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STANDING AND SOCIAL CHOICE: HISTORICAL EVIDENCE

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INTRODUCTION

The true test of any proposed model is neither its complexity nor its novelty. It is, instead, whether the model explains more data than the one that it is intended to supersede. The easiest way to criticize a model, including one built upon economic analysis, is to identify a point of reference, or datum, that the model fails to explain. The more difficult—and more useful—way to challenge a model, however, is to offer up an alternative that explains all the data that the prior model explains, *plus one*. Indeed, any scientific theory, including one based upon economic analysis, is valid only if it is falsifiable.¹ While it is invariably difficult to falsify any theory

¹ See KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability."); see also 2 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 66-91 (2d ed. 1970) (stating that inexplicable data create a crisis for a scientific theory and establish the need to devise new paradigms that account for that data); *infra* note 72.

grounded in a social science, perhaps the best we can do is to embrace a credible theory—one that appeals to our intuition—until an alternative credible theory that accounts for at least one more datum is offered.

The lawyer faces a similar task. The effective lawyer learns to blend the image that affords her client relief with a larger and more compelling jurisprudential image composed of more points of reference—or dots—than that offered by her opponent. She does so by demonstrating that if the court grants her client relief, the picture that she has painted will remain essentially unchanged or, perhaps, even that its most important features will be sharpened. The ineffective lawyer, rather than offering up a new, and hopefully better, picture, simply tries to convince the decisionmaker that the existing picture is wrong. Most scholars who have considered the Supreme Court's standing doctrine have tried to demonstrate that the picture—at least as painted by the Supreme Court—is wrong.

In this two-article series, I hope to demonstrate that the social choice explanation of standing I offer accounts for more standing *and nonstanding* case law, and for more of the history surrounding standing, than do prior explanations. In *Standing Back from the Forest: Justiciability and Social Choice*,² I set out the theoretic framework, parts of which I will further develop here, and in this Article, I will present comprehensive empirical support to demonstrate that the social choice theory of standing meets the stringent test set out above. Together, in these articles, I hope to demonstrate that the social choice model I offer better explains three critical sets of data for assessing standing than does any prior model. In the prior article, I explained how standing fits within a larger jurisprudential framework and why standing is necessarily distinct from associated justiciability doctrines and from the cause of action inquiry.³ In this Article, I further demonstrate that the social choice theory of standing better explains, first, the anomalous historical context in which the modern standing doctrine emerged; and second, and perhaps most importantly, the standing cases themselves. Without understating the difficulty of the assigned task, I also hope to do more. I hope to demonstrate in these articles that standing serves a critical, if rarely understood, purpose in furthering

² Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. (forthcoming Dec. 1995). Due to the simultaneous publication of these articles, cross-references will be to parts rather than to pages.

³ See *id.* part II.B.

the separation-of-powers principles upon which our system of government ultimately rests.

The task before us then is, in a sense, as lawyerly as it is academic. Scholarship explaining that the Supreme Court's standing picture is wrong is abundant. Some of it has been written by now-sitting Supreme Court justices.⁴ In this Article, I will not try to demonstrate what is wrong with this picture;⁵ instead, using social choice theory, I will try to offer up a better picture, one that encompasses more data than has been captured in prior snapshots. If I succeed, I will argue that it is because I have taken a sufficient number of steps back, enough to embrace within my field of vision the implications of the theory of social choice for standing. Social choice is used here as a positive, rather than normative, tool. But the analysis has significant normative implications for the constitutional separation of powers between the Supreme Court—and the federal judiciary generally—and Congress.⁶

In Part I, I provide an overview of the social choice literature and framework as it relates to standing.⁷ Part II will place standing in its historical context. In that Part, I will use the social choice framework developed in Part I to demonstrate that, in contrast with prior relevant Supreme Courts, the Burger and Rehnquist Courts were particularly prone to possessing multi peaked preferences.⁸ I will then explain how and why the Court superimposed its three-prong standing test, initially created in the context of interpreting

⁴ See STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1094 (2d ed. 1985) (positing that, in cases involving reliance upon a federal statute, the standing inquiry is inseparable from a determination on the merits, a position not taken in the third edition of the casebook); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (arguing that the constitutional foundations of standing rest in part on the desire to insulate the executive branch from judicial interference).

⁵ While I will criticize particular applications of standing, *see infra* part III.D (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)), I will argue that particular misuses do not undermine the critical functions that the standing doctrine serves.

⁶ The model is set out in detail in the predecessor article. *See Stearns, supra* note 2. Familiar readers can skip ahead to Part II of this Article, which will begin the historical analysis of the Burger and Rehnquist Courts. Unfamiliar readers are invited to read Part I, which will summarize the essential argument, and to refer to the prior article, which is cross-referenced throughout, for greater detail.

⁷ While Part I will largely summarize my prior work, it will also offer important new insights on the difference between constitutional law and constitutional process, which help to explain the separation-of-powers underpinnings of the modern standing formulation. *See infra* part I.A.

⁸ Multi peakedness is defined, *see infra* part I.A, and illustrated visually, *see infra* note 17.

section 10(a) of the Administrative Procedure Act,⁹ onto all federal court claimants, even those relying upon the Constitution for their substantive claims.¹⁰ Finally, Part III will provide a comprehensive overview of the modern standing case law using the social choice framework set out in the prior article and in Part I. Part III will also explore the relationship between standing and other important bodies of case law, most notably criminal procedure. I will conclude by demonstrating that the social choice theory of standing better accounts for the historical context in which modern standing doctrine has emerged and the standing cases themselves than do prior theories.

I. OVERVIEW: THE SOCIAL CHOICE THEORY OF STANDING

A. *Constitutional Law Versus Constitutional Process*

In *Standing Back from the Forest: Justiciability and Social Choice*, I explained that standing has emerged as a logical and predictable strategy employed by Supreme Court justices responding to interest group incentives to manipulate the critical path of decisionmaking when the Supreme Court lacks a Condorcet-winning preference, or alternatively stated, when the Court's preferences are multi-peaked.¹¹ The analysis stems from a critical insight drawn from *The Misguided Renaissance of Social Choice*,¹² that, as a result of the obligation of the Supreme Court—along with virtually all appellate courts—to resolve cases properly before it, the Court is unable to employ a Condorcet-producing decisional rule.¹³ Instead, it employs a decisional rule that, while not Condorcet-producing, is capable of ensuring outcomes in all cases.¹⁴ Within particular

⁹ Ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702 (1988)).

¹⁰ See *infra* part II.B.2.

¹¹ See Stearns, *supra* note 2. The twin concepts of Condorcet-winning preferences and multi-peakedness are explained below. See *infra* notes 17-20 and accompanying text.

¹² Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994).

¹³ See *id.* at 1258-71.

¹⁴ See *id.* A minor exception arises in cases that involve three or more remedies. That category, which was the subject of John M. Rogers, "I Vote This Way Because I'm Wrong": *The Supreme Court Justices as Epimenides*, 79 KY. L.J. 439 (1990-91), remains indeterminate regardless of decisional rule. But case-by-case voting, a non-Condorcet rule, cures the more common indeterminacy that would arise when the Court lacks a Condorcet-winning option over the underlying issues in a case that requires the

cases, the Court—along with virtually all appellate courts—employs case-by-case, rather than issue-by-issue, decisionmaking. Case-by-case decisionmaking enables the Court to resolve all cases, even those for which it lacks a Condorcet winner.¹⁵ If the Court instead employed a Condorcet-producing rule, for example issue-by-issue decisionmaking, it would locate all available Condorcet winners, but would cycle when no Condorcet winner is present.¹⁶

To understand the nature of Supreme Court voting rules, we will need to review briefly the Condorcet paradox. The paradox reveals that in a group of three or more persons, each with preferences that satisfy the condition of transitivity (referred to in social choice as rationality), the group's preferences, when aggregated, may defy rationality. Three persons with the following ordinal rankings: (1) A,B,C; (2) B,C,A; (3) C,A,B, will discover an anomaly when they try to choose their preferred option through some commonly employed voting techniques. If, for example, the group's members try to select their preferred option using unlimited pairwise contests, they will soon discover that while they prefer A to B and B to C, they simultaneously prefer C to A.¹⁷ In the

binary choice to affirm or reverse. See Stearns, *supra* note 12, at 1266-67 n.176.

¹⁵ See Stearns, *supra* note 12, at 1270-71.

¹⁶ See *id.* at 1258-71 (providing illustration).

¹⁷ The same group preferences can be depicted on a graph:

While social choice, as with economics generally, eschews interpersonal utility comparisons, *see id.* at 1249 n.106, for the limited purpose of illustrating multi-peakedness graphically, I have assumed that each marginal ranking is worth one util per person and that interpersonal utilities can thus be compared. The options appear across the horizontal axis and the utils appear across the vertical axis. Each person is identified

language of social choice, a branch of economics that finds its conceptual origin in the Condorcet paradox,¹⁸ unlimited pairwise voting leads to a "cycle" when the group lacks a Condorcet-winning preference. A cycle arises when, for any proposed outcome, an alternative outcome has the support of a majority in a pairwise context.¹⁹ Because this holds true for any proposed outcome, no outcome is stable under this voting regime.

With some sets of preferences, the same voting procedure can lead to stable results even if there is no majority first-choice candidate. Thus, if the group's preferences are instead (1) A,B,C; (2) B,C,A; (3) C,B,A (note that only person 3's preferences have been changed), unlimited pairwise voting would produce a stable outcome, option B.²⁰ While option B is not the first choice of a

at the top of her utility curve. P1, for example, receives three utils if A is selected, two utils if B is selected, and one util if C is selected. P2 receives three utils for B, two for C, and one for A. The curve for P2 intersects the midpoint of the right wall and resumes at the midpoint of the left wall. To complete the visual conceptualization, imagine cutting the graph into a rectangle, rolling it into a tube, and taping the left and right walls together. The left and right walls would then be continuous. P3 begins at the upper left corner, representing C, after the walls are taped together. As the visual depiction reveals, the group's preferences are multi-peaked. For any given outcome, an alternative has the support of a majority. Thus, at P3's preferred option C, P1 and P2 would improve by one util each by moving to B. Majority support also exists for moves from points B and C and, as a result, the group moves from peak to peak to peak, but never rests. See Stearns, *supra* note 2, part I.A.

¹⁸ See Stearns, *supra* note 12, at 1221-25.

¹⁹ See *id.* at 1233-47 (illustrating cycles in market and legislative contexts). In game theory, a related branch of economics, a cycle is said to arise in the absence of a core. See John S. Wiley, Jr., *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 558 (1987).

²⁰ The revised group preferences can also be graphically illustrated:

majority of the group's members, it will defeat either of the other options in pairwise contests. Option B is referred to as the Condorcet winner.

While social choice theorists often evaluate voting rules based upon their ability to ensure that available Condorcet winners prevail, the decisional rules of some very important collective decisionmaking bodies have evolved in a manner that thwarts the Condorcet criterion.²¹ Institutions that do not have the ability to remain inert when faced with preferences that cycle employ rules that, while they do not satisfy the Condorcet criterion, ensure a collective outcome regardless of the group's preferences.²² In *The Misguided Renaissance of Social Choice*, I demonstrated that the Supreme Court employs case-by-case voting, rather than issue-by-issue voting, because the former rule, while it fails to satisfy the Condorcet criterion, ensures a collective outcome in all cases.²³ In *Standing Back from the Forest*, I extended the analysis to demonstrate that while case-by-case decisionmaking prevents cycling in particular cases, it cannot prevent intertemporal cycling, namely cycling that occurs over time and across cases.²⁴ One commonly employed voting rule that prevents cycling, including intertemporal cycling, is a prohibition on reconsideration of defeated alternatives.²⁵ I

Again, each person is identified at the peak of her utility curve. In contrast with the prior graphic, *see supra* note 17 (demonstrating the absence, due to multi peakedness, of a stable outcome), in this graphic, B, which provides P2 with three utils, and P1 and P3 with two utils each, is a stable outcome. Any move from B (to either A or C) will improve the plight of only one player and thus fail to sustain majority support. While B is not the first-choice candidate, it will defeat any alternative candidate in a pairwise contest. B is known as the Condorcet winner. *See Stearns, supra* note 12, at 1252-57.

²¹ *See* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY ch. 2.1 (forthcoming 1996).

²² *See id.* (illustrating non-Condorcet-satisfying rules used in appellate courts and in elections).

²³ *See* Stearns, *supra* note 12, at 1258-71. As stated above, *see generally* Rogers, *supra* note 14, a minor exception arises in the context of three-remedy cases. Another institution that by design employs a non-Condorcet voting rule is elections. *See* STEARNS, *supra* note 21, ch. 2.1 (discussing the evolutionary significance of Condorcet and non-Condorcet rules in elections and in appellate court voting); *cf.* Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 979-81, 1015-17, 1031-35 (1989) (observing that, within legislatures, which generally prefer Condorcet-producing rules, committee chairs are selected through non-Condorcet plurality voting, with or without a runoff).

²⁴ *See* Stearns, *supra* note 2, part I.A (illustrating intertemporal cycling and positing its connection to the evolution of stare decisis); *see also* Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41, 83-106 (1994) (illustrating intertemporal cycling with English tort cases).

²⁵ In a group with non-Condorcet preferences (1) A,B,C; (2) B,C,A; and (3) C,A,B,

further demonstrated that in the Supreme Court, *stare decisis* operates as a proscription on reconsideration of defeated alternatives that prevents intertemporal cycling.²⁶

Social choice, and specifically Arrow's Theorem, reveals a fundamental tension between five voting conditions—each of which is ultimately grounded in a majoritarian norm, and each of which is commonly associated with fair collective decisionmaking²⁷—and the condition of collective rationality, namely the ability to translate three or more individually transitive orderings into a transitive group ordering.²⁸ Because no institution can simultaneously satisfy the five fairness conditions and the condition of rationality, Arrow's Theorem provides a critical set of criteria with which to evaluate the evolution of decisional rules within collective decisionmaking bodies. Stated differently, a corollary to Arrow's axiomatic proof reveals that in any given collective decisionmaking institution that is functional (meaning only that it issues collective decisions), at least one of the five fairness conditions or the condition of rationality must be sacrificed.²⁹ To ensure collective outcomes

any two pairwise votes will produce an outcome, but will do so by preventing a final pairwise contest between the option defeated in the first round and the prevailing option. With a prohibition on reconsideration of defeated alternatives, the following voting path, A v. B (A wins); A v. C (C wins), produces outcome C even though B would have defeated it, revealing a cycle. Alternative agenda setters could set voting paths leading to their preferred outcomes, A or B. As explained below, *see infra* text accompanying notes 31-32 and part I.C.1, this voting rule affords significant power to the agenda setter.

²⁶ See Stearns, *supra* note 2, part I.A. For an illustration of how *stare decisis* prevents intertemporal cycling, see *infra* text accompanying notes 54-65.

²⁷ See *infra* part I.C.2 (describing range, universal domain, unanimity, independence of irrelevant alternatives, and nondictatorship).

²⁸ See Stearns, *supra* note 12, at 1283-85.

²⁹ This explains the framework employed in *The Misguided Renaissance of Social Choice*, see Stearns, *supra* note 12, in evaluating proposals based upon Arrow's Theorem to expand judicial review. In contrast with legal scholars who employ Arrow's Theorem to demonstrate the incompetence of Congress in aggregating preferences as a justification for expanding the Supreme Court's decisional authority, I argued that each institution is imperfect when compared with the Arrowian ideal (namely the impossible institution that meets all five fairness conditions and the rationality criterion) and that each institution should be evaluated based upon which Arrowian criteria are met and which are relaxed to render those institutions functional. See *id.* at 1257-85. Only after revealing each institution's Arrowian deficiencies (and Arrow's Theorem proves that each institution that functions will have at least one deficiency), and the significance of the identified deficiencies to that institution's assigned tasks, can we evaluate whether to shift decisional authority from one institution to another. As demonstrated below, see *infra* part I.C.2, the analysis follows from a corollary to Arrow's axiomatic proof, namely that, for any collective decisionmaking institution that functions, at least one of six Arrowian criteria must

within individual cases, the Supreme Court employs a non-Condorcet voting rule, namely case-by-case voting.³⁰ While that rule compromises collective rationality, it ensures a collective outcome in each case. In addition, to prevent intertemporal cycling, the Court, by employing stare decisis, presumptively prohibits reconsideration of defeated alternatives.

While stare decisis reduces the doctrinal indeterminacy that would arise over time and across cases if the Court's preferences cycled, it does so at a cost. While a proscription on reconsideration of defeated alternatives prevents cycles, it also provides tremendous power to whomever is given the authority to set the agenda.³¹ Because the combination of agenda-setting authority and a non-Condorcet voting rule affords the agenda setter with disproportionate influence over collective outcomes, the prohibition on reconsideration of defeated alternatives violates the Arrovian fairness criteria, and because the proscription on reconsideration prevents a pairwise contest between the initially defeated option and the ultimate winner, someone must be afforded the authority to determine which votes will—and will not—be taken. Stated differently, someone must be given the power to set the critically important voting path. With a proscription on reconsideration of defeated alternatives in place, the agenda setter has complete power to determine the collective outcome.³² In choosing the relevant path, and thereby selecting the outcome, the agenda setter effectively thwarts the will of a majority of the group's members.

The phenomenon of path dependency can be demonstrated with actual Supreme Court cases. In *Standing Back from the Forest*, I demonstrated that the same two actual Supreme Court cases, presented in different orders, would result in precisely opposite outcomes in *both* cases if we assume that the Court adheres to stare decisis.³³ In the Supreme Court, as in any appellate court, the

be relaxed.

³⁰ See Stearns, *supra* note 12, at 1270-71.

³¹ In a group with non-Condorcet-winning preferences, the agenda setter can control the outcome if each group member votes strictly in accordance with his or her ordinal ranked preferences. If the group members depart from those preferences, the voting rules will depart from the Arrovian criterion of independence of irrelevant alternatives. In legislatures, Arrovian Independence is generally relaxed. See *id.* at 1278-80.

³² The discussion thus far assumes principled voting, meaning adherence to the Arrovian condition of independence of irrelevant alternatives, and ordinal ranking. I will discuss the significance of relaxing each of these assumptions below. See *infra* part I.D.

³³ See Stearns, *supra* note 2, part I.B; see also *infra* part I.C.1 (summarizing the

doctrine of stare decisis affords those who control the order of case presentation not only the power to determine the relative timing of case decisions, but also and more importantly, the substantive content of case decisions.³⁴ Recognizing that stare decisis renders the evolution of legal doctrine path dependent, Judge Easterbrook has advocated relaxing stare decisis in constitutional cases.³⁵ He states: "[t]he order of decisions has nothing to do with the intent of the framers or any of the other things that might inform constitutional interpretation."³⁶ As these articles reveal, however, in evaluating the significance of stare decisis, one must distinguish the substantive corpus of constitutional law from what I will refer to as constitutional process.³⁷ By constitutional process I mean the institutional structures and decisionmaking rules through which the substantive corpus of constitutional law is made.

Judge Easterbrook is undoubtedly correct that nothing in the substantive corpus of constitutional law grounds the outcomes of case decisions in the fortuitous order of case presentations. But the social choice analysis offered in these articles reveals that fortuity-based paths may well be grounded in important norms associated with fair constitutional process. Briefly stated, my thesis is that while a prohibition on reconsideration of defeated alternatives, including, for example, stare decisis, produces path dependency, it need not conduce to path manipulation.³⁸ As applied to the

analysis).

³⁴ For an illustration, see *infra* text accompanying notes 54-65. While Frank Easterbrook has observed that stare decisis renders Supreme Court precedents path dependent, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 819-20 (1982) (asserting that, with stare decisis, "everything depends on the fortuitous order of decision"), these articles provide a critically different perspective on stare decisis and its relationship to standing than has been offered in the literature thus far.

³⁵ See Easterbrook, *supra* note 34, at 820.

³⁶ *Id.*

³⁷ For a more detailed response to Judge Easterbrook's analysis, see *infra* text accompanying notes 89-98.

³⁸ Professor Saul Levmore has presented a similar hypothesis in distinguishing the use of motion-and-amendment and succession voting in parliamentary procedure. Both rules, because they prevent reconsideration of defeated alternatives, produce path dependent results. Under motion-and-amendment, the committee chair, given her power to recognize motions, can exert substantial control over the voting path. See Levmore, *supra* note 23, at 1024-25 (observing that "well-informed and clever chairpersons can manipulate motion-and-amendment voting by recognizing favored members first so that their motions need not survive a great many votes," and that "the chair's power is only increased by its ability to rule secondary amendments 'not germane'"). In contrast, under succession voting, the body votes upon the motions

Supreme Court, *stare decisis* ensures that the evolution of legal doctrine will depend upon the order—or path—of case decisions. At the same time, standing—by presumptively grounding the order of case decisions in fortuitous factors beyond the control of the litigants themselves—grounds the critical path of case decisions in fair constitutional process.

In the last twenty-five years, standing has furthered those critically important process-based norms in a manner that is not replicated by any other Supreme Court doctrine.³⁹ In the discussion that follows, I will explain why the Supreme Court—like all appellate courts—employs non-Condorcet decisional rules that can thwart the will of a present majority of its members within cases and that inevitably produce path dependent results across cases. I will then explain how *stare decisis*, operating together with standing, helps to prevent path manipulation, thus improving both the fairness and rationality of constitutional decisionmaking.

B. *Cyclical Preferences Within a Single Case:*
Kassel v. Consolidated Freightways Corp.

*Kassel v. Consolidated Freightways Corp.*⁴⁰ presented a challenge to the constitutionality, under the dormant Commerce Clause, of an Iowa law prohibiting (with exceptions) sixty-five-foot trailers on highways within the state.⁴¹ The Court issued three opinions: a plurality opinion, written by Justice Powell; a concurrence, written by Justice Brennan; and a dissent, written by then-Associate Justice Rehnquist. The three justices distilled the case to two issues: first, whether the trial court should have applied the balancing test first announced in *Raymond Motor Transportation, Inc. v. Rice*⁴² (instead

in the order in which they are made. Levmore explains that “since it is difficult for the chair to judge the quantity of motions yet to be proposed, it is difficult to position one’s favorite correctly,” under this procedure. *Id.* at 1025. Thus, while succession voting does not prevent the path dependency of outcomes, it may significantly reduce the power of the committee chair to manipulate that path.

³⁹ The analysis in the text does, however, have significant implications for the Supreme Court’s other justiciability doctrines, including most notably, ripeness and mootness. Each of these doctrines can be explained as presumptively prohibiting persons or groups from controlling the critical path of case decisions by presenting cases in a manner not dictated by factors largely beyond their control.

⁴⁰ 450 U.S. 662 (1981).

⁴¹ See *id.* at 669.

⁴² 434 U.S. 429, 433 (1978) (noting that the “inquiry under the Commerce Clause [does not end] . . . without a weighing of the asserted safety purpose against the degree of interference with interstate commerce”).

of a mere rational basis test), and second, whether the trial court had properly considered evidence introduced for the first time at trial or, instead, whether the court should have limited itself to the evidence that the state legislature actually considered.⁴³ The anomaly of Supreme Court voting rules can be demonstrated by considering each of the Court's three opinions. Justice Powell, for a plurality, held that the Iowa statute violated the dormant Commerce Clause.⁴⁴ He determined that the appropriate test is the *Raymond* balancing test and that the court below had correctly considered trial evidence.⁴⁵ Justice Brennan, in concurrence, would have ruled, instead, that the appropriate test is a rational basis test and that the trial court should have considered only that evidence presented in the legislature.⁴⁶ Finally, Justice Rehnquist, in dissent, would have upheld the statute, applying a rational basis test and considering evidence admitted at trial.⁴⁷ Assume, as is consistent with all three opinions, that if the trial court had employed the more lenient rational basis test and considered *more* rather than *less* evidence with which to find a rational basis, including that admitted at trial by the state's attorneys, the result would have been, per Justice Rehnquist, to uphold the statute.⁴⁸

Now consider what would happen if the Court were to use issue-by-issue voting, which has the benefit of identifying available Condorcet winners, rather than case-by-case voting.⁴⁹ On the first

⁴³ See *Kassel*, 450 U.S. at 671-76.

⁴⁴ See *id.* at 678-79.

⁴⁵ See *id.*

⁴⁶ See *id.* at 680-82 (Brennan, J., concurring).

⁴⁷ See *id.* at 689-96 (Rehnquist, J., dissenting).

⁴⁸ Otherwise, the Court's resolution of the two legal issues presented would not affect the outcome of the case.

⁴⁹ It is not my position that the *Kassel* Court missed a Condorcet winner, but rather that *Kassel* illustrates why the Court employs a non-Condorcet voting rule. Over the three relevant questions, the two underlying legal issues and the binary choice of outcome, the preferences of the justices cycle, demonstrating the *absence* of a Condorcet winner. Stated differently, the Court's three relevant majorities (recall that any two named justices represent at least five votes), one for applying the rational basis test (Brennan & Rehnquist, JJ.), one for admitting trial evidence (Powell & Rehnquist, JJ.), and one for striking the Iowa statute (Powell & Brennan, JJ.), cannot simultaneously be satisfied. See *infra* note 62. In my discussion of *Kassel* in *The Misguided Renaissance of Social Choice*, I gave a mistaken impression on this issue. After explaining that issue-by-issue voting produces the dissenting result, I stated, "[t]hus Supreme Court voting procedures did not identify the Condorcet winner in this case." Stearns, *supra* note 12, at 1257. I should have stated instead that the absence of a Condorcet winner (or the presence of a cycle) in *Kassel* helps to explain the Court's choice of a non-Condorcet rule.

issue, which substantive test to apply, Justices Brennan and Rehnquist win two to one over Justice Powell, in favor of the rational basis test. On the second issue, whether to allow trial evidence not considered by the state legislature, Justices Powell and Rehnquist win two to one over Justice Brennan, holding that such evidence should be admitted. But if the Court employs a rational basis test and permits the trial court to consider evidence introduced by the state's attorneys, then based upon the assumption stated above, the result is to affirm, rather than to reverse, which is Justice Rehnquist's position *in dissent*. The anomaly is illustrated in the table below.⁵⁰

	Substantive Standard	Permissible Evidence	Preferred Ruling
Powell	<i>balancing test</i>	<i>trial evidence</i>	<i>reverse</i>
Brennan	<i>rational basis</i>	<i>no trial evidence</i>	<i>reverse</i>
Rehnquist	<i>rational basis</i>	<i>trial evidence</i>	<i>affirm</i>
Issue-by-issue outcome (hypothetical)	rational basis	trial evidence	affirm
Case-by-case outcome (actual)			<i>reverse</i>

TABLE 1: *Kassel v. Consolidated Freightways Corp.*

The question then arises why the Court has issued an opinion that on an issue-by-issue basis thwarts the will of a majority of its members. In *The Misguided Renaissance of Social Choice*, I demonstrated that the Court employs case-by-case rather than issue-by-issue voting because the latter rule, while capable of ensuring that available Condorcet winners prevail, is incapable of ensuring a collective outcome in the absence of a Condorcet winner.⁵¹ To see the problem that issue-by-issue voting would pose, consider the three majorities in *Kassel*: (1) a majority endorsing a rational basis test (Brennan & Rehnquist, JJ.); (2) a majority approving the

⁵⁰ The actual positions taken in the different opinions and the actual case outcome appear in italics; the hypothetical outcomes based upon issue-by-issue rather than case-by-case voting are in Roman typeface.

⁵¹ See Stearns, *supra* note 12, at 1259-71 (providing examples and potential outcomes under both types of voting).

admission of trial evidence (Powell & Rehnquist, JJ.); and (3) a majority striking down the Iowa statute (Powell & Brennan, JJ.). Given these three majorities, if the Court employed a Condorcet-producing voting rule, such as an unlimited motion-and-amendment procedure, the Court's preferences would cycle.⁵² Thus, a motion to consider trial evidence would pass, as would a motion to employ the rational basis test. The two-motion combination would appear to produce Justice Rehnquist's dissenting outcome, *except* that a third motion to strike the statute will also pass. The motion process can then begin all over again, but, because there is no Condorcet winner, the Condorcet voting rule has no stopping point. As a result, employing an unlimited motion-and-amendment procedure would not allow the Court to meet its collective obligation to resolve those cases properly before it.⁵³

To avoid this problem and to ensure that it can resolve all cases properly before it, the Supreme Court, along with virtually all appellate courts, employs case-by-case decisionmaking, even though that rule, as in *Kassel*, sometimes thwarts the preferences of a majority of the Court's members on an issue-by-issue basis. But, while case-by-case decisionmaking avoids the problem of cycling in particular cases, it does not avoid the problem of cycling altogether. Specifically, case-by-case voting does not solve the problem of intertemporal cycling, namely cycling that arises over time and across cases.

C. Cyclical Preferences over Time and Across Cases: *Seattle* and *Crawford*

The relationship between stare decisis and standing is best illustrated by considering two companion cases issued on the same day, *Crawford v. Board of Education*⁵⁴ and *Washington v. Seattle School*

⁵² This holds true not only for motion and amendment, but also for any Condorcet rule. See WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 69 (1982). Condorcet-producing rules all lead to the same place when a Condorcet winner is available and to cycling when there is no Condorcet winner. See *id.* at 67-69. In contrast, different non-Condorcet rules can lead to different outcomes, whether or not the group has a Condorcet-winning preference. See *id.*; see also Stearns, *supra* note 2, part I.A.

⁵³ Some readers might respond that standing itself avoids the Court's collective obligation to decide cases. As these articles demonstrate, however, the avoidance explanation of standing is both incomplete, see *infra* part I.C.1, and less robust than the social choice explanation of standing.

⁵⁴ 458 U.S. 527 (1982).

District No. 1.⁵⁵ In *Crawford*, the Supreme Court upheld against a Fourteenth Amendment Equal Protection Clause challenge a California constitutional amendment preventing state courts from ordering integrative busing unless the court first determined that a federal court would have so required based upon the Equal Protection Clause of the Fourteenth Amendment.⁵⁶ In *Seattle*, the same Court struck down on equal protection grounds a Washington referendum that prevented local school boards from ordering integrative busing unless the school board first determined that the federal or state constitutions would so require.⁵⁷ Justice Marshall, who alone dissented in *Crawford*, stated that he believed the two cases were constitutionally indistinguishable.⁵⁸ In his *Seattle* dissent, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, Justice Powell also demonstrated that he believed that the two cases could not be distinguished.⁵⁹ Setting aside the substantive question whether the two cases are distinguishable—which, in fact, does not matter for the analysis to follow—these two cases reveal precisely the same anomaly that arose in *Kassel*. The only difference is that here the anomaly arose across two cases, while in *Kassel* it arose within a single case.

As before, there are three irreconcilable majorities: (1) a majority to uphold the *Crawford* amendment; (2) a majority to strike the *Seattle* initiative; and (3) a majority composed of Chief Justice Burger and Justices Marshall, Powell, Rehnquist, and O'Connor, to decide the cases the same way regardless of whether the state laws are upheld or struck down. Because these majorities arose across cases, rather than within a given case, the case-by-case voting rule did not operate to prevent the Court from revealing that its

⁵⁵ 458 U.S. 457 (1982).

⁵⁶ See *Crawford*, 458 U.S. at 529, 545.

⁵⁷ See *Seattle*, 458 U.S. at 462-63, 487.

⁵⁸ See *Crawford*, 458 U.S. at 547-48 (Marshall, J., dissenting) ("I fail to see how a fundamental redefinition of the governmental decision-making structure with respect to the same racial issue can be unconstitutional when the State seeks to remove the authority from local school boards, yet constitutional when the State attempts to achieve the same result by limiting the power of its courts.").

