deemed comparable to the experience at VMI. There were numerous differences between VMI and VWIL. Initially, there are obvious prestige differences, because VMI has a history of producing high quality graduates for over 100 years, VMI has more PhDs on faculty, more degree programs and a significantly larger endowment (518 at 531). Additionally, the curriculum for VWIL rejected the adversative approach used by VMI, deeming it "inappropriate" for women. Instead, VWIL preferred a method based on cooperation and aimed at "[reinforcing] self-esteem". Both the District Court and the Court of Appeals accepted VWIL as

a reasonable and comparative alternative to VMI. The US appealed to the Supreme Court maintaining that VMI's single-sex admission policy was a violation of the Equal Protection Clause and that VWIL was not a sufficient alternative.

Writing for the Majority, Justice Ginsburg finds that VMI's single sex admission policy is not justified in the face of an equal protection challenge. She summarizes the previous rulings in gender equal protection cases, in which the Court focuses "on the differential treatment, or denial of opportunity for which relief is sought, the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely with the State. See *Mississippi University for Women* 458 US at 724," (518 US at 533). The notion that the state must provide an "exceedingly persuasive justification," making it very difficult for sex based legislation to survive constitutional scrutiny, is not new. This standard was used in *Mississippi University for Women* (as noted above) and in *J.E.B. vs Alabama*. However, in those cases, the Court supported a male challenge under the Equal Protection Clause. VMI is not a landmark in terms of the legal rule because the rule can be traced to *Mississippi University*. It is a landmark because this legal rule is applied to allow women into male only institutions. In doing so, the Court stresses that it is skeptical of schemes which are based on stereotypes concerning the differences between men and women.

Justice Ginsburg agrees with the state that there are "physical differences" between men and women that do not exist between people of different races or national origins. However, beyond merely relying on explicit physical differences, the state uses "over-broad generalizations" about the different talents, capacities or preferences of males and females to justify the legislation (518 US at 541).

The state claims that the program would fundamentally change if women are admitted because most women would not like the rigorous, advserative martial VMI program. The state further asserts women would prefer a more cooperative program like WWIL. These stereotypical assumptions about the preferences of men and women are rejected by the Court. Women currently serve in the US military and

this suggests that this argument is overblown. Moreover, there were clearly some women who wanted admission to VMI, as they applied for and brought a suit to gain admission.

The Court wholly rejects any analysis relying on generalizations or stereotypes. Harkening back to the language which allowed women to be restricted from jury service and the like, the Court maintains "generalizations about 'the way women are,' [or] estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits most men. It is also revealing that Virginia accounted for its failure to make the VWIL experience 'the entirely militaristic experience of VMI' on the ground that VWIL 'is planned for women who do not necessarily expect to pursue military careers.' 852 F. Supp., at 478. By that reasoning, VMI's 'entirely militaristic' program would be inappropriate for men in general or as a group, for '[o]nly about 15 percent of VMI cadets enter career military service.' " (518 US at 550).

Again, rejecting gender stereotypes is not novel to the Court's jurisprudence. Recall from above, in *J.E.B. vs Alabama*, the Court maintained that gender stereotypes cannot allow men to be struck from a jury. The language of the Court also relies on outdated *female* stereotypes to explain the state's violation of the equal protection clause. Still, the Court's decision was not explicitly dealing with the state's reliance on female stereotypes to exclude females. It is not until VMI that the Court extends this analysis to a case concerning a female challenger. Again, this underscores the strategic behavior of the Court. The Court systematically expanded gender jurisprudence using cases with male challengers before applying it to female challengers. This may decrease the costs associated with new precedent discussed in section 3. For example, there may be less backlash associated with a ruling which gives men consideration equal to women. Then that same logic can be applied to

give women equal consideration but the Court may couch its decision in previous rulings to minimize the controversy of its decision.

4.8 Conclusion

This section provides an in depth discussion of the evolution of gender equal protection jurisprudence. This analysis illustrates two theoretical claims from the third section. First, a given case is issued as an example from a class of cases. The Supreme Court generally adjudicated equal protection challenges from men, but the legal rules were used to adjudicate challenges from men and women. The Court references stereotypes about men and women in its opinions, underscoring that the legal rules should apply to both men and women. The Court receives a benefit from most of these cases that is much broader that the single outcome.

Second, the majority of the analysis of this legal area addresses three decisions, each of which results in a new standard of review (*Reed vs Reed*, *Craig vs Borne*, and *VMI*). However, a closer analysis demonstrates that the Court may employ a different standard of review, and thus a different means ends analysis, in cases other than these three cases. Not only do traditional outcome focused analyses miss this evolution, but any discussion that does not explicitly review the language of the Court would also miss these subtle distinction. Both of these conclusions are intended to underscore the Court's role as a strategic actor in applying precedent, demonstrating that the Court does not explicitly trade off following precedent with following political preferences.

5 THE POLITICS OF PRECEDENT: AN EMPIRICAL ASSESSMENT

5.1 Empirical Design

It has been difficult to examine the political and strategic motivations behind precedent because previous measures do not capture the content of legal rules. We cannot rely on the assumption that the standard of review used in a landmark case is applied in every case in a given area of law. Courts may select a different controlling standard, arguing that the facts in a case require different scrutiny. We need to substantively evaluate the legal terminology used by the Supreme Court and the Court of Appeals to really determine what law is being applied and how that law interacts with decision-making.

I offer a concise definition of precedent, using the standard of review as a foundation. The "law" is the standard of review used in a case and the "precedent" is the standard of review used in the previous case in the same area of case law. From this conceptual definition, I propose two distinct ordinal measures of precedent.

Table 5.1: The Law

Legal Standard	Party With Burden	Ordinal Measure
Rational basis	Individual	0
Heightened rational basis	Individual	1
Intermediate scrutiny	Government	2
Heightened intermediate scrutiny	Government	3
Strict scrutiny	Government	4

Tablec summarizes the content of legal policy measure. The ordinal measure increases as the nature of the burden placed on the government increases from the rational basis standard, which has no burden on the government, to the strict scrutiny standard, which has the highest burden on the government. The courts explicitly,

with few exceptions, identify the standard used for adjudication in their written opinions.

To understand subtle fluctuations in the behavior of the Supreme Court and the lower courts, I propose an ordinal measure combining the legal policy and the outcome. Table 5.2 summarizes this measure. Relying on the above distinctions in the standard of review, I also will determine if the party with the burden won. Note from Table 5.2, there is a higher value if the government wins (versus if the individual wins) under the intermediate standards and strict scrutiny when compared with the rational basis standards. This captures the shift in the burden from the individual under rational basis to the government under the other standards. It should also be noted that this notion of outcome is a function of legal rules rather than a liberal/conservative direction and is removed from the problems of the dispositional outcome based measures discussed above.

Table 5.2: The Law Plus Outcome

Legal Standard	Outcome	Ordinal Measure
Rational basis	Government Wins	0
Rational basis	Individual Wins	0.5
Heightened rational basis	Government Wins	1
Heightened rational basis	Individual Wins	1.5
Intermediate scrutiny	Individual Wins	2
Intermediate scrutiny	Government Wins	2.5
Heightened intermediate scrutiny	Individual Wins	3
Heightened intermediate scrutiny	Government Wins	3.5
Strict scrutiny	Individual Wins	4
Strict scrutiny	Government Wins	4.5

It is important to note that these measures are still vast over simplification of a complex statement of law and policy. It is not my intention to conclude that all statements of precedent can be reduced down to a single statement of the standard of review. My only goal here is to provide a potential mechanism to measure a minimally understood concept.