⁵⁹ The only distinction that Justice Powell cited between the two state laws was that while the Washington initiative permitted integrative busing based upon either the state or federal constitutions, the California amendment permitted integrative busing only to remedy a violation of the federal constitution. See *Seattle*, 458 U.S. at 490 n.3 (Powell, J., dissenting). That distinction, however, would appear to cut in precisely the opposite direction of the two case results because it affords the Court with a broader basis with which to uphold the Washington initiative than to uphold the California amendment.

preferences cycled. If the Supreme Court revealed that its preferences cycled over time and across cases, the state of the law would be entirely uncertain. To prevent the doctrinal uncertainty that would result if the Supreme Court revealed that its preferences cycled over time and across cases—and, more importantly, to prevent interest groups from opportunistically benefitting from the resulting doctrinal uncertainty—the Supreme Court employs *stare decisis*.⁶⁰

Social choice reveals that one device commonly employed to prevent intertemporal cycling is a proscription on reconsideration of rejected motions. To cycle, an institution requires as many votes as available options.⁶¹ In *Crawford* and *Seattle*, the Court faced the equivalent of three motions, each with majority support: (1) uphold the *Crawford* amendment; (2) strike the *Seattle* initiative; and (3) decide the cases the same way. To demonstrate that the Court's preferences cycled (and that the three majorities could not be satisfied simultaneously), the Court would have needed to take the equivalent of three pairwise votes. With only two votes and three options, the institution will achieve a stable outcome, although the outcome will be arbitrary in that the order in which the votes are taken, or the voting "path," will fully determine the substantive outcomes. With only two votes and three options, the outcome will inevitably thwart the will of a present majority of the Court's members.⁶²

⁶⁰ Because the *Crawford* and *Seattle* cases were decided on the same day, *stare decisis* did not operate as a constraint that prevented the Court from revealing that its preferences cycled. But because of the Court's voting rules, the two cases did not produce doctrinal uncertainty; instead, they produced a highly attenuated distinction, one embraced by only a minority of the Court. Under the *Crawford* and *Seattle* rulings, states can retreat from integrative busing when the facts resemble those in *Crawford*, but they cannot do so when the facts resemble those in *Seattle*. If that seems odd, given that a majority of the Court rejected the significance of any factual distinction between these two cases, that is the point. Because the Court employs a non-Condorcet voting rule, its rulings will sometimes thwart the will of a majority of its members. While the simultaneous rulings in these cases reveal that the Court's preferences cycled, the cycle has no legal significance. Instead, the distinction drawn in the two cases, however attenuated and even if embraced by only a minority of the Court, becomes the law. Worse yet, it becomes constitutional law. While revealed cycles have no doctrinal significance, as these articles demonstrate, they have tremendous jurisprudential significance in explaining the Court's use of *stare decisis* and standing.

⁶¹ See Stearns, *supra* note 2, part I.A.

⁶² If the cases are decided the same way, one of the majorities in *Crawford* or *Seattle* will find its will suppressed; if the cases are decided differently, the majority favoring sameness will find its will suppressed.

In the Supreme Court, intertemporal stare decisis, meaning the presumptive obligation of the justices to adhere to precedents of the Court, operates as a proscription on reconsideration of rejected motions.⁶³ In turn, stare decisis provides substantial power to whoever is authorized to determine the path in which cases are presented to the Supreme Court. Consider, for example, what would have happened, with a stare decisis rule in place, if *Crawford* and *Seattle* were decided a year apart instead of on the same day. If *Crawford* had arisen first, the majority who thought the two cases indistinguishable would have upheld the *Seattle* initiative, with the result that both state laws would have survived the equal protection challenges. If, instead, *Seattle* arose first, the majority who thought the two cases indistinguishable would have struck the *Crawford* amendment, with the result that both state laws would have been struck down. In short, the person or group who controls the order in which these two cases are decided would fully control the outcomes in *both* cases.⁶⁴

This analysis reveals that stare decisis, a doctrine that ameliorates the doctrinal uncertainty that arises in the absence of Condorcet-winning options over time and across cases, creates a problem of its own, namely the power of interest groups to control the substantive outcomes of cases by manipulating the order of case presentations. Stated differently, while stare decisis inevitably renders Supreme Court doctrine path dependent, the question remains whether it inevitably renders Supreme Court doctrine subject to path manipulation.

With stare decisis in place, the second case will present the question whether the first case governs. Assuming that they adhere to stare decisis, those justices who think that the two cases are constitutionally indistinguishable will not consider the question of

⁶³ See Stearns, *supra* note 2, part I.A (explaining stare decisis in social choice terms); see also *id.* (distinguishing intertemporal stare decisis (the presumptive obligation of members of the same court to adhere to precedents issued by that court as a whole) from hierarchical stare decisis (the obligation of lower courts to adhere to precedents issued by higher courts) and horizontal stare decisis (the obligation of panels or judges within a given court to adhere to precedents issued by prior panels or judges on the same court)); *id.* part II.B (explaining that intertemporal stare decisis is a presumptive, rather than absolute, obligation).

⁶⁴ To anticipate an early objection, one could argue that in the Supreme Court, the Rule of Four governing petitions for writ of certiorari affords the Court control of its voting path. As demonstrated below, see *infra* part I.C.1, however, absent a barrier to justiciability in the form of standing, the Rule of Four would be of only limited value in preventing path manipulation in the Supreme Court.

how the second case, had it come to the Court first, should be resolved.⁶⁵ That inquiry will be suppressed in precisely the same manner that a proscription on reconsideration of rejected motions suppresses a final pairwise contest between a defeated option and the ultimate winner. Had *Crawford* and *Seattle* been decided a year apart rather than on the same day, stare decisis would have prevented those justices who viewed the cases as constitutionally indistinguishable from considering in the second case those arguments that would have led them to rule differently had the second case arisen first. In preventing reconsideration of those arguments that, but for the order of cases, might have led to a contrary result in the second case, stare decisis renders the order in which cases are presented critical to the substantive outcomes of both cases. At the same time, the rule requires that someone be afforded the authority to consider which two votes for the three options—uphold or strike the *Crawford* amendment; uphold or strike the *Seattle* initiative; decide the cases in the same manner or differently—will actually be taken. Regardless of the order of case presentations, however, one of the three majorities will find its will ultimately suppressed.

1. Agenda Control: The Power of Certiorari and Intra- Versus Inter-Circuit Stare Decisis

If presumptive adherence to the doctrine of stare decisis renders the evolution of legal doctrine path dependent, the question then arises who, ultimately, has the authority to set the Supreme Court's agenda. The Rule of Four governing decisions to grant petitions for writ of certiorari⁶⁶ affords a minority of the Court substantial agenda-setting authority. The social choice analysis set out in these articles, however, demonstrates that the Court's own power of docket control may be less significant in preventing litigant path manipulation than it first appears. In fact, without the standing

⁶⁵ In Arrowian terms, stare decisis operates as a restriction on the range of those justices who believe that the two cases are constitutionally indistinguishable.

⁶⁶ For an analysis of the Rule of Four, see Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068-1109 (1988) (explaining the genesis and operation of the rule, including its potential for conflict with "majority rules governing other aspects of the Court's business"); see also ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 162-222 (7th ed. 1993) (providing a detailed explanation of how and when the Supreme Court grants certiorari); Stearns, *supra* note 12, at 1281 (discussing the Rule of Four in relation to the "nondictatorship" criterion of Arrow's theorem).

doctrine in place, interest groups would retain substantial effective control over the critical path of cases in the Supreme Court even with the Supreme Court's nominal power of docket control. To see why, we will first need to imagine a regime in which the Court has no discretion over its docket and in which it imposes no barriers to justiciability. We will then introduce the power of certiorari and demonstrate that it alone is insufficient to prevent litigant path manipulation. I will again use *Seattle* and *Crawford* as illustrations.

In a regime with neither Supreme Court docket control nor barriers to justiciability, an interest group dedicated to furthering the authority of the states to use busing for integrative purposes would first present the *Crawford* case and obtain a favorable decision, and then present the *Seattle* case and also obtain a favorable decision. Alternatively, an interest group dedicated to neighborhood education would employ the opposite strategy, with the opposite results.⁶⁷ Absent any barrier to justiciability and with a nondiscretionary Supreme Court docket, we would experience a race to the bottom in which interest groups would try to force cases onto the Supreme Court's docket in the most favorable order to affect the substantive evolution of legal doctrine.

Assume now that the Supreme Court has the power to control its own docket, but has no doctrinal barrier to justiciability in the form of standing. In this regime, the same interest groups identified above could effectively force a circuit split, or a split among the states' highest courts on whether a state, having initiated integrative busing, has the power to cut back on it. The resulting

⁶⁷ One might object that litigants do not know the justices' positions on the issues that they are litigating until the justices issue their actual opinions. Again, it is important to bear the nirvana fallacy in mind. While interest groups certainly lack complete or perfect information concerning the preferences of the various justices, published opinions provide such groups with a substantial amount of information with which to make educated guesses in developing arguments and in developing case-presentation strategies. We would expect well-informed interest groups to identify those justices who are least likely to be sympathetic to their position, those justices who are most likely to be sympathetic to their position, and those justices who are most likely to be subject to persuasion. Informed lawyers will try to direct their briefs and arguments to the last group of justices after closely analyzing whatever information, based primarily on written opinions, is available about that group's members. Thus, across a range of cases in a given area of law, written opinions provide a stylized and piecemeal form of ordinal rankings. See *infra* part I.D; see also Stearns, *supra* note 2, part II.A ("The publication of written opinions provides judges with an opportunity to criticize colleagues and allows members of the bar and academics to criticize sitting judges who fail to abide by their own stated principles in future cases."). Written opinions thus provide interest groups with substantially greater information than they would otherwise have.

split on this important question of federal law would substantially raise the cost of denying certiorari in the Supreme Court.⁶⁸ Without standing, therefore, the Court's nominal power of docket control would be largely illusory.

In addition, stare decisis renders the evolution of legal doctrine on a multimember appellate court path dependent.⁶⁹ The same phenomenon not only applies at the circuit court level, but is likely to be even more pronounced there than in the Supreme Court. In contrast with the Supreme Court, which decides cases as a court of the whole, circuit courts decide cases in panels of three, which bind the entire circuit absent overruling by the court en banc or by the Supreme Court. Within a given circuit, the possibility of path dependent iterations created by panels that do not reflect the composition of the court as a whole is therefore substantially greater than it is on the Supreme Court. If the Supreme Court recognizes that the evolution of legal doctrine within the circuits is sometimes the arbitrary product of path dependent iterations, it has a twofold incentive.⁷⁰ First, it will seek to ensure that the doctrine of stare decisis is adhered to *within* but not *among* the circuits. *Intra-* but not *inter-*circuit stare decisis avoids the indeterminacy that would result from cyclical preferences within each circuit. At the same time, the regime ensures that path dependent iterations, which produce arbitrary bodies of law within a given circuit, are not replicated among the circuits. Second, to ensure multiple path dependent iterations from which to choose—which provides an apt economic definition of issue percolation⁷¹—the Court would want

⁶⁸ Similarly, if litigants could present the claims of third parties, an organization dedicated to expanding the reach of the substantive provisions of the Bill of Rights, by locating convicted criminals who have failed to raise their potential claims in collateral attacks, could present cases that would create the necessary circuit splits to effectively force ultimate Supreme Court resolution of the underlying substantive legal issues. For a discussion of this standing case category, labeled “no right to enforce the rights of others,” see *infra* part III.A.

⁶⁹ See Stearns, *supra* note 2, part II.A; see also Easterbrook, *supra* note 34, at 820 (suggesting abandonment of stare decisis in certain situations as “[t]he best way out of the trap of path dependence”). For a discussion distinguishing my position on the significance of social choice for the evolution of stare decisis from that of Judge Easterbrook, see Stearns, *supra* note 2, part II.B (explaining that, by failing to recognize how stare decisis and standing, operating together, improve the overall rationality and fairness of Supreme Court decisionmaking, and thus arguing for relaxed stare decisis in constitutional cases, Judge Easterbrook has committed the isolation fallacy).

⁷⁰ See Stearns, *supra* note 2, part I.B.

⁷¹ See *id.*

the power to decide when to resolve particular issues, rather than to be forced to decide issues based upon a fixed rule. If, for example, the Supreme Court were obligated to resolve cases whenever a circuit split on a question of federal law arises, then interest groups could readily create circuit splits to force Supreme Court decisionmaking. In fact, all three of these features, each explained by the social choice framework set out in these articles—*intra-* but not *inter-*circuit stare decisis, the Supreme Court's power of docket control, and standing—are reflected in actual practice.⁷²

2. Arrow's Theorem Revisited: The Axiom, the Corollary, and Standing's Fairness Foundation

As set out above, stare decisis creates opportunities for litigant path manipulation within circuit courts, which lack the power of docket control. In turn, intra-circuit stare decisis raises the cost to the Supreme Court of denying certiorari when circuits split on important questions of federal law. While standing does not cure the path dependency that results from presumptive adherence to stare decisis on the Supreme Court and within the circuits, standing ameliorates path dependency's most damaging effects by rendering path manipulation substantially more difficult. To fully understand the relationship between stare decisis and standing, we need to recast these doctrines in social choice terms.

While stare decisis ameliorates the doctrinal uncertainty that would arise in a court with cyclical preferences, either at the Supreme Court or appellate court level, it also renders the evolution of legal doctrine path dependent. In the language of social choice, path dependency and its byproduct, path manipulation, create a fundamental problem associated with fair collective decisionmaking. In social choice, "fairness" is a complex term of art, ultimately grounded in the majoritarian norm. Kenneth Arrow, in his famous impossibility theorem for which he was awarded the Nobel Prize in Economics,⁷³ proved that no method of aggregating collective

⁷² While the empirical support for the main thesis presented in these articles is by no means complete, the breadth of phenomena that the analysis thus far explains is informative. As Mancur Olson has explained: "The persuasiveness of a theory depends not only on how many facts are explained, but also on how diverse are the kinds of facts explained." MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 13 (1982); see also POPPER, *supra* note 1, at 36-37 (outlining the elements which determine the "scientific status" of a theory).

⁷³ See Norman Macrae, *The Brusque Recessionary*, *ECONOMIST*, Dec. 23, 1978, at 45,

preferences can simultaneously satisfy five conditions commonly associated with fair collective decisionmaking and ensure collective rationality. As stated above,⁷⁴ rationality in social choice means the ability to aggregate individually transitive orderings into a transitive collective ordering. The Arrovian fairness conditions⁷⁵ are:

(1) *Range*: All decisionmakers must be able to rank all available options in any order.

(2) *Universal Domain*: No aggregate outcome can be held off-limits for the group as a whole.

(3) *Unanimity*: The group must move from the status quo to any position that improves the lot of at least one member without harming another member (the Pareto criterion).⁷⁶

(4) *Independence of Irrelevant Alternatives*: In given pairwise contests, the group's members must choose based solely on the merits of presented alternatives, without considering the future agenda.

(5) *Nondictatorship*: No member of the group can select outcomes for the group as a whole.

51 ("Professor Kenneth Arrow won a Nobel Prize in economics by trying to discover a 'social welfare function,' designed to be useful in guiding the planning authority for a society—and then discovering to his surprise and chagrin that it is logically impossible for any such function to exist.").

⁷⁴ See *supra* text accompanying notes 21-32; see also Stearns, *supra* note 12, at 1250-52 (discussing rationality as stated in Arrow's theorem).

⁷⁵ The following terms, which are widely used in the social choice literature, vary somewhat from the original formulation in KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 22-33 (1951). Arrow subsequently endorsed them in the revised edition of his book. See KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 105 (2d ed. 1963). The formulation has been attributed to the authors of Murray Kemp & A. Asimakopulos, *A Note on "Social Welfare Functions" and Cardinal Utility*, 18 CANADIAN J. ECON. & POL. SCI. 195-200 (1952), and William Vickrey, *Utility, Strategy, and Social Decisional Rules*, 74 Q. J. ECON. 507, 507-09 (1960). See DENNIS C. MUELLER, *PUBLIC CHOICE II* 386 (1989).

I have provided detailed definitions of each of these criteria previously and explored the implications of each for the thesis to follow. See Stearns, *supra* note 2, part I.C; Stearns, *supra* note 12, at 1247-50. Without repeating that analysis, I will provide the essential argument and refer interested readers, where appropriate, to the prior—more detailed—works.

⁷⁶ As set forth below, the Arrovian unanimity condition is perhaps best thought of as the "Pareto criterion, with a twist." See *infra* note 118 (explaining that satisfying Arrovian unanimity can inhibit rather than maximize economic growth, thereby resulting in a Pareto inferior aggregate result, if the relevant universe of participants is defined as the legislators).

Many, if not most, legal academics assessing the significance of Arrow's Theorem for judicial decisionmaking have concluded either that because the Supreme Court does not employ unlimited pairwise voting⁷⁷ or because the prospect of collective irrationality in the Supreme Court is too bleak,⁷⁸ the theorem offers little or no guidance for assessing the decisionmaking of the Supreme Court (or other appellate courts). Others have largely ignored the collective features of decisionmaking by appellate courts, including the Supreme Court, and concluded that Arrow's Theorem, because it is damning for legislatures, including Congress, justifies a significant expansion of constitutional judicial review.⁷⁹

In *The Misguided Renaissance of Social Choice*, I addressed these and other claims, first, to demonstrate that Arrow's Theorem provides a critical framework for assessing Supreme Court voting rules and, second, to demonstrate that the results of a thorough

⁷⁷ See Lewis A. Kornhauser, *Modelling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORGANIZATION 441, 455-57 (1992); see also Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 109 n.37 (1986) (discussing Easterbrook's application of Arrow's Theorem and the authors' disagreement with Easterbrook over the usefulness of the theorem for analyzing judicial decisionmaking); Revesz & Karlan, *supra* note 66, at 1094 n.120 (criticizing Easterbrook's decisional model as inaccurately portraying the mechanism by which justices decide on legal rules because "[j]ustices are not asked to consider competing rules pairwise . . . [but rather are] simply asked to select . . . the single rule that they deem most desirable").

⁷⁸ Consider, for example, the following comments by Daniel Farber and Philip Frickey:

In a sense, the Riker/Easterbrook thesis [demonstrating the possibility of legislative cycling] proves too much. If chaos and incoherence are the inevitable outcomes of majority voting, then appellate courts (which invariably have multiple members and majority voting rules) and even the 1787 Constitutional Convention are equally bankrupt. As a result, the Riker/Easterbrook thesis is bereft of any implications for public law, since it tells us to be equally suspicious of *all* sources of law. If we accept the thesis as to legislatures, we are left with nowhere to turn.

DANIEL A. FARBER & PHILIP B. FRICKEY, *LAW AND PUBLIC CHOICE* 55 (1991).

⁷⁹ See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-7, at 12 n.6 (2d ed. 1988) (positing that Arrow's Theorem "[a]t the very least . . . puts the burden of persuasion on those who assert that legislatures (or executives) deserve judicial deference as good aggregators of individual preference"); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787 (1992) (advocating a broad expansion of judicial review based upon insights drawn from social choice for statutes that burden fundamental rights or invoke suspect classifications by arguing that, under the Due Process and Equal Protection Clauses, an independent judiciary could protect society from the welfare losses that result from legislative failure). For a detailed critique of the Stout thesis, see Stearns, *supra* note 12, at 1225 n.18.

Arrovian analysis of Supreme Court and congressional decision-making is substantially less bleak than most scholars realize.⁸⁰ For present purposes, the critical insight is that Arrow's Theorem demonstrates that in evaluating the competence of any collective decisionmaking body, it is critical to avoid the nirvana fallacy, through which scholars erroneously compare a real world institution against an ideal institution that never has existed and that may be impossible to create.⁸¹ Arrow's Theorem, which is an axiomatic proof, demonstrates what the ideal institution is. Because no institution can satisfy the five Arrovian fairness conditions and simultaneously ensure collective rationality, the ideal institution, which is both nonexistent and impossible to create,⁸² *would* satisfy all six of these criteria. But the insight that no institution can satisfy all six criteria does not prove that real world collective decisionmaking institutions cannot and do not function. To assess the significance of Arrow's Theorem for the evaluation of institutions and rules, however, we must focus not on the axiom itself, but rather, upon a corollary to be derived from the axiom: For any given institution that does function, at least one fairness condition, or rationality, must be compromised.⁸³ Avoiding the nirvana

⁸⁰ In that article, I demonstrated that most authors considering the implications of Arrow's Theorem for the Supreme Court and Congress have committed at least one of three conceptual errors: the nirvana fallacy, the isolation fallacy, and the composition fallacy. See Stearns, *supra* note 12, at 1229-33. When each of these fallacies is properly exposed, the constitutional division of powers between the federal judiciary and Congress is both more rational and more fair, as those terms are understood in social choice, than it first appears. Scholars commit the nirvana fallacy when they hold real world institutions against the standard of an ideal institution that has never existed and may never exist and then, based upon identified deficiencies, conclude that the real world institutions are either inefficient or otherwise ill-equipped to handle their assigned tasks. See *id.* at 1231-32; see also Ronald Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J.L. & ECON. 183, 187 (1981) (discussing the nirvana fallacy); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (same); Stearns, *supra* note 12, at 1230 n.33 (excerpting referenced works); *infra* notes 84-87 and accompanying text (explaining the isolation and composition fallacies).

⁸¹ See *supra* note 80.

⁸² Arrow's Theorem proves axiomatically the inability to create such an institution.

⁸³ In *The Misguided Renaissance of Social Choice*, I employed the six criteria set out in Arrow's Theorem as benchmarks with which to compare real world institutions, namely the Supreme Court and Congress. See Stearns, *supra* note 12, at 1257-86. By evaluating which Arrovian criteria are relaxed (and adhered to) within each institution in light of that institution's assigned tasks, I was able to evaluate proposals to shift power from one institution to the other, for example, to shift what has traditionally been viewed as legislative authority to the federal judiciary through expanded judicial review, without committing the nirvana fallacy. The analysis demonstrated that most

fallacy, then, requires a full analysis, based upon this corollary, of which of the six conditions are adhered to—or relaxed—in each institution, or for each rule, under review.

In addition, many legal scholars relying upon Arrow's Theorem have committed the isolation fallacy.⁸⁴ Specifically, they have failed to recognize that the (inevitably imperfect) institutions that they are evaluating were not intended to operate, and have not operated, in isolation.⁸⁵ Instead, the institutions under review—the Supreme Court and Congress⁸⁶—have always operated in an inherently complementary fashion.⁸⁷ When viewed as operating in conjunction, these institutions appear both more rational and more fair than when viewed in isolation. In *Standing Back from the Forest*, I extended this analysis to demonstrate that institutions not only improve their collective fairness and rationality by operating in conjunction, but also that the combination of more than one decisional rule may improve the fairness and rationality within any given institution.⁸⁸ Specifically, while *stare decisis* improves the Supreme Court's rationality, standing improves the Supreme Court's fairness. Just as the Supreme Court and Congress cannot be meaningfully evaluated in isolation, neither can either of these

proposals to rework the constitutional balance of powers based upon social choice would undermine the rationality and fairness of the affected institutions. *See id.*

⁸⁴ *See id.* at 1242-44 nn.85-88.

⁸⁵ *See id.* at 1230.

⁸⁶ Previously, I demonstrated that markets operating in conjunction with lawmaking institutions, courts and legislatures, produce results that are more rational and more fair than if either markets or those institutions operated in isolation. *See id.* at 1233-47.

⁸⁷ The composition fallacy, while closely related to the isolation fallacy, is nonetheless distinct:

The isolation fallacy is the failure to recognize that a particular institution that cycles might not cycle if it works in conjunction with another institution. The fallacy of composition is the failure to recognize that, even if two separate institutions cycle, collectively they may reduce cycling. The two remain distinct because (1) the decisionmaker that prevents a given institution from cycling may be a single person, thus implicating the isolation fallacy, but not the composition fallacy; and (2) there may be circumstances in which two institutions cycle in the same manner and in response to the same factual phenomena, thus preventing the institutions from having a positive synergistic effect in reducing cycling when operating together. Both fallacies come into play when the two decisional bodies each have multiple members, such that [they] are capable of cycling, and when the factual phenomena that cause one to cycle do not cause the other to cycle.

Id. at 1230-31 n.35.

⁸⁸ *See generally* Stearns, *supra* note 2.

doctrines when evaluating the federal judiciary's fairness and rationality.

In a provocative article that first explored the implications of social choice for Supreme Court decisionmaking, Judge Frank Easterbrook committed the latter form of isolation fallacy in evaluating constitutional *stare decisis*.⁸⁹ Recognizing that *stare decisis* renders the evolution of legal doctrine, and specifically constitutional doctrine, path dependent, and further recognizing the high barriers to overruling, Judge Easterbrook argued that *stare decisis* should be relaxed in constitutional cases. He stated that: "[t]he order of [case] decisions has nothing to do with the intent of the framers or any of the other things that might inform constitutional interpretation."⁹⁰ As these articles demonstrate, however, while it is undoubtedly true that nothing in the substantive corpus of constitutional law grounds the substance of case decisions in the order of case presentations, the linkage of outcomes to order may well be grounded in constitutional process-based norms. Stated differently, the linkage of outcomes to the order—or path—of case decisions is an inevitable byproduct in a legal regime that seeks to prevent the doctrinal indeterminacy that would otherwise result from intertemporal cycling. While *stare decisis* promotes doctrinal stability and judicial rationality, it also creates a problem of its own. Specifically, *stare decisis* compromises Arrowian fairness by preventing the requisite number of pairwise contests to reveal cycles, thereby rendering the evolution of legal doctrine path dependent. In turn, *stare decisis* creates opportunities for non-Condorcet minority interests to control the substantive evolution of legal doctrine. Such interest groups can exert disproportionate influence on the creation of constitutional doctrine by manipulating the path of case decisions. But, again, a proper analysis of *stare decisis* requires that the doctrine not be viewed in isolation. As these articles demonstrate, *stare decisis* operates in conjunction with barriers to justiciability, including, most notably, standing.

While *stare decisis* ameliorates the problem of cyclical indeterminacy by preventing, at least presumptively, the requisite number of votes relative to the number of options to reveal cyclical preferences, it does so at a cost readily identified in Arrowian terms. If interest groups were given unfettered power to control the order of case presentations, non-Condorcet interest groups, who

⁸⁹ See Easterbrook, *supra* note 34, at 814-21.

⁹⁰ *Id.* at 820.

could not succeed in securing their legislative agenda in Congress,⁹¹ would have a strong incentive to try to achieve their agenda in the courts through path manipulation. Because judicial decisionmaking rules, in contrast with legislative decisionmaking rules, are non-Condorcet-producing,⁹² such groups have a substantially greater chance in the courts of having their agenda reflected in doctrine. The incentive to manipulate the path of case decisions is especially strong in a Court with preferences that are multi-peaked, meaning that the Court typically lacks Condorcet-winning preferences over the most controversial issues. While a multi-peaked Court invites interest group path manipulation, it does so at the cost of suppressing the will of a present majority in Congress or on the Court.

As stated above, the Arrovian fairness criteria are each ultimately grounded in the majoritarian norm.⁹³ Restrictions on range, universal domain, or nondictatorship,⁹⁴ for example, each have the effect of preventing the institution from taking the requisite number of pairwise votes to reveal cyclical preferences.⁹⁵ In turn, such restrictions enable the institution to achieve transitive collective orderings but at the cost of suppressing majority rule. By proscribing reconsideration of rejected motions, stare decisis operates as a range restriction. Judges (including Supreme Court justices) who adhere to stare decisis are no longer free to rank all available options in any order they choose. After an option is defeated in an earlier round, for example, after the Court determines that the *Crawford* amendment should be upheld or that the *Seattle* initiative should be struck down, justices who adhere to stare decisis will then determine whether the second case is governed by the first, rather than how they would have ruled in the second case had the order of cases been reversed. Thus, if *Crawford* and *Seattle* had been decided a year apart, stare decisis would have rendered the outcomes rational—or internally consistent—but, at the same time, it would have denied those justices who thought the cases

⁹¹ For an analysis demonstrating Congress's relative superiority of acting upon Condorcet winners, see Stearns, *supra* note 2, part I.C; Stearns, *supra* note 12, at 1256, 1271-81.

⁹² See Stearns, *supra* note 2, part I.A.

⁹³ See *supra* text accompanying note 27.

⁹⁴ See Stearns, *supra* note 12, at 1247-49 (defining these terms); Stearns, *supra* note 2, part I.C (same).

⁹⁵ For a more detailed discussion, see Stearns, *supra* note 12, at 1258-76, 1281-83; Stearns, *supra* note 2, part I.C.

indistinguishable from considering whether they would have achieved a contrary result absent an indistinguishable precedent. As with all range restrictions, *stare decisis* promotes rationality at the cost of path dependency. As stated above, however, not all rules that create path dependency invite path manipulation.⁹⁶ Provided that the critical path of case decisions is not governed by any particular group or groups, but is instead a random byproduct of events beyond our control, we may well decide that path dependency is an acceptable price to pay for stable legal doctrine. Stated differently, we might accept a certain degree of arbitrariness in the evolution of legal doctrine if the path is determined by fair process. In short, it is my thesis that, operating in conjunction, *stare decisis* and standing improve the overall rationality and fairness of lawmaking.

In these articles, I have argued that the standing doctrine, as formulated in the Burger and Rehnquist Courts, while it does not prevent path dependency, reduces path dependency's most damaging effects. Standing, as presently formulated, presumptively grounds the critically important path of case presentations in fortuitous historic events beyond the control of the litigants themselves.⁹⁷ In turn, standing substantially reduces opportunities for advertent path manipulation by non-Condorcet minorities. Thus viewed, because standing furthers an important majoritarian norm on which our system of government is based, standing is well-grounded in fair constitutional process. That is not to suggest that with standing, no path manipulation takes place.⁹⁸ It is instead to

⁹⁶ See *supra* note 38 and accompanying text. Additionally, not all rules that lead to path manipulation do so to the same degree.

⁹⁷ Criminals certainly control the facts that give rise to their convictions and sentences: They commit the underlying crimes. But they do not, at least in the overwhelming majority of cases, do so with an eye toward eventually creating a novel precedent on a cutting-edge issue of criminal law or procedure. Instead, when a convicted criminal raises a challenge that requires a court to make law either in a direct appeal or a collateral attack, she does so for one reason only—to obtain relief from her conviction or sentence. See Stearns, *supra* note 2, part II.A.

⁹⁸ For a discussion of advertent path manipulation by Thurgood Marshall, for the NAACP, on behalf of African-Americans, and by Ruth Bader Ginsburg, on behalf of women, both of whom sought, with considerable success, to expand the range of protections under the Fourteenth Amendment Equal Protection Clause, see Stearns, *supra* note 2, part II.B. Again, it is important to remember that the critical inquiry is not whether any path manipulation takes place with the standing doctrine in place. Instead, as with any legal doctrine, we must focus on the effect of standing on the margin: Is there less path manipulation with standing than there would be without standing? These articles demonstrate that the answer to that question is almost surely yes.

suggest that with standing in place in its present form, there is substantially less path manipulation than there would be if the Supreme Court abandoned standing.

As this Article will demonstrate, standing is a set of *substantive* legal rules governing the circumstances in which a case may be presented in federal court. The standing ground rules ensure that the critically important path of case decisions is primarily determined by fortuitous events beyond the control of the litigants themselves, rather than by the litigants' desire to make law. Although they have not been so presented by the Supreme Court, each standing case category will be described below in the form of a substantive ruling: (1) no right to enforce the rights of others; (2) no right to prevent diffuse harms; and (3) no right to an undistorted market. These substantive categories, especially the first two, prevent interest groups from avoiding the presumptive requirement that a set of fortuitous historic events affecting litigants in a fairly direct manner, rather than the mere desire to control the substantive evolution of legal doctrine by manipulating the path of case decisions, governs the order of case presentations within the federal judiciary. If, instead, interest groups could identify persons (other than themselves) or harms that, although pervasive and imperceptible to most individuals, can be said to affect the group's members, then those groups could readily manipulate the path—and thus the substance—of case decisions. The third category, which is analytically the richest, is something of a hybrid. It involves cases that have features resembling both interest group litigation and traditional bipolar litigation, and the Court's effort—often employing ill-fitting metaphors drawn from other legal contexts and superimposed on its standing analysis—to categorize those cases in one direction or the other.

3. Standing Between Litigation and Legislation

These articles further demonstrate that standing advances a critical distinction that is often overlooked between adjudicatory and legislative lawmaking. While both the federal courts and Congress create positive law, often in code-like fashion and affecting large numbers of people, and sometimes exclusively with prospective effect, social choice reveals a critical difference in the respective lawmaking powers of these two institutions.⁹⁹ Congress is empow-

⁹⁹ This discussion is based upon Stearns, *supra* note 2, part I.C.

ered to make law with respect to any issue that it sees fit as a matter of policy and is the master of its own timing. It can resolve issues narrowly, and then expand the reach of its statutes, or it can initially resolve issues broadly, with an eye toward refining its statutory scheme in the future.¹⁰⁰ Congress faces only two constraints on its lawmaking powers: (1) Congress requires an express or implied constitutional delegation of authority; and (2) Congress cannot violate any independent constitutional provisions. Otherwise, the scope and timing of congressional lawmaking is for Congress alone to decide.

In contrast, while the Supreme Court, in the exercise of its positive lawmaking powers, often affects as many people or institutions as does Congress—and often does so with prospective effect—the two institutions do not thereby have lawmaking powers that are equal in kind, although they may at times possess powers that are equal in degree.¹⁰¹ Instead, the Court, because of two

¹⁰⁰ The Supreme Court has repeatedly emphasized that Congress and state legislatures control their own timing. Thus, the Court has refused, for example, to invalidate economic regulation on equal protection grounds where the legislature has chosen to deal with a broad issue in incremental fashion. *See, e.g.*, *Bowen v. Owens*, 476 U.S. 340, 348 (1986) (“Congress’ adjustments of this complex system of [Social Security] entitlements necessarily create distinctions among categories of beneficiaries, a result that could be avoided only by making sweeping changes in the Act instead of incremental ones. A constitutional rule that would invalidate Congress’ attempts to proceed cautiously in awarding increased benefits might deter Congress from making any increases at all.”); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955) (“The legislature may select one phase of one field and apply a remedy there, neglecting the others.”).