To code precedent (from Table 5.1), I use the following definitions:

0: Rational basis[1] - Party challenging legislation must prove "no conceivable relation" between government action and any government end (does not have to be the end the government argues itself). Example of cases that would be cited for this type of review: *United States Railroad Retirement Bd. v. Fritz* (449 U.S. 166, 1980), *FCC vs. Beach* (1993). To code the legal outcome (from Table 5.2): if the government wins, it is coded as 0; if the individual wins, it is coded as 0.5.

1: Heightened rational basis - Party challenging legislation must prove government action is not "rationally related" to a "legitimate government end". Example of cases that would be cited for this type of review: *Williamson vs Lee* (1955), *Reed vs. Reed* (1971). To code the legal outcome (from Table 5.2): if the government wins, it is coded as 1; if the individual wins, it is coded as 1.5.

2: Intermediate standard - Government has burden to demonstrate legislation is "substantially related" to a "legitimate government end." Example of cases that would be cited for this type of review: *Craig vs. Boren* (1976). To code the legal outcome (from Table 5.2): if the individual wins, it is coded as 2; if the government wins, it is coded as 2.5.

3: Heightened intermediate standard - Government has burden to demonstrate legislation has an "exceedingly persuasive justification" *and* is "substantially related to the achievement of [the government's] objectives." Example of cases that would be cited for this type of review: *US vs. Virginia* (1996). To code the legal outcome (from Table 5.2): if the individual wins, it is coded as 3; if the government wins, it is coded as 3.5.

4 Strict scrutiny - Government has burden to demonstrate legislation is "narrowly tailored to serve a compelling government interest via the least restrictive means," Example of cases that would be cited for this type of review: *Korematsu v. United*

[1]Differentiating between two types of rational basis standards is not common but I differentiate between opinions which argue that an individual must meet a very high burden versus those cases where the individual must only meet some kind of burden.

States (323 U.S. 21, 1944). To code the legal outcome (from Table 5.2): if the individual wins, it is coded as 4; if the government wins, it is coded as 4.5.

My hypotheses concern the interaction between the law applied by the lower courts, the ideology of the lower courts, the ideology of the Supreme Court and the Supreme Court's decision to change precedent in a given term. The main variables that need to be collected to test these hypotheses are precedent and ideology.

Case Selection: To ensure a workable sample, I code a subset of cases. Because of the need to treat Supreme Court cases as an exemplar from a class of cases, I use a subset of cases that are all from the same legal area. Given the evolution of the Supreme Court's doctrine in gender equal protection cases across time and specific issues, it is be fruitful to use these cases. The subset of cases that I focus on is those from the Supreme Court and the Courts of Appeals from 1965-2008, allowing for ample time before the Supreme Court's landmark decision in *Reed vs Reed* (1971). This will help demonstrate the lower court dynamics that existed before that decision and that led up to the Supreme Court's decision to implement the rational basis standard in *Reed*. Additionally, by using gender equal protection cases, I can speak to the Supreme Court's role in development of rights for protected groups.

Table 5.3: Summarizing Cases, 1965-2008

Supreme Court	
Number of Cases in Data	31
Pro Government Outcome	0.38
Male Challenger	0.75
Court of Appeals	
Number of Cases in Data	65
Pro Government Outcome	0.46
Male Challenger	0.32

Table 5.3 summarizes the cases that were collected using the parameters discussed in the case selection section. There are 31 Supreme Court cases and 65 Court

of Appeals cases. This demonstrates that the Supreme Court does not have an opportunity to decide all of the cases in a given area. Instead the high court must rely on lower courts to issue opinions in accordance with the high court's precedent.

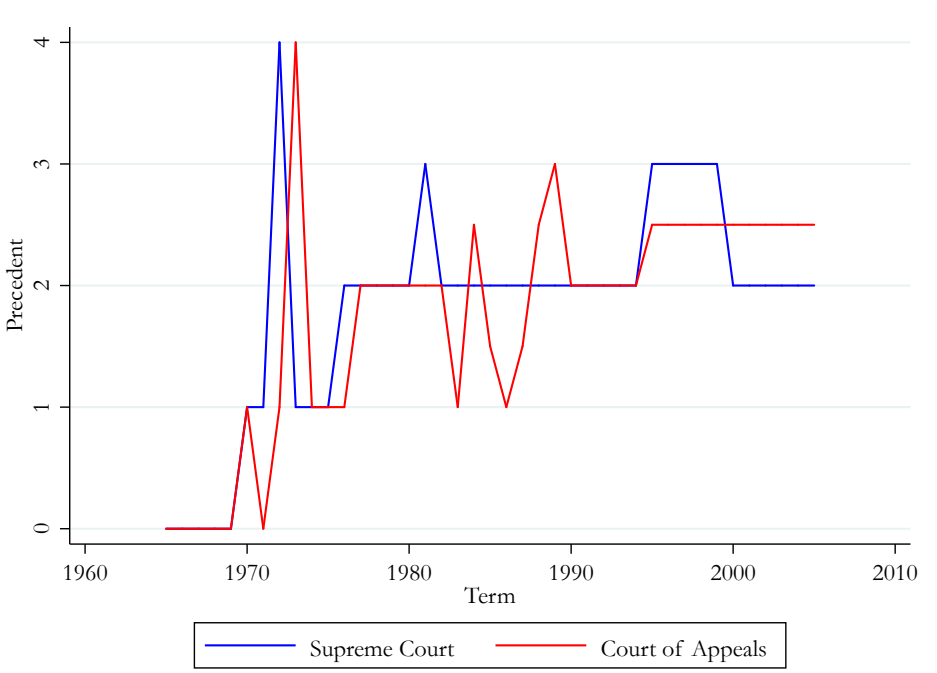
Second, this table summarizes the percent of cases that are decided in a pro-government direction at the Supreme Court level and the Court of Appeals level. If the Supreme Court only pursued outcomes, we would not expect to see outcomes at about 40 percent. If the only concern was the liberal or conservative outcome, particularly given the stability of the Court membership during the time in question, we would expect to see either all pro government (conservative) or all not pro government (liberal). This gives preliminary evidence that the attitudinal hypothesis (hypothesis 2 in section 3), that the Court only pursues particular outcomes, does not sufficiently explain Supreme Court behavior.

Finally, this validates the discussion in the previous section, which posits that the Supreme Court strategically chose to hear cases with men challenging gender based restrictions rather than women. If the Supreme Court's docket was a function of the pool, we would expect to see the number of male challengers in the Court of Appeals cases more equal to the number of male challengers in the Supreme Court cases. Instead we see a large divergence, indicating that this is a function of the Supreme Court's behavior when setting its docket.