In nearly opposite fashion, the Supreme Court has rejected an equal protection challenge to the public accommodations provisions of Title II of the Civil Rights Act of 1964, based upon an argument that the statute failed to provide for case-by-case determinations on whether the business subject to the statute affected interstate commerce, instead creating a broad legislative classification. *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 302-03 (1964).

¹⁰¹ In contrast with the analysis offered in the text, Steven Winter has argued that “[o]nce we recognize that legislation and adjudication are not dichotomous, but are merely different points on a single normative spectrum, then we are free to assume responsibility.” Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1512 (1988). It is my position that standing furthers a difference in kind (meaning that judicial and legislative powers are *dichotomous*), but not necessarily in degree, between judicial and legislative lawmaking powers. Thus, I have explained:

[T]o determine the legitimacy of any area of constitutional case-law, one cannot look at the aggregate level of detail. Instead, one must look, at the level of each individual case, to determine whether judicial creation of positive law was required to resolve the rights and obligations of the parties before the Court. If, in deciding several—or several dozen—cases for which

very different limitations on its lawmaking powers, has a much more restricted lawmaking role. Unlike Congress, the Supreme Court controls neither the scope nor the timing of its lawmaking powers. Instead, at least in theory—and I hope to show in these articles that, in large part due to standing, also in practice—the scope and timing of the Court’s lawmaking powers are presumptively determined by historical fortuity, rather than by judicial preferences or litigant path manipulation.

D. *Informal Accommodations and Formal Rules*

The foregoing analysis suggests that the formal rulemaking structures in Congress and in the Supreme Court afford each a form of comparative advantage over the other with respect to particular kinds of lawmaking. The relative competence of each institution is enhanced by stare decisis operating in conjunction with standing. With respect to the rational resolution of issues over which its members’ preferences cycle, Congress has the comparative advantage because, unlike the Supreme Court, Congress can remain inert, thus defaulting to the status quo.¹⁰² Specifically, Congress is not required to provide a collective outcome, which, absent a Condorcet winner, would inevitably thwart the will of a majority.¹⁰³ In

the answer to that question is yes, the Court creates a code-like body of case law, one can only conclude that creating that body of detailed positive law is a necessary part of the Court’s job.

Stearns, *supra* note 2, part III.A.

¹⁰² See Stearns, *supra* note 12, at 1258-71; see also *supra* note 30 and accompanying text.

¹⁰³ The analysis in the text is nearly the opposite of that offered in Professor William Eskridge’s recent book, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1995). Eskridge, relying upon the obligation of courts, including the Supreme Court, to resolve cases, and the ability of Congress to remain inert, states:

[T]he Court ought to consider voices suppressed in the political process, and this suggests a meta-canon: decide close cases against the politically salient interests and in favor of interests that have been subordinated in the political process. Congress can, of course, override the Court’s decision, and indeed is more likely to do so if the loser is politically powerful.

Id. at 294. In contrast with Professor Eskridge’s *normative* use of public and social choice, in these articles and in *The Misguided Renaissance of Social Choice*, Stearns, *supra* note 12, I have used social choice to provide a *positive* explanation of why the Supreme Court employs non-Condorcet-producing rules and why Congress employs Condorcet-producing rules, based upon the former’s obligation to decide cases and the latter’s power of inertia. I have also argued that the Court’s standing doctrine substantially furthers the objectives that underlie that essential division of constitutional responsibility. Professor Eskridge would encourage the federal courts,

contrast, with respect to issues over which a collective outcome is required, for example, claims that underlie legal challenges presented by convicted criminals or criminal defendants, the courts, including the Supreme Court, have a comparative advantage. The courts have a comparative advantage in the latter context because they employ non-Condorcet decisional rules that ensure collective outcomes, even if they have preferences that cycle.

The argument, as developed thus far, however, is incomplete. The difficulty is that members of the Supreme Court could, if they adopted certain informal practices, identify cyclical preferences. Similarly, formal legislative rules in Congress appear to create substantial agenda-setting power, and formal limits on reconsideration appear to promote path dependency.¹⁰⁴ The essential distinction between Condorcet-producing and non-Condorcet-producing rules, therefore, must be further explained. In fact, important, albeit informal, practices that have evolved in both institutions further the essential distinction between the Supreme Court, as an institution relatively ill-equipped to act upon Condorcet-winning preferences, and Congress, as an institution relatively well-equipped to act upon such preferences. I do not intend to suggest that no exceptions to this general dichotomy can be identified. In law, as in life, divisions are relative, which is why I have suggested that the relevant standard for analysis is one of comparative—not absolute—advantage. In the Supreme Court, I have assumed that the justices are aware of, and vote in accordance with, their ordinally ranked preferences. These assumptions (which I have labeled ordinal ranking and principled voting),¹⁰⁵ even if they are only adhered to in imperfect form, are essential to my thesis that, in contrast with

including the Supreme Court, to deliberately render congressional inertia sufficiently costly such that, by remaining inert, which is often the most rational legislative response when faced with non-Condorcet preferences, Congress would effectively thwart the will of a present majority of its members. In Professor Eskridge's suggested regime, Congress could not help but defy Arrowian rationality precisely because it would lose its option to remain inert in those instances in which it lacks a Condorcet winner. For my more thorough critique of Professor Eskridge's book, see Maxwell L. Stearns, *Review of William N. Eskridge, Jr., Dynamic Statutory Interpretation* (1995), 86 PUB. CHOICE (forthcoming Mar. 1996).

¹⁰⁴ See William H. Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 AM. POL. SCI. REV. 349, 363 (1958) (positing that the limit on the number of permissible amendments to proposed congressional bills creates opportunities for path manipulation). For my critique of Riker's thesis, see Stearns, *supra* note 2, part I.C (illustrating that strategic voting, if permitted, creates a quasi-market solution to the amendment-limiting rule); see also *id.* part I.A (same).

¹⁰⁵ See Stearns, *supra* note 2, part I.A (describing these two assumptions).

Congress, the Supreme Court is relatively ill-equipped to ensure that available Condorcet-winning preferences prevail. It is therefore important to determine whether these assumptions hold in the Supreme Court.

The best way to test the validity of each assumption is to consider the consequences of relaxing them.¹⁰⁶ Assume, first, that we relax the ordinal ranking assumption, but still require a collective outcome in the absence of a Condorcet-winning preference. Whoever is afforded the authority to set the agenda can control the outcome of the case. But, because the Court's members have not considered their relative ranking of relevant options, such a regime would undermine the justices' ability to avoid arbitrary outcomes. Relaxing the ordinal ranking assumption, therefore, increases, rather than decreases, the irrationality associated with employing a non-Condorcet decisional rule to resolve cases in which the Court's members lack a Condorcet winner.¹⁰⁷

One might object that appellate court judges, including Supreme Court justices, simply do not ordinally rank their preferences. While that is true, opinion writing serves as an apt proxy, which provides justices with a stylized and piecemeal form of ordinal rankings.¹⁰⁸ From a social choice perspective, opinion writing can be viewed as a practice that evolved to ensure substantial or relative compliance among justices with the ordinal ranking assumption. Opinion writing serves this function by providing participating justices—and members of the bar—with valuable information about their colleagues' ordinally ranked preferences with respect to those options presented for resolution in the cases before them.

Even if we assume that opinion writing ensures limited compliance with the ordinal ranking assumption, however, that does not ensure that justices will necessarily abide by their ordinal rankings in a given case. Regardless of formal voting rules, such practices as logrolling or vote trading, if permitted in the Supreme Court, might undermine principled voting. In effect, logrolling would create a quasi-market solution to the formal *stare decisis* rule by allowing the requisite number of iterations *outside* the formal voting process to

¹⁰⁶ After demonstrating the irrationality that would result if each assumption were relaxed, I will discuss the practices that promote substantial, albeit imperfect, adherence to them.

¹⁰⁷ See Stearns, *supra* note 2, part I.A (illustrating the effect of relaxing the ordinal ranking assumption).

¹⁰⁸ See *id.*

reveal a cycle.¹⁰⁹ While the formal rule allows only n minus 1 pairwise contests for n options, one short of the requisite number to reveal a cycle,¹¹⁰ with logrolling there is no *effective* limit on the number of informal iterations that can take place.

Publication of written opinions thus serves a dual function. Not only does it provide a form of ordinal rankings, albeit in a stylized and piecemeal form, but also it raises the cost to the justices of employing such informal strategies as logrolling and vote trading to depart from ordinal rankings.¹¹¹ Written opinions provide substantial fodder for justices on the Court, academics, members of the press, and practitioners, to criticize justices who fail to abide by the content of their own ordinal rankings. I do not intend to suggest that justices never render inconsistent votes. I am instead suggesting that the cost of inconsistency is *relatively* higher in a regime with published written opinions than it would be in a regime without such opinions. As a result, logrolling is substantially more costly and more difficult for sitting justices than it is for members of Congress. As before, it is important to bear in mind that the relevant inquiry is not whether a particular institution is deficient as against some ideal benchmark; rather, it is whether that institution, given its formal *and informal* decisional structures, is relatively better or worse at its assigned task than is the counterpart institution for which decisional authority is proposed.

The foregoing analysis demonstrates that case-by-case voting, coupled with opinion writing and publication, affords the Supreme Court a comparative advantage in issuing collective outcomes, even over issues presented in actual cases for which the justices' preferences cycle, for example, even in the absence of a Condorcet winner. In contrast, Congress is relatively better equipped at

¹⁰⁹ See *id.* (illustrating circumstances in which logrolling leads to cycling).

¹¹⁰ See *id.* (elaborating on the use of formal rules that prevent cycling by limiting the number of pairwise contests relative to the number of options).

¹¹¹ In contrast, the Supreme Court justices rarely issue written opinions in certiorari grants or denials. As a result, in the context of decisions to grant or to deny petitions for writ of certiorari, we might expect a less principled set of decisional processes, one that might include vote trading. See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 140-215 (1991) (discussing the extent of strategic behavior among several Supreme Court justices in deciding whether to grant or to deny petitions for writ of certiorari); see also Revesz & Karlan, *supra* note 66, at 1068 (positing that particular Supreme Court justices do not apply criteria governing issuance of writs of certiorari or stay pending certiorari in a consistent manner); Stearns, *supra* note 2, part I.A (discussing these cited sources and distinguishing certiorari grants and denials from issuance of case decisions).

remaining inert in the face of cyclical preferences because its formal *and informal* decisional structures are better than those of the Supreme Court at ensuring that available Condorcet winners prevail and at revealing preferences that cycle.

While some congressional voting rules have features that appear non-Condorcet, for example, setting formal limits on reconsideration,¹¹² vesting agenda-setting authority in particular members of Congress, and using procedures such as "calendar Wednesday" and the filibuster¹¹³ (each of which either provides disproportionate authority to particular minorities within Congress or creates a form of path dependency), a largely opposite evolutionary path for informal practices has facilitated Congress's comparative advantage at identifying both available Condorcet winners and preferences that cycle.¹¹⁴ While limits on reconsideration, for example, might prevent the requisite number of formal votes relative to the available number of options to reveal a cycle, the prevalent congressional practice of logrolling or vote trading ensures that the requisite number of iterations can occur *outside* the formal voting process to reveal Condorcet winners or cyclical preferences.¹¹⁵ In addition, having identified preferences that cycle, Congress has the authority to avoid the irrationality that would result if it were forced to act upon non-Condorcet-winning options.¹¹⁶ Congress, unlike the Supreme Court, can remain inert. Inertia allows the status quo to govern, which is a rational strategy in the absence of a Condorcet-winning proposal to depart from the status quo. Furthermore, Congress sometimes achieves fair collective results by

¹¹² See Riker, *supra* note 104, at 353-62 (explaining that limitations on amendments to bills in both houses of Congress sometimes prevent those bodies from revealing cyclical preferences).

¹¹³ For a discussion of these and other related legislative devices, see Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 397-98 (1992).

¹¹⁴ See Levmore, *supra* note 23, at 1012-43 (explaining the general convergence of parliamentary practice in legislative bodies toward Condorcet-producing rules and noting exceptions); see also Stearns, *supra* note 12, at 1265-66 & n.172 (linking choice of Condorcet- versus non-Condorcet-producing rules to the issue whether the institution in question needs to achieve a collective outcome or whether it can instead remain inert).

¹¹⁵ See Stearns, *supra* note 2, part I.A (identifying informal legislative practices that can overcome apparent limits in formal congressional voting rules in identifying Condorcet winners); *id.* part I.C (further explaining Congress's ability to engage in vote trading or logrolling, thereby revealing cycles and Condorcet winners outside the formal voting process).

¹¹⁶ See *id.* part I.C ("Congress enhances its collective rationality by employing strategic voting.").

deliberately thwarting the Condorcet criterion.¹¹⁷ By trading votes within and across bills, members of Congress, in contrast with Supreme Court justices, are able to cardinalize, or place relative weights upon, their preferences, rather than merely rank them ordinally. In Arrovian terms, vote trading, which sacrifices the Arrovian independence of irrelevant alternatives criterion, enables Congress to approach unanimity.¹¹⁸

In addition, while agenda-setting authority has been criticized by some legal academics as producing arbitrary and irrational results,¹¹⁹ the same informal practices discussed above ameliorate this tendency. While an agenda-setting member of Congress certainly has the formal authority to set a path leading to a place where only she would like to go, that cannot be an effective long-term strategy if she wants to logroll with her colleagues in the future.¹²⁰ Instead, the path is likely to become as much a part of the informal bargaining processes as are the substantive bills and amendments.¹²¹

¹¹⁷ See *id.* (explaining that "[o]nce we recognize that not all legislators care equally about each ordinal ranking, we can infer that some vote trades can achieve or at least approach unanimity even while thwarting the Condorcet criterion").

¹¹⁸ See Stearns, *supra* note 12, at 1279-80 (discussing this ability of legislators to reveal the intensity of their preferences through strategic voting and vote trading). It is important to note that while vote trading allows the legislature to move toward Pareto optimality, the result is not necessarily (indeed, it may not be in most instances) wealth maximizing. As I have previously explained, Arrovian unanimity is best thought of as the Pareto criterion, with a twist:

This analysis is not intended to suggest that the outcomes of legislative processes are Pareto superior in terms of wealth maximization. Instead, the analysis demonstrates that legislative voting processes generally satisfy the Pareto criterion, given the preferences of the legislators. The legislators' preferences, however, if satisfied by legislative voting processes, may produce outcomes that are actually Pareto inferior in that they frustrate rather than enhance wealth maximization. . . .

While it may appear counterintuitive that in achieving Pareto superior legislation from the standpoint of legislators' preferences, the legislature can achieve a Pareto inferior aggregate result in terms of frustrating wealth maximization, this result is consistent with the insight from interest group theory that Congressmen, in seeking to provide concrete legislative benefits to their constituents to ensure reelection, engage in individually rational trades that impose costs on everyone and that ultimately leave everyone worse off.

Id. at 1277 n.220.

¹¹⁹ See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983); see also RIKER, *supra* note 52, at 137-68 (positing an inevitable tension in legislative rulemaking between path manipulation and strategic voting, which together promulgate irrational and unpredictable collective outcomes).

¹²⁰ For a more elaborate presentation, see STEARNS, *supra* note 21, ch. 2.

¹²¹ Anyone who has ever been part of an organization in which all important

In short, informal congressional practices not only limit the institutional significance of formal decisional rules, but they also provide members of Congress with substantially greater power to prevent the adoption of non-Condorcet-winning preferences than judicial counterparts possess. Of course, informal practices of the sort discussed above have their costs. Thus, for example, while we have some idea, based upon written opinions, of what to expect from our justices, these very informal accommodations ensure that decisionmaking among members of Congress will very often defy both the ordinal ranking and principled voting criteria. In fact, it is fair to say that, while we tend to criticize politicians for lack of principles, formally principled decisionmaking—meaning consistent adherence to previously announced ordinal rankings—is largely inconsistent with the structure of legislative, as opposed to judicial, decisionmaking.¹²² Thus, in matters over which we would expect principled decisionmaking to matter most, including, for example, ensuring that legislative decisionmaking not thwart constitutional principles, we might expect ultimate decisional authority to rest in the federal judiciary. On the other hand, in matters over which conflicting—and multi peaked—preferences are likely to be in the greatest need of reconciliation, we would expect decisional authority to rest, at least presumptively, in Congress.¹²³ We would expect

business occurs *before* formal meetings will recognize the argument in the text. Notwithstanding the formal institutional rules, which include the requirement of meetings, effective business people (by which I mean those who generally achieve what they set out to achieve) are often effective because they relegate such rules to the status of facade, engaging in important matters before such meetings take place. Effective members of Congress, no doubt, engage in precisely the same strategy.

¹²² That is not the case with all potential forms of government. Thus, in a Rousseauian republic, we would expect participants, in subordinating their individual wills to the benefit of society as a whole, to abide by a more consistent set of preferences. In fact, the Marquis de Condorcet, who was strongly influenced by Rousseau, proposed the Condorcet criterion with that in mind. In his decisional scheme, the object of collective decisionmaking was not mutual accommodation, but rather, a means with which to ensure that the collective decisionmaking body identified the *best* choice from available options. See Stearns, *supra* note 12, at 1250 n.108. It is perhaps also not surprising that civilian systems, which have a stronger republican influence than ours, provide all formal lawmaking powers to legislatures and subordinate the courts to a far less prominent role. One feature of this subordinated adjudicatory role is the absence of a formal doctrine of *stare decisis*. For a more detailed discussion, see Stearns, *supra* note 2, part I.B (observing that civilian courts adhere to *stare decisis* as a matter of informal practice and accommodation).

¹²³ In contrast with Professors Pildes and Anderson, who critique Arrow's Theorem for the normative implications of strict adherence to the specified fairness conditions, which, they suggest, provide little or no role for collective deliberation, see Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social*

that provisional allocation, at least in part, because Congress has at its disposal more rational devices for resolving irrational, or cyclical, preferences—namely, resolution through commodification or *non*resolution through inertia—than does the Supreme Court.

The difficulty with this provisional allocation is that, as we broaden the range of matters over which the Court exercises the power of judicial review and afford litigants increased power to present cases turning on such issues in the most favorable order, we force the federal courts, including ultimately the Supreme Court, to resolve issues that they are less well-equipped to address than Congress is.¹²⁴ One rational method by which the Supreme Court could deal with such litigation is to devise a doctrine that enables

Choice Theory, Value Pluralism, and Democratic Politics, 90 COLUM. L. REV. 2121, 2202-03 (1990) (asserting that “[s]ocial choice theory fails to take note of several features of democratic institutions . . . [that] are essential for deliberation”); *see also* Stearns, *supra* note 12, at 1229 n.30, 1251 n.115 (critiquing the Pildes and Anderson thesis), this Article emphasizes the axiomatic, rather than normative, implications of Arrow’s Theorem. It does so by applying the corollary derived from Arrow’s Theorem, *see supra* text accompanying note 83 (stating the corollary that, in any institution that issues collective decisions, at least one of the six Arrowian criteria must be relaxed), to each institution under review. In turn, the analysis treats Arrow’s Theorem for its evolutionary, rather than normative, significance. This Article uses social choice theory to demonstrate the evolutionary significance in legislatures, which are prone to possessing multi peaked preferences, of deliberation and strategic voting. To be clear, Professors Anderson and Pildes and I agree that deliberation is critical to the functioning of legislatures. We disagree on how that observation relates to the theory of social choice. I argue that social choice explains why legislative rules conduce to deliberation and to strategic voting. Anderson and Pildes argue, in contrast, that social choice, because it misconceives the concept of collective rationality, “is wholly inadequate for evaluating democratic institutions.” Pildes & Anderson, *supra*, at 2142. But social choice is only “wholly inadequate” if one treats each Arrowian criterion for its normative significance. In fact, the corollary to Arrow’s Theorem developed in these articles proves that all six Arrowian criteria cannot have equal normative significance to all collective decisionmaking institutions. In these articles, I assume that because *no* institution can meet all six Arrowian criteria, Arrow’s Theorem is best understood for its evolutionary implications. Thus viewed, social choice explains why particular institutions relax—and adhere to—particular Arrowian criteria. Thus viewed, the deliberative features of legislative decisionmaking fall squarely within the framework of social choice.

¹²⁴ This distinction affords interest groups, and specifically non-Condorcet interest groups, that are unable to secure legislative victories, with a strong incentive to seek satisfaction in the federal courts by identifying a potential legal dispute—one that may affect them tangentially or not at all—that requires for its resolution the very issue that Congress, either advertently or through inertia, declined to resolve. *See* Stearns, *supra* note 2, part III.A-B (asserting that courts’ inability to maintain the status quo in light of cycling preferences gives interest groups “an opportunity, through litigation, to shift the burden of legislative inertia”); *see also infra* part II.A (demonstrating multi peakedness on the Burger and Rehnquist Courts).

the Court to resolve formally and institutionally the cases before it, while at the same time preserving Congress's power to address—or not address—the underlying issues, at least until an appropriate consensus has formed.¹²⁵ Standing, thus viewed, is a rational judicial response to litigant incentives stemming from the different decisional rules employed in the Supreme Court and in Congress.

But these formal and informal decisional rules are surely not of the recent vintage that we associate with standing. The questions then arise why standing emerged during the New Deal and why it was transformed into its present form and status during the Burger and Rehnquist Court eras. The remainder of this Article will address those questions.

II. STANDING IN HISTORICAL CONTEXT

To understand why standing emerged as it did when it did, it is first necessary to place the Burger and Rehnquist Courts, which developed standing into its present form, into their appropriate historical contexts. To do so, I will use the social choice framework set out above. The analysis will demonstrate that those Courts were uniquely multi peaked with respect to the most controversial issues of the day, and thus had a particular incentive to devise a doctrine, like standing, that would reduce opportunities for advertent litigant path manipulation. It is also necessary to consider the origin of the modern standing formulation, which grew in large part out of the Court's interpretation of section 10(a) of the Administrative Procedure Act¹²⁶ in the landmark standing decision, *Association of Data Processing Service Organizations v. Camp*.¹²⁷ That decision began the continuing process of superimposing, for both statutory and constitutional claimants, tort-based common-law conceptions of injury, causation, and redressability as preconditions to standing. The doctrinal history reveals that the Court increasingly relied upon these common-law conceptions because they were particularly well-suited to promoting paths of case decisions that were presumptively governed by factors beyond the control of the litigants themselves.

¹²⁵ An appropriate consensus could form if a Condorcet minority emerges in the future, or if a non-Condorcet minority joins forces with a larger, successful coalition through a strategic logroll.

¹²⁶ Ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702 (1988)).

¹²⁷ 397 U.S. 150 (1970).

A. *The Burger and Rehnquist Courts:
A Study in Multi-peaked Preferences*

One must, of course, be extremely cautious in summarily characterizing any particular era of the Supreme Court. As with standing, generalizations about the Supreme Court, and particular historical periods on the Court, are largely worthless as such.¹²⁸ For any given generalization, exceptions abound. Fortunately, given the analytic framework set out in Part I, we do not need a comprehensive history of the Supreme Court to place standing in its proper context. At the same time, the social choice framework enables us to go well beyond simplistic generalizations in seeking historical support for this Article's thesis on the evolution of modern standing. In fact, in several recent articles, critics of modern standing have combed the history of the Supreme Court to locate support for a public interest litigation model in early-American

¹²⁸ Cf. *Data Processing*, 397 U.S. at 151 ("Generalizations about standing to sue are largely worthless as such."). For my analysis of this oft-quoted sentence, see Stearns, *supra* note 2, part I.C (evaluating this statement in the context of meta-language). Stated differently, it is important to avoid "history 'lite,'" see generally Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995), and even "history 'lean,'" see generally Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591 (1995). Professor Flaherty demonstrates that, through history lite, legal academics tend to cull secondary and tertiary sources to support normative arguments that are generally consistent with a one-sided view of a richer historical period that, properly viewed, reveals a pervasive tension between two conflicting ideologies. Specifically, modern constitutional historians have generally failed adequately to account for the inevitable tension between republicanism and liberalism in the late eighteenth century. See Flaherty, *supra*, at 546-49 (noting the "complexity of the Federalist achievement" in "synthesi[zing] [these] different [and often opposing] traditions"). But see Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 605-06 (1995) (positing that "[r]epublicanism . . . does not stand opposed to liberalism, and indeed the opposition between republicanism and liberalism has been quite damaging to the academic study of law (and to the profession of history as well)"); see also Epstein, *supra*, at 592 (positing that, in constitutional interpretation, "history offers us *too much* information without the means of sorting it out"). The principal historical focus of this two-part series on standing, however, is not on the founding period. Instead, these articles focus on the New Deal and post-New Deal periods during which modern standing was created and transformed. See *infra* note 176 and accompanying text. These articles avoid embracing a one-sided vision of these later historical periods, however, by framing the analysis in terms of an inevitable tension (closely related to that which Flaherty identifies, and which has persisted throughout our history) between the conflicting desires to create institutions that promote fair and rational collective decisionmaking. See Stearns, *supra* note 12, at 1278 n.222 (exploring the relationship between the theory of social choice and the theory of republicanism); *id.* at 1233-47, 1287-88 (exploring the relationship between the theory of social choice and the objective of wealth maximization).

practice.¹²⁹ This literature, which for the most part reveals a consensus that the federal judiciary embraced two models of litigation (a public- and a private-interest model) in the early part of our nation's history, has provided significant contributions to the literature on standing. In particular, it has provided strong support for arguments against limiting Congress's power to create novel causes of action that have no antecedents in the common law.¹³⁰ The purpose of this Article, however, is not to criticize modern standing, but to explain it. To do that, we must consider two anomalies of far more recent vintage: first, the creation of standing as a justiciability barrier during the New Deal; and, second, the transformation of standing into its present prominent role during the Burger and Rehnquist Courts.

This subsection will demonstrate that in one peculiar respect, which happens to be uniquely important in connecting the evolution of modern standing to the social choice analysis discussed in Part I, the Burger and Rehnquist Courts are strikingly different from prior relevant periods on the Supreme Court. That might appear to some readers to be a rather odd proposition. After all, most constitutional historians, if asked to identify a single period since the New Deal, when the Court began to use standing, that fundamentally altered the shape of the Supreme Court and its role within our separation-of-powers scheme, would identify the Warren Court era.¹³¹ During Earl Warren's tenure as Chief Justice from 1953 to

¹²⁹ I have summarized the recent literature in Stearns, *supra* note 2, part I.C.

¹³⁰ Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992) (rejecting the notion that the citizen-suit provision of the Endangered Species Act conferred standing upon a citizen to assert abstract "procedural" rights against the government when the government's failure to allow the statutory procedure did not threaten a separate concrete interest of the citizen).

¹³¹ See Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 630 (1991). Wells aptly summarizes the Warren Court's influence as follows:

Led by Chief Justice Warren, the Court struck down laws that maintained racial distinctions and transformed the law of state criminal procedure by incorporating almost all of the guarantees of the Bill of Rights . . . such as the *Miranda* warning, to ensure their enforcement. Furthermore, the Court breathed life into the equal protection clause, making it a powerful weapon for combatting inequality across a wide range of issues. It tightened first amendment restrictions on governmental regulation of speech, imposed new procedural requirements on the denial of government benefits, and commanded the wholesale reapportionment of legislative districts across the country. In sum, the Warren Court made the Constitution a far more serious restraint on government than it had been before 1954.

Id. at 630-32 (footnotes omitted).

1969, the Court fundamentally altered the nature of constitutional criminal rights, reading broad protections into the Bill of Rights on behalf of state and federal criminal defendants;¹³² that created, seemingly from whole cloth, the fundamental right to vote in state elections and the right to have one's vote weighted equally with others,¹³³ thus intruding on what had been, for our entire history, an exclusive state legislative function; that afforded Congress broad regulatory power to prohibit racial discrimination in places of public accommodation,¹³⁴ with foreboding implications for the once-restrictive state action doctrine;¹³⁵ and, perhaps most notably, that handed down *Brown v. Board of Education*,¹³⁶ which not only reversed nearly a century of post-emancipation, race-based segregation in the South, but also, in a single stroke of the pen, forever pitted the notion of judicial restraint, founded upon originalism and textualism, against the most fundamental notions of justice and morality. And while the Burger Court issued *Roe v. Wade*,¹³⁷ Justice Douglas's opinion in *Griswold v. Connecticut*,¹³⁸ issued during the Warren Court, provided the necessary (if suspect)

¹³² See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding criminal trials to be a fundamental right); *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966) (holding that police must provide specified warnings prior to interrogation, including the right to remain silent and to assistance of counsel, for those who cannot afford it); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (applying the Fifth Amendment privilege against self-incrimination to the states); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that indigent criminal defendants have a fundamental right to state-assisted counsel under the Sixth Amendment).

¹³³ See *Kirkpatrick v. Preisler*, 394 U.S. 526, 536 (1969) (extending the equal population rule to congressional districts); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that equal protection requires that state legislative districts be equal in population); *Baker v. Carr*, 369 U.S. 186, 226-29 (1962) (holding that an equal protection challenge to a state's legislative redistricting is not a nonjusticiable political question).

¹³⁴ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding application of the public accommodations provision of the Civil Rights Act of 1964 to a motel which claimed that it did not operate in interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (upholding application of the same provision to a restaurant which claimed that it did not operate in interstate commerce).

¹³⁵ See *The Civil Rights Cases*, 109 U.S. 3, 13, 26 (1883) (invalidating the public accommodations provisions of the 1875 Civil Rights Act and creating the state action doctrine).

¹³⁶ 347 U.S. 483, 495 (1954) (concluding that "in the field of public education the doctrine of 'separate but equal' has no place").

¹³⁷ 410 U.S. 113, 154 (1973) (concluding that "the right of personal privacy includes the abortion decision").

¹³⁸ 381 U.S. 479, 484-85 (1965) (discussing the various zones of privacy created by the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments).

foundation, by distinguishing the fundamental right of privacy from the discredited doctrine of substantive due process.¹³⁹

It would appear that the Burger and Rehnquist Courts, if not entirely successful in attempting to restore a once pervasive sense of judicial modesty, simply harkened back to less noteworthy eras in which the Supreme Court truly was the third—and perhaps least dangerous¹⁴⁰—branch. In this historical context, it is perhaps not surprising that some of the Burger Court's most notable opinions can fairly be characterized as hybrids, representing a sometimes difficult balance between the desire to adhere to precedents laid down in a more liberal era, during the Warren Court, and the contrary desire to infuse a greater notion of judicial restraint.¹⁴¹ Thus, during Warren Burger's tenure as Chief Justice between 1969 and 1986, the Court located for the first time, and then cut back upon, a fundamental right to abortion;¹⁴² issued a hair-splitting decision upholding a state medical school's use of race as an admissions criterion, while invalidating the school's process of setting aside a specified number of places for candidates admitted through affirmative action;¹⁴³ located, for the first time, an execu-

¹³⁹ For a more comprehensive list of landmark Warren Court precedents, see Wells, *supra* note 131, at 630-32.

¹⁴⁰ This expression is taken from Professor Bickel's famous book, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* at ix, 1 (1962), which in turn relied upon Alexander Hamilton's characterization of the federal judiciary as "least dangerous." *THE FEDERALIST* NO. 78 (Alexander Hamilton).

¹⁴¹ The seeming ambivalence of the Burger Court is one of the overriding themes in the well-known collection of essays, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983).

¹⁴² See *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-93 (1983) (upholding a parental notification provision for minors seeking an abortion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 63-65 (1976) (upholding a state statute in which a preset number of weeks was rejected for determination of viability and noting that in *Roe v. Wade* the Court had recognized that "viability was a matter of medical judgment, skill, and technical ability" and further noting that the Court wished to "preserve[] the flexibility of the term").

Of course, the Rehnquist Court upheld substantially more restrictive abortion laws. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2819, 2822-29 (1992) (upholding most provisions (except for spousal notification) of Pennsylvania's restrictive abortion statute and concluding that abortion restrictions infringe upon a protected liberty interest subject to a newly minted undue burden test rather than upon a fundamental right subject to strict scrutiny); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 507-20 (1989) (plurality opinion) (upholding several restrictions on the right to abortion and suggesting the abandonment of the trimester framework).

¹⁴³ See *Board of Regents v. Bakke*, 438 U.S. 265, 315, 355 (1978) (holding that "race-conscious remedial action is permissible" but that the school's "special admis-

tive privilege, but then allowed a Special Prosecutor to overcome that privilege by issuing a subpoena;¹⁴⁴ and upheld a literacy test for the District of Columbia Police Department, notwithstanding disparate race-based outcomes, because no purposeful discrimination was found¹⁴⁵ while, in extending the Equal Protection Clause to require northern states to desegregate their de facto segregated public schools, willingly inferred discriminatory intent to segregate an entire system based upon proof of segregative intent for only a part of that system.¹⁴⁶ Because of the hybrid nature of its rulings, the Burger Court's legacy is largely one of a transitional bridge between two more ideologically driven Supreme Court periods.¹⁴⁷

sions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity").