Using the measurement for the legal variables discussed above, Figure 5.1 shows the evolution of precedent over time in this subset of cases. Initially, we can see that there is some evolution of the standard of review over time. The Supreme Court starts out with a rational basis standard of review and then quickly raises it to strict scrutiny. The Court then revisits the issue and the standard of review remains between intermediate and heightened intermediate. The Courts of Appeals seem to follow the Supreme Court's rulings. However, there are notable exceptions. During the 1980s, the precedent used by the lower courts fluctuates, while the Supreme Court continues to use the same precedent. The composition of the Court changed

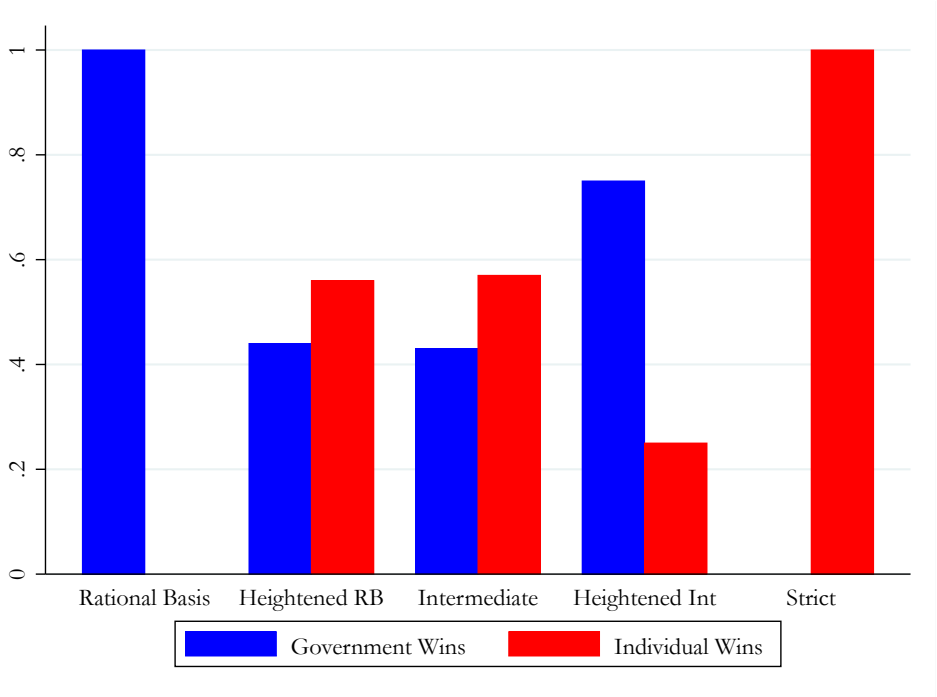
dramatically during this period and yet we see no attempt by the Supreme Court to change precedent. It may be the case that the Court was waiting for a particular case to change precedent.

Figure 5.1: Precedent: Supreme Court and US Courts of Appeals, 1965-2005



Figures 5.2 and 5.3 show the law plus outcome variable for the US Supreme Court and the Courts of Appeals. Figure 5.2 is the outcomes at the Supreme Court level. Notice, when the Supreme Court uses strict scrutiny or the lowest rational basis standard, the party with the burden loses in 100 percent of the cases. When the Court applies the lowest rational basis standard, this places a high burden on the individual to demonstrate that the relationship between the governments means and ends is not rational. Under this standard, in my sample, the individual always loses. When the Court applies the strict scrutiny standard, this places a high burden on the government to demonstrate that the government action is narrowly tailored

Figure 5.2: Legal Outcomes, US Supreme Court, 1970-2005

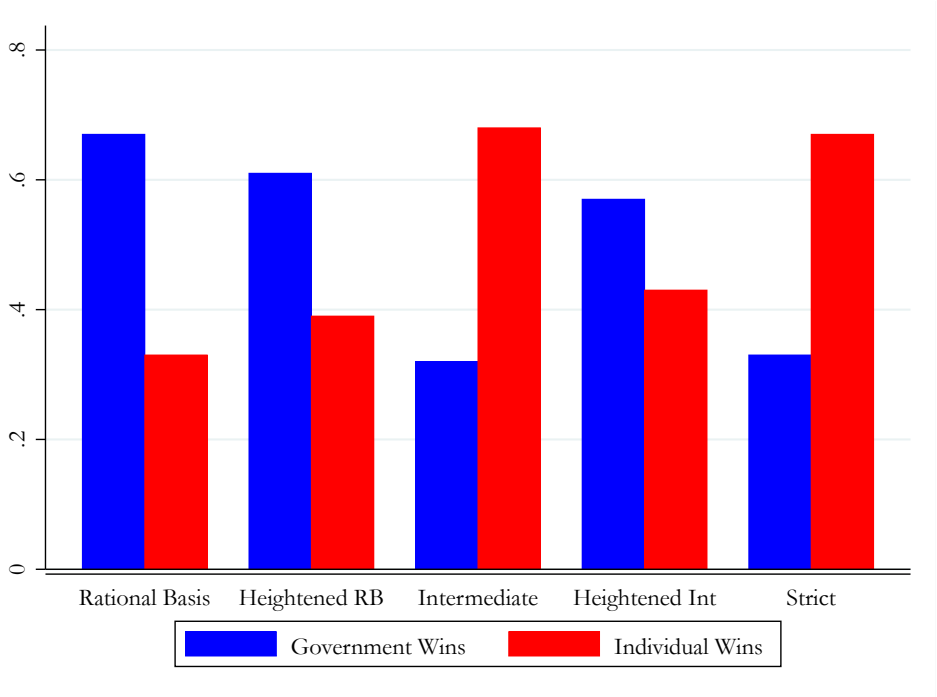


and meets a compelling government interest. Under this standard, in my sample, the government always loses.

Contrast that with the application of these same standards by the Courts of Appeals. Under the rational basis standard, the government wins about 70 percent of the time and under the strict scrutiny standard, the government wins about 30 percent of the time. While we can clearly see that the burden shift changes the probability that the government will win, at the Courts of Appeals level, the outcome is not certain. This informs the Supreme Court's decision to maintain a particular precedent or change to a new precedent.

The Court's oversight over the lower court is limited, as the Supreme Court only hears about 1 percent of all cases that apply for certiori. So, the Court cannot individually review every case decided by the lower courts. Different standards have

Figure 5.3: Legal Outcomes, US Courts of Appeals 1965-2005



different costs associated with oversight and the Supreme Court must take this into account. In the mid-range standards, we see similar outcomes. At the Supreme Court level, the party with the burden tends to lose at a greater frequency than at the Court of Appeals level. The Supreme Court seems to be pursuing clear applications of the rules.

Still, Figure 5.3 provides support for hypothesis 4 from section 3. Specifically, I argued that the lower courts will follow the dictates of the Supreme Court. When the Supreme Court issues a legal rule favoring a particular party, the lower courts apply that rule and tend to find in favor of that party. The Supreme Court uses this understanding of the lower courts as agents implementing the Supreme Court's rulings to inform its decision concerning which legal rules to employ.

5.2 Changes in Precedent

Dependent Variable: To test the decision theory which explains the Supreme Court's decision to change precedent, I use the legal variable discussed above to create the dependent variable of Supreme Court change. Specifically, the Law, from Table 1, in a given term (term t) is subtracted from the term immediately previous (term t-1). If the Supreme Court changes precedent during a given term (term t), the value will be non-zero. If the Supreme Court does not change precedent during a given term (term t), the value will be zero. Diagnostics[2] revealed serial correlation so I use a variant of an error correction model and include the lag of the difference as well (De Boef & Keele 2008). To fully eliminate autocorrelation, I also included the lag of the value of precedent.

Key Independent Variables: To empirically test the hypotheses discussed previously, it is necessary to include measures for both precedent and ideology on the right-hand side of the equation.