¹⁴⁴ See *United States v. Nixon*, 418 U.S. 683, 707 (1974) (Burger, C.J.) (concluding that "the legitimate needs of the judicial process may outweigh Presidential privilege").

¹⁴⁵ See *Washington v. Davis*, 426 U.S. 229, 246 (1976) (White, J.) (noting that "the disproportionate impact of [a particular literacy test does not] warrant the conclusion that it is a purposeful device to discriminate").

¹⁴⁶ See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 213 (1973) (Brennan, J.) (holding that a school system determined to maintain deliberate racial segregation in one portion of a system "has the affirmative duty to desegregate the entire system").

¹⁴⁷ In his recently published biography of Justice Powell, Professor John Calvin Jeffries, Jr. provides a similar account of the Burger Court as a prelude to characterizing Justice Powell, who served for most of that Court and the first two years of the Rehnquist Court, from 1972 to 1987, as the fulcrum holding the balance between two often irreconcilable extremes. Not surprisingly, therefore, Justice Powell is widely regarded as having had an unusually strong jurisprudential impact on the most divisive issues of the day, including busing, affirmative action, and the rights of criminal defendants. Professor Jeffries explains:

The Supreme Court in Powell's time was neither consistently liberal nor dependably conservative, neither predictably activist nor reliably restrained. It was an era of judicial balance. The periods before and after were of a distinctly different character. In the liberal heyday of Chief Justice Earl Warren, the Justices commanded an end to segregation, greatly expanded the rights of criminal defendants, and zealously sought to reform many other aspects of American society and law. After Powell retired, the Supreme Court entered the conservative ascendancy associated with the Chief Justiceship of William Rehnquist.

In between lay a period—lasting for the better part of a generation—in which neither liberals nor conservatives dominated the Supreme Court. These were years of ideological stalemate and political pragmatism, of conflict and compromise, of decisions that owed less to dogmas of the left or the right than to a flexible search for justice, order, and decency in a changing world. And this Court's most characteristic voice, the one that proved most often decisive, was that of its most reluctant member, Justice Lewis F. Powell, Jr., of Virginia.

And if the Warren Court represented one ideological extreme, surely the Rehnquist Court represents the other. Or does it? Some members of the Rehnquist Court, most notably, the Chief Justice and Justices Scalia and Thomas, even if sometimes disagreeing at the margins, undoubtedly share a common conservative constitutional ideology. That ideology is largely associated with substantially reducing the extent of the federal judiciary's policymaking role and leaving that function to Congress and state legislatures. One might be inclined to label such an ideology as one of judicial restraint, but that seemingly noncontroversial label itself has profound normative underpinnings. Thus, academics have not hesitated to point out that the process of "restoring" the Court to a less influential policymaking role, in the face of precedents tending in the opposite direction, requires its own form of judicial activism.¹⁴⁸ Not surprisingly, therefore, one characteristic of the present activism on the right is its call for reduced adherence to the doctrine of *stare decisis*, especially in constitutional cases.¹⁴⁹

JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 12 (1994). As explained below, the mid- to late-Burger and early- to mid-Rehnquist Courts were characterized by three competing jurisprudential camps, none of which could predictably dominate the Court: first, a liberal approach designed to keep the Constitution attune with the times; second, a conservative approach designed to restore the federal judiciary to a more limited role; and third, a moderate approach that alternatively eschewed the ideologically driven approaches of the left and right in favor of more individualized, "reasoned," and methodological judgments. In social choice terms, these Courts can be viewed as possessing three irreconcilable peaks, *see supra* note 17 and accompanying text (illustrating a group with multi-peaked preferences), thus preventing any of the three camps from assuming, with any reasonable degree of confidence, that, if the Court were to issue a substantive decision in a given case, it would not be relegated to dissatisfied minority, or even to dissatisfied majority, status. As demonstrated below, this insight goes a long way in explaining why standing evolved into its present form during this critical period on the Court.

¹⁴⁸ See, e.g., Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992) (arguing that *Lujan* is a form of substantive due process from the right); cf. Richard J. Pierce, Jr., Comment, *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1187, 1193 (1993) (arguing that *Lujan*, by restricting those injuries for which a congressional grant of standing is permitted to those defined at common law, promotes agency capture by the intended regulatory objects).

¹⁴⁹ See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2861 (1992) (Rehnquist, C.J., dissenting) (arguing against rigid adherence to *stare decisis* in constitutional cases, stating that "[e]rroneous decisions in . . . constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible"); *see also id.* at 2880-85 (Scalia, J., dissenting) (providing

On the opposite side, until quite recently in any event, a liberal bloc of comparable size,¹⁵⁰ consisting of Justices Blackmun, Brennan, and Marshall,¹⁵¹ demonstrated an equal commitment to preserving, and expanding upon, the victories of the Warren and early Burger Court eras. Again, not surprisingly, this bloc exhibited a new-found admiration for the doctrine of *stare decisis*, albeit not a consistent one, and did not hesitate to label the conservative bloc's efforts to delimit the reach of their favored precedents as a form of unfettered judicial activism. Finally, the so-called "centrist" Republican appointees—Stewart (then O'Connor), Powell (then Kennedy), and Souter (replacing Brennan)—forged a middle path, striking a difficult, and certainly unpredictable, balance between the objectives of restoring the judiciary to a less prominent role and of respecting the high-profile precedents laid down in a more liberal era.¹⁵²

Given the number of years that the Burger and Rehnquist Courts have spanned, it may be helpful to provide a graphic depiction of the shifting coalitions from the beginning of the Burger era to the present Court. For simplicity, I have divided the history of the Supreme Court into four periods:

a vitriolic attack on the joint opinion's position that *stare decisis* requires continued adherence to some manifestation of a fundamental right to abort).

¹⁵⁰ It is important to note that the actual size of Supreme Court coalitions, as demonstrated by Justice Powell's disproportionate impact on the Court, *see supra* note 147, is not important, provided there are no less than three coalitions, any two of which contain the requisite five votes to form a controlling majority. *See* Stearns, *supra* note 12, at 1256 n.137. For a more detailed presentation of the composition of, and replacements on, the Court during the relevant periods, *see infra* Table 2.

¹⁵¹ Although it is fair to describe Justice Stevens as enigmatic, *see, e.g.*, William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1088 (observing that "Justice Stevens is widely viewed as 'enigmatic, unpredictable, [a] maverick, a wild card, a loner'"), for purposes of Table 2 below, he fits most comfortably in the liberal bloc.

¹⁵² While it is perhaps too early to determine whether, with the exception of issues related to "gender," Justice Ginsburg will join the bloc in the middle or on the left, and where Justice Breyer will fit in this spectrum, I have placed them in the moderate bloc based upon the limited voting record that is available.

	<i>Liberal</i>	Moderate	CONSERVATIVE
Period One 1969 to 1972	<i>Black</i> [Powell 1972] <i>Fortas</i> [BLACKMUN 1970] <i>Brennan</i> <i>Douglas</i> <i>Marshall</i> <i>Total: 5, then 4</i>	White Harlan [REHNQUIST 1970] Stewart <i>Total: 3, then 2</i>	BURGER <i>TOTAL: 1, then 3</i>
Period Two 1972 to 1986	<i>Blackmun</i> <i>Brennan</i> <i>Stevens</i> <i>Marshall</i> <i>Total: 4</i>	White Stewart [O'Connor 1981] Powell <i>Total: 3</i>	BURGER [REHNQUIST 1986] REHNQUIST [SCALIA 1986] <i>TOTAL: 2</i>
Period Three 1986 to 1994	<i>Blackmun</i> [Breyer 1994] <i>Brennan</i> [Souter 1990] <i>Stevens</i> <i>Marshall</i> [THOMAS 1991] <i>Total: 4, then 1</i>	White [Ginsburg 1994] O'Connor Powell [Kennedy 1988] <i>Total: 3, then 5</i>	REHNQUIST SCALIA <i>TOTAL: 2, then 3</i>
Period Four 1994 to present	<i>Stevens</i> (Souter ?) <i>Total: 1 (maybe 2)</i>	Breyer Souter [?] Kennedy [?] O'Connor Ginsburg <i>Total: 5 (maybe 3)</i>	REHNQUIST SCALIA THOMAS (Kennedy ?) <i>TOTAL: 3 (maybe 4)</i>

TABLE 2: Multi peakedness in the Burger and Rehnquist Courts in Four Periods

I have employed the following conventions in the table: italics indicate liberal justices; all capitals indicate conservative justices; and ordinary typeface indicates moderate justices. In brackets after each justice who has been replaced appears the name of the replacing justice, in his or her appropriate typeface, with the date of replacement. Using appropriate brackets and parentheses, I have indicated those justices whose classification is subject to question.¹⁵³ At the bottom of each box, I have listed the total number

¹⁵³ The capital letters initially used for Justice Blackmun indicate that he started

of justices that appear in the given category for the relevant period. In periods one, three, and four, I have listed a range, suggesting either the loss of a core member or ambivalence in classifying particular justices. Assuming that my general classifications are sound, the table demonstrates that in period one, coming out of the Warren Court era, the liberals, while still in control of the Court, were losing their reign. With only five justices, the liberal camp could not afford any defections if it were to issue a predictable ruling in a given case. In periods two and three, which represent the mid- to late-Burger Court and the early- to mid-Rehnquist Court, no single camp dominated the Court, and any two camps could form a five-vote majority coalition. This period was most ripe for the formation of the modern standing doctrine. In the current period, period four, the Court has created a bare (and questionable) majority moderate bloc and has gradually strengthened its conservative bloc. Depending upon the extent of moderate defections in either direction, for example, if Souter votes with Stevens, the remaining liberal, or if Kennedy, joined by another moderate, votes with the conservatives, the results are again unpredictable.¹⁵⁴ In

as a conservative, but then moved to the liberal bloc in period two. Professor Riggs has classified Blackmun first as a conservative, then as a moderate, then as a liberal. See Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 689-90 (1993). While I agree with Riggs's more complex classification for Justice Blackmun, I have placed him in the conservative, then liberal, blocs, based upon the category in which he was classified for the longest duration within each specified period. Even if Blackmun is more moderate for part of periods one and two, the analysis does not change because the Court remains multi peaked. Moreover, as early as 1973, when Blackmun issued *Roe v. Wade*, 410 U.S. 113 (1973), he fit most comfortably within the liberal bloc. Assuming Blackmun is best classified as conservative for the early part of his tenure on the Supreme Court, the liberal bloc would then have lost its ability to control controversial case outcomes when Blackmun replaced Justice Fortas. Upon later acquiring Justice Blackmun as a member, thus regaining the lost Fortas vote, the liberal bloc had already lost too many members (since Black had been replaced with Powell, a moderate) to regain its majority status. It is worth noting that in classifying justices as liberal, moderate, or conservative, Professor Riggs has implicitly assumed a single, albeit graded, liberal-to-conservative ideological spectrum, rather than a multi peaked spectrum.

¹⁵⁴ Notably in periods two and three, Justice Powell was often the fulcrum, as White, Stewart, and O'Connor (and with decreasing frequency, Souter), the other moderates, often voted with the conservative blocs. See Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI-KENT L. REV. 481, 481 (1990) (explaining that "[i]n 1990, it appears that the Court has a core conservative bloc of five (Rehnquist, O'Connor, Scalia, Kennedy & Souter), with one other (White) providing a rather consistent conservative vote"); David M. O'Brien, *On Supreme Court Commentaries and Developing Constitutional Law*, 81 MICH. L. REV. 839, 845 n.53 (1983) (describing Justice Potter Stewart as the

fact, we might expect the most defections from members of the moderate bloc, given their less than absolute commitment to ideological principles in deciding cases. If so, multi peakedness extends into the present period.

While a social choice depiction of the preceding analysis will certainly fail to capture the complexities that arise in any particular case, it will, nonetheless, be helpful for the discussion to follow.¹⁵⁵ Before proceeding, we will need to make a few assumptions. In fact, in an effort to increase the number of potential cases captured in the analysis, I will provide four paradigms, based upon four different sets of assumptions. In the end, however, all four paradigms will illustrate the same point: The Burger and Rehnquist

Court's "second moderate conservative") (reviewing JESSE CHOPER ET AL., *THE SUPREME COURT: TRENDS AND DEVELOPMENTS, VOLUME 3: 1980-1981* (1982)); Riggs, *supra* note 153, at 697 (describing Justice White, since 1981, as the Court's sole moderate, with a "continuing conservative tilt"); Linda P. Campbell, *Justice White: The Democrat Who Often Votes with Court Conservatives*, CHI. TRIB., Mar. 21, 1993, at 18. In period four, Justice Kennedy has become the fulcrum, but with a clear, and doctrinally significant, shift to the right. *See infra* note 166; *see also* Joan Biskupic, *When Court Is Split, Kennedy Rules*, WASH. POST, June 11, 1995, at A14 (noting that Justice Kennedy "holds the decisive vote").

¹⁵⁵ It is important to note that the paradigms set out below, which are intended to demonstrate the possibility of cyclical preferences, are inevitably based upon assumptions that cannot be proven using actual case results. The Court, for reasons explained above and in Stearns, *supra* note 12, does not employ unlimited pairwise voting, which would be needed to reveal cyclical preferences. Instead, the Court employs case-by-case voting. This voting rule avoids cycles but sometimes creates irrational, or arbitrary, results. The discussion to follow is intended to demonstrate that the sometimes inconsistent results of case-by-case voting might be masking a deeper pathology, namely cyclical preferences leading to irrational outcomes. That pathology is likely to encourage rational justices to devise a doctrine, like standing, which would enable the Court to avoid the irrationality of its own creation. While the assumptions required to demonstrate the hypothetical cycles presented below cannot be proved (or disproved), the presence of cases that reveal shifting majorities on dispositive issues across separate opinions or across plurality, concurring, and dissenting opinions in a given case, provide strong evidence that the Court was prone to possessing cyclical preferences in periods two and three.

While Professor Rogers uses the term "shifting-majority" to describe cases in which different justices sign on to separate parts of the Court's majority opinion, *see, e.g.*, *Board of Regents v. Bakke*, 438 U.S. 265 (1978); *see also* Rogers, *supra* note 14, at 459-61 (collecting cases); Stearns, *supra* note 12, at 1271 n.191 (analyzing *Bakke*), I have used the term instead to describe cases in which the Court issues a plurality, concurrence, and dissent and in which there are two requisite issues to achieve the Court's holding but where an issue-by-issue resolution of these issues produces the result in dissent. *See* Rogers, *supra* note 14, at 443 n.9 (discussing similar cases). It is also worth noting, as the *Kassel* hypothetical illustrates, *see supra* part I.B, that the disputes over which the Court's preferences are likely to cycle need not be as political in nature as those described in the text.

Courts, at least until recently, were unable to ensure with any reasonable degree of certainty that, in resolving particular cases, especially the most divisive cases of the day, they would not thwart the will of a present majority, thereby creating an arbitrary or irrational result.

Assume that the Court is composed only of the three camps described above, which for ease of presentation, we will refer to as the (A) conservative bloc; (B) liberal bloc; and (C) moderate bloc. For the first paradigm, assume that the Court grants certiorari in a case that provides an opportunity to reverse a liberal Warren Court precedent. The conservative bloc would most prefer to issue a strong ruling that signals a retreat from the position established by the Warren Court. If required to uphold the precedent, however, the conservative bloc would prefer to do so on the basis of whatever independent rationale the liberal bloc offers rather than to rely upon the moderate bloc's rationale, which rests upon *stare decisis*. While this might appear counterintuitive, assume the conservative bloc members reason that a ruling that rests upon *stare decisis* might limit their ability to reverse Warren-era precedents in future cases more than a ruling that rests upon a set of principles, even ones with which they sharply disagree. In that sense, the liberal bloc's proposed ruling might be viewed as more narrow than the moderate bloc's proposed ruling with respect to the particular facts of the case. Based upon those assumptions, the conservative bloc's preferences are (A,B,C). Assume that the liberal bloc would most prefer to rule in accordance with its own principles. Failing that, it would prefer upholding the precedent based on the moderate bloc's *stare decisis* analysis to overturning the precedent based upon the conservative bloc's analysis. The liberal bloc's resulting preferences are (B,C,A). Finally, assume that the moderate bloc would most prefer to rest an affirmance on the doctrine of *stare decisis*. Failing that, it is more inclined to overrule based upon the conservative bloc's principles, which, but for *stare decisis*, it agrees with, than to uphold based upon the liberal bloc's principles. The moderate bloc's resulting preferences are (C,A,B). The resulting preferences are non-Condorcet, or multi-peaked, and thus not capable of rational resolution.¹⁵⁶

¹⁵⁶ Of course, the Court would issue an opinion, but, in doing so, it would inevitably thwart the will of a majority of its members.

For the second paradigm, consider the case of *Bowers v. Hardwick*,¹⁵⁷ where the Court upheld the conviction of a man charged with violating a Georgia statute prohibiting consensual acts of sodomy.¹⁵⁸ The state had prosecuted on the basis that as applied to heterosexual acts of sodomy, the statute was unconstitutional. As applied to the defendant, a gay man, the state maintained that the act was constitutional. Thus, to reverse the conviction, the Court would have had to expand the reach of the privacy cases to include protection for consensual acts of homosexual sodomy.¹⁵⁹ Ruling in the defendant's favor would have required departing from a nearly two-hundred-year history in which the constitutionality of such statutes was assumed. This time, with respect to the rationale, the moderate bloc aligns itself with the conservative bloc's members, in favor of affirming the conviction. Its rationale is not an ideological commitment to the propriety of the underlying statute, or even, necessarily to principles of federalism or a more limited judicial role. Instead, the moderate bloc would rule on a much narrower ground, one which might be viewed as a form of *reverse stare decisis*. Members of the moderate bloc determine that the privacy cases, for which they also lack an overriding ideological commitment, have not extended sufficiently far to cover this case and that the history of such state statutes suggests that their constitutionality has long been assumed.

Assume that the liberal bloc would most like to reverse and issue an opinion that expands the reach of the privacy cases. If required to uphold the conviction, however, the liberal bloc members would prefer doing so on the conservative bloc's rationale because the moderate bloc's rationale—if generally employed to assume the constitutionality of statutes that have long been on the books and not challenged—might be more restrictive in future cases involving rights expansions.¹⁶⁰ The liberal bloc's resulting preferences are (B,A,C). Assume that the conservative bloc, which would most like

¹⁵⁷ 478 U.S. 186 (1986).

¹⁵⁸ See *id.* at 195-96.

¹⁵⁹ In *Bowers v. Hardwick*, the Supreme Court declined to reach the issue of whether homosexuals are a suspect class under the Equal Protection Clause. The Court will likely reach that issue in *Romer v. Evans*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995).

¹⁶⁰ Some members of the conservative bloc, for example, if free to assess each claim on the merits, might, on occasion, employ natural law principles in future cases to forge a coalition with the liberal bloc to expand rights in a particular case, a result at odds with the more technical approach taken by the moderate bloc members.

to issue a strong ruling suggesting that the Constitution does not protect a generalized right of privacy, would next prefer upholding the conviction based upon the moderate bloc's more limited rationale than to reverse. The conservative bloc's resulting preferences are (A,C,B). Finally, assume that the moderate bloc, if forced to choose between the liberal and conservative positions, would prefer to reverse, based upon the liberal bloc's rationale, than to uphold the conviction, thereby suggesting a wholesale rejection of recently issued privacy cases. The moderate bloc's resulting preferences are (C,B,A). The direction of this cycle is the opposite of that in the prior example because the moderate bloc alignment—resting the case analysis on a technical narrow ground—is with the conservative rather than the liberal bloc. Again, the resulting preferences are non-Condorcet and multi peaked, thus preventing the Court from ensuring a rational resolution of the case.¹⁶¹

The third paradigm, which, in contrast with the prior two, does have a Condorcet winner, is based upon the Supreme Court's recent decision, *Planned Parenthood v. Casey*,¹⁶² in which three members of the Court's moderate bloc, Justices O'Connor, Souter, and Kennedy, issued a joint opinion striking several provisions of a Pennsylvania statute that limited the right of a woman to have an abortion. Assume that the moderate bloc would most prefer the joint-opinion analysis, resting primarily upon *stare decisis* and the desire not to overturn *Roe v. Wade*. Assume that, if forced to choose between upholding the statute in its entirety, thus reversing *Roe*, or affirming based upon the liberal bloc's preferred ruling, which would more strongly endorse *Roe*, the moderate bloc members would choose to rule with the liberal bloc. The moderate bloc's resulting preferences are (C,B,A). Assume that the conservative bloc would most like to issue a strong opinion upholding the abortion statute in its entirety and reversing *Roe*. Failing that, if forced to uphold the statute, the conservative bloc members would prefer signing onto the joint opinion with the moderate bloc, which, at the very least, suggests that *Roe* may not have been correct when decided. This ruling might in the future provide a firmer foundation for reversing *Roe*. The conservative bloc's preferences are

¹⁶¹ The fact that the Court reached a result and upheld the conviction does not disprove the thesis set out above. In fact, it tends in the opposite direction by demonstrating that if the Court as a whole lacks a Condorcet-winning preference, it will be forced to issue an opinion that a present majority of its members may disfavor relative to an available alternative.

¹⁶² 112 S. Ct. 2791 (1992).

(A,C,B). Finally, assume that the liberal bloc members would most like to issue a strong opinion invalidating the Pennsylvania statute in its entirety. Failing that, they would prefer signing onto the moderate bloc's joint opinion, which at the very least does not overturn *Roe*. The liberal bloc's resulting preferences are (B,C,A). For these preferences, there is a Condorcet winner at C, representing the moderate bloc's joint opinion. In fact, the joint opinion in *Casey*, resting primarily upon stare decisis, was the ruling in the case.¹⁶³

The first two paradigms, which produced a cycle, depended upon a seemingly odd alliance on a question of substantive law between the liberal and conservative blocs, against the moderate bloc, albeit for one of the two groups' second choices among three approaches. The fourth and final paradigm rests upon a more intuitive form of liberal/conservative alliance, which can also give rise to standing. Over the past several years, the number of close decisions, and especially five-to-four decisions, on the Supreme Court has increased significantly.¹⁶⁴ In these close cases, the outcome has often turned on the view of one or more justices in the moderate bloc, whose views on the underlying issue were not well-known. Thus, in the Burger Court, Justice Powell often controlled the outcome of politically volatile cases, although not in a predictable manner;¹⁶⁵ and, in the most recent terms on the Rehnquist Court (period four in Table 2), Justice Kennedy has often controlled equally unpredictable outcomes in close cases.¹⁶⁶ While the liberal

¹⁶³ See *id.* at 2803, 2806-16.

¹⁶⁴ For an analysis of the increased prevalence of five-to-four decisions and suggested root causes over the past several decades, see Riggs, *supra* note 153, at 676 (observing, based upon reviewed case data, that "one can easily discern a much larger volume of single vote decisions in the last decades of this century than in the early ones").

¹⁶⁵ See *id.* at 697 n.86 (placing Justice Powell's agreement score—agreement with the majority of the Court—at 71.3% from 1981-86).

¹⁶⁶ See JEFFRIES, *supra* note 147, at 556-57 (explaining how replacement of Justice Powell with Justice Kennedy likely altered outcomes in politically divisive cases from 1988 to 1989 and providing illustrations); see also Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 44-45 (1989) (explaining that in his first full term, "[j]oining Chief Justice Rehnquist and Justices White, O'Connor, and Scalia, Justice Kennedy supplied the critical fifth vote in a series of conservative 5-4 decisions in cases concerning abortion, capital punishment, civil rights, and criminal procedure"); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1119 (1994) ("Although Kennedy was a less controversial choice [than Robert Bork], 'the Court's swing seat no longer functioned as a vote that balanced the liberal and conservative blocs by siding with one or the other from case

and conservative blocs likely possess opposite substantive preferences in the politically divisive cases that are prone to close margin decisions, in the same cases they may well have one important common preference. This common preference is the subject of the fourth paradigm: Members of both camps might take the position that it is better to wait until the Court is required to make a decision by a set of facts that demands a substantive ruling of law (and which may be more favorable to them) than to rush to judgment now and hope that whoever controls the outcome, for example Justices Powell or Kennedy, votes in a way favorable to their side. Given this incentive to delay the resolution of close margin and politically divisive rulings, the liberal and conservative blocs create multi peaked preferences through an alignment based not on the underlying issue of substantive law but rather on the issue of standing.¹⁶⁷

In any event, the multi peakedness of the Burger and Rehnquist Courts, as illustrated in these hypotheticals, is noteworthy in two critical respects. First, it ensures that the Court's members cannot exert any reasonable degree of control over the Court's substantive

to case. Instead, Kennedy's vote most often served as a tie-breaker that could tip the balance in favor of the conservatives." (quoting HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 361 (3d ed. 1992)); Joan Biskupic, *Court's Conservatives Make Presence Felt: Reagan Appointees Lead Move Rightward*, WASH. POST, July 2, 1995, at A1, A17 (observing that "[t]he justice who was in the majority most [in the 1994-95 term] was Kennedy, 93 percent of the time"); Biskupic, *supra* note 154, at A14 (observing that Justice Kennedy "casts the fifth—and deciding—vote and in recent years . . . has been in the majority on important cases more than any other justice").

¹⁶⁷ It is also worth noting that the prospect of a new judicial appointment following the retirement or death of a sitting justice can affect the incentives of the remaining sitting justices on the question of standing. If a group of justices in the liberal or conservative bloc anticipates the replacement of a justice in the opposing camp with one of its own, the incentive to delay issuing a substantive decision would increase if the present expected outcome is either adverse to that camp's interests or close. Alternatively, if a coalition anticipates losing a member to another camp, the opposite incentive would arise. Personnel changes—and the incentives they pose for litigants—may have influenced the development of the ripeness and mootness doctrines even more than the standing doctrine, although no doubt it has influenced all three. Absent ripeness and mootness, interest groups could constantly try to manipulate well-settled rules without identifying a fortuity-based factual predicate by repeating prior facts or anticipating future facts in a given case. In any event, while this Article demonstrates that the Court's preferences can cycle over time with no personnel changes on the Court, I do not intend to suggest that cycling depends upon uniform personnel. Instead, intertemporal cycling is exacerbated when we introduce personnel changes, especially changes that might alter the coalition structure of the Court. Anticipating such changes will also contribute to the incentives of at least some justices to favor standing to a determination on the merits.

rulings. Instead, the Court's members are only able to predict that if a majority is unable to secure enough votes to resolve the case in a particular manner, the Court's substantive ruling will reflect the preferences of some minority of the Court, as in *Kassel*, *Seattle*, and *Crawford*. The result, namely suppressing the will of a present majority of the Court's members, will hold even if those members have full knowledge of everyone's preferences in advance. The possibility is increased when such preferences are not known. Given its obligation to issue a ruling in all cases properly before it, a multi-peaked Court has but two options: It may either decline certiorari in all controversial cases,¹⁶⁸ or it may devise a doctrine that enables the Court to consider such cases but to reach a collective outcome on something *other than* the merits, except when absolutely necessary. The latter option would serve to minimize, but not to eliminate, the Court's collective irrationality. This intuition, that the Court employs standing to avoid ruling on the merits, has led many scholars to suggest that standing is no more than a means by which to avoid deciding difficult cases.¹⁶⁹ While that insight might contain more than a kernel of truth, it certainly fails to capture the entire story, or even its most significant elements. After all, the more obvious mechanism for avoiding difficult cases is declining certiorari. Even then, however, only four justices must agree to issue a writ of certiorari, while five must agree on the outcome for the Court to issue an opinion in a given case,¹⁷⁰ setting aside plurality opinions. But if the Court is able to predict that non-Condorcet rulings will thwart the will of a present majority, rather than effectively roll the dice, we might expect fewer controversial cases to reach the Court's self-governed docket than history suggests. The much larger difficulty with the avoidance thesis is that the Court has never suggested that its standing precedents apply only to itself and not to lower federal courts.¹⁷¹ And with good reason. Given the preceding analysis,

¹⁶⁸ For a discussion of the practical limits of this approach, see *supra* part I.C.1.

¹⁶⁹ See Stearns, *supra* note 2, part I.C.

¹⁷⁰ To be clear, five justices need not agree on the method of reaching that outcome to issue a collective ruling; instead, they must only agree on the most often binary decision to affirm or reverse. The preference aggregation problems arise in attempting to coalesce the members' preferences around any given rationale. See Stearns, *supra* note 12, at 1272 n.192 (explaining that "Supreme Court voting rules, unlike legislative voting rules, impose virtually no consensus requirement beyond agreement on binary choice of outcome" as a precondition to collective resolution of a case).

¹⁷¹ Cf. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988)

lower federal courts, which lack the power of docket control, are even more susceptible to litigant path manipulation than is the Supreme Court.

While operating indirectly, therefore, the application of standing to the lower federal courts is a necessary condition of the Supreme Court's effective power to control its own docket. Because the lower federal courts cannot control their own dockets in the same manner as can the Supreme Court, standing prevents litigants from forcing circuit splits on important questions of federal law. Such circuit splits, more than any other factor, increase the cost of certiorari denials in the Supreme Court.¹⁷² It is not surprising, therefore, that the standing cases strongly suggest that they are intended to apply to all federal courts.

In fact, if standing were actually intended to enable the Supreme Court to avoid deciding difficult cases, the doctrine would quickly backfire. Ideological litigants would happily take the avoidance signal as an invitation to force judicial creation of positive law at the district and circuit court levels. The resulting precedents, if favorable, would be no less attractive within the affected circuits than if decided by the Supreme Court, which will have signaled an intent to keep them in place. And, if unfavorable, the precedents would only invite further litigation elsewhere designed to create circuit splits that render the Supreme Court's hands-off approach unpalatable. The avoidance strategy, even if successful in the very short term, would promote, rather than inhibit, ideologically based federal court litigation. If so, in short order, the Supreme Court would likely cut back upon, or perhaps even abandon, standing as yet another example of a doctrine that has proved unworkable over time. But the historical record is flatly inconsistent with that thesis. Standing is alive and well, and thus in great need of further analysis.

Judicial multi peakedness is noteworthy in a second critical respect. Multi peaked preferences attract litigants who seek to force judicial creation of positive law, and specifically of positive law that lacks majority or Condorcet-minority legislative support, for the very same reason that multi peaked preferences create angst among the justices who, in the aggregate, possess them.¹⁷³ Because the

(positing that "[a] true standing decision determines whether a plaintiff has a right to judicial relief in any federal court, not just the Supreme Court") (citation omitted).

¹⁷² See STERN, *supra* note 66, at 197-202 (discussing the importance of resolving circuit splits on important questions of federal law as motivating grants of petitions for writ of certiorari).

¹⁷³ As shown below, multi peaked judicial preferences might also invite broad-based

Supreme Court, given its decisional processes, is unable to ensure any sense of collective rationality in processing multi-peaked preferences for decision, interest groups view the Court as a free-for-all in which such fortuitous matters as timing can lead to major victories that would never have occurred in a legislative forum.

In any event, even assuming that both the Burger and Rehnquist Courts possessed multi-peaked preferences, thus inviting litigant attempts at path manipulation, the question remains whether this phenomenon began in the 1970s, when the modern standing doctrine took its present form and status. Again, a complete history of the Supreme Court is unnecessary for the task at hand. As stated above, the modern doctrine of standing has its roots in the New Deal expansion of federal and state regulatory authority.¹⁷⁴ In fact, constitutional historians have largely agreed that standing evolved to stave off unwelcome attacks by those harmed by regulatory programs that were designed to combat the Depression.¹⁷⁵ While traces of the doctrine can be found in much earlier practice,¹⁷⁶ as an historical matter, the general wisdom is well

statutory conferrals of standing. See *infra* part III.D (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

¹⁷⁴ See Fletcher, *supra* note 171, at 225 (stating that the Supreme Court began to develop this doctrine in the 1930s); Stearns, *supra* note 2, part I.C (stating that the standing doctrine was developed by Justices Brandeis and Frankfurter to prevent challenges to favored regulatory programs); Winter, *supra* note 101, at 1453 (arguing that the rise of administrative agencies created the potential for more adjudication).

¹⁷⁵ See Fletcher, *supra* note 171, at 225 (asserting that the standing doctrine arose out of the litigation surrounding the growth of administrative agencies); Winter, *supra* note 101, at 1453 (stating that the standing doctrine was developed as a result of the litigation problems caused by the intrusion of administrative agencies into "previously unregulated corners of society").

¹⁷⁶ Steven Winter has documented extensively the early sittings of standing language in the late 18th century equity practice in federal courts. See generally Winter, *supra* note 101. Winter demonstrates that these early uses of standing terminology were intended to limit the equitable powers of federal courts and *not* to limit federal litigation to a single private rights model. See *id.* at 1446-47 (explaining that beginning with *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court began to employ the early equity standing language to insist upon a single private-rights litigation model). Numerous authors have corroborated Winter's thesis. In a recent summary of the literature, Professor Gene Nichol stated:

In separate, major, and compelling efforts, Louis Jaffe in 1965, Raoul Berger in 1969, and Steven Winter in 1988 have demonstrated that injury was not a requisite for judicial authority in either the colonial, framing, or early constitutional periods. The Judiciary Act of 1789, like several contemporaneous state statutes, allowed "informer" actions. English practice included prerogative writs, mandamus, *certiorari*, and prohibition, all designed to "restrain unlawful or abusive action by lower courts or public agencies," and requiring only "neglect of justice," not individual injury.

supported.¹⁷⁷ The question that these articles have failed to address, and which constitutional historians have left largely unexplained, however, is why standing assumed its present form and status beginning in the 1970s. Briefly stated, my thesis is that the presence of multi-peaked preferences in the Burger and Rehnquist Courts largely explains, in economic terms, the incentives of litigants to force judicial codification of non-Condorcet-winning preferences into law and the concomitant incentives of Supreme Court justices to prevent litigant path manipulation by imposing a standing barrier.¹⁷⁸ Even assuming, however, that the presence of multi-peakedness on the Burger and Rehnquist Courts accounts for the evolution of modern standing from its New Deal roots, the question remains, then, whether the same incentives were present at some earlier time between the New Deal, when the Court first introduced standing, and the Burger and Rehnquist Courts, when standing assumed its present form. The answer is almost certainly no.

To see why, we need to consider the two major transitional jurisprudential periods on the Supreme Court between the New Deal and the Burger Court. The first period begins, of course, with President Franklin Delano Roosevelt's threatened Court-packing plan and Justice Owen Roberts's famous "switch in time that saved nine."¹⁷⁹ The plan to add one justice for every justice over the age of seventy who did not retire was intended to limit the influence of the four conservatives who consistently thwarted FDR's New Deal efforts: Justices McReynolds, Butler, Van Devanter, and Sutherland.¹⁸⁰ Roberts's vote averted FDR's perceived need to

Stranger suits and relator practice countenanced the assertion of judicial power without the existence of a direct personal stake in the controversy.

Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1151-52 (1993) (citations omitted).

¹⁷⁷ See Stearns, *supra* note 2, part I.C.

¹⁷⁸ I also demonstrated in *id.* part II.B, based upon the social choice analysis, that standing serves functions that are not replicated by the question whether a plaintiff has a cause of action, or by the related justiciability doctrines of ripeness and mootness.

¹⁷⁹ See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); see also *infra* note 180.

¹⁸⁰ In addition to the "Four Horsemen," as the four conservative justices were sometimes called, Justice Owen Roberts rather consistently sided with the conservatives against FDR's New Deal initiatives, thereby creating a majority in major cases. As William E. Leuchtenburg states:

From the beginning of the Roosevelt era, Administration leaders had worried about Mr. Justice Roberts. Their anxiety had eased when Roberts had helped compose the majority in *Nebbia*, *Blaisdell*, and the gold clause

pack the Court; in fact, FDR ultimately replaced virtually every member of the Court during his long administration.¹⁸¹ The important point for our purposes is that, over a relatively short period of time, FDR succeeded in replacing those justices committed to a constitutionally imposed laissez faire regime, under the guise of substantive due process, with justices who were more willing to allow government regulatory intervention consistent with the objectives of the New Deal, and, critically, who shared a minimal ideological commitment to respecting precedents that were adverse to FDR's regulatory programs.¹⁸²

cases. But when Roberts joined the Four Horsemen in striking down the Railroad Retirement Act, New Dealers recognized that the conservatives on the Court, for the first time since FDR took office, had gotten the upper hand. Furthermore, the language of Roberts's opinion led them to fear the worst—that this was no temporary defection but a signal that Roberts was permanently lost. In fact, in every important division on the Court for almost all of the next two years, Roberts was to align himself with the Conservative Four. The *Rail Pension* decision, then, loomed as far more important than the particular legislation at issue. May 6 was to be looked back on as the day of a historic shift of power on the highest bench.

WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 42 (1995); see also *id.* at 168-74 (observing that between 1935 and 1937, Justice Roberts consistently joined the Four Horsemen).

The most famous single instance of the collective efforts of these justices to thwart the New Deal programs, however, came after May 6, 1935. On "Black Monday," May 27, 1935, the Court struck the National Industrial Recovery Act and the mortgage moratoria in the *Frazier-Lemke Act* in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), and issued *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which prevented FDR from removing a commissioner on the independent Federal Trade Commission. For an analysis of *Humphrey's Executor*, see *infra* note 183 and accompanying text. For an historian's recent review of this critical Supreme Court period, see generally LEUCHTENBURG, *supra*. Justice Roberts's defection in the 1937 case *West Coast Hotel*, 300 U.S. 379, referred to as the "switch in time that saved nine," turned the tide for FDR on the Supreme Court and rendered his originally devised Court-packing plan unnecessary to the survival of his New Deal initiatives. See LEUCHTENBURG, *supra*, at 142, 177.

¹⁸¹ From 1937 through 1941, FDR appointed 7 of the associate justices: Black in 1937; Reed in 1938; Frankfurter and Douglas in 1939; Murphy in 1940; and Byrnes and Jackson in 1941. See LEUCHTENBURG, *supra* note 180, at 220. Justice Byrnes, who resigned one year after his appointment, was replaced by Justice Rutledge, *see id.*, the only new associate with federal judicial experience prior to joining the Supreme Court. *See id.* at 212. He had served for two years on the United States Court of Appeals for the District of Columbia Circuit. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947*, at 13 (1963).

¹⁸² See Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 638 (1990) (explaining that "[w]ithin five years [of FDR's re-election], the victory of the liberal forces was consolidated as Roosevelt appointed a number of justices who were both ideologically committed to

During the same period, the Court achieved two noteworthy objectives beyond upholding New Deal programs. First, it began to clear the way for the creation of what is now commonly referred to as the "fourth branch."¹⁸³ The regulatory agencies created in the New Deal were relatively modest in both scope of authority and size by more modern standards, but their creation and approval during the New Deal Court proved critical for the regulatory expansion in the Great Society program during the 1960s.¹⁸⁴ During the latter

the New Deal and vigorously opposed to the judicial activism of the *Lochner* era"); see also Riggs, *supra* note 153, at 682-84 (observing that when FDR elevated Justice Harlan Stone to Chief Justice in October 1941 (Stone was appointed Associate Justice by Calvin Coolidge), only Justice Stone and Associate Justice Owen Roberts had more than four years of experience on the Supreme Court).

¹⁸³ Ironically, while *Humphrey's Executor*, 295 U.S. 602, which prevented FDR from removing an officer of the Federal Trade Commission who did not share FDR's political views, was viewed as a major setback to the New Deal, it ultimately helped pave the way for numerous New Deal programs by establishing the power to create independent federal agencies. See Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779. Verkuil explains:

The independent agency has existed for one hundred years, since the formation of the Interstate Commerce Commission as the prototype. But its "independence" did not become a matter of constitutional concern until the 1930's, when the New Deal greatly expanded the number of agencies and commissions. Ironically, President Roosevelt, the great spawner of administrative government, was the victim as well as the beneficiary of the independence concept.

Id. at 780; see also Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 164 n.46 (1990) (observing that "a host of independent agencies was created during the New Deal"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 441 (1987) (observing that, while such independent agencies as the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Radio Commission "were created well before the New Deal" and while many New Deal regulatory agencies differed in that they "faced relatively clear legislative instructions," "the enduring legacy of the [New Deal] period is the insulated administrator").

¹⁸⁴ Professor Theodore J. Lowi explains:

Depending on who is doing the counting, an argument can be made that Congress enacted more regulatory programs in the five years between 1969 and 1974 than during any other comparable period in our history, including the first five years of the New Deal. It is possible to identify 130 major regulatory laws enacted during the decade of 1969-79. Moreover, an even stronger argument can be made that the regulatory policies adopted during that period were broader in scope and more unconditional in delegated discretion than any other programs in American history.

Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 298 (1987) (footnotes omitted); see also Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 391-93 (1987) (confirming Lowi's historical analysis but disagreeing on implications for the nondelegation doctrine).

period, with the occasional—and exceptional—use of the now moribund nondelegation doctrine to limit substantively the scope of federal regulatory statutes,¹⁸⁵ Congress's authority to confer substantial regulatory authority on independent agencies was largely assumed based upon New Deal precedents. Today, the once limiting nondelegation doctrine poses virtually no barrier to delegating broad-based regulatory authority to agencies.¹⁸⁶ In the New Deal Court, the standing doctrine furthered the objective of promoting a regulatory bureaucracy aimed at combatting the Depression by limiting the potential class of plaintiffs entitled to challenge the regulatory expansion.¹⁸⁷ For that very reason, constitutional historians largely trace the origins of standing to the New Deal.¹⁸⁸

Second, in creating a Court more favorably disposed to governmental regulation, President Roosevelt himself ultimately created a second rift in the Supreme Court, which replaced the former rift over the constitutional validity of economic substantive due process. Having packed the Court sufficiently to ensure that

¹⁸⁵ See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 17 (1982) ("The Court . . . has never entirely abandoned the delegation doctrine. It continues to live a fugitive existence at the edge of constitutional jurisprudence."). The authors explain that in addition to occasional references by individual justices, "[t]he Court sometimes refers to the doctrine . . . when interpreting broad statutes, using it in support of an otherwise tenuous effort to narrow statutory construction." *Id.* at 12.

¹⁸⁶ See *id.* at 12 (positing that in recent years, nondelegation has become something of a "nondocctrine").

¹⁸⁷ Steven Winter explains:

The liberals [including most notably Justices Brandeis and Frankfurter] were interested in protecting the legislative sphere from judicial interference. Their goal was to assure that the state and federal governments would be free to experiment with progressive legislation. The private rights model was not just an available prototype, it was an ascendent prototype that would serve their purposes well. By excluding the public rights model . . . the liberals could preclude any dissatisfied private citizen from invoking the Constitution in the courts to challenge the progressive programs enacted by the polity.

Winter, *supra* note 101, at 1456-57 (citations omitted). While Winter's thesis helps to explain the emergence of standing in the New Deal Court, it fails to explain why the Burger and Rehnquist Courts, which were more skeptical of governmental intrusion into private orderings, failed to abandon or cut back upon standing, rather than to increasingly develop and employ it. For a discussion of this issue, see *infra* part II.B.2. Using Winter's terminology, the question remains why the private rights model was an ascendent prototype in an increasingly conservative Court that presumably wished to cut back upon liberal precedents that began in the New Deal and that were expanded in the Warren Court.

¹⁸⁸ See Winter, *supra* note 101, at 1456-57.

his regulatory programs would withstand due process challenges, which were limited in number by the new standing doctrine, President Roosevelt forged a Court that was sharply divided on the jurisprudential framework for interpreting the Fourteenth Amendment Due Process Clause.¹⁸⁹ While the Court was divided on the question why economic liberties were not protected by the Due Process Clause, the far more important division existed with respect to locating those rights that the clause did protect. Because a majority of the Court agreed that economic liberties were no longer protected, and that prospective economic regulation was therefore permissible, the different bases on that question were of little concern. But the different jurisprudential bases created an increasingly important emerging rift over how to determine which rights were protected, those deemed fundamental based upon notions of natural rights or those set out in the Bill of Rights, and what the protected rights entailed. After a long and often heated debate between the so-called incorporationists and the so-called fundamental rights camp,¹⁹⁰ which lasted from Chief Justice

¹⁸⁹ See Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71. The author explains:

Following the constitutional crisis of 1937, the personnel of the United States Supreme Court changed rapidly as Franklin Roosevelt named new Justices whom he believed committed to the modern views of the New Deal. Roosevelt appointees constituted a majority of the Court by 1942, but instead of harmony, the Court entered one of the most divisive periods in its history. The economic issues which had dominated the Court's calendar for nearly a half-century gave way to new questions of civil liberties and the reach of the Bill of Rights, and these cast the jurisprudential debate between judicial restraint and judicial activism in a new light.

Id. at 71.

¹⁹⁰ See Paul Bender, *Is the Burger Court Really Like the Warren Court?*, 82 MICH. L. REV. 635 (1984). Bender explains:

[M]ost of [the] criminal procedure cases [issued by the Warren Court] were manifestations of the Court's ultimate adoption of the doctrine of selective "incorporation" of Bill of Rights guarantees into the fourteenth amendment, a slowly developing approach that Justice Frankfurter had staunchly opposed, with decreasing success, throughout his career on the bench, but that had been consistently urged in dissent for many years by Justices Black and Douglas. The Goldberg appointment tipped the balance here, and once tipped, a solid "incorporationist" majority emerged.

Id. at 639 (footnote omitted). It is worth noting that, in fact, the Goldberg appointment did not have the impact that Bender suggests. Goldberg was appointed in 1962 and retired from the Supreme Court in 1965, when he was replaced with Abe Fortas. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW at lxxxiii (2d ed. 1991); JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION: HOW THE SUPREME COURT HAS RULED

Vinson's New Deal Court through the Warren Court, the Court eventually succeeded in imposing upon the states all but four substantive protections set out in the Bill of Rights.¹⁹¹ At the same time, the Court succeeded in limiting the extent of federal constitutional intrusion into state sovereignty, at least over criminal procedure matters, according to the express terms of the Constitution's text.¹⁹² As shown below, both transitions that began in

ON ISSUES FROM ABORTION TO ZONING 684 (1992). As late as 1965, Goldberg reaffirmed his *opposition* to incorporation in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("Although I have not accepted the view that 'due process' as used in the Fourteenth Amendment incorporates all of the first eight Amendments, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." (citation omitted)). Bender cites *Duncan v. Louisiana*, 391 U.S. 145 (1968), for the proposition that the Goldberg appointment forged a solid incorporationist majority, on the ground that only Justices Harlan and Stewart dissented from that decision, *see* Bender, *supra*, at 639 n.11, which incorporated the Sixth Amendment right to a jury trial in criminal cases via the Fourteenth Amendment Due Process Clause. *See Duncan*, 391 U.S. at 149. But that would suggest that the appointment of Fortas in 1962, rather than Goldberg in 1965, tipped the scales in favor of incorporation.

¹⁹¹ William E. Leuchtenburg explains that the debate over the meaning of the Fourteenth Amendment Due Process Clause between Justices Frankfurter and Black surfaced most prominently in the 1947 decision *Adamson v. California*, 332 U.S. 46, which held that the Fourteenth Amendment Due Process Clause did not afford criminal defendants the right not to testify at trial. *See* LEUCHTENBURG, *supra* note 180, at 252; *see also Adamson*, 332 U.S. at 63-68 (Frankfurter, J., concurring) (agreeing that the Fifth Amendment should not apply to the states). *But see id.* at 71-92 (Black, J., dissenting) (arguing that the Fifth Amendment should apply to the states). The incorporation/fundamental rights debate continued for years and did not settle doctrinally until well into the Warren Court. *See* LEUCHTENBURG, *supra* note 180, at 252-58. By the early 1960s, *see, e.g., Robinson v. California*, 370 U.S. 660, 667 (1962) (applying the Eighth Amendment ban on cruel and unusual punishment to the states), *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961) (applying the exclusionary rule to the states), Leuchtenburg explains that "the Warren Court was breaching the wall separating the Fourteenth Amendment from the first eight amendments at a breakneck pace." LEUCHTENBURG, *supra* note 180, at 255. He goes on to observe, "Almost every year in the 1960s brought a new victory for the incorporationists." *Id.* at 256.

While the incorporationists overwhelmed the fundamental rights camp in this period, Justice Black's total incorporation approach ultimately gave way to partial incorporation. Thus, the Second Amendment, the Third Amendment, the Fifth Amendment requirement of indictment by a grand jury, and the Seventh Amendment, have not been incorporated. *See* STONE ET AL., *supra* note 190, at 784 (discussing the extent of the incorporationist victory); Stearns, *supra* note 2, part II.B (same).

¹⁹² *See* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). In explaining the significance and power of Justice Black's incorporation approach, Bobbitt states:

Black developed the textual argument, and a set of supporting doctrines, with a simplicity and power they had never before had. His view was that the Constitution has a certain number of significant prohibitions which,

the New Deal, the first, from a laissez faire Court to a Court that largely ratified broad-based regulatory programs, and the second, from a fundamental rights jurisprudence to an incorporationist jurisprudence, were critically different in social choice terms from the transitional period represented in the Burger and early to mid-Rehnquist Courts. That difference largely explains why, although the modern standing doctrine has its roots in the New Deal, its trunk and branches took form in the 1970s and 1980s.

The second period, as stated above, was the Warren Court expansion of fundamental rights, which extended well beyond the more literalist approach taken in part by the New Deal Court. Whereas President Roosevelt had succeeded in creating a Court through threat and force, appointing nine justices during his presidency, the circumstances giving rise to the Warren Court era were more fortuitous. President Eisenhower, who appointed Earl Warren as Chief Justice—albeit as part of a political compromise that helped to land him the Republican nomination and, ultimately, the presidency¹⁹³—and Associate Justice William Brennan, with the hope that both would help restore the Court to a less prominent role associated with an earlier era, ultimately lamented both choices, labeling them the biggest mistakes of his presidency.¹⁹⁴ Much of

when phrased without qualification, bar any extension of governmental power into the prohibited areas. A judge need not decide whether such an extension is wise or prudent; and as such a non-decider, he is a mere conduit for the prohibitions of the Constitution. He is not, as the realists charged, enforcing his own views; indeed he may sometimes be in the exquisite position of affirming legislation hostile to his own views. Moreover, he is doing so on a basis readily apprehendable by the people at large, namely, giving the common-language meanings to constitutional provisions. This allowed Black to restore to judicial review the popular perception of legitimacy which the New Deal crisis had jeopardized.

Id. at 31.

¹⁹³ As Donald Lively has observed, while President Eisenhower labeled his appointment of Earl Warren as Chief Justice a mistake, he “could not really claim betrayal”:

Eisenhower’s nomination of Warren can be regarded both as a payback for the latter’s assistance in securing the Republican presidential nomination for Eisenhower in 1952 and a shrewd tactic designed to defuse political warfare between the more progressive Warren faction and the more conservative Nixon elements of the California Republican Party.

Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 555 n.30 (1986) (citing BERNARD B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 21-22 (1983), and G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 139-44 (1982)).

¹⁹⁴ See RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 30

the Warren Court's success in furthering policy objectives related to racial equality, the rights of the criminally accused, the desegregation of public schools, and, with the help of Congress, places of public accommodation, has been attributed to Chief Justice Earl Warren's charisma and political acumen.¹⁹⁵ Through political acumen, more than through intellectual force, Earl Warren transformed the role of Chief Justice, at least for a time, from that of co-equal jurist and administrator to that of majority whip.¹⁹⁶ At the same time, Associate Justice William Brennan provided strong intellectual leadership on the left that lasted well beyond the Warren Court era.¹⁹⁷ Indeed, while the Warren Court was marked by politicization, the success of that politicization was due in very significant part to the leadership's ability to bring even those who doubted the propriety of a more activist Supreme Court into the fold in major cases. Defections, therefore, signaled disagreements on particular cases, rather than on the propriety of a more active judicial role.

(1980); Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1057 n.93 (1994); Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 230 (1990).

¹⁹⁵ See generally SCHWARTZ, *supra* note 193, at 72-127.

¹⁹⁶ In his well-noted biography, Bernard Schwartz describes Earl Warren's transformation of the Chief Justice's role as follows:

Frankfurter once compared a great Chief Justice's manner of presiding over the Court with Toscanini leading an orchestra. And Warren brought more authority, more *bravura*, to the Chief Justiceship than had been the case for years. The Justices who sat with him have all stressed that Warren may not have been an intellectual like Frankfurter, but then, as Justice Potter Stewart puts it, "he never pretended to be one." More important, says Stewart, he possessed "instinctive qualities of leadership." When Stewart was asked about claims that Justice Black was the intellectual leader on the Court, he replied, "If Black was the intellectual leader, Warren was the *leader leader*." According to Stewart, Warren "didn't lead by his intellect and he didn't greatly appeal to others' intellects; that wasn't his style. But he was an instinctive leader whom you respected and for whom you had affection, and . . . as the presiding member of our conference, he was just ideal.

Id. at 31.

¹⁹⁷ As Bruce Ackerman explains: "While casting a 'swing vote' is important, intellectual leadership is no less so: Earl Warren needed William Brennan." Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1168 (1988). *But cf.* THE BURGER COURT, *supra* note 141, at 211 (positing that "the hallmark of the Burger Court has been strength in the center [including Justices Stewart, White, Blackmun, Powell, and Stevens] and weakness on the wings").

In short, the two relevant periods, while marked by transition, were not marked by the multi peaked fractionalization that the modern standing doctrine was designed to combat. Instead, during the New Deal era, opponents of government regulation increasingly became a minority, giving way to a newly forming majority that shared, in significant part, a common jurisprudential vision, at least with respect to what was almost certainly the most pressing jurisprudential issue of the day. That is not surprising given that a single president replaced those opposed to his policies on constitutional grounds and appointed nearly the entire Court. Most notably, the Supreme Court that FDR appointed did not embrace, on the basis of a neutral set of principles (including *stare decisis*), a particular respect for precedents laid down in an earlier era with which they disagreed, for example, the regime of *Lochner*.¹⁹⁸ As demonstrated above, it is the presence of a third cohesive—but not dominant—bloc that is governed by neutral principles, rather than the dominant ideology of the two extreme wings of the Court, that sets the stage for multi peakedness and that in turn explains the Burger and Rehnquist Court's transformation of standing in a later period. The transformation from one dominant framework to another, for example, the rejection of *Lochner* in favor of a pro-regulatory regime, or the rejection of a fundamental rights due process jurisprudence in favor of incorporation, is fundamentally different in social choice terms than is the emergence of three competing jurisprudential frameworks, none of which can ensure that it will govern in a given case. While the Warren Court owes its historic role to more fortuitous circumstances, it, like the Court that FDR forged, was also typified by a newly formed majority coalescing around a single dominant ideology associated with employing the federal courts to bring about desired social change.

In translating the preceding analysis into social choice terms, the following schematic will be helpful:

¹⁹⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

Figure Three, which depicts a Supreme Court with preferences that form a single valley at the intersection of two slopes,¹⁹⁹ is based upon the divisive Supreme Court typified by the sharp debate between Justice Black and Justice Frankfurter. Justice Black believed that the Fourteenth Amendment Due Process Clause was intended to incorporate all substantive protections in the Bill of Rights and to apply them to the states.²⁰⁰ Justice Frankfurter believed that the same clause was intended to prevent states from impinging upon fundamental rights irrespective of the substantive content of the Bill of Rights.²⁰¹ The two vertical axes, the one to the left for fundamental rights and the one to the right for rights listed within the Bill of Rights, begin at the base with the strongest rights and then include increasingly weak claimed rights as one moves up from the base. For any claimed right, one would locate its position on the vertical axis and then draw a horizontal line connecting that axis to the slope representing those justices whose framework is governed by that axis. The further one moves from the base, whether based upon the fundamental rights or the

¹⁹⁹ The schematic could also have been drawn with a single peak that descends in two directions.

²⁰⁰ See *Adamson v. California*, 332 U.S. 46, 71-92 (1947) (Black, J., dissenting) (articulating the incorporation theory of the Fourteenth Amendment Due Process Clause).

²⁰¹ See *id.* at 63-68 (Frankfurter, J., concurring) (articulating the fundamental rights theory of the Fourteenth Amendment Due Process Clause and attacking Justice Black's incorporation theory).

incorporation framework, the fewer the members of the respective jurisprudential camp that join in vindicating that right.²⁰²

As stated above, the two approaches—fundamental rights and incorporation—were *both* consistent with the rejection of a prior dominant jurisprudential view, typified by *Lochner v. New York*,²⁰³ that prevented many forms of prospective economic regulation. While neither the incorporationist camp nor the fundamental rights camp continued to embrace the *Lochnerian* notion of economic substantive due process, beyond that, the two camps took very different approaches in trying to determine which claimed rights were and were not protected by the Fourteenth Amendment Due Process Clause.

Unlike the legislature with a single-peaked curve and one slope,²⁰⁴ the members of this Court, when faced with a case testing the outer limits of the Due Process Clause, did not share a single view of the issue before them, and disagree only as to where along a shared spectrum the Court's ruling should fall. Instead, the two camps sharply differed in how they defined the issues in controversial cases testing the boundaries of the Due Process Clause.

Within each camp, however, the members' preferences *did* resemble those in a legislature with a single peak and single slope. Although the justices within each camp may not have entirely agreed on which rights should be included as fundamental rights or as listed rights (for example, the fundamental rights camp members might have disagreed on which and how many rights are deemed fundamental, and the incorporationist camp members might have disagreed on whether all, or some, of the substantive provisions in the Bill of Rights should have been incorporated²⁰⁵), the justices agreed on how to frame the legal inquiry, or, in social choice terms, they agreed on the relevant political spectrum.²⁰⁶ In other words,

²⁰² As demonstrated *infra* note 216, because the two camps exist on different planes for some claimed rights, cross-camp coalitions will form while for other rights only intra-camp coalitions will form.

²⁰³ 198 U.S. 45 (1905).

²⁰⁴ See Stearns, *supra* note 2, part I.B, tbl. 3.

²⁰⁵ Stated differently, these justices may have disagreed on whether incorporation was an absolute doctrine or if, instead, it operated as a presumption, and, if the latter, how far the presumption extends. Indeed, the Court ultimately settled upon partial incorporation. See *infra* note 211 (listing unincorporated rights).

²⁰⁶ As Professor Riker explains, "[t]his kind of agreement is precisely what is lacking in a cycle [of voting outcomes], where voters disagree not only about the merits of alternatives but even about where the alternatives are on the political

while the members in each camp might have disagreed about where along the spectrum a particular ruling should lie, they did agree upon what the spectrum looked like.²⁰⁷ This intermediate paradigm, between the single slope curve and the multi-peaked curve, is critical in understanding the historical circumstances that rendered the Supreme Court particularly conducive to creating the modern standing doctrine beginning in the 1970s.

Historically, the relative size of the two curves, depicted in Figure Three above, one representing the fundamental rights camp and the other representing the incorporation camp, changed over time as the number of justices espousing Justice Frankfurter's fundamental rights view decreased and the number of justices espousing Justice Black's incorporationist view increased.²⁰⁸ Figure Three is therefore a static and somewhat stylized image, depicting a single period in which four justices share Justice Frankfurter's view that the relevant issue in cases involving the substantive content of the Fourteenth Amendment Due Process Clause is whether the claimed right is fundamental and in which five justices share Justice Black's view in the same cases that the substantive issue is whether the claimed right should be incorporated by virtue of its status in the Bill of Rights.²⁰⁹

Now consider a case in which a criminal challenges his conviction on the ground that the police questioned him in violation of his right to remain silent.²¹⁰ The four members of the Frankfurter camp might disagree as to whether, if proven, the claimed right is of sufficient importance to warrant protection as a fundamental right. But they do agree on one thing; the issue is whether the right to remain silent is a fundamental right worthy of protection under the Fourteenth Amendment Due Process Clause. Similarly, the five

dimension." RIKER, *supra* note 52, at 128.

²⁰⁷ Professor Riker observes: "[s]ingle-peakedness is important because it has an obvious political interpretation. Assuming a single political dimension, the fact that a profile . . . is single-peaked means the voters have a common view of the political situation, although they may differ widely on their judgments." *Id.* at 126.

²⁰⁸ See *supra* notes 191-92.

²⁰⁹ This is roughly the Court that Professor Bender has described, albeit with the appointment of Justice Fortas, rather than Justice Goldberg, tipping the scales in favor of incorporation. See Bender, *supra* note 190, at 639.

²¹⁰ The discussion to follow is based upon *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966) (holding that the Fifth Amendment privilege against self-incrimination requires that police provide specified warnings to the accused prior to interrogation).

members of the Black camp might disagree as to how far the incorporation doctrine extends; Justice Black may view it as a near absolute presumption while Justices Douglas and Goldberg might instead view the presumption as somewhat less strong. But the camp's members do agree that the relevant question is how far the presumption—based upon inclusion of the identified right within the Bill of Rights—extends.²¹¹

This paradigm is different from both the single-slope and multi-peaked paradigms. Unlike the single-slope paradigm, this paradigm represents a Court that is sharply divided as to how to frame the pressing issues of the day. With a single slope, a Court or legislature whose members each have a different preference can achieve a rational outcome.²¹² The single-valley, two-slope paradigm is also critically different from the multi-peaked paradigm.²¹³ As demonstrated below, the relative sizes of the two camps and the significant overlap of where each of the two different approaches leads enabled the Court to achieve rational outcomes even in cases that landed precisely on the Court's fault line. Unlike the multi-peaked paradigm, this paradigm represents a Court that, notwithstanding its sharp division, was able to achieve stable outcomes, even if it was unable to predict which framework would govern in particular cases.

Even though the five justices in the Black camp constitute a majority on the dominant approach, they are unable to control the outcome unless all five agree on the particular right in question. More typically, given the overlap in outcomes with respect to particular rights among the two camps, depicted in Figure Four, below, a cross-camp coalition consisting of some members of the fundamental rights camp and some members of the incorporationist camp will control particular outcomes.

²¹¹ As an historical matter, the Court ultimately settled on a partial incorporation approach, under which all but four substantive provisions of the Bill of Rights—the Second Amendment, the Third Amendment, the Fifth Amendment right to a grand jury, and the Seventh Amendment—were incorporated. See *STONE ET AL.*, *supra* note 190, at 784 (listing unincorporated rights).

²¹² See Stearns, *supra* note 2, part I.B, tbl. 3.

²¹³ See *id.* tbl. 1.

FIGURE 4

While the result in each case will depend upon the commonality of outcomes across camps, in contrast with the multi-peaked preference diagram,²¹⁴ the cross-camp coalitions that do form will be stable because no present majority on the deciding Court favors an alternative outcome, whether based upon a different substantive framework or a set of neutral principles such as adherence to stare decisis. To create cyclical instability, the Court would need no less than three options, none of which carries a majority.²¹⁵ In this case, the Court has only two options—to vindicate or not to vindicate the right in question—even though the bases for decision among the ultimate coalition members differ. Moreover, this holds true even though the predictability of the line-up from case to case is not strong.²¹⁶

²¹⁴ See *id.* tbl. 1.

²¹⁵ See *id.* (explaining that, to reveal a cycle, an institution must have a minimum of three options and take as many pairwise contests—through formal or informal means—as there are options).

²¹⁶ While not essential to following the argument in the text, it might be helpful to consider the three-dimensional aspects of Figure Three, see *supra* text accompanying note 199. Look again at Figure Three, this time imagining that the diagonal line descending from the listed rights axis is coming toward you and that the diagonal line descending from the identified rights axis is moving away from you. Now imagine that the two vertical axes, representing the fundamental rights and incorporation approaches, and the horizontal axis, representing the number of justices, form a goal post. If you were to turn the goal post counterclockwise 90 degrees, such that the two vertical axes converge and form a single vertical line directly in front of you, the two descending slopes would then form a tent, as illustrated in Figure Five below.

As the Court continued to shift toward the incorporationist camp, however, the ability to define issues and predict outcomes

FIGURE 5

Because the two diagonal lines exist along different planes, when the graphic image is turned, they appear to form a tent rather than a valley as each descending line is pivoted along the relevant vertical axis. Thus viewed, we can graphically depict a particular claimed right that appears along only one relevant dimension or camp. Figure Six, below, identifies a claimed incorporation right that attracts no cross-over membership from the fundamental rights camp. As a result, only three justices vote to vindicate the listed right and the result is nonincorporation. For a list of unincorporated rights, see *supra* note 211.

FIGURE 6

substantially increased.²¹⁷ Once a sufficient number of incorporationist camp members emerged, they were able to ensure a majority on any given claimed right, even if some members of the camp defected. While Justice Frankfurter, for example, may have disagreed with the rationale and outcome in a given case, his vote no longer rendered the prevailing rationale for vindicating or denying a particular claimed right uncertain.

As stated above, the difference between single-valley and multi-peaked preferences is critical to the evolution of standing. If a Court characterized by single-valley preferences is concerned with achieving rational and stable outcomes, it has no need to create a doctrine like standing. While the Court in this period was sharply divided on how to approach the underlying issues, over time it was increasingly able to predict the critical line-ups across the two major camps. Moreover, as suggested above, the incorporationists were increasingly able to rely solely on their own members to control case outcomes. And because the relevant cases involved the rights of criminal defendants and convicted criminals raising collateral challenges, the Court was unable to avoid making law.²¹⁸ In the end, therefore, both the majority and the minority could predict with considerable certainty both how the issue would be defined, or stated differently, what the relevant issue spectrum would look like,²¹⁹ and where, along the defined spectrum, the Court's ruling would likely fall.