Court of Appeals Precedent: I code precedent using the scheme discussed above. For the purposes of this paper, I aggregate Court of Appeals precedent and discuss the median application of precedent by the Courts of Appeal during each term. To determine if the lower court diverges from Supreme Court precedent, I use the precedent used by the Supreme Court in the previous term (term t-1) and subtract it from the median precedent used by the Court of Appeals in the current term. If this is non zero, it demonstrates that the Court of Appeals is diverging from the Supreme Court at the median. If this is zero, it demonstrates that the Court of Appeals is not diverging from the Supreme Court at the median. Looking at the median value best represents how the Supreme Court might assess if a given precedent aggregates in a way that is valuable to the Court. This series is also autocorrelated so I also

[2]These diagnostics included plotting the residuals, doing a q-test of the residuals, and a Breusch-Godfrey test.

include the lagged value of the median Court of Appeals precedent in the empirical model[3].

This variable is used to assess the hypothesis stated above. As the Court of Appeals diverges, I expect that the Supreme Court is more likely to change precedent. The Supreme Court is not be getting a sufficient aggregate payoff from existing precedent if the Court of Appeals is already diverging from the existing payoff.

Supreme Court Ideology: This section uses the Martin-Quinn scores of justice ideology (Martin & Quinn 2007). Using logic similar to the DW-Nominate scores, these scores are built using the voting behavior of Supreme Court justices. Justices who frequently vote together are considered to be closer to each other ideologically, than justices who frequently vote in opposition to one another. It is advantageous to use this vote based score in this analysis for three reasons. First, my dependent variable is not based on votes. By evaluating Supreme Court behavior that is separate from votes, I avoid the endogeneity problems inherent in typical outcome focused analysis. Second, using the scores from Martin and Quinn allows me to capture the ideological drift that many justices undergo over time (Epstein et al. 2007). Finally, when I use the median Martin-Quinn score for the bench, this demonstrates the voting behavior of the median justice on the Court. This allows me to couch my theoretical argument in terms of how legal rules and voting behavior (outcome or policy preferences) interact. At the justice level in my data, the Martin-Quinn scores take on values from -6.617 to 4.406, ranging from most liberal to most conservative. At the court level in my data, the Martin-Quinn median voter scores take on values from 0.017 to 1.053.

Court of Appeals Ideology: This section uses a proxy measure for lower court ideology, which relies the ideology of those who were responsible for the judge's nomination (Giles, Hettinger & Peppers 2001). Specifically, the score is a combina-

[3]Diagnostics reveal that this variable is not cointegrated with the dependent variable but I still use a variant of an error correction model (De Boef & Keele 2008). While not empirically necessary, the model is theoretically is appropriate to assess how Court of Appeals precedent influences the Supreme Court's decision to change precedent.

tion of the DW-Nominate ideology score of the nominating President and the home state senators. Similar to the Segal/Cover scores discussed in section 2, this measure approximates ideology separate from actual votes (Segal & Cover 1989, Segal et al. 1995). The empirical model below uses the weighted average of the mean ideology of the Court of Appeals. Again, taking a cue from the error correction model, the model includes the lagged value of the mean ideology and the change in the mean ideology. This will allow for us to discuss the effect a shock to the mean ideology in a given term has and determine if the effect of mean ideology of the Courts of Appeals stays in the system across time. At the judge level, this variable ranges from -3.5 to 3.5, representing a liberal to conservative spectrum. The observed mean values range from -0.091 to 0.101.

Table 5.4 presents the regression results. The independent variables relevant to the propositions argued in the theory above are Court of Appeals divergence, Court of Appeals ideology and Supreme Court ideology. As we can see, the ideology of the Supreme Court is a statistically significant predictor the Court's decision to change precedent. Recall, contrary to previous work, I do not argue that there is a direct tradeoff between ideological preferences and legal rules. Instead, the Supreme Court can use precedent to achieve policy preferences. Thus, we would expect this variable to be statistically significant. Also, remember, as the discussion proceeds to other variables, those results exist while holding ideology constant. There are still portions of the variance that are explained by factors other than ideology.

The value of the Court of Appeals divergence in the given term is not statistically significant. This is not too surprising as the Supreme Court would have difficulty observing the behavior of the Court of Appeals and responding to change precedent in the same term. The lag value of the Court of Appeals divergence is more telling. This variable is statistically significant and demonstrates that if the Court of Appeals diverged in the previous term, the Supreme Court is more likely to diverge in the current term. This supports my hypothesis discussed above. In short, the Supreme

Table 5.4: ECM: Changes in Supreme Court Precedent, 1965-2005

Variable	Estimate (SE)	Pscore*
Δ Precedent$_{(t-1)}$	0.001 (0.169)	0.996
Precedent$_{(t-1)}$	-0.815 (0.214)	0.001
Court of Appeals Divergence	-0.061 (0.234)	0.797
Court of Appeals Divergence$_{(t-1)}$	0.407 (0.226)	0.083
Δ Mean Court of Appeals Ideology	0.679 (6.553)	0.918
Mean Court of Appeals Ideology$_{(t-1)}$	2.694 (1.831)	0.151
Median Supreme Court Ideology	-1.796 (0.806)	0.033
Constant	2.258 (0.628)	0.001
Long Range Multipliers**		
Court of Appeals Divergence	1.427 (2.59)	0.710
Court of Appeals Ideology	3.096 (3.49)	0.617
N= 39		
R^2=0.4787		
*P scores estimated for a two-tailed test		
**Calculated using the Bardsen method		

Court changes precedent if the Court of Appeals diverges. The Supreme Court is not getting the preferred aggregate payoff from the precedent used in previous cases, thus the Court will change precedent in the belief that it will attain a higher payoff with the new precedent.

The Court of Appeals ideology is not statistically significant both in the current term and as a lagged value. This indicates that the mean ideology of the lower courts is not a predictor of the Supreme Court's decision to change precedent. The mean ideology of the Court of Appeals does not change much over time. The observed values in the regression above ranges from -0.091 to 0.101. It may be fruitful to evaluate the Court of Appeals ideology in terms of the distance from the Supreme Court's ideology.

Finally, the long range multipliers are calculated using the values of the constant and the lags for each of the Court of Appeals Divergence and the mean Court of Appeals ideology. Standard errors are calculated using the Bardsen method. Essentially, these variables evaluate if the effect of divergence and ideology extend through time. Neither of these variables are statistically significant, so we can conclude when a change in these variables enters the system, any effect it has is realized within one term and does not extend through time.

5.3 Predicting the Standard of Review

Next, we can predict the specific standards of review that will be employed in a given opinion. I use the same coding rules represented in Tables 5.1 and 5.2, but the unit of analysis is now the judge rather than the court term. Specifically, I analyze the majority opinion and any concurring or dissenting opinions. The standard of review employed by the justice is coded based on the language of the opinion they join or write. If the majority opinion relies on heightened rational basis and the justice joins the majority and does not write a separate opinion, that justice is coded as applying heightened rational basis. If the majority relies on heightened rational basis but the justice writes a separate opinion applying a different legal rule (intermediate scrutiny for example), that justice is coded as applying intermediate scrutiny. The same logic is applied to justices who join concurring opinions or dissenting opinions.