The historical transition from a fundamental rights Court to an incorporationist Court is largely consistent with the single-valley, two-slope paradigm. While the New Deal Court had employed the newly minted standing doctrine to stave off attacks against regulatory intrusions, neither it nor the successor Courts, which continued to resolve the incorporationist/fundamental-rights controversy through the Warren Court era, carried the standing doctrine into the nonregulatory due process context.²²⁰ The Court did not avoid deciding those cases presenting the question of which rights

²¹⁷ See *supra* notes 191-92 (explaining the continuing dominance of the incorporationists).

²¹⁸ See Stearns, *supra* note 2, part II.A.

²¹⁹ See RIKER, *supra* note 52, at 126-28 (explaining political significance of unipeaked preferences).

²²⁰ In fairness, appropriate cases testing this proposition are uncommon because fewer ideological cases were presented during the New Deal than today. But that too might be a product of the absence of a multi-peaked Court that could not control the outcome of its decisionmaking processes and that would have invited such litigation.

were fundamental or which Bill of Rights provisions required incorporation, either when the fundamental rights jurists were in command or when they lost control to the incorporationists, in large part because the relevant issues were presented in criminal cases. More importantly, the Court's outcomes, even though inconsistent on the governing methodology, remained stable over time. This was true even though the Court was sharply divided on one of the most critical jurisprudential issues of the day. The Court reshaped the definition of the issue as the incorporationists assumed supermajority status and, ultimately, formed a stable equilibrium at the point where all but four substantive provisions in the Bill of Rights were incorporated and applied to the states.

The final resolution of the incorporation controversy occurred in the next major transitional period, that of the Warren Court. The Warren Court, which invited, rather than resisted, cases testing the outer limits of federal judicial power in protecting the rights of racial minorities and the criminally accused, had little need to flirt with standing and, if anything, predictably chose to relax the doctrine at the margins in an effort to vindicate novel constitutional challenges.²²¹ The Warren Court fundamentally redefined—at least for a period—the role of the federal judiciary within our constitutional scheme, eschewing traditional limiting principles of originalism and textualism in favor of an overriding sense of fundamental fairness.²²² The Warren Court further promoted the notion that the judiciary—and especially the Supreme Court—was an institution of last resort for those whose most ardent claims were resisted in the political branches. Perhaps not surprisingly, therefore, the Warren Court's activism required it to issue the most prominent reminder of the Court's role as constitutional expositor

²²¹ Indeed, while the Warren Court maintained the essential standing framework created in the New Deal Court, it, somewhat predictably, liberalized the doctrine at the margins. See Joan Mahoney, *A Sword As Well As a Shield: The Offensive Use of Collateral Estoppel in Civil Rights Litigation*, 69 IOWA L. REV. 469, 469 (1984) ("Many of the decisions of the Warren Court were predicated on the belief that federal constitutional issues ought to be tried, or at least finally resolved, in federal court. To that end, concepts of standing were broadened . . ."); Arthur H. Abel, Note, *The Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187, 1189 (1985) (positing, based upon *Baker v. Carr*, 369 U.S. 186 (1962), that "[d]uring the Warren Court years, the standing requirement was designed simply to ensure that plaintiffs pursued their claims vigorously").

²²² I am not using the term fairness in its social choice sense in the preceding sentence; instead, I am using it in the sense that the Warren Court understood it, namely the use of courts to advance the interests of politically and economically disadvantaged groups.

since *Marbury v. Madison*.²²³ With minor exceptions,²²⁴ not since the early chestnuts of *Marbury*²²⁵ and *Martin v. Hunter's Lessee*²²⁶ was the legitimacy of the Supreme Court's role in interpreting the Constitution so seriously drawn into question in a direct legal challenge to its authority as it was in *Cooper v. Aaron*.²²⁷ The Court made quick work, of course, of Governor Faubus's contention that potential public disorder, which he was in large part responsible for inciting, provided a basis for defying the requirements of *Brown v. Board of Education*.²²⁸

Once again, a united Court stood firm and reaffirmed that, whatever its jurisprudential tools, the Supreme Court's role remains as it has since *Marbury*. It is not necessary to detail the history of the Warren Court, which is amply documented elsewhere.²²⁹ We need only observe that the most controversial decisions issued by the Warren Court were far more controversial outside than inside the Supreme Court chambers. While the landmark opinions *Mapp v. Ohio*²³⁰ and *Miranda v. Arizona*²³¹ were decided by narrow majorities, other controversial cases, including *Brown v. Board of Education*,²³² *Cooper v. Aaron*,²³³ and *Gideon v. Wainwright*,²³⁴ were issued with supermajority or unanimous support. While the Warren Court obviously did not share the preferences of the citizenry whose popular will it often thwarted, its members shared a sufficiently common, and perhaps more enlightened, vision that

²²³ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (rejecting Governor Faubus's contention that civil unrest provides a basis for failing to follow the dictates of *Brown v. Board of Education*, 347 U.S. 483 (1954), and stating that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), had established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

²²⁴ For a discussion of statements by Presidents who challenged the Supreme Court's role as ultimate expositor of the Constitution, see GERALD GUNTHER, CONSTITUTIONAL LAW 21-25 (12th ed. 1991) (discussing statements by Presidents Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Delano Roosevelt).

²²⁵ 5 U.S. (1 Cranch) 137 (1803).

²²⁶ 14 U.S. (1 Wheat.) 304 (1816).

²²⁷ 358 U.S. 1 (1958).

²²⁸ 347 U.S. 483 (1954).

²²⁹ See, e.g., SCHWARTZ, *supra* note 193; WHITE, *supra* note 193.

²³⁰ 367 U.S. 643 (1961) (six to three).

²³¹ 384 U.S. 436 (1966) (five to four).

²³² 347 U.S. 483 (1954) (unanimous).

²³³ 358 U.S. 1 (1958) (unanimous on result).

²³⁴ 372 U.S. 335 (1963) (unanimous on result).

enabled it to again predict with considerable certainty both how critical case issues would be defined and resolved.

That vision, of course, is what was fundamentally lacking in the transitional era typified by the Burger and early-Rehnquist Courts. The Burger and Rehnquist Courts were divided in a fundamentally different and far more debilitating manner than were the Courts of the two principal eras that preceded them. Unlike the single-valley Court attempting to resolve the fundamental rights/incorporation debate, the Burger and Rehnquist Courts could not ensure with any degree of certainty how relevant case issues would be defined, or where along any given spectrum particular Court rulings would lie. Because the Burger and Rehnquist Courts possessed multi-peaked, rather than single-valley preferences, the conditions were ripe for the creation of a doctrine designed to prevent the inevitable irrationality that arises when a collective decisionmaking body is forced to decide issues in the absence of Condorcet-winning preferences. Thus, while the New Deal Court imposed standing in a united front against unwelcome challenges to favored New Deal programs and to discipline recalcitrant lower federal courts, the Burger and Rehnquist Courts built on those early roots to transform standing into something else entirely. In the Burger and Rehnquist Courts, standing became a necessary vehicle to prevent the irrationality of the Court's own creation. Even an institution that could not agree either on how to define or resolve divisive issues could agree on one principle: Better not to decide, or to let lower federal courts decide, the most difficult issues presented than to condone outcomes no more predictable than a role of the dice. In the Burger and Rehnquist Courts, the conditions were ripe for the transformation of standing into its present form, set out below, and for the elevation of standing to its present level of doctrinal and practical significance. The next subsection will explain the origin of the metaphors the Burger and Rehnquist Courts employed—*injury in fact*, *causation*, and *redressability*—in devising the modern standing formulation.

B. *Modern Standing: Evolution and Doctrine*

Before analyzing the development of standing in the Burger and Rehnquist Courts, we will need to consider briefly the doctrine's statutory and judicial origins.²³⁵ Any analysis of modern standing

²³⁵ As stated above, much of the vocabulary that surrounds the development of

law must begin with the Administrative Procedure Act (APA), enacted in 1946, and the landmark 1970 Supreme Court decision, *Association of Data Processing Service Organizations v. Camp*,²³⁶ which infused the APA's standing provision, section 10(a),²³⁷ and ultimately the Case or Controversy Clause of Article III,²³⁸ with an important and controversial substantive gloss. In the twenty-five years since *Data Processing* was decided and despite the near universal condemnation that the decision has generated among academics, the Court has largely added layers of complexity to that decision's basic approach.

In *Data Processing*, the Court announced that plaintiffs relying for standing upon APA section 10(a) and a substantive federal statute must satisfy a two-prong test: first, the plaintiff must allege both that she falls within the zone of interests protected or regulated by the relevant statute; and second, she must allege an injury in fact.²³⁹ The origins of the injury-in-fact test are dubious, at least to the extent that the Court purports to have based that test upon the APA.²⁴⁰ The *Data Processing* Court further stated that the injury-in-fact prong of its standing formulation was of constitutional dimension,²⁴¹ which petitioners conceded in the companion case,²⁴² *Barlow v. Collins*.²⁴³ In a 1987 case, *Clarke v. Securities Industry Association*,²⁴⁴ the Court observed that it has continued to adhere to the essential division established in *Data Processing* by requiring claimants who rely for standing upon the Constitution to satisfy its injury-in-fact test, and the subsequently added causation

standing was derived from the earliest period of United States equity practice, carried over from England. See *supra* note 176; see also Stearns, *supra* note 2, part I.C. For our purposes, the critical point is that, whatever its early common law foundations, the standing doctrine, as employed today, emerged in the New Deal and underwent its most critical transformation during the Burger and Rehnquist Courts.

²³⁶ 397 U.S. 150 (1970).

²³⁷ Ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702 (1988)).

²³⁸ U.S. CONST. art. III, § 2.

²³⁹ See *Data Processing*, 397 U.S. at 152-53.

²⁴⁰ For a discussion of the debate that led to the adoption of that test, see *infra* part II.B.2.

²⁴¹ See *Data Processing*, 397 U.S. at 151-52.

²⁴² See Fletcher, *supra* note 171, at 257 (citing petitioner's briefs in *Barlow v. Collins*, 397 U.S. 150 (1970)).

²⁴³ 397 U.S. 159, 163-64 (1970) (relying on *Data Processing* to grant tenant farmers standing to challenge a Department of Agriculture regulation under the Food and Agriculture Act of 1965 on the grounds that the farmers had alleged both injury in fact and that they were within the zone of interests protected by the Act).

²⁴⁴ 479 U.S. 388 (1987).

and redressability tests,²⁴⁵ and by limiting the zone-of-interest test to APA section 10(a) standing cases.²⁴⁶ In any event, the Court has continued, through its interpretation of Article III, to adhere to the injury-in-fact requirement in virtually all cases—albeit in a fashion that is much criticized as inconsistent—and it has gone further, adding the two prongs identified above. In the process, the Court has effectively metamorphosed three common law tort analogies—*injury in fact*, *causation*, and *redressability*—to the level of quasi-constitutional doctrine.²⁴⁷

Many scholars have been quick to point out the conceptual and practical difficulties inherent in both the original *Data Processing* standing formulation, which requires that the plaintiff satisfy both the zone-of-interest and injury-in-fact tests, and its modern counterpart, which requires that the plaintiff satisfy a three-part test, including injury-in-fact, causation, and redressability.²⁴⁸ While the academic criticism is as voluminous as it is varied, three common threads underlie much of the commentary. First, the APA's statutory history strongly suggests that the standing provision, section 10(a), was not intended to have independent substantive content, either in the form of a zone-of-interest test or an injury-in-fact test. Instead, section 10(a) was largely intended as a conduit through which plaintiffs would allege standing in accordance with the underlying substantive statute or constitutional provision.²⁴⁹

By itself, this erroneous gloss would seem no more problematic than any other questionable exercise in Supreme Court statutory interpretation. After all, Congress could presumably amend or

²⁴⁵ The causation prong was first mentioned in *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (holding that the plaintiff failed to establish injury in fact because enforcement of the statute would result in jailing the child's father without necessarily producing support payments), and was given constitutional status in *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (observing that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party").

²⁴⁶ See *Clarke*, 479 U.S. at 400 n.16.

²⁴⁷ For an analysis of the tort metaphor in modern standing, see Stearns, *supra* note 2, part I.C.

²⁴⁸ See, e.g., Nichol, *supra* note 176, at 1144-45 (positing that in adding the redressability prong, the Court has failed to recognize that procedural rights created by Congress are intended to alter incentives and not necessarily to facilitate particular results); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1463 (1988) (asserting that the conceptions underlying the Supreme Court's three-part standing test "have no place in regimes in which the legal injury is often of a different order" than that prevalent in the nineteenth century).

²⁴⁹ See *Fletcher*, *supra* note 171, at 255-59 ("The touchstone [of § 10(a)] is that anyone whom a 'relevant statute' considers to be adversely affected or aggrieved by agency action has standing to seek review of the action under that statute.").

supersede the APA in order to clarify its position on standing. In fact, the Court has recently employed the injury-in-fact test originated in *Data Processing* to invalidate an express congressional grant of standing in *Lujan v. Defenders of Wildlife*.²⁵⁰ The plaintiffs in *Lujan*, who fell clearly within the ambit of the statute, were denied standing based upon their inability to establish a legally cognizable injury in fact,²⁵¹ thus calling into question Congress's ability to "cure" the Court's construction, or misconstruction, of section 10(a). Perhaps the greatest difficulty with the *Data Processing* Court's conversion of the common law principle of injury into quasi-constitutional doctrine was the Court's lack of precision. While the Court has repeatedly emphasized that standing has both constitutional and prudential underpinnings,²⁵² (the former grounded in the Case or Controversy Clause of Article III²⁵³ and the latter grounded in the concept of judicial self-restraint²⁵⁴), the Court has never clearly articulated standing's constitutional/prudential boundary.²⁵⁵ Nor have the standing cases been consis-

²⁵⁰ 504 U.S. 555, 576-77 (1992) (holding in part that "the public interest in proper administration of the laws . . . [cannot] be converted into an individual right by statute that denominates it as such, and that permits all citizens . . . to sue").

²⁵¹ See *id.* at 564.

²⁵² See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 468 (1992) (Scalia, J., dissenting) (observing that standing consists of the constitutional requirements of Article III and a set of prudential considerations); *Franchise Tax Board v. Alcan Aluminium Ltd.*, 493 U.S. 331, 335 (1990) ("We have treated standing as consisting of two related components: the constitutional requirements of Article III and nonconstitutional prudential considerations.").

²⁵³ See, e.g., *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 113 S. Ct. 2297, 2301 (1993) (noting that standing is an essential part of the constitutional requirements of Article III); *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2776 (1992) (requiring that plaintiffs establish standing in order to "invoke the constitutional power of the federal courts and adjudicate a case or controversy under Article III").

²⁵⁴ See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 119 (1979) (discussing "prudential rules of self-restraint designed to bar from federal court those parties who are ill-suited to litigate the claims they assert"); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (same).

²⁵⁵ For a recent student comment highlighting several inconsistencies in the Court's constitutional/prudential boundary, see Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063 (1994). Gottlieb would limit standing's constitutional underpinnings to the concern for zealous advocacy, relegating all other concerns, including both federalism and separation of powers, to prudential status. See *id.* at 1071. Gottlieb fails, however, to provide any compelling rationale for rejecting an Article III foundation for federalism and separation-of-powers concerns, beyond noting several inconsistencies in the cases and claiming that, if these other standing concerns are provided constitutional footing, the Court will limit both its power and that of

tent. In the current Court, that illusory doctrinal boundary has created a profound schism between the so-called moderates who, although generally skeptical of public interest litigation, would largely defer to Congress's power to create novel causes of action and their more conservative counterparts who, in *Lujan*, relied upon standing to prevent Congress from delegating its authority to private attorneys general to monitor executive agencies in federal courts.²⁵⁶ If we assume, as the Court has repeatedly suggested, that standing, in its constitutional and prudential dimensions, is largely intended to preserve Congress's principal lawmaking role,²⁵⁷ *Lujan* appears questionable at best. In any event, despite its dubious origins, as standing is presently formulated, the Court requires that virtually all federal court plaintiffs satisfy the three-

Congress. *See id.* at 1071-76. The difficulty with Gottlieb's thesis, however, is twofold. First, his argument that constitutional standing limits judicial power is premised upon an unstated normative baseline that eschews a more limited judicial role. As these articles have demonstrated, however, there are profound structural reasons, revealed by social choice, for the Supreme Court to seek to limit its lawmaking role, and those reasons are very closely tied to the constitutional concept of separation of powers. Second, it is by no means clear, as Gottlieb appears to assume, that resting constitutional standing upon a separation-of-powers basis limits Congress's power to overcome, by statute, judicial denials of standing.

Grounding constitutional standing on separation of powers may signal the need for an express federal statutory grant of standing to pursue claims of relief that have no analogues at common law. In that sense, the separation-of-powers theory of constitutional standing might limit the power of lower federal courts, which otherwise might view prudence differently than does the Supreme Court, but not limit Congress, at least in the same manner or to the same degree. If a federal statute creates standing to pursue a claim for which the Constitution alone would not support standing, there is no reason, consistent with a prior ruling that denied standing to pursue the constitutional claim based upon separation of powers, to then deny standing to pursue the statutory claim. Instead, the congressional determination on the question of standing satisfies the separation-of-powers concern in its *constitutional*, and not merely in its prudential, dimension. The same result might not hold if a state legislature or a federal agency attempted to confer standing to raise the same challenge.

That is critically different from imposing, as the Court appears to have done in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a stringent injury-in-fact requirement based upon Article III, on statutory, as well as constitutional, standing claims. In that case, Congress, along with state legislatures and agencies, may be powerless to supersede the ruling.

²⁵⁶ *See Lujan*, 504 U.S. at 573. In essence, the *Lujan* Court was divided on whether the constitutional foundation was located exclusively in Article III or in both Articles II and III. *See id.* For an analysis of *Lujan*, see *infra* part III.D.

²⁵⁷ *See, e.g., Allen v. Wright*, 468 U.S. 737, 752 (1984) (stating that the idea of separation of powers underlies the standing doctrine); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (stating that standing defines the properly limited role of courts in a democratic society).

prong standing test, whether those plaintiffs rely for standing upon the APA, the Constitution itself, or a direct congressional grant of standing.

A second thread running through the standing literature is that the *Data Processing* Court's injury-in-fact test, while apparently intended as a neutral mechanism designed to limit the federal judiciary to its proper and limited role, cannot be applied other than in a highly normative manner.²⁵⁸ In effect, every denial of standing, while intended to prevent the Court from reaching the merits of an underlying claim, can be recast as a substantive holding, one that reveals the normative dimension of standing's injury-in-fact inquiry. While Part III will demonstrate that the modern standing doctrine forces upon the federal judiciary many of the value judgments that it was presumably intended to prevent federal courts from reaching,²⁵⁹ it will also demonstrate that recognizing the normative underpinnings of the Court's standing determinations only begins the analysis. A standing denial is not improper merely because it can be translated into a substantive ruling. Instead, to determine the propriety of a standing denial, we need to weigh the Court's potential alternative substantive rulings, first, the inevitable substantive ruling that results from a standing denial, and, second, the ruling on the merits of the underlying claim—one that may be the irrational product of multi-peaked judicial preferences—that would result if standing were conferred.²⁶⁰ In short, while a standing denial is inevitably substan-

²⁵⁸ This point has been made most artfully by Professor William A. Fletcher. Fletcher states:

I wish to show that the "injury in fact" requirement cannot be applied in a non-normative way. There cannot be a merely factual determination whether a plaintiff has been injured except in the relatively trivial sense of determining whether plaintiff is telling the truth about her sense of injury.

If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint. If this is so, there can be no practical significance to the Court's "injury in fact" test because all people sincerely claiming injury automatically satisfy it. This should be so because to impose additional requirements under the guise of requiring an allegation of "injury in fact" is not to require a neutral, "factual" showing, but rather to impose standards of injury derived from some external normative source.

Fletcher, *supra* note 171, at 231.

²⁵⁹ See *infra* part III.

²⁶⁰ As demonstrated *infra* part III.A., this approach differs from that offered by William Fletcher and others who have criticized modern standing on the ground that

tive, it is most often a very *different* substantive ruling, both in terms of its content and its rationality, than that which results when the Court grants standing and addresses the merits of the underlying claim. A proper analysis therefore must go beyond the mere recognition that standing determinations are substantive and instead compare the two potential alternative substantive rulings in any given standing case.²⁶¹

The final theme that runs through the standing literature is that by infusing a judicially imposed injury-in-fact requirement upon federal court claimants, the Supreme Court may have signaled an unwelcome retreat from the long history of public litigation in England and in the United States at the time of the Constitution's framing.²⁶² Again, the Court, to the extent that it has sent this signal, has not done so in a consistent fashion.²⁶³ Thus, while the Court has allowed, albeit in an inconsistent manner, housing market testers and residents of communities who are afforded standing under the Fair Housing Act of 1968 to challenge discriminatory residential real estate marketing practices, even though the litigants themselves had no interest in securing housing,²⁶⁴ the Court has

it contains an unstated normative component. *See supra* note 258.

²⁶¹ *See Stearns, supra* note 2, part II.B (describing shadow case analysis in which standing cases are not directly compared, but, instead, the relationships between standing cases and their shadow cases—those hypothetical cases in which litigants could raise the same claims with no credible standing barrier—are compared).

²⁶² *See, e.g., Sunstein, supra* note 148, at 177 (positing that “early English and American practices give no support to the view” that injury in fact is a requirement for Article III cases or controversies).

²⁶³ *See, e.g., Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972)* (allowing “a generous construction” of the Fair Housing Act of 1968 and holding that any member of the housing unit who claimed injury from the owner’s discriminatory actions had standing to sue under the statute); *Flast v. Cohen, 392 U.S. 83, 105-06 (1968)* (holding that a taxpayer had standing to challenge the financing of religious schools on Establishment Clause grounds).

²⁶⁴ *See Havens Realty v. Coleman, 455 U.S. 363, 373-74 (1982)* (holding that a fair housing organization consisting of one white member and one African-American member had standing under the FHA to challenge the dissemination of untruthful and discriminatory housing information, stating that the injury required by Article III may exist by virtue of “statutes creating legal rights, the invasion of which creates standing” (quoting *Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)*)); *Trafficante, 409 U.S. at 211-12* (upholding a Fair Housing Act provision granting standing to plaintiffs who claimed that the defendants unlawfully denied them truthful housing information because of their race, even though the plaintiffs were testers who were not interested in actually securing housing, but instead were raising the claim on behalf of others who failed to secure desired housing because of racial discrimination); *see also Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109-15 (1979)* (converting a third party standing claim of residents not attempting to secure housing into a first party standing claim to enjoy the “social and professional benefits of living

recently denied standing to environmental litigants in spite of their invocation of a statute that expressly afforded them private attorney general status.²⁶⁵ Somewhat oddly, the "originalist" criticism of the modern standing doctrine, which demands a stronger foundation for retreating from centuries of public interest litigation based upon Article III, comes from the left.²⁶⁶ The anomaly disappears, however, when we recognize that, in *Lujan v. Defenders of Wildlife*, the Court used standing to prevent Congress from conferring upon private attorneys general the power to monitor and prevent, through federal court actions, executive-agency conduct that potentially harms the habitats of endangered species abroad.

In any event, scholars have argued that neither Article III nor section 10(a) of the APA were intended to reverse centuries of precedents in which ideological plaintiffs have sought relief in judicial fora.²⁶⁷ By superimposing standing's injury-in-fact requirement onto cases in which plaintiffs rely upon federal statutes, the Court has signaled a serious intrusion into Congress's power to define new judicially cognizable injuries. Again, this issue is at the core of the present schism over standing in the Supreme Court.²⁶⁸

What is missing from the existing literature on standing, however, is a positive explanation for why, in spite of the obvious incongruities within the Supreme Court's standing doctrine, the Court has continued to develop and rely upon it. Any positive analysis of standing must answer, or at least provide substantial insights designed to explain, the following questions. First, why did the Court, in spite of near unanimous criticism of the 1970 *Data*

in an integrated community"); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (conferring standing upon an African-American in search of housing near his place of employment to challenge under the FHA the town's refusal to rezone for reasons related to race, where the developer's proposal created "substantial probability" that the project would be completed, even though development was contingent upon uncertain federal housing subsidies). For a thoughtful analysis of these and other FHA cases, see generally David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 64-81.

²⁶⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992).

²⁶⁶ See, e.g., Sunstein, *supra* note 148, at 166 (stating that the novel interpretation that Article III forbids Congress from granting standing to citizens to bring suit is "essentially an invention of federal judges . . . [and inconsistent with] the original understanding of the Constitution").

²⁶⁷ For a discussion of the prevalence of these practices, see Stearns, *supra* note 2, Introduction subpart C.

²⁶⁸ See *infra* part III.D (analyzing the *Lujan* opinions).

Processing decision,²⁶⁹ retain and further develop that decision's basic framework? Second, why did the Court superimpose the injury-in-fact test first articulated in *Data Processing* onto Article III, thus requiring that all federal court plaintiffs satisfy its inevitably normative standing test? Third, why, if a liberal New Deal Court created standing to stave off attacks against regulatory programs, did an emerging conservative Court, in the 1970s and 1980s, expand upon, rather than retreat from, standing in a renewed effort to invite challenges to previously protected federal regulatory programs? Fourth, why, if standing was created out of deference to Congress, did it become a barrier to Congress's power to define novel causes of action? Finally, why is the current Supreme Court split on where (assuming any exist) the constitutional origins of standing lie? By tracing the doctrinal evolution of standing and tying it into the preceding analysis, the remainder of this Article will address these critical questions.

1. Pre-Administrative Procedure Act Standing

To understand the *Data Processing* Court's transformation of standing, it is first necessary to consider the pre-APA standing doctrine. Scholars have divided the earliest standing cases, which began during the New Deal, into three conceptual paradigms:²⁷⁰ first, some federal statutes expressly denied standing to affected claimants;²⁷¹ second, some statutes expressly conferred standing upon affected claimants;²⁷² and, third, some statutes simply failed to address the question of standing.²⁷³ In the first two categories,

²⁶⁹ *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

²⁷⁰ The following summary, including several of the examples selected, is drawn in significant part from the excellent discussion set out in Fletcher, *supra* note 171, at 226-27.

²⁷¹ See, e.g., Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 8, 9 (precluding veterans from challenging agency denials of benefits in federal court).

²⁷² See, e.g., Communications Act of 1934 § 402(b), 47 U.S.C. § 402(b)(6) (Supp. V 1993)) (conferring standing upon "any . . . person . . . aggrieved or whose interests are adversely affected by any order of the [Federal Communications] Commission"); see also *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940) (granting standing to complainant even though the claimed injury was not a factor which the Commission was legally obligated to consider).

²⁷³ See, e.g., *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939) (denying standing to challenge TVA's regulatory conduct absent an allegation that the agency had invaded plaintiff's legal right, for example, one grounded in property, contract, or tort); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938) (denying standing to challenge federal loans and grants to competing

where Congress specifically addressed the question of standing, the pre-*Data Processing* Court almost invariably deferred to Congress's express will. Faced with congressional silence, on the other hand, the Court devised an amalgam of standing presumptions drawn from the common law of property, contract, or tort.²⁷⁴

The concept of legal injury was central to this early approach to standing. A plaintiff relying upon a federal statute that was silent on the question of standing would be afforded standing if she alleged an injury cognizable at common law. While the legal injury doctrine did not prevent Congress from creating novel claims, it had the practical consequence of allowing the federal judiciary, including most notably the Supreme Court, to protect Congress in its creation of New Deal programs at lower political cost than if those courts reached the merits of every constitutional challenge to a federal regulatory expansion. It also had three significant benefits associated with judicial administrability: first, it had the effect of reducing the number of such actions, thus conserving judicial resources; second, by creating presumptive rules to govern the determination of injury, grounded in common law principles with which the lower federal courts were intimately familiar,²⁷⁵ it enabled the Supreme Court to promote a relatively consistent application of its standing principles in lower federal courts; and, finally, it helped to prevent recalcitrant lower federal courts from addressing the merits of challenges to administrative agency regulations, thereby decreasing the potential for circuit splits on important questions of federal law.²⁷⁶

The nearly simultaneous retreat from Lochnerian substantive due process and the erection of a judicial standing barrier is no coincidence; indeed, the two doctrinal developments are inextricably linked.²⁷⁷ The linkage of standing to a cognizable legal injury,

municipal utilities, holding that plaintiff had no right to be immune from lawful municipal competition); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (directly linking standing inquiry to infringement of comparable common law right); Fletcher, *supra* note 171, at 226-27 & n.37.

²⁷⁴ See *supra* note 273.

²⁷⁵ It is noteworthy that *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which had the effect of taking the lower federal courts out of the business of promulgating their own parallel common law in diversity cases, was issued during the formative standing period on the New Deal Court. For an analysis of *Erie*, and its connection to standing, see *infra* notes 284-85 and accompanying text.

²⁷⁶ See *infra* text accompanying note 283 (observing that, while FDR ultimately packed the Supreme Court, albeit without increasing the number of justices, he did not succeed in packing the lower federal courts).

²⁷⁷ Cf. Sunstein, *supra* note 248, at 1438. Sunstein recognizes the linkage between

grounded in the common law or a relevant statute, would not have protected New Deal programs from attack in a regime that recognized a fundamental right to contract and to own property free of prospective governmental regulation. Curiously, however, the linkage works in both directions: In a regime that rejected *Lochner* and that allowed substantial governmental intrusion into private orderings, a justiciability doctrine designed to stave off

the emergence of standing and the erosion of *Lochnerian* jurisprudence, stating:

The private-law model of standing . . . reflected a confluence of two sets of ideas, both closely associated with the *Lochner* era and the New Deal attack on the jurisprudence of *Lochner*. The first, prominent in *Lochner* itself, was that the judiciary existed largely to protect common-law interests from governmental incursions. The common law formed the baseline from which courts distinguished between government inaction and action or neutrality and partisanship. For this reason, intrusions on common-law rights, and not on other sorts of interests, served to trigger judicial protection. The second idea—a reaction against *Lochner* on the part of those hospitable to the administrative state—was that doctrines of justiciability, including standing, should be designed to minimize the occasions for judicial intervention into the regulatory process.

The advocates of judicial control, hostile to administrative regulation, saw no need for judicial intervention in order to safeguard the interest in regulatory protection. And in light of the recent history, those favorable to regulation were highly suspicious of the courts. The idea that courts might intervene to protect regulatory beneficiaries from a recalcitrant agency was entirely foreign to their experience. As a result, there was a mutual agreement on the private-law model from those who believed in the need for a continuing role for the legal system in supervising administrative regulation, and those who thought that adjudicative controls were to a large degree anachronistic.

Id. While Sunstein recognizes the linkage between the decline of *Lochner* and the emergence of standing, his explanation of its significance differs from that in this Article. For Sunstein, the decline of *Lochner* created a common interest in limiting judicial regulatory intervention between the liberals and the conservatives. The liberals, or “those who thought adjudicative controls . . . anachronistic,” never thought that courts would protect agency regulation. *Id.* The conservatives, or those “who believed in the need for a continuing role for the legal system in supervising administrative regulation,” were reticent to let the emerging liberal Court protect programs that they opposed. *Id.*

The difficulty is that, whether or not prior Supreme Courts protected agency regulation, there was little doubt that the entire mission of FDR’s Court-packing plan was to forge a Court that would protect his New Deal programs. Given that he ultimately succeeded in replacing the entire Court, it is doubtful that the emerging liberal majority was distrustful of its own power to preserve New Deal programs, regardless of what their predecessors had done. The more likely explanation for the confluence of standing and the demise of *Lochner*, as explained below, *see infra* text accompanying notes 282-85, is that the emerging liberal Supreme Court needed a vehicle to protect regulatory programs from attack in the conservative lower federal courts.

unwelcome challenges to governmental regulation would appear unnecessary, or at best, redundant. After all, without *Lochner*, the very challenges that standing was intended to prevent would have been denied on the merits. As demonstrated above,²⁷⁸ because the New Deal justices shared substantially common preferences, at least in their willingness to condone regulations that the *Lochner* Court held off limits, they could predict with considerable certainty the outcome of challenges to many regulatory programs. The outcome would be to uphold many, or most, of the regulations that the newly created standing doctrine protected from attack. Thus, in a Court that is willing to provide Congress with broad authority to regulate the economy directly and to establish agencies with the power to regulate in accordance with the legislative will, it is doubtful that standing's function is to protect the Court from rulings that might thwart the preferences of a majority of the Court's members or to prevent litigant path manipulation. In that critical respect, New Deal standing differs from modern standing.