Figure 5.4: Comparing Standards of Review by Justice

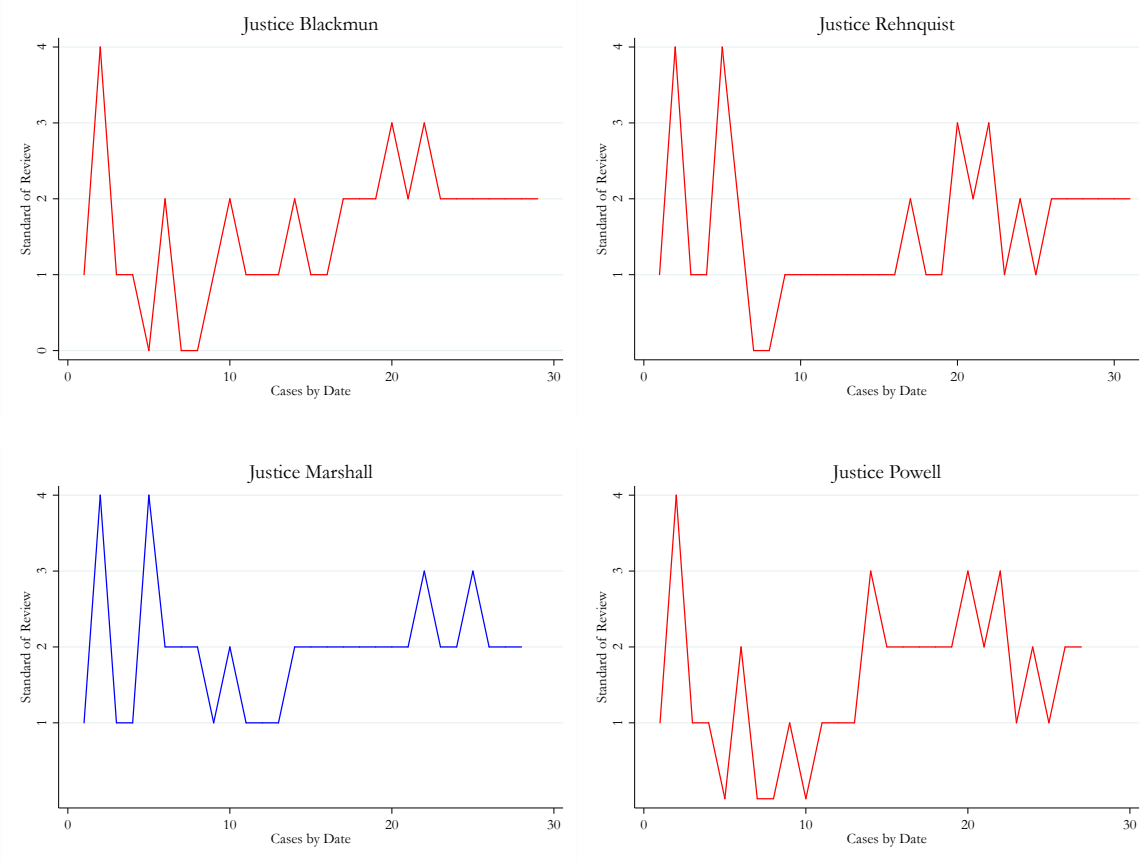


Figure 5.4 compares the standards of review used by selected justices across different cases. There is clearly variation in the standards that the justices apply. Furthermore, that variation is not simply a reflection of the variation across time that we saw in Figure 5.1. Instead, the different standards are employed by different justices as different times. I maintain that that difference is driven in part by how strategic the justice is and the justice's beliefs about the reactions of the lower courts. This variation is also driven by the justice's preferences. For example, Justice Marshall never applies the lower rational basis standard (coded 0). Using the logic discussed in section 3, for Marshall, the value of a higher standard of review was always greater than the costs of writing the opinion and the value of the lower standard of review.

To evaluate the factors that may influence the justices' application of a given standard of review, I include the justices' ideology scores from Martin and Quinn (discussed above). I also use the median Court of Appeals standard of review from the previous term and the median Court of Appeals ideology, as used in the previous analysis. I also include controls for various case factors. First, I include a dummy variable for if challenger in the case is male. This is intended to capture any systematic difference that may exist in the standard of review employed by justices in cases from men versus cases from women. Second, I include a dummy variable for if the government was a primary party. While the majority of the cases have the government as a party, this is not always the case. Recall from *Reed vs Reed*. the primary parties in this case were individuals both involved in an dispute over the estate. I include this variable to control for the possibility that justices behave systematically different in adjudicating these cases if the government is not a primary party. Finally, I include a dummy variable for the justice's the decision-direction in the case This is to control for if the justice is only seeking a particular outcome and therefore their decision concerning the standard of review would be predicted by their decision concerning the outcome.

Using the justice level application of the standard of review, I use an ordered logit to evaluate the factors that influence a justice's application of a particular standard of review. Table 5.5 presents the regression results and Table 5.6 presents the marginal effects for each variable across each value the dependent variable takes on. While the majority of the analysis of the results focuses on predicted probability graphs in the remaining parts of this section, from Table 5.5 and Table 5.6 we can make some preliminary conclusions about the substantive and statistical significance of the variables of interest.

First, justice ideology is negative and statistically significant. As a justice becomes more liberal, that justice is more likely to apply a higher standard of review. This confirms the basic logic of the attitudinal model but does so by focusing on legal rules. In short, a liberal justice is more likely to apply a legal rule that places a higher burden on the government. This makes it easier for individuals challenging the government to succeed. Despite being consistent with the logic of the attitudinal model, this does not directly confirm the assumptions of the attitudinal model. If the attitudinal model is correct, the justices have no interest in pursuing a standard of review which supports their most preferred party. If justices were only interested in outcomes, it would be highly unlikely we would see any statistically significant connection between ideology and legal rules. Thus, we can reject hypothesis two in section three, which maintains that justices to not systematically apply precedent. We can accept hypothesis three in section three, which maintains that justices will use legal rules that favor its most preferred party

Second, the median legal rule applied by the lower court is not statistically significant but the median ideology of the lower court is positive and statistically significant. As the ideology if the lower court becomes more conservative, the Supreme Court is more likely to issue a higher standard of review. This suggests that the justices favor legal rules which are more constraining for the lower court. A conservative lower court is going to prefer to rule in favor of the government in these kind of consti-

Table 5.5: Standard of Review, 1965-2005

Variable	Estimate (SE)	Odds ratio	pvalue
Justice Ideology	-0.188 (0.0573)	0.828	0.001
Median Court of Appeals Law	0.224 (0.214)	1.251	0.295
Median Court of Appeals Ideology	6.811 (2.525)	907.57	0.007
Male Challenger	0.112 (0.432)	1.118	0.796
Government Party	-0.248 (0.244)	0.780	0.309
Decision Direction	0.0137 (0.248)	1.012	0.956
Cutpoint 1	-2.526 (0.937)		
Cutpoint 2	-0.398 (0.874)		
Cutpoint 3	1.762** (0.862)		
Cutpoint 4	3.206*** (0.823)		
Observations	273		
Wald χ^2	21.00		
R^2	0.031		

Robust standard errors in parentheses

tutional challenges. However, when the Supreme Court employs a higher standard of review, this is going to make it more difficult for the conservative court to follow its preference. Again, the fact that the median ideology of the lower court is a statistically significant predictor of the legal standards applied by justices undermines the conclusions of the attitudinal model. From these empirical results, we can see

that there are other strategic factors which influence the Court's application of legal rules.

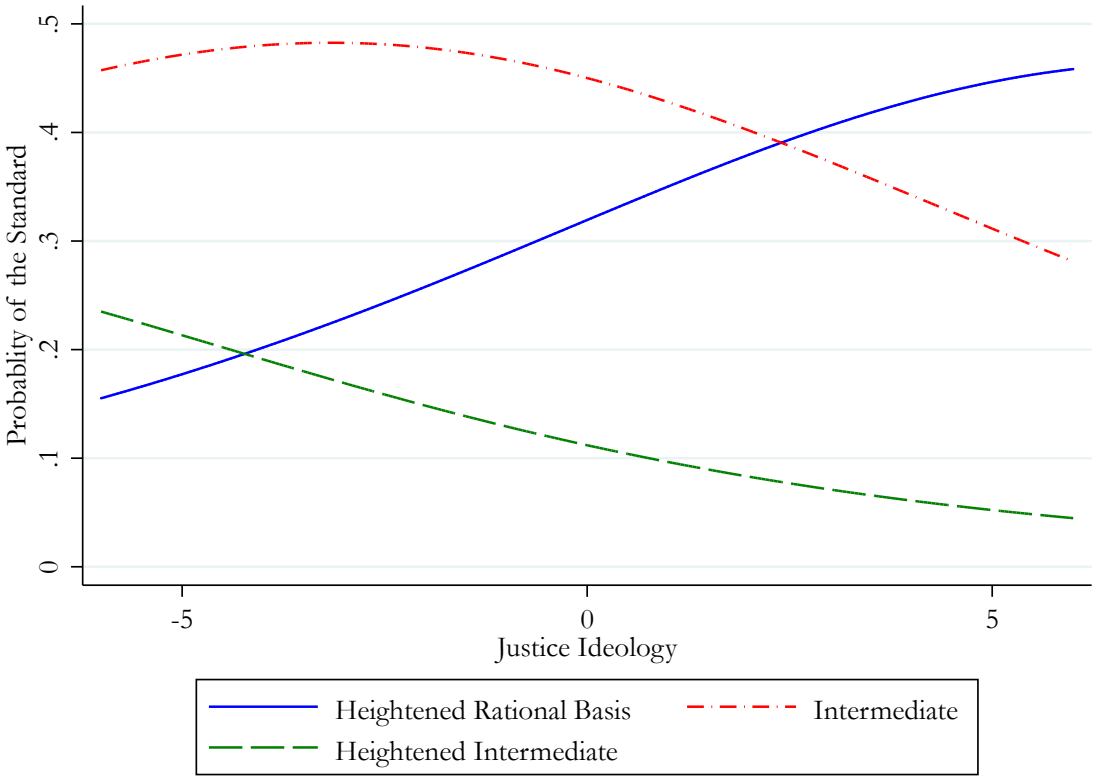
Table 5.6: Marginal Effects by Standard

	Rational Basis (SE) Pvalue	Heightened RB (SE) Pvalue	Intermed. (SE) Pvalue	Heightened Intermed (SE) Pvalue	Strict Scrutiny (SE) Pvalue
Justice Ideology	0.012	0.032	-0.020	-0.017	-0.007
	(0.004)	(0.014)	(0.008)	(0.006)	(0.003)
	0.003	0.002	0.011	0.002	0.010
Median Court of Appeals Law	-0.015	-0.039	0.024	0.020	0.009
	(0.015)	(0.036)	(0.023)	(0.020)	(0.010)
	0.319	0.281	0.294	0.305	0.332
Median Court of Appeals Ideology	-0.442	-1.173	0.0723	0.621	0.270
	(0.187)	(0.456)	(0.372)	(0.231)	(0.089)
	0.018	0.010	0.052	0.007	0.002
Male Challenger*	-0.007	-0.019	0.012	0.010	0.004
	(0.030)	(0.074)	(0.051)	(0.037)	(0.016)
	0.803	0.796	0.808	0.789	0.789
Government Party*	0.016	0.043	-0.025	-0.023	0.004
	(0.016)	(0.042)	(0.025)	(0.024)	(0.001)
	0.314	0.308	0.319	0.324	0.289
Decision Direction*	-0.001	-0.002	0.001	0.001	0.001
	(0.016)	(0.043)	(0.026)	(0.022)	(0.009)
	0.956	0.956	0.956	0.956	0.956
Probability of Standard	0.07	0.32	0.46	0.11	0.04

*=A discrete change from 0 to 1

All other values held at their mean when calculating each marginal effect

Figure 5.5: Predicted Probabilities of Standards by Justice Ideology



Despite these initial conclusions, it may be more helpful to evaluate the graphs of the predicted probabilities from this model. Figure 5.5 shows the predicted probability for each standard of review across different values of justice ideology. [4] For simplicity of presentation, Figure 5.5 only includes the predictions for Heightened Rational Basis, Intermediate Scrutiny and Heightened Intermediate Scrutiny. Appendix three includes a graph of all five standards of review, as well as this graph with 95 percent confidence intervals for the predicted probabilities.

From the figure we can see that for both Intermediate Scrutiny and Heightened Intermediate Scrutiny, as justices become more conservative they are less likely to use these intermediate standards. For Heightened Rational Basis, as justices become

[4] All other values are held constant at their means (for continuous variables) or their modes (for dichotomous variables).

more conservative, they are more likely to use these standards. This supports the argument that there is a connection between justice preferences and the legal rules applied by justices. Specifically, justices apply rules that make it easier for their party to win. The selection of the legal rule is not dispositive, as we see in Figure 5.1 and Figure 5.2, as well as from the fact that case direction is statistically insignificant in Table 5.5 and across all values of the dependent variable in Table 5.6. A particular rule does not necessarily imply a given outcome, but it makes a given outcome easier to attain.

Figure 5.6: Predicted Probabilities of Standards by Median Lower Court Ideology

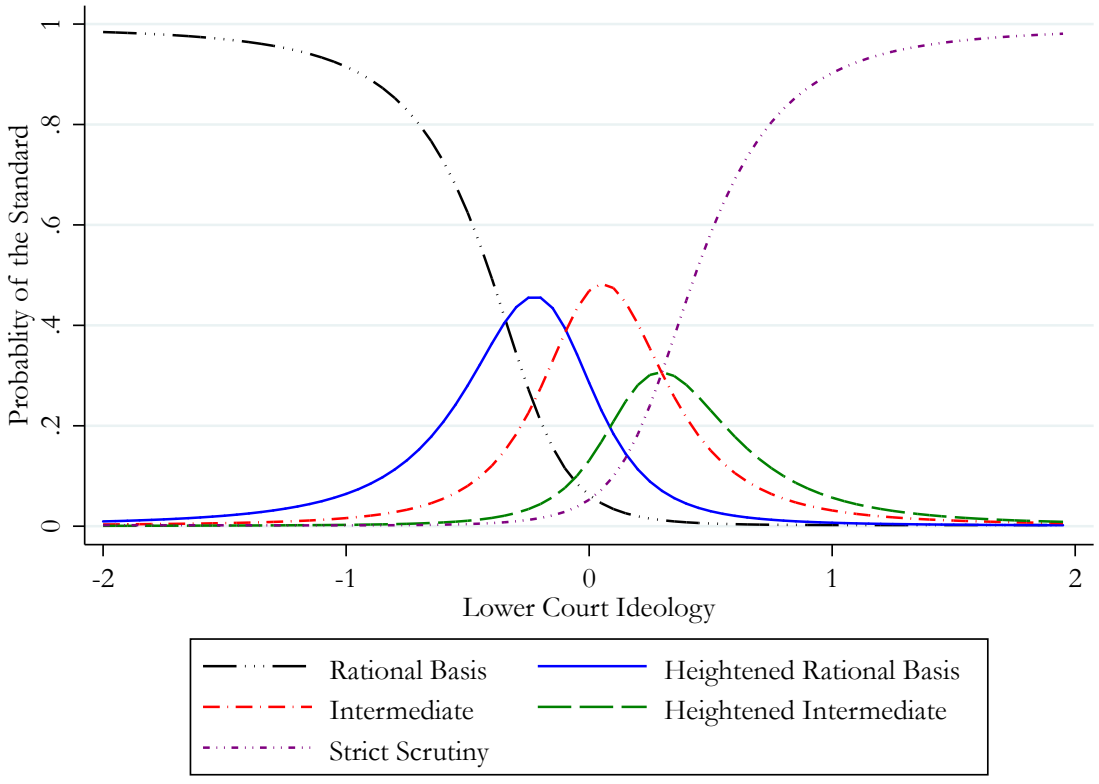


Figure 5.6 supports a similar conclusion about the strategic behavior justices use when applying legal rules. Figure 5.6 illustrates the predicted probability for each