As demonstrated above,²⁷⁹ path manipulation arises primarily in courts whose members share widely divergent and multi-peaked preferences. This requires no less than three jurisprudential frameworks, none of which has majority support. Because President Roosevelt succeeded, by force or threat of force, in forging a Court willing to remove the then-perceived constitutional barriers to his New Deal policies, the New Deal Court's preferences were closely aligned on the most important doctrinal issue of the day, namely whether his regulatory policies would withstand constitutional attacks. And while forging a Court that willingly ratified New Deal programs ultimately created a split on the jurisprudential interpretation of the Fourteenth Amendment Due Process Clause with respect to noneconomic interests (with Justice Frankfurter championing a fundamental rights jurisprudence and Justice Black championing incorporationism),²⁸⁰ standing was not a necessary vehicle to prevent the divided Court from thwarting the will of a majority of its members. Instead, because the Court had two slopes along different dimensions that were of shifting, but unequal, size, it was again able to produce stable outcomes and, over time, to predict

²⁷⁸ See *supra* notes 199-207 and accompanying text (noting that the two dominant approaches of the New Deal Court, fundamental rights and incorporation, were both consistent with the rejection of *Lochner*).

²⁷⁹ See *supra* notes 54-65 and accompanying text.

²⁸⁰ See *supra* notes 191-92 and accompanying text.

with a considerable degree of accuracy both the definition of issues and outcome resolution. Two obvious questions then arise: First, why did the Court, for the first time, develop a self-conscious law of standing during the New Deal?²⁸¹ Second, what function did standing serve on the New Deal Court?

In its earliest incarnation, standing served two dominant purposes, both of which are critically different from the purposes that standing serves on the modern Court. First, standing was a low-cost mechanism that enabled the New Deal Court to stave off unwelcome challenges to New Deal programs without having to incur the political costs—or embarrassment—associated with determinations on the merits that differed widely from those of a recent era typified by *Lochner*.²⁸² Second, standing provided a

²⁸¹ Cf. Fletcher, *supra* note 171, at 225. The author states: "The creation of a separately articulated and self-conscious law of standing can be traced to two overlapping developments in the last half-century: the growth of the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values." *Id.* While these two events no doubt contributed to the development of standing, it is critical that they be severed both conceptually and chronologically in analyzing standing. Thus, while the rise of the administrative state during the New Deal coincided with the creation of standing, standing took its present form substantially later, during the Burger and Rehnquist Court eras. In addition, ideological litigation, without more, would appear an unlikely basis for the development of modern standing. If, for example, those presenting ideological challenges share a common jurisprudential vision with that of the prevailing jurists, as was often the case in the Warren Court, such suits might be welcome. If, on the other hand, they do not, the Court might still welcome the opportunity to defeat those challenges on the merits, rather than, by failing to consider them based upon standing, leave open the possibility to litigants to present those challenges in the future. As this Article suggests, the better explanation for the development of standing into its present form lies in the fact that the Burger and Rehnquist Courts, which were typified by multi-peaked preferences, were unable to predict with any reasonable degree of certainty the outcome of ideologically driven cases on the merits because of voting procedures unique to appellate courts. The very same inability to predict outcomes *encouraged* rather than *discouraged* ideological interest groups, dissatisfied with the legislative silence or with legislative outcomes, to attempt to force non-Condorcet-winning preferences into law judicially. As this Article demonstrates, the Burger and Rehnquist Courts developed standing as a rational response to these litigant incentives, as a means to prevent outcomes that arbitrarily and irrationally thwarted the preferences of a majority of the Court's members.

²⁸² The standing cases, unlike rulings on the merits, possessed a technical, even mechanical, quality that at least in the short term reduced the extent to which the Court appeared to have done a doctrinal about-face on the question whether prospective economic regulation violates due process.

To be sure, even the very earliest standing cases were no less normative than are their modern counterparts. A ruling that a plaintiff has no standing to challenge a regulation that imposes costs on his business, for example, a minimum wage or maximum hour law, is no different than a substantive legal ruling that a plaintiff has

very useful mechanism for docket control in the Supreme Court, and perhaps more importantly, in lower federal courts. These points, while obviously related, remain distinct. While President Roosevelt succeeded in forging a Court that shared his constitutional (and political) vision, the same was not true for the lower federal courts, which having been packed in the three preceding Republican administrations, were sympathetic to *Lochner* and hostile to FDR's regulatory agenda.²⁸³

It is no coincidence that the architects of the New Deal standing doctrine, Justices Brandeis and Frankfurter, were also the architects of *Erie R.R. v. Tompkins*.²⁸⁴ As William Braverman explains:

The federal courts' domination by conservative judges and Justices who opposed much of the progressive legislation that Frankfurter and other liberal intellectuals and politicians supported . . . helps explain Frankfurter's antidiversity position. Through diversity jurisdiction, cases that would otherwise have been in the state courts found their way into the federal courts, where they were heard by the type of judge whom Frankfurter and his progressive colleagues opposed.²⁸⁵

no right to conduct his business free from unwanted government regulation of wages and hours. Cf. Fletcher, *supra* note 171. But unlike determinations on the merits, denials of standing possessed a more mechanical quality, one that appeared at least to prevent the Court from reaching the difficult policy questions associated with substantive due process. Thus, while a series of substantive rulings, upholding each New Deal program against attacks drawn from myriad constitutional provisions, would have signaled that the Court, manipulated by FDR's force or threat of force, had changed course, thereby undermining the Court's appearance of doctrinal integrity, the erection of a standing barrier achieved the same objective with less embarrassment. The Court could claim that the question of standing was new because the nature of legal rights claimed in the regulatory era was new.

²⁸³ See PETER H. IRONS, *THE NEW DEAL LAWYERS* 13 (1982) (observing that the Hughes Court "shared with their lower-court brethren an equal commitment to the precepts of constitutional fundamentalism and a similar 19th-century perspective"); Joseph L. Rauh, Jr., *Lawyers and the Legislation of the Early New Deal*, 96 HARV. L. REV. 947, 949 (1983) (book review) (observing that prior to the Roosevelt administration, "three successive Republican administrations had stacked the lower federal courts with judges hostile to federal action of almost any kind").

²⁸⁴ 304 U.S. 64 (1938).

²⁸⁵ William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1096 (1993) (citations omitted). As early as 1925, Frankfurter and Brandeis, who authored *Erie*, began their analytic assault on diversity jurisdiction, and most notably on *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which allowed federal judges to create their own *Lochnerian* common law at the expense of progressive state regulatory programs. See Braverman, *supra*, at 1099 (collecting authorities).

Absent standing, an ambitious, or contrarian, circuit could have effectively forced the Supreme Court to address the merits of those cases that standing was intended to prevent by distinguishing cases in which the Court did rule on the merits, thus striking down particular New Deal programs. The resulting circuit splits would not afford the Supreme Court with the luxury of using a short-hand vehicle to leave favored programs in place. But, through standing, the Supreme Court could impose a greater degree of doctrinal uniformity throughout the circuits, by preventing recalcitrant lower courts from creating distasteful bait. In other words, standing, like *Erie*, proved an essential tool in disciplining the lower federal courts. *Erie* prevented the lower federal courts from interfering with progressive state law programs, while standing prevented the same courts from interfering with progressive federal programs.

The pre-*Data Processing* Court's flexible approach to standing is noteworthy in two additional respects. First, inherent in the approach is a nearly complete deference to Congress, both in its power to regulate the economy *and* in its power to confer upon public and private parties the power to litigate in federal court.²⁸⁶ The degree of partnership, or kinship, between the New Deal Congress and the New Deal Court, while repeated, albeit to a lesser extent, during the Warren Court era,²⁸⁷ was largely lacking during much of the Burger and Rehnquist Court eras, when the modern standing doctrine took its present shape. Second, by employing common law analogies, the Court merely created a set of legal presumptions. Presumptions are, of course, simply vehicles to be deployed in the face of congressional silence and to be abandoned in the event of congressional redirection. In that sense, the newly erected standing barrier was neither unique nor unusual. In the face of legislative silence or statutory ambiguity, federal courts routinely resolve cases by filling gaps, often based upon common law principles. Those presumptions, however, are generally abandoned when Congress enacts a statute expressing a contrary intent. And while common law presumptions, when applied in an

²⁸⁶ See Fletcher, *supra* note 171, at 226 (observing that "it is fairly clear that the [APA's] reference to 'relevant statute' was intended . . . to continue the flexibility and variation in response to particular statutory grants and purposes").

²⁸⁷ See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964) (upholding the public accommodations provision of the 1964 Civil Rights Act against a challenge by the motel); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (upholding the same provision against challenge by a restaurant).

era typified by novel legislative intrusions into the marketplace, might prevent many meritorious legal challenges, that is not necessarily an undesirable result. After all, courts, unlike legislatures, lack the power of institutional inertia. To the extent that the Court's members did not share like preferences during the New Deal era (or to the extent that the New Deal Court's members shared like preferences that differed from those of the population at large, lower federal courts, or representatives in Congress), standing enabled the Court, in the face of congressional silence, to avoid being drawn into a lawmaking function that could result in judicial codification of non-Condorcet-winning preferences.

But if the essence of the New Deal standing doctrine was to allow the Court to defer to Congress in its adoption of New Deal regulatory programs, a critical question arises: Why did the later Burger or Rehnquist Courts, which were generally far more skeptical of the power of government to improve the nation's economy through regulation, continue to adhere to, and to increasingly employ, the standing doctrine? As shown below, recent standing case law suggests that, beginning in the Burger Court and continuing in the Rehnquist Court, the doctrine served, and continues to serve, a very different but no less valuable function than it did during the New Deal. Rather than employing standing as a vehicle to provide short-hand merits determinations at low political cost and to discipline lower federal courts, the Burger and Rehnquist Courts have employed standing to prevent high stakes institutional dice rolls, in which no one, including a majority of the Court's own members, are able to predict, or are likely to be satisfied with, the resulting outcomes.

2. The Adoption and Interpretation of the APA

The second major chapter in standing law began in 1946, with the adoption of the Administrative Procedure Act.²⁸⁸ The APA can fairly be characterized as an umbrella statute that was intended to add uniformity to the already burgeoning field of administrative law and procedure. The APA addressed the question of standing in somewhat cryptic terms. Section 10(a) provides standing to "person[s] . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute."²⁸⁹ Since its adoption,

²⁸⁸ Ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-559, 701-706 (1988)).

²⁸⁹ Ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C.

academics have been sharply divided as to what section 10(a) means.²⁹⁰ To the extent that a consensus has formed as to the section's meaning, the consensus is largely contrary to prevailing Supreme Court interpretation.²⁹¹ Social choice theory is not particularly helpful in explaining the Court's initial interpretive error, but it is very helpful in explaining why the Court, despite two and a half decades of academic condemnation, has continued to adhere to it.

In the landmark 1970 *Data Processing*²⁹² decision, the plaintiffs sought standing to sue in federal court based upon section 10(a) of the APA and upon two substantive statutes, section 4 of the Bank Service Corporation Act²⁹³ and the National Bank Act.²⁹⁴ In conferring standing, the Supreme Court interpreted the APA to require a federal court plaintiff to allege, first, that she suffered an "injury in fact"²⁹⁵ and, second, that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."²⁹⁶ The *Data Processing* Court further suggested that the injury-in-fact requirement is of constitutional dimension.²⁹⁷ As a result, every federal court plaintiff, whether relying upon the APA, the Constitution, or some independent statute, must satisfactorily demonstrate an injury in fact or be denied standing.

Data Processing is noteworthy in that its two-part standing test infused section 10(a) with substantive content despite strong

§ 702 (1988)).

²⁹⁰ For a review of the early academic debate, dominated by Professor Kenneth Culp Davis, who claimed that the APA required an injury in fact, and Professor Louis Jaffe, who argued that the APA was not intended to alter prior standing law, see Fletcher, *supra* note 171, at 256-57.

²⁹¹ See *id.* at 255 n.151 ("It is fairly clear from the legislative history, as well as from the statutory text, that the APA was designed to preserve existing standing law.").

²⁹² *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

²⁹³ 12 U.S.C. § 1864 (1988).

²⁹⁴ 12 U.S.C. § 24 (1988 & Supp. V 1993).

²⁹⁵ *Data Processing*, 397 U.S. at 152.

²⁹⁶ *Id.* at 153.

²⁹⁷ See *id.* at 151-52. In the companion case, *Barlow v. Collins*, 357 U.S. 159 (1970), the petitioners conceded and the Court stated that the injury-in-fact prong was a constitutional requirement. See Fletcher, *supra* note 171, at 257 (citing petitioner's brief). In criticizing *Data Processing*, Professor Fletcher states: "[m]ore damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision." Fletcher, *supra* note 171, at 229.

statutory language and history suggesting a contrary intent.²⁹⁸ While consensus within the standing literature is often elusive, one area in which a considerable consensus has formed is in the rejection of the *Data Processing* Court's interpretation of section 10(a).²⁹⁹ Modern commentators have expressed general agreement that section 10(a) was not intended to alter the flexible approach to standing, set out above, that preceded the APA's adoption. Instead, section 10(a) was intended to be a neutral conduit.

The statutory history and language, while not conclusive on the point, strongly suggest that, based upon section 10(a), federal court plaintiffs would be afforded or denied standing on the same basis as under existing federal statutes and case law. The confusion over the substantive content of section 10(a) stems largely from a debate, following the statute's adoption, between Professors Kenneth Culp Davis and Louis L. Jaffe.³⁰⁰

Professor Davis argued, based upon House and Senate Committee reports, that section 10(a) was intended to require, as a prerequisite to standing, that plaintiffs allege an injury in fact.³⁰¹

²⁹⁸ See *supra* notes 239-49 and accompanying text.

²⁹⁹ See, e.g., Richard B. Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1566-70 (1979) (book review) (describing the *Data Processing* formulation as an "unredeemed disaster"); Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 425 (observing "sharp criticism" of the *Data Processing* decision); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 480 (1995) (observing that "[t]he [*Data Processing*] injury-in-fact test has come under intense scholarly criticism for lacking coherent limitations and for failing to provide an objective test of standing divorced from the 'merits' of whether the plaintiff's interests are legally protected").

Relying on language in *Data Processing* that suggests that injury need not be economic for a federal court to confer standing, see *Data Processing*, 397 U.S. at 154, Cass Sunstein has expressed some support for the *Data Processing* standing formulation as a "rejection of private property as the predicate for judicial intervention in favor of an approach that calls on courts to ensure the identification and implementation of public values." Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 893 (1987).

³⁰⁰ Compare 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.06, at 232 (1958) with LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965). For scholars supporting Jaffe's position, see Fletcher, *supra* note 171, at 231 (positing that Jaffe's position is stronger, as an historical matter, than is Davis's); Sunstein, *supra* note 148, at 171-73 (arguing that English precedents common at the framing of the Constitution support the argument that federal courts are empowered to entertain public actions).

³⁰¹ See 3 DAVIS, *supra* note 300, § 22.06, at 232. Professor Fletcher has observed that, "given [Professor Davis's] eloquent and consistent pleas for clarity and simplicity in the law of standing," it is ironic that Davis was partly at fault for standing's "clouded and difficult . . . actual operation." See Fletcher, *supra* note 171, at 256.

Professor Jaffe, in contrast, argued that section 10(a) was not intended to prevent courts from continuing to hear public actions, as they had done historically.³⁰² Indeed, as recently as 1968, two decades after the APA's adoption and just two years prior to *Data Processing*, the Supreme Court in *Flast v. Cohen*³⁰³ signaled strong support for public actions based directly upon the Establishment Clause. In *Flast*, the Court conferred standing upon a group of taxpayers seeking to challenge government contributions to a religious organization on Establishment Clause grounds.³⁰⁴ Given the ubiquity of taxpayer status, the *Flast* case bears striking resemblance to *qui tam* actions prevalent in England and throughout the United States at the time that the Constitution was proposed and ratified.³⁰⁵ The Court, following *Data Processing*, chipped away at *Flast* in the 1982 decision, *Valley Forge Christian College v. Americans United for Separation of Church and State*,³⁰⁶ denying taxpayer standing to claimants challenging a federal land grant to a religious organization, also allegedly in violation of the Establishment Clause.

The transformation from *Flast* to *Valley Forge*, whether well-founded or not, suggests that the nature of the Court's standing analysis underwent a critical transformation in the aftermath of *Data Processing*. Regardless of the origin of the legal right in question, the Court was going to scrutinize with greater care whether a claimant, even one relying upon the Constitution rather than a federal statute, suffered an injury analogous to those recognized at common law. While one might be inclined to rationalize *Flast* and *Valley Forge* on the Court's own terms, accepting the proposition that expenditures of tax dollars bear a closer nexus to taxpayer status than do land grants and disregarding the obvious economic equivalence of the two governmental actions,³⁰⁷ the overall thrust of the Court's standing decisions following *Data Processing*, as demonstrated below,³⁰⁸ suggests that much more is going on. The

³⁰² See JAFFE, *supra* note 300, at 459-500 (1965) (arguing that federal courts had historically entertained public actions); *id.* at 528-30 (arguing that § 10(a) of the APA makes no mention of an injury-in-fact requirement).

³⁰³ 392 U.S. 83 (1968).

³⁰⁴ For a more thorough analysis of *Flast* and of the later *Valley Forge* opinion, which held that taxpayers lacked standing to challenge a land grant allegedly in violation of the Establishment Clause, see *id.* part I.A.

³⁰⁵ See Stearns, *supra* note 2, Introduction subpart C.

³⁰⁶ 454 U.S. 464 (1982).

³⁰⁷ See Stearns, *supra* note 2, part I.A.

³⁰⁸ See *infra* part III.

critical question addressed in the following part then is why, given that the Burger and Rehnquist Courts have tended in a substantially more conservative direction than their New Deal predecessor, they have continued to employ standing to stave off challenges to a wide array of allegedly unlawful government actions by applying the injury-in-fact test traceable to *Data Processing*.

III. STANDING IN THE BURGER AND REHNQUIST COURTS

Despite the dubious origins of the *Data Processing* injury-in-fact standing requirement, the modern Court has continued to adhere to, and to further develop, the *Data Processing* framework. In *Linda R.S. v. Richard D.*,³⁰⁹ the Court first articulated two additional standing requirements, causation and redressability,³¹⁰ and in *Warth v. Seldin*,³¹¹ it added these two prongs to its constitutional standing test.³¹² As a result, under present Supreme Court interpretation, the Article III Case or Controversy Clause imposes as a precondition to standing for every federal court plaintiff that she properly allege injury in fact, causation, and redressability. The Court has imposed these requirements without regard to the substantive basis of the underlying legal claim. While the Court has not had the same difficulties in interpreting these additional prongs as it has had in interpreting the injury-in-fact requirement,³¹³ it is fair to say that incorporating these prongs has done little to clarify the problems associated with constitutional standing. This section will analyze many of the apparent incongruities within the standing case law.

For ease of presentation, I will divide the modern constitutional standing case law into three major groupings: (1) no right to enforce the rights of others; (2) no right to prevent diffuse harms; and (3) no right to an undistorted market. In describing the cases

³⁰⁹ 410 U.S. 614 (1973).

³¹⁰ See *id.* at 617-18.

³¹¹ 422 U.S. 490 (1975).

³¹² See *id.* at 504.

³¹³ Cf. Winter, *supra* note 101, at 1379 ("From tort law, we would have assumed that the necessary causal chains would vary as different policies and purposes are implicated. Yet one of the oddities of standing law is that, in its treatment of the issue of causation, a strange uniformity predominates instead." (footnotes omitted)). Winter cites *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978), in which the Court granted the claimants standing despite an arguably attenuated causal link, as a counterexample to this proposition. In fact, when that case is considered using the shadow case analysis suggested below, see *infra* part III.A, this seeming anomaly is also removed.

within each grouping, I will consider cases in which the claimants rely for standing upon the Constitution and upon federal statutes,³¹⁴ including section 10(a) of the Administrative Procedure Act.³¹⁵ I will then revisit statutory standing conferrals in light of *Lujan v. Defenders of Wildlife*.³¹⁶ This will help to explore the difference between the standing doctrine's constitutional and prudential foundations. Before describing the three groupings of standing cases, it will be helpful to explain my choice of headings.³¹⁷

The first grouping, no right to enforce the rights of others, is most commonly referred to in the literature as "no third-party standing." My choice of heading is intended to emphasize two features of these cases. First, as with other standing precedents, the Court's denial of third-party standing invariably masks a substantive legal ruling. For example, in *Gilmore v. Utah*,³¹⁸ the Court, in terminating the stay of execution it had previously entered, effectively denied Mrs. Gilmore standing to raise the claims of her son, Gary Gilmore. Furthermore, the Court made a substantive determination that Mrs. Gilmore herself lacked the legal right to prevent the state of Utah from convicting and executing a criminal defendant in a manner that allegedly violated the Constitution, even if the affected criminal defendant were her son.³¹⁹ Second, while

³¹⁴ The most prominent recent statutory standing case is, of course, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). It is fair to say that the principles that underlie *Lujan* are difficult to square with the principles that underlie the constitutional standing cases and that the actual holding is difficult to square with prior statutory standing precedents. As suggested below, however, social choice might help to provide a positive explanation of the case. See *infra* part III.D (positing that the *Lujan* standing denial might represent the Court's signal to Congress not to avoid responsibility and shift blame for controversial policy results—those that might reflect multi-peaked preferences—through broad statutory standing provisions that effectively delegate controversial policymaking powers to the federal judiciary).

³¹⁵ Ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702 (1988)).

³¹⁶ 504 U.S. 555 (1992). This case is discussed below, see *infra* part III.D.

³¹⁷ The headings I employ are noteworthy in two respects. First, they are stated as substantive legal rules. Second, the heading for category three—no right to an undistorted market—is new to the standing literature.

³¹⁸ 429 U.S. 1012 (1976) (order of the Court terminating stay of execution).

³¹⁹ See Stearns, *supra* note 2, part II.B. Chief Justice Burger (joined by Justice Powell) and Justice Stevens (joined by Justice Rehnquist) would have decided *Gilmore* on standing grounds. See *Gilmore*, 429 U.S. at 1013 (Burger, C.J., concurring); *id.* at 1017 (Stevens, J., concurring). The Court's order terminating the stay of execution, which was joined (in addition to the four listed justices) by Justices Stewart, was, instead, based on Gary Gilmore's "knowing and intelligent" decision to waive any and all federal claims. *Id.* at 1013. One interesting aspect of *Gilmore* is that it reflects

the Court has generally prevented claimants from raising the legal rights of others, it has not done so in all cases,³²⁰ and it has generally allowed Congress to alter that presumption by creating a right to enforce third-party interests by statute.³²¹ In addition to these features, scholars have pointed out that many standing cases under other labels can readily be analyzed as third-party standing cases.³²² As demonstrated below, several cases that fall within the third grouping, no right to an undistorted market, cannot readily be characterized as no third-party standing cases.³²³ For present purposes, the more critical point is that a major body of non-standing case law, criminal procedure, provides a critical contrast in analyzing third-party standing cases.³²⁴

The second grouping, no right to prevent diffuse harms, includes the general presumptive rule against taxpayer standing. In the predecessor article, I analyzed the two principal cases, *Flast* and *Valley Forge* at length³²⁵ and demonstrated that the incongruity that those cases reveal may result from the very cycling phenome-

a liberal/conservative lineup against at least one, often critical, vote in the center, Justice Stewart. Such a lineup is consistent with the predictions about standing drawn from the social choice model.

³²⁰ See, e.g., *Powers v. Ohio*, 499 U.S. 400, 412-14 (1991) (allowing a white defendant to raise *Batson* challenge on the ground that the defendant was effectively raising the right of the potential African-American juror not to be excluded). For a critical analysis of *Powers*, see *infra* text accompanying notes 381-86.

³²¹ See *supra* note 264 and accompanying text; *infra* notes 361-66 and accompanying text.

³²² See Fletcher, *supra* note 171, at 246 ("If we were so inclined, we could call almost all cases in which standing is seriously contested third party standing cases. That is, difficult standing cases are almost always third party standing cases in the sense that the direct interests of the plaintiff are viewed as less important than the interests of non-parties, and the plaintiffs are seen as seeking to serve not only their own interests but those of others as well.").

³²³ See *infra* part III.C (explaining that cases within this grouping are not susceptible of third-party standing characterization). In addition to positing a category of standing cases that defies the third-party standing label, this Article departs from Professor Fletcher's analysis in arguing that "difficult standing cases" fall into the final category, no right to an undistorted market, see *infra* part III.C, rather than into the first category, no right to enforce the rights of others. This follows from the shadow case analysis, see *infra* part III.A; see also Stearns, *supra* note 2, part II.B, which resolves many apparent anomalies associated with third-party standing.

³²⁴ By comparing those cases in which convicted criminals have forced the judicial creation of positive law with those standing cases in which ideological plaintiffs have been prevented from forcing judicial creation of positive law on the same, or on similar, issues, we see the critical function that standing serves, especially on a multi-peaked Court. We also see that many of the apparent incongruities within this body of case law lie at the periphery of so-called third-party standing.

³²⁵ See Stearns, *supra* note 2, part I.A.

non that standing—and stare decisis—were in large part designed to eradicate.³²⁶ As with the presumptive rule against third-party standing, the Court, until quite recently in any event, has permitted Congress to define as individual rights, enforceable in federal courts, those injuries that traditionally would have been viewed as diffuse.³²⁷ Most recently, in *Lujan*,³²⁸ the Court suggested that standing, in its constitutional dimension, prevents Congress from translating diffuse harms into individual rights, at least when preventing such injuries requires that the federal courts monitor the executive branch.

The third grouping, no right to an undistorted market, which has been given the most novel heading, is intended to capture the body of standing case law that is analytically the richest in many

³²⁶ See *id.* As I explained in that article, it is very important to keep distinct the two levels of social choice analysis when viewing these cases. In these articles, I demonstrate that standing itself serves to ameliorate, but not to remove, many of the doctrinal anomalies that would result if litigants were provided unfettered control over the path of Supreme Court decisionmaking. Because institutional cycling can occur both at a single moment in a given case or over time across several cases, the Court has developed decisional rules that prevent the requisite number of votes to reveal cycles in both situations. Case-by-case voting prevents snapshot cycling, cycling that would arise if the Court employed issue-by-issue voting when it has shifting majorities. See Stearns, *supra* note 12, at 1256-57. It does not, however, prevent the form of cycling that is the focus of this Article, namely cycling that occurs over time.

In response to the doctrinal difficulties that cycling poses, the Court has developed two decisional rules. The first, stare decisis, prevents the requisite number of votes to reveal cycles that occur over time. See Stearns, *supra* note 2, part I.A. The second, standing, prevents litigants from manipulating the substance of Supreme Court precedent by controlling the path of case decisions. Together, these rules enable the Court to satisfy its obligation to resolve cases in a fair manner even when a cycle may be present. It does so by ensuring that all litigants play according to the same ground rules.

But, of course, these very voting rules apply no less to the standing cases themselves than to other substantive areas of Supreme Court case law. As a result, we should expect the standing cases themselves to be affected by the very voting rules that create the doctrinal irrationalities and incongruities that the doctrine is designed to reduce. While this is unavoidable, it is also not a basis with which to condemn standing. The relevant question when assessing any legal doctrine, including standing, is not whether the doctrine is invariably applied in a consistent or correct manner. See Stearns, *supra* note 12, at 1230 n.33 (discussing the nirvana fallacy). It is, instead, whether the objectives of the overall system of which the doctrine under review is a part are likely to be furthered with or without that doctrine in place. Despite the standing doctrine's apparent incongruities, which are due in significant part to the aggregation problems that social choice reveals for all decisional bodies, standing continues to serve important objectives that are not satisfied by other legal doctrines.

³²⁷ See *supra* note 264 (describing the principal Fair Housing Act cases).

³²⁸ 504 U.S. 555 (1992). For a critical analysis of *Lujan*, see *infra* part III.D.

respects. As with the first grouping, these cases, in which the Court has denied standing because the chain between the alleged misconduct and the plaintiffs' claimed harm was attenuated,³²⁹ invariably involve substantive legal determinations. When properly analyzed, these standing cases, and their underlying substantive determinations, reveal both the critical social choice and separation-of-powers dimensions that underlie the modern standing case law.

It is worth noting that I have used the term "undistorted" rather than "unregulated" in the heading. My choice of terminology is intended to distinguish the standing cases from the cases that marked the end of the *Lochner* era. In *West Coast Hotel v. Parrish*³³⁰ and its progeny, the Court held, in cases in which standing was not seriously disputed,³³¹ that the Constitution no longer prevented prospective economic regulation that had been held off limits under *Lochner*. *West Coast Hotel* effectively held that there is no right to an unregulated market, at least as a matter of constitutional due process. In the standing cases, in contrast, plaintiffs are not claiming that economic regulation is per se unconstitutional. Instead, they are claiming that, if we assume that the regulation in question violates some independent constitutional guarantee, most commonly the Equal Protection Clause, or statute, then they have a right to have the regulation struck down if striking that regulation will ultimately inure to their benefit. Whereas *West Coast Hotel* held that the Due Process Clause does not prevent market regulation, in these standing cases, the Court has effectively ruled that plaintiffs do not have the right to the benefits associated with removing independently unconstitutional or otherwise illegal market distortions.

The heading also captures another important feature of these cases. Some illegal market distortions can be superimposed upon

³²⁹ See, e.g., *Allen v. Wright*, 468 U.S. 737, 759 (1984) (denying taxpayer-plaintiff standing to challenge IRS procedures that afford tax-exempt status to certain racially discriminatory schools); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43-44 (1976) (denying plaintiff standing to challenge IRS ruling that allegedly encouraged hospitals to deny services to indigent patients and declaring claim too speculative); *Warth v. Seldin*, 422 U.S. 490, 504-07 (1975) (denying low-income plaintiffs standing to challenge exclusionary zoning practices for failure to allege facts from which it could reasonably be inferred that, absent the challenged practices, they would be able to purchase or lease land).

³³⁰ 300 U.S. 379 (1937).

³³¹ While the defendant in *West Coast Hotel* raised the question whether plaintiff had standing, see *id.* at 386, the Court did not address the standing issue in its opinion, suggesting that standing was not seriously disputed.

a regime that takes a set of legal regulations, instead of a state of laissez faire, as its baseline.³³² Thus, in *Allen v. Wright*,³³³ the plaintiffs alleged that the illegal market distortion resulted from the conferral of tax-exempt status in violation of the Equal Protection Clause,³³⁴ and in *Simon v. Eastern Kentucky Welfare Rights Organization*,³³⁵ the plaintiffs alleged that such a market distortion resulted from the conferral of tax-exempt status in violation of the Internal Revenue Code.³³⁶ Again, the claimed right is not to a market that is unregulated, but rather to a market, whether regulated or not, that is not distorted by illegal means.

None of the three groupings is entirely distinct. And within each grouping, which can perhaps be better thought of as a presumptive doctrine, exceptions can be found. As stated above, scholars writing about standing have relied upon the resulting inconsistencies to challenge both the doctrine's foundations and applications. Much of that literature has been summarized already.³³⁷ Because this Article differs from the existing standing literature both in its starting point and in its method of analysis, it

³³² The position in the text is not to be confused with Professor Sunstein's critique of *Lochner*. Sunstein contends that the conceptual difficulty with *Lochner* was that it took private orderings as its baseline without recognizing that allowing markets to operate is a deliberate governmental decision. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697, 1718 (1984). While I have previously criticized this thesis, see Stearns, *supra* note 12, at 1265 n.172, suffice to say here that Sunstein's analysis, by conflating opposing baselines, renders difficult—if not impossible—the task of meaningfully discussing regulatory policy. For a related critique, see generally GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* (1991). Robinson states:

Cass Sunstein's criticism of *Lochner* seems to me unsound. Sunstein criticizes *Lochner* and "Lochner-like understandings" for taking as a baseline from which to decide constitutional cases the unregulated market (the market subject only to the standards of the common law). More generally he criticizes the Court for assuming that the common law was inherently "natural and inviolate," and [for accepting] this status quo as the basis for determining a neutral principle. Of course, the Court took the status quo as a baseline; what else could it take, where should it start if not from the status quo? It is not correct to say the Court took the status quo to be inviolate; it was only a starting point. One must start somewhere. It is impossible to impose a burden of proof without some notion of what it is that must be proved, which cannot be formulated without a further understanding of an accepted baseline.

Id. at 61-62.

³³³ 468 U.S. 737 (1984).

³³⁴ See *id.* at 739.

³³⁵ 426 U.S. 26 (1976).

³³⁶ See *id.* at 28.

³³⁷ See Stearns, *supra* note 2, Introduction subpart C.

should not be surprising that, in finding a substantial justification for the modern standing doctrine, the Article further differs from that literature. I have started from the premise that, as with all areas of substantive Supreme Court doctrine, we cannot expect entirely consistent standing case law.³³⁸ I have also started from the premise that if we assume that Supreme Court justices, whatever their individual tastes and preferences happen to be, can be expected generally to behave rationally, we should be able to understand why standing developed as it did when it did and what functions that doctrine presently serves. I have already demonstrated the function that standing served on the New Deal Court, and I have posited that that function has changed over time. By analyzing the modern standing cases according to the groupings set out above, the remainder of the Article will explain the modern function, and durability, of this enigmatic doctrine.