standard of review across different values of median lower court ideology [5]. This figure includes the predictions for Rational Basis, Heightened Rational Basis, Intermediate Scrutiny, Heightened Intermediate Scrutiny, and Strict Scrutiny. Appendix three has the predictions for just Heightened Rational Basis, Intermediate Scrutiny, and Heightened Intermediate Scrutiny and the 95 percent confidence intervals.

Figure 5.6 shows that justices are influenced by the federal judicial hierarchy in the application of legal rules. Specifically, if the lower court is conservative, a justice is more likely to use a higher standard of review. This is a bigger constraint on the lower court. If the lower court votes in favor of the government under a higher standard of review, it is going to be more costly for the lower court. There would need to be a clearer fact pattern to support a verdict in favor of the government. Similarly, if the lower court is liberal, a justice is more likely to use a lower standard of review. This would constrain liberal lower court judges because it is more difficult for individuals to win under this standard. This underscores the strategic concerns that justices employ when selecting a particular standard of review. Moreover, this allows us to reject the attitudes only hypothesis for a more strategic account for Supreme Court decision-making.

5.4 Conclusions

In this section, I provide preliminary support for the argument that the Supreme Court strategically uses legal rules. First, I introduce a new measure of precedent. This measure captures the legal rules employed by the Court and validates the notion that particular legal rules lead to particular outcomes. This is generally supported both at the Supreme Court level and the Court of Appeals level.

Second, I explore the Supreme Court's decision to change precedent. I find support for my hypothesis that as the lower court becomes more divergent, the Supreme

[5] All other values are held constant at their means (for continuous variables) or their modes (for dichotomous variables).

Court is more likely to change precedent. Rather than being a single-minded seeker of policy preferences in a given case, the Supreme Court has a broader interest in the implications of its decisions. Even strategic choice models tend to focus on how the Supreme Court bargains to achieve its most preferred outcome in a given case. Here I show that the strategy of the Supreme Court includes the Court's usage of legal rules and its position in the federal judicial hierarchy.

Finally, this section demonstrates the factors that predict a justice's application of a particular legal rule. Justice ideology and lower court ideology predict the legal rule a justice employs. Justices are strategic actors that pursue policy using legal rules rather than just dispositional outcomes.

6 CONCLUSIONS

This project theoretically and empirically explores the conditions under which the Supreme Court decides to change precedent when issuing a given opinion and explains the strategic concerns that influence the Supreme Court's decision to apply a particular legal rule. Conceptually, there are two contributions. First, precedent is redefined in terms of how the standard of review employed by the Court produces an aggregation of outcomes at the lower court level. Precedent is a tool that the Supreme Court uses in its position as a principal in the federal judicial hierarchy. Precedent can be understood as a legal rule which yields certain outcomes from other actors. Thus, the value precedent is defined by the cases that will be decided by other courts.

Second, using this understanding of precedent, this allows us to re-evaluate how the Court may weigh the payoff of precedent against the payoff from a particular dispositional outcome. The Court does not optimize over a single outcome in a single case. Instead, the Court optimizes over all outcomes in a particular legal area. From this, we can generate predictions of the Supreme Court's behavior. When the cost of a new precedent and the cost of issuing a less preferred outcome are sufficiently low, the Court will elect to issue a new precedent, even when this precedent results in a single outcome that diverges from its most preferred outcome. As these costs increase, the Court becomes more likely to maintain the status quo. Additionally, as the payoff of a particular outcome increases relative to the payoff from precedent increases, the likelihood the Court will maintain the status quo increases. As the payoff of the outcome in a single case decreases relative to the payoff from the precedent, the likelihood the Court will issue a new precedent increases.

This project seeks to explain why a politically minded Supreme Court would issue a decision that diverges from its most preferred ideological outcome. At first blush, it would seem that the Court is being constrained by precedent and acting against

its ideological preferences. Instead, by understanding the broader implications of a given legal standard, the Court may be pursuing a legal standard which resolves a large number of cases within a class of cases in favor of its most preferred outcome. While this does not mean the Supreme Court is beyond ideological considerations, it does indicate that even an ideological court has an interest in precedent.

The implications of this research are three fold. First, this project make a first attempt to theoretically explain the Supreme Court's rational interest in precedent. The institutional concerns of an unchecked Supreme Court find their roots in the founding of the US Constitution. Specifically, the life tenure of justices and the power to review the constitutionality of actions seemed to be an unchecked power to critics of the judiciary (*Federalist Number 78* 1788). Even if the Supreme Court is only motivated by political interests, there are strategic concerns and costs associated with decisions that are contrary to the general principal of stare decisis. The Supreme Court has an interest in preserving its institution and seeing future cases resolved in its most preferred direction.

This theoretical contribution lays the foundation to evaluate the value of precedent beyond the judicial hierarchy. For example, legislators respond to these legal rules as well. When the Supreme Court issues a decision, relying on a particular standard of review, that signals legislators of the type of judicial review that legislation will face. This may increase or decrease the authority of the government to enact legislation in a particular area. Both the Supreme Court and legislators are aware of this and may strategically respond to each other in the pursuit of the goals of both institutions.

Second, this project can be expanded empirically to include other courts (particularly state supreme courts) and other issue areas. The standard of review analysis here can be employed in other areas. For example, recall my early discussion of *Texas vs Johnson*. In this case the Supreme Court used a strict scrutiny standard when striking down the flag burning statute. Free speech is another area which underwent

an evolution in the standard of review of a low burden on the government in the early 1900s to a high burden on the government in the 1960s. Using the same logic and the same coding rules, we can see if these strategic factors are as relevant in other legal areas.

Third, this project makes an attempt to contribute to the broader dialogue on the Supreme Court's role as a "anti-majoritarian institution." Scholars have been discussing the behavior of the Supreme Court for over 60 years. Regardless of our conclusions, it seems that the institutional integrity of the Court remains strong. However, understanding the factors that contribute to the outputs of both law and policy at the Supreme Court has implications for understanding how rights can be protected for groups in the future. This project specifically focuses on the evolution of law in the protection of minority rights. While I argue a generalizable theory, the collection of these cases, and and studying their outcomes and their use of law shed more light on the development of legal protections for specific groups. Understanding how the Court has effectively carved out protections to prevent government sponsored gender based classifications, can help understand how minority protections are developed and evolve. This can allow us to discuss the Court's future role in protecting minority rights.

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APPENDIX A: DERIVING EQUILIBRIUM

Given L_1 plays a and L_2 plays b
Given SC plays A, under what conditions is the expected utility of A' greater than or equal to B'?

$$\begin{aligned} EU_{SC}(AA') &\geq EU_{SC}(AB') \\ (P_{A'} - C_{A'}) + (M_A - C_A) &\geq (P_{B'} - C_{B'}) + (M_A - C_A) \\ (P_{A'} - C_{A'}) &\geq (P_{B'} - C_{B'}) \\ P_{A'} &\geq P_{B'} - C_{B'} + C_{A'} \\ P_{A'} &\geq P_{B'} + C_{A'} - C_{B'} \end{aligned}$$

Under what conditions is the expected utility of A' less than B'?

$$\begin{aligned} EU_{SC}(AA') &< EU_{SC}(AB') \\ (P_{A'} - C_{A'}) + (M_A - C_A) &< (P_{B'} - C_{B'}) + (M_A - C_A) \\ (P_{A'} - C_{A'}) &< (P_{B'} - C_{B'}) \\ P_{A'} &< P_{B'} - C_{B'} + C_{A'} \\ P_{A'} &< P_{B'} + C_{A'} - C_{B'} \end{aligned}$$

The SC will play A' for $P_{A'} \geq P_{B'} + C_{A'} - C_{B'}$
The SC will play B' for $P_{A'} < P_{B'} + C_{A'} - C_{B'}$

Given L_1 plays a and L_2 plays b
Given SC plays B, under what conditions is the expected utility of A' greater than or equal to B'?

$$\begin{aligned} EU_{SC}(BA') &\geq EU_{SC}(BB') \\ (P_{A'} - C_{A'}) + (-M_B - C_B) &\geq (P_{B'} - C_{B'}) + (-M_B - C_B) \\ (P_{A'} - C_{A'}) &\geq (P_{B'} - C_{B'}) \\ P_{A'} &\geq P_{B'} - C_{B'} + C_{A'} \\ P_{A'} &\geq P_{B'} + C_{A'} - C_{B'} \end{aligned}$$

Given SC plays B, under what conditions is the expected utility of A' less than B'?

$$\begin{aligned} EU_{SC}(BA') &< EU_{SC}(BB') \\ (P_{A'} - C_{A'}) + (-M_B - C_B) &< (P_{B'} - C_{B'}) + (-M_B - C_B) \\ (P_{A'} - C_{A'}) &< (P_{B'} - C_{B'}) \\ P_{A'} &< P_{B'} - C_{B'} + C_{A'} \\ P_{A'} &< P_{B'} + C_{A'} - C_{B'} \end{aligned}$$

The SC will play A' for $P_{A'} \geq P_{B'} + C_{A'} - C_{B'}$
The SC will play B' for $P_{A'} < P_{B'} + C_{A'} - C_{B'}$

Given L_1 plays a and L_2 plays b
For $P_{A'} \geq P_{B'} + C_{A'} - C_{B'}$ and therefore SC plays rule A'
Under what conditions is outcome A greater than or equal to outcome B?

$$\begin{aligned} EU_{SC}(AA') &\geq EU_{SC}(BA') \\ (P_{A'} - C_{A'}) + (M_A - C_A) &\geq (P_{A'} - C_{A'}) + (-M_B - C_B) \\ M_A - C_A &\geq -M_B - C_B \\ M_A &\geq C_A - C_B - M_B \end{aligned}$$

Under what conditions is outcome A less than outcome B?

$$\begin{aligned} EU_{SC}(AA') &< EU_{SC}(BA') \\ (P_{A'} - C_{A'}) + (M_A - C_A) &< (P_{A'} - C_{A'}) + (-M_B - C_B) \\ M_A - C_A &< -M_B - C_B \\ M_A &< C_A - C_B - M_B \end{aligned}$$

The SC will play A for $M_A \geq C_A - C_B - M_B$
The SC will play B for $M_A > C_A - C_B - M_B$

Given L_1 plays a and L_2 plays b
For $P_{A'} < P_{B'} + C_{A'} - C_{B'}$ and therefore SC plays rule B'
Under what conditions is outcome A greater than or equal to outcome B?

$$
\begin{aligned}
EU_{SC}(AB') &\geq EU_{SC}(BB') \\
(P_{B'} - C_{B'}) + (M_A - C_A) &\geq (P_{B'} - C_{B'}) + (-M_B - C_B) \\
M_A - C_A &\geq -M_B - C_B) \\
M_A &\geq C_A - C_B - M_B
\end{aligned}
$$

Under what conditions is outcome A less than outcome B?

$$
\begin{aligned}
EU_{SC}(AA') &< EU_{SC}(BA') \\
(P_{A'} - C_{A'}) + (M_A - C_A) &< (P_{A'} - C_{A'}) + (-M_B - C_B) \\
M_A - C_A &< -M_B - C_B \\
M_A &< C_A - C_B - M_B
\end{aligned}
$$

The SC will play A for $M_A \geq C_A - C_B - M_B$
The SC will play B for $M_A > C_A - C_B - M_B$

APPENDIX B: CASES IN ESTIMATION

Case Name	US Cite	Decision Date
REED v. REED	404 U.S. 71	11/22/71
DUNN et al. v. BLUMSTEIN	405 U.S. 330	3/21/72
ALEXANDER v. LOUISIANA	405 U.S. 625	4/3/72
STANLEY v. ILLINOIS	405 U.S. 645	4/3/72
FRONTIERO v. RICHARDSON	411 U.S. 677	5/14/73
KAHN v. SHEVIN	416 U.S. 351	4/24/74
GEDULDIG v. AIELLO et al.	417 U.S. 484	6/17/74
SCHLESINGER v. BALLARD	419 U.S. 498	1/15/75
TAYLOR v. LOUISIANA	419 U.S. 522	1/21/75
WEINBERGER v. WIESENFELD	420 U.S. 636	3/19/75
STANTON v. STANTON	421 U.S. 7	4/15/75
TURNER v. UTAH et al.	423 U.S. 44	11/17/75
MATHEWS v. DE CASTRO	429 U.S. 181	12/13/76
CRAIG v. BOREN	429 U.S. 190	12/20/76
CALIFANO v. GOLDFARB	430 U.S. 199	3/2/77
CALIFANO v. WEBSTER	430 U.S. 313	3/21/77
ORR v. ORR	440 U.S. 268	3/5/79
PARHAM v. HUGHES	441 U.S. 347	4/24/79
CABAN v. MOHAMMED ET UX.	441 U.S. 380	4/24/79
MASSACHUSETTS v. FEENEY	442 U.S. 256	6/5/79
WENGLER v. DRUGGISTS MUTUAL	446 U.S. 142	4/22/80
KIRCHBERG v. FEENSTRA et al.	450 U.S. 455	3/23/81
MICHAEL M. v. SUPERIOR COURT	450 U.S. 464	3/23/81
ROSTKER v. GOLDBERG et al.	453 U.S. 57	6/25/81
MISSISSIPPI UNIVERSITY v. HOGAN	458 U.S. 718	7/1/82
LEHR v. ROBERTSON et al.	463 U.S. 248	6/27/83
HECKLER v. MATHEWS et al.	465 U.S. 728	3/5/84
CLARK v. JETER	486 U.S. 456	6/6/88
J. E. B. v. ALABAMA	511 U.S. 127	4/19/94
UNITED STATES v. VIRGINIA	518 U.S. 515	6/26/96
NGUYEN v. INS	533 U.S. 53	6/11/01

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