A. *No Right to Enforce the Rights of Others*

This grouping, which is most commonly referred to as third-party standing, lies at the core of the modern standing doctrine. At least one author has suggested, in fact, that virtually all standing cases can be conceptually recast as cases within this grouping.³³⁹ While I will demonstrate that it is in fact difficult to fit several of the cases within the third grouping, no right to an undistorted marketplace, in a third-party standing paradigm,³⁴⁰ the more important point is that many cases that traditionally have been treated apart from standing altogether are critical in understanding why the Court, in crafting this standing rule, has created a substantive legal ruling that individuals presumptively lack the right to enforce the rights of others. A proper analysis of these cases also reveals the illusory nature of the claim by the Supreme Court and some commentators that the third-party standing doctrine is intended to promote zealous advocacy.³⁴¹ In fact, the analysis

³³⁸ This was among the major insights of Judge Easterbrook's provocative article, *Ways of Criticizing the Court*. See Easterbrook, *supra* note 34, at 813. For my analysis and critique of Easterbrook's thesis, see Stearns, *supra* note 2, parts I.B-C.

³³⁹ See Fletcher, *supra* note 171, at 245.

³⁴⁰ See *infra* part III.C.

³⁴¹ See, e.g., *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *Craig v. Boren*, 429 U.S. 190, 194 (1976); Gottlieb, *supra* note 255, at 1071 (arguing that the only constitutional basis for standing is the need to promote zealous advocacy); cf. Abel, *supra* note 221, at 1189 (observing that in the Warren Court, the standing doctrine was largely grounded in the desire to promote vigorous advocacy).

reveals that quite often the opposite is more nearly true; third-party standing denials are designed to promote *appropriate* advocacy rather than *zealous* advocacy.³⁴² Ironically, perhaps, at least given the Court's occasional reference to zealous advocacy to justify its third-party standing requirement,³⁴³ one of the features of appropriate advocacy is that it not be overly zealous.

As demonstrated above,³⁴⁴ denying third-party standing is invariably a substantive legal ruling. Two cases best illustrate this paradigm. In the first, while not technically resolved on standing grounds,³⁴⁵ the Supreme Court effectively denied Mrs. Bessie Gilmore standing to challenge the conviction and death sentence of her son, Gary Gilmore, on constitutional grounds.³⁴⁶ In doing so, the Court also held that Mrs. Gilmore lacked the substantive legal right to prevent an allegedly unconstitutional conviction and execution, even if the person to be executed were her son. In the second case, the Supreme Court denied Mr. Adolph Lyons, a prior Los Angeles Police Department chokehold victim, standing to challenge the LAPD chokehold practice on behalf of potential future victims.³⁴⁷ In doing so, the Court effectively held that Mr. Lyons, based upon the facts that he alleged, lacked the substantive right to prevent allegedly unconstitutional chokeholds in his community.

The question then arises why the Court, in the guise of a technical determination on standing, intended to prevent a substantive ruling on the merits of the underlying legal issue, has issued an alternative substantive ruling limiting the claimant's legal rights. To answer that question, we need to consider the choices that the Court faced in these cases. In *Gilmore*, the Court had the choice either to grant Mrs. Gilmore standing and to resolve the merits of the constitutional challenges to Gary Gilmore's conviction and death sentence, even though Gary Gilmore had not chosen to press those claims, or to deny Mrs. Gilmore standing and hold, as

³⁴² See *infra* text accompanying notes 381-86.

³⁴³ See *supra* note 341.

³⁴⁴ See *supra* text accompanying notes 256-61.

³⁴⁵ See *supra* text accompanying note 319 (discussing the breakdown of the *Gilmore* opinions and votes).

³⁴⁶ See *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (terminating a stay of execution on the grounds that Gary Gilmore "made a knowing and intelligent waiver of all federal rights he might have asserted after the Utah trial court's sentence was imposed").

³⁴⁷ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

a matter of substantive law, that she lacked the power to challenge a conviction and death sentence that she alleged violated the Constitution.³⁴⁸ There is no third option that would altogether allow the Court to avoid making positive law.³⁴⁹ And in *Lyons*, the Court faced a similar choice: grant standing and resolve the underlying constitutional challenge, or deny standing and wait until a convicted victim of a chokehold challenges the practice as part of his direct appeal or collateral attack.³⁵⁰ In each case, the Court must choose between two alternatives, both of which involve the judicial creation of positive law, and decide which is least bad based upon whichever values the Court considers important. In the standing context, I would suggest that the Court has viewed two values as critically important when asked to make positive law. First, the Court is concerned with the extent to which it is likely to encroach upon Congress's lawmaking function, which includes Congress's power not to address a given issue by statute unless and until an appropriate legislative consensus has formed.³⁵¹ Second, the Court is concerned with its own ability to aggregate preferences in a rational manner in those cases it does resolve on the merits.³⁵²

As demonstrated above, the Burger and Rehnquist Courts, perhaps for the first time in the Court's history, were characterized by multi peaked preferences. This multi peakedness, coupled with decisional rules that prevented the requisite number of iterations to reveal cycles, whether within a single case or over a group of cases, prevented the Court from ensuring that if it addressed the merits of a case, the disposition of which required a resolution of one or more controversial issues, it would not thwart the preferences of a present majority. In other words, with respect to those issues that were likely to be controversial, the Court could not ensure with any reasonable degree of accuracy that its substantive rulings would be other than irrational and arbitrary.³⁵³ For the same

³⁴⁸ See 429 U.S. at 1014 (Burger, J., concurring).

³⁴⁹ This is because the Court must collectively resolve the case. See Stearns, *supra* note 12, at 1258-71 (explaining why appellate courts employ non-Condorcet voting rules).

³⁵⁰ See 461 U.S. at 101-05.

³⁵¹ See Stearns, *supra* note 12, at 1259 (describing congressional power of inertia).

³⁵² See *supra* part II.A (demonstrating multi peakedness in the Burger and Rehnquist Courts).

³⁵³ See *supra* part II.A (explaining that the Burger and Rehnquist Courts, because they each had three divergent ideological frameworks, none with majority support, were multi peaked).

reason that members of a multi-peaked court are gun-shy when faced with a controversial case, ideological litigants, when looking at a Court that has multi-peaked preferences, could not be more pleased. After all, while such a Court by no means ensures success at codifying a non-Condorcet preference into law, virtually any other configuration (except, of course, a non-Condorcet preference in the public with majority support on the Supreme Court) ensures failure. If one takes enough shots at securing a favorable precedent, given the value of path dependency, the chances of long-run success increase.

One substantive body of case law that particularly tends to attract ideological litigants involves the rights of the criminally accused. Holding aside the merits of *Gilmore* and *Lyons*, we can already begin to see why the Court, faced with the choice either to grant standing and address the merits of issues over which its preferences were multi-peaked, or to deny standing and issue a substantive ruling that the claimant lacked the general right to prevent unconstitutional conduct in her community, would elect the latter course. After all, if the Court had granted standing in these cases, it would have invited ambitious interest groups to forage for litigants who have chosen not to press their own constitutional claims. Especially in the criminal procedure context, countless claims exist at any given time, even though many or most of the affected parties—the majority of whom are in jail—elect not to pursue them.³⁵⁴ As a result, the government's arguably illegal conduct often goes unpunished, and therefore undeterred, at least until a convicted criminal chooses to challenge that conduct in an appropriate proceeding. At first blush, this regime might appear rather unattractive or, at the very least, no more attractive than a tort regime that requires that a plaintiff be injured before suing a tortfeasor.³⁵⁵ Both regimes ultimately rest upon a judicial definition of injury.

³⁵⁴ Before I began to teach law, I represented two death row inmates. In both cases, I benefitted from a public interest group that served as an information clearing-house and produced a newsletter identifying potential claims and updates on related precedents. While this organization reduced the cost of raising challenges in such cases, the cost with standing in place remained higher than it would have been if standing were abandoned. Without standing, the organization could have raised constitutional challenges on behalf of those sentenced to death without having to have found an attorney to represent a particular death row inmate who had a relevant claim.

³⁵⁵ See Stearns, *supra* note 2, Introduction subpart C (contrasting requirement of injury in standing to requirement of injury in tort).

In tort law, we could easily expand our definition of injury to include a person who is disturbed when noninjurious negligence goes unpunished.³⁵⁶ Similarly, in standing cases, we could expand our definition of injury to include a person who is disturbed when the government's illegal conduct goes unpunished.³⁵⁷ In fact, in both contexts, the courts are propelled into action when the consequences of a collective governmental decision, by either a legislature or the courts, would be direct and significant to the claimants before them for reasons that are unrelated to the desire to make new law. Of course, the legislature cannot be forced to respond, but, by filing a lawsuit in which appropriate claims are raised, litigants can force the courts to act. Where no shadow case—that case in which the same claim can be presented with no credible standing barrier³⁵⁸—exists, judicial creation of positive law with respect to underlying claims, for which the preferences of the justices or lower court judges may be multi peaked, cannot be avoided. Thus, for example, when a convicted criminal challenges the constitutionality of his conviction or sentence in a proper appeal or habeas proceeding in federal court, that court lacks the luxury of delaying the creation of positive law. Courts cannot wait either until an appropriate legislative consensus forms, or until the Supreme Court's preferences coalesce around a dominant framework. In such cases, the federal courts cannot avoid shifting the burden of congressional inertia. Without the presumption against third-party standing, however, ambitious ideological litigants could force the federal judiciary to do so at will, simply by locating an affected party who has chosen not to enforce her own legal rights. Such litigants could affect the path, and thus the substance, of legal doctrine by controlling the order or timing of case presentations.

But in denying standing, the Court has not avoided making positive law. Instead, it has determined as a matter of substantive law that the third-party claimant lacks a substantive legal right to pursue the underlying claim.³⁵⁹ And, as demonstrated below, the

³⁵⁶ See *id.*

³⁵⁷ Cf. Fletcher, *supra* note 171, at 231 (arguing that standing's injury-in-fact requirement has no meaning beyond ensuring that the claimant is truthful).

³⁵⁸ See Stearns, *supra* note 2, part II.B (describing and demonstrating shadow case analysis); *infra* text accompanying notes 367-78 (same).

³⁵⁹ For a recent Supreme Court decision based upon third-party standing principles, see *United States v. Hays*, 115 S. Ct. 2431 (1995). The *Hays* Court held that residents in a congressional voting district, which was adjacent to a district that they alleged was awkwardly drawn for racial reasons in violation of *Shaw v. Reno*, 113 S.

Court has not always applied third-party standing principles in a consistent manner.³⁶⁰ To a multi-peaked Court, however, the substantive legal ruling resulting from a denial of standing is often likely to be more attractive than the alternative of granting standing and addressing the underlying claim on the merits for two reasons. First, the standing denial has a presumptive—rather than absolute—character. While there may be no general right to enforce the rights of others, the federal courts often vindicate rights, even constitutional rights, that are triggered by various sources of positive law. Thus, for example, a violation of the doctrine of unconstitutional conditions can attach even though there is no “right” to the underlying largesse that is the subject of the constitutional claim.³⁶¹ Under the doctrine of unconstitutional conditions,

Ct. 2816 (1993), lacked standing to challenge the race-based gerrymander. *Hays* illustrates not only the difficulty with third-party standing, namely that such denials are invariably substantive, but also serves as an apt prelude to some of the problems that arise in the final standing category, no right to an undistorted market. *See infra* part III.C. The *Hays* Court stated:

Where a plaintiff resides in a racially gerrymandered district . . . , the plaintiff has been denied equal treatment because of the legislature’s reliance on racial criteria, and therefore has standing to challenge the legislature’s action. Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference.

115 S. Ct. at 2436 (citation omitted). The Court may have intuitively feared that, if persons living outside a gerrymandered district were afforded standing to challenge the gerrymandered district, it would invite ideological path manipulation. But by redefining the injury to include the right to participate in a voting process unaffected by racial gerrymandering, the Court could easily have identified a first-party injury. In fact, the Court recognized the problem. *See id.* at 2437 (“Of course it may be true that the racial composition of District 5 [in which the plaintiffs resided] would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment.”). As in the final standing category, *see infra* part III.C, the Court may also have intuited that path manipulation can result from claims premised upon an asserted right to a market, whether for hospital services, schooling, or voting, that is undistorted by a law that allegedly violates the Fourteenth Amendment Equal Protection Clause.

³⁶⁰ *See, e.g., infra* text accompanying notes 381-86 (discussing *Powers v. Ohio*, 499 U.S. 400 (1991)).

³⁶¹ This provides a useful method with which to explain the Supreme Court’s “right to counsel” cases, which otherwise appear inconsistent. In *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), the Supreme Court held that, while states are not required to provide an appeals process in criminal cases, having done so, they cannot deny transcripts to all indigent criminal appellants; otherwise the right to an appeal would

for example, the Court has willingly vindicated under the Due Process Clause rights that owe their creation to state law, but that the state has doled out in an arbitrary or discriminatory manner.³⁶² Similarly, in cases arising under the Fair Housing Act,³⁶³ the Court has vindicated the right to nondiscriminatory dissemina-

be rendered illusory. In *Douglas v. California*, 372 U.S. 353, 357 (1963), the Supreme Court struck down a California statute that conditioned access to appellate counsel upon a finding that such counsel would be helpful to the criminal appellant or the court. Finally, in *Ross v. Moffitt*, 417 U.S. 600, 619 (1974), the Supreme Court held that, having complied with *Griffin* and *Douglas*, North Carolina did not violate equal protection or due process in failing to provide counsel to indigents for discretionary appeals or for petitions for writ of certiorari to the United States Supreme Court. The Supreme Court, in each case, employed an equal protection/fundamental rights framework, largely in response to concerns that might have been raised had it instead relied upon due process after the discredited *Lochner* era. In fact, the Court could have achieved precisely the same results based upon due process without appearing *Lochnerian* and without relying upon the equal protection/fundamental rights methodology, which has itself been criticized as a subterfuge for vindicating what are essentially substantive due process claims. See Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 303 (1986) (describing the Court's reliance upon equal protection/fundamental rights as a subterfuge for substantive due process); James A. Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 MO. L. REV. 423, 427 (1988) (arguing that the Court has relied on "substantive equal protection" analysis to "invalidate social and economic regulation with which it [has] disagreed"); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1132 (1969) (positing that equal protection/fundamental rights analysis "may be little more than . . . substantive due process . . . decked out in the trappings of equal protection").

The Court could have held that the transcript and direct appeals cases required the state, having given its largesse to some criminal appellants, not to deny that largesse to others through arbitrary and discriminatory (or essentially standardless) means, see *Douglas*, or in an illusory manner, see *Griffin*. This would have allowed the Court to achieve the result it achieved in *Griffin* and *Douglas*. Moreover, because North Carolina had not provided state-funded counsel to anyone for either discretionary appeals or for Supreme Court certiorari petitions, the state's denial, based upon this analysis, would not have violated due process. As a result, the Court also would have produced the result it achieved in *Ross*. In all three cases, the Court could have avoided identifying as fundamental the rights to a transcript on appeal, to appeals, and to counsel for particular categories of appeals; instead, it could have left the definition of the underlying rights to the state. The Court would then have intervened only to ensure that the state, having created a right, properly allocated its largesse among convicted criminals.

³⁶² For a recent book that analyzes the doctrine of unconstitutional conditions, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993). While Professor Epstein focuses primarily upon economic coercion as the principal state conduct that is invalid under the unconstitutional conditions doctrine, the above discussion demonstrates that that same analysis can be used to strike noneconomic classifications through which the state allocates its largesse in an arbitrary, discriminatory, or illusory manner. See *supra* note 361.

³⁶³ 42 U.S.C. § 3604 (1988).

tion of residential real estate marketing information for housing testers who were themselves not in the market for housing;³⁶⁴ for residents not seeking housing but who wished to secure “the social and professional advantages of living in an integrated community”;³⁶⁵ and for a multiracial fair housing organization, noting that “[t]he actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”³⁶⁶ Presumably, had the claimants relied upon the Equal Protection Clause rather than a federal statute for their claims, the Court would have denied standing in these cases based upon third-party standing principles.

Second, creating positive law through a denial of standing might be more attractive to a multi-peaked Supreme Court because the standing denial tends to discourage future litigants from attempting to force upon the Court cases presenting issues over which the justices’ preferences are multi-peaked. In fact, one issue on which sitting justices on a multi-peaked Court can probably agree is that it is better to wait for a case in which they have no choice but to rule on a divisive issue than to allow ideological litigants to come in and place their bets but force the Court to roll the dice.

These insights further explain why a proper analysis of third-party standing cases prevents us from directly comparing case results. To properly analyze these cases, we must instead ask, for any given case in which standing was granted or denied, whether there exists a “shadow” case in which another litigant could present the same issue with no credible standing challenge.³⁶⁷ When we compare the relationships between the actual standing cases and their shadow cases, rather than directly comparing the outcomes of the standing cases themselves, many apparent incongruities

³⁶⁴ See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972) (finding a congressional intention to define standing under the Fair Housing Act as broadly as is permitted by Article III). In analyzing *Trafficante*, David Logan explains: “Because the *Trafficante* plaintiffs had alleged that they were themselves injured [by the inability to live in an integrated community], the injury in fact requirement was met even though the defendant’s discriminatory practice was aimed at other persons who were not parties to the suit.” Logan, *supra* note 264, at 65.

³⁶⁵ *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112 (1979) (relying on *Trafficante* and a broad definition of standing under the Fair Housing Act to allow housing testers who live within the target area to evade summary judgment).

³⁶⁶ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975), and relying upon *Gladstone, Realtors* to find injury in fact and thus standing to sue for a housing tester).

³⁶⁷ See Stearns, *supra* note 2, part II.B.

disappear. For example, to understand why, in *Los Angeles v. Lyons*,³⁶⁸ Mr. Lyons, a chokehold victim, was not afforded standing to enjoin the Los Angeles Police Department's chokehold practice,³⁶⁹ we need only consider the 1985 case, *Tennessee v. Garner*,³⁷⁰ in which the Court addressed the same underlying legal issue. In *Garner*, the Court was presented with the question whether the Fourth Amendment prohibits a police officer, relying upon the common law fleeing-felon doctrine, from detaining a suspected criminal with deadly force absent probable cause that the suspect is dangerous.³⁷¹ In striking the seizure under the Fourth and Fourteenth Amendments, the Court resolved the same substantive issue presented in *Lyons*, but in a factual context that rendered the judicial creation of positive law unavoidable, and therefore proper.

Similarly in *Gilmore v. Utah*,³⁷² in which the Supreme Court terminated a stay of execution, thus effectively denying standing to Gary Gilmore's mother in her effort to challenge the constitutionality of her son's conviction and planned execution,³⁷³ it is quite easy to devise a shadow case: a direct appeal or collateral attack by Gary Gilmore himself. Had Gary Gilmore pursued his own legal remedies, he would have faced no credible standing barrier with respect to the very claim that his mother had been denied standing to raise. In both shadow cases, the judicial creation of positive law, even in the face of multi-peaked preferences, would have been unavoidable.

The shadow case analysis further reveals that the Court has not been altogether consistent in applying its third-party standing doctrine. As early as *Strauder v. West Virginia*,³⁷⁴ in which the Court held that the Equal Protection Clause prevents the State, in the criminal trial of an African-American defendant, from excluding African-American jurors by law, the Court made clear that the claimed right existed in the criminal defendant, rather than in the prospective juror.³⁷⁵ The *Strauder* case thus contained two critical

³⁶⁸ 461 U.S. 95 (1983).

³⁶⁹ See *id.* at 105.

³⁷⁰ 471 U.S. 1 (1985) (holding that a statute that allowed a police officer to use deadly force to arrest a fleeing suspect who was apparently unarmed and nondangerous violated the Fourth and Fourteenth Amendments).

³⁷¹ See *id.* at 12-13.

³⁷² 429 U.S. 1012 (1976).

³⁷³ See *supra* text accompanying note 319 (explaining the procedural context of, and voting line-up in, *Gilmore*).

³⁷⁴ 100 U.S. 303 (1880).

³⁷⁵ See *id.* at 305. In defining the defendant's claim, the Court stated:

limitations: It did not hold that the prospective minority juror has a right to serve on the jury and it did not hold that an African-American criminal defendant has a right to have members of his own race serve on the jury. Instead, the Court suggested that, regardless of the composition of the ultimate jury, the defendant's rights will be honored if African-Americans, as members of the defendant's race, are not systematically excluded by law from the jury venire from which the grand and petit juries are drawn.³⁷⁶

Given the statistical likelihood that the African-American draw in any particular jury will be small, *Strauder* set the stage nearly a century later for *Batson v. Kentucky*.³⁷⁷ In *Batson*, an African-American criminal defendant challenged the prosecutor's systematic exercise of peremptory challenges against prospective African-American jurors. In holding that the prosecutor must provide a race-neutral explanation for the exclusion of African-American jurors in a criminal trial of an African-American defendant, the Court, while extending *Strauder*, adhered to its central premise that the right exists in the defendant not to have members of his own race systematically excluded from jury service, which now includes race-based peremptory challenges.³⁷⁸ And while the Supreme

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred [sic] against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons *of his race or color* may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

Id. (emphasis added). The italicized language reveals the limitations of the *Strauder* Court's gloss on the defendant's claim. As defined by the Court, the defendant claimed the right not to have persons of *his* race or color systematically excluded from jury service. This suggests that persons of another race or color, contrary to *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that, under the Equal Protection Clause, a white criminal defendant may object to race-based exclusions of African-American jurors through peremptory challenges), have no right to challenge the exclusion of a minority juror. Moreover, because a minority juror can be excluded in the trial of a white defendant, the Court implied that a prospective minority juror has no right to serve.

³⁷⁶ See *Strauder*, 100 U.S. at 305.

³⁷⁷ 476 U.S. 79 (1986). For a case in which the Supreme Court denied standing to raise many of the same issues raised in *Batson*, in a manner that is consistent with this Article's shadow-case analysis, see *O'Shea v. Littleton*, 414 U.S. 488 (1974) (holding in a civil rights class action brought against a magistrate and a circuit court judge for allegedly engaging in illegal bond-setting, sentencing, and jury-fee practices, that the plaintiffs had failed to allege injury in fact and thus had not satisfied Article III's case or controversy requirement for standing).

³⁷⁸ See *Batson*, 476 U.S. at 86-87. But see *Carter v. Jury Comm'n*, 396 U.S. 320,

Court in *Carter v. Jury Commission*³⁷⁹ held that a juror excluded on the basis of race could sue for a violation of his equal protection rights,³⁸⁰ the *Carter* Court did not suggest that a criminal defendant could press the excluded juror's claim independently of a *Batson* or *Strauder* claim.

If we assume that the *Strauder*, *Batson*, and *Carter* Courts correctly identified the substantive rights in question, then the next case becomes quite difficult. In *Powers v. Ohio*,³⁸¹ the Supreme Court addressed the question whether a white criminal defendant can raise a *Batson* challenge when the prosecutor has allegedly employed race-based peremptory challenges to exclude African-Americans from the jury.³⁸² In vindicating that claimed right, the Supreme Court essentially flipped *Strauder*, *Batson*, *Carter* and its third-party standing analysis on their heads. In *Powers*, the Court effectively redefined the injury articulated in *Batson* now to include the prospective juror's *Carter* right not to be excluded on the basis of race and conferred standing upon the defendant, who was white, to litigate the excluded juror's claim.³⁸³ And it did so in circumstances in which, under its third-party standing analysis, standing would have been considered improper.

The difficulty in *Powers* is identifying whose equal protection rights have been violated. If *Powers* had raised the same injury at issue in *Batson*, namely the right of a minority not to have members of his own race systematically excluded from jury service, then the case would not have implicated standing principles at all. Instead,

329-30 (1970) (holding that individual jurors subject to racial exclusion have the right to present in court equal protection challenges to that exclusion).

³⁷⁹ 396 U.S. 320 (1970).

³⁸⁰ See *id.* at 329-30. The *Carter* Court stated:

Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.

Id. at 529. The *Carter* plaintiffs did not challenge race-based peremptories, but rather a set of jury selection procedures that, while "devoid of any mention of race," *id.* at 536, operated in a manner that systematically excluded African-Americans from both grand and petit juries. See *id.* 334-37. Thus, while *Carter* cut back on one of the limiting principles of *Strauder*, namely that excluded minority jurors have no right to serve, it left *Batson* unaffected. Stated differently, an effective *Batson* challenge post-*Carter* still required that the state peremptorily strike members of the defendant's race for nonneutral reasons.

³⁸¹ 499 U.S. 400 (1991).

³⁸² See *id.* at 402.

³⁸³ See *id.* at 423.

Powers simply would not have raised a valid substantive legal claim. Members of his race had not been systematically excluded from service on the jury that convicted him. Powers argued, instead, that the excluded African-American jurors' equal protection rights had been denied and that, as a criminal defendant who was convicted by the jury from which these African-Americans had been excluded, he had standing to raise that claim.³⁸⁴ In accepting this argument, the Court effectively perverted both the underlying legal claim and its third-party standing analysis.

The *Powers* Court redefined the underlying legal claim, which it had previously suggested rested with the criminal defendant, to rest now with the excluded jurors.³⁸⁵ If we assume, however, that the *Powers* Court properly defined the underlying injury, such that the race-based peremptory challenge violated the juror's right under *Carter*, rather than those of the criminal defendant under *Batson*, then, based upon third-party standing principles, Powers should have been denied standing to raise the claim.

To understand *Powers*, we need to recognize that the Court fell victim to its own use of metaphor in analyzing the question of standing. We also need to recognize that *Powers* lies at the outer edge of an otherwise important doctrine. In most third-party standing cases, the Court is concerned that if it allows ideological litigants to identify and to rely upon the rights of others in forcing the resolution of substantive legal issues, it will afford such litigants with substantial power to manipulate the critical path that influences the substantive evolution of legal doctrine. The third-party standing doctrine does not prevent path dependency, which is an inevitable consequence of decisional rules that prevent the requisite number of votes to reveal cycles. But, by ensuring that fortuity, rather than advertent path manipulation, controls the order of case decisions, the doctrine makes the outcome of its path dependent voting procedures more fair. The Supreme Court has infused its standing analysis with traditional notions borrowed from tort law—injury in fact, causation, and redressability—not because those features have any abstract significance to justiciability, but instead because those features serve as apt metaphors for when the Court is unable to avoid shifting the burden of congressional inertia. They are apt because they are virtually always present when a convicted criminal in a direct appeal or collateral attack alleges that her

³⁸⁴ See *id.* at 410-12.

³⁸⁵ See *id.* at 415.

conviction or sentence was secured in violation of her constitutional rights. In such cases, the courts, including the Supreme Court in a case properly before it, do not have the luxury to abstain from making positive law with respect to the convicted criminal's underlying legal claims. Unless the courts address the claims on the merits, the convicted criminal will incur the most severe consequences that the state or federal government can impose. Moreover, in such cases, the claimant is least likely to be concerned with path manipulation; instead, she simply wants whatever relief a court is willing to provide. Simply put, because there is no shadow case in criminal appeals and habeas proceedings, courts are willing to make law, even at the risk of producing results that defy the Condorcet criterion.

The *Powers* Court implicitly construed its standing elements literally, rather than metaphorically.³⁸⁶ It recognized that if Mr. Powers had been convicted and sentenced in violation of the Constitution, the government's illegal conduct could be said to have caused him a concrete injury. But while that is true, it is also circular. The government caused him a concrete injury only if we assume that *his* constitutional rights, rather than *someone else's*, were violated. If the jury exclusion violated the potential juror's rights under *Carter*, rather than those of Mr. Powers under *Batson*, then the exclusion caused the potential juror, but not Mr. Powers, a

³⁸⁶ Thus, the *Powers* Court conferred third-party standing based upon a determination that Powers would litigate the issue zealously and that the Court, if it granted relief, would remedy whatever harm the race-based exclusion could be said to have caused Powers. The Court stated:

This congruence of interests [between the defendant and the excluded jurors] makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights. Petitioner has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for we have recognized that discrimination in the jury selection process may lead to the reversal of a conviction.

Id. at 414. While it is undoubtedly true that the defendant would press the jurors' claims vigorously and that a favorable ruling would provide the defendant with the desired relief, the Court's analysis begs the question whether any relief afforded the defendant would flow from curing the violation of the defendant's rights or those of someone else. Had the Court construed its standing metaphors of zealousness and redressability as proxies for when to shift the burden of legislative inertia, rather than as justiciability criteria with independent content, it would have recognized the anomaly that Powers had deployed all the trappings of a criminal appeal to stress the urgency of judicial creation of positive law in a context more appropriately suited to nonurgent civil litigation brought by someone else or not at all.

concrete injury. The Court further recognized that if it reversed Mr. Powers's conviction and sentence, it would redress any injury that he might have suffered. But that too is circular. If we assume that Mr. Powers, as opposed to the prospective juror, had no injury, there was nothing for the Court to redress. By implicitly viewing injury in fact, causation, and redressability as abstract elements of justiciability with independent content, rather than as metaphors designed to limit the Court's lawmaking powers except when absolutely necessary, the Court effectively conferred upon Mr. Powers third-party standing to raise an excluded juror's substantive legal claim, *even though* it had stated repeatedly that third-party standing was presumptively improper.

Commentators criticizing the third-party standing doctrine have focused largely on two other cases that lie along the doctrine's periphery, *Sierra Club v. Morton*³⁸⁷ and *United States v. Students Challenging Regulatory Agency Procedures*.³⁸⁸ Given the common teaching technique of starting at the outer edge of a legal doctrine and working toward the middle to explain its purpose, this temptation is easy to understand. But such an approach tends to obfuscate the analysis nonetheless. The Sierra Club, an organization which described itself as having "a special interest in the conservation and the sound maintenance of the national parks,"³⁸⁹ brought suit to challenge the construction of a recreational area in a national park. In denying standing, the Court observed that the plaintiffs had failed to allege that their members had actually used the national park in question.³⁹⁰ The Court stated that while "aesthetic, conservational, and recreational" harms could satisfy standing's injury requirement,³⁹¹ it was unwilling to abandon the requirement that the claimant herself suffer such an injury.³⁹²

The *Sierra Club* decision is ironic in that the Court, in its third-party standing decisions, has on occasion linked the requirement of injury to the promotion of zealous advocacy.³⁹³ At the very least,

³⁸⁷ 405 U.S. 727 (1972).

³⁸⁸ 412 U.S. 669 (1973).

³⁸⁹ *Sierra Club*, 405 U.S. at 735 n.8 (quoting paragraph three of the complaint).

³⁹⁰ *See id.* at 735.

³⁹¹ *See id.* at 738.

³⁹² *See id.*

³⁹³ *See, e.g., Powers v. Ohio*, 499 U.S. 400, 414 (1991) (positing that "there can be no doubt that petitioner will be a motivated, effective advocate for the excluded persons' rights"); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (finding that, "[w]here practical obstacles prevent a party from asserting rights on behalf of itself," a court should consider whether the party can be expected to

this case appears to render that justification quite dubious. Certainly the Sierra Club would have been an effective and zealous advocate on conservation matters. In fact, zealousness, like the more formalized standing requirements, has been employed largely as a catch phrase, or metaphor, intended to capture a very different concern.³⁹⁴ Zealousness, like injury in fact, causation, and redressability, is closely correlated with those cases in which the Court cannot avoid shifting the burden of congressional inertia. But, in fact, the zealous advocacy metaphor may be less apt than the other standing metaphors.³⁹⁵ The Court actually has denied third-party standing because the advocates in question would litigate *too zealously* rather than not zealously enough. Certainly, the *Gilmore* and *Sierra Club* claimants would have litigated as ambitiously as the parties whose interests they sought to vindicate.³⁹⁶

Ironically, the difficulty with the Sierra Club was not the *lack of* zealousness, but *too much* zealousness. Because the Sierra Club stated that its goal was to promote "conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested,"³⁹⁷ it was likely to present its case in a broader manner than would litigants seeking to ensure that their particular uses of the park were not harmed. While the same might

present the issues "with the necessary adversarial zeal"); *Craig v. Boren*, 429 U.S. 190, 194 (1976) (noting that, because questions had been presented "vigorously" and "cogently," the denial of standing would "serve no functional purpose"). It is worth noting that, while commentators have focused on the zealousness justification for standing, *see, e.g.*, Gottlieb, *supra* note 255, at 1071; Abel, *supra* note 221, at 1189, the Court has only occasionally expressly recognized this rationale for the doctrine. The argument in the text might help to explain the Court's apparent reluctance to ground standing in the desire to promote zealous advocacy.

³⁹⁴ But *see* Gottlieb, *supra* note 255, at 1071 (arguing that the concern for zealous advocacy is the only standing requirement with a legitimate constitutional basis). For my criticism of the Gottlieb thesis, *see supra* note 255.

³⁹⁵ *See supra* note 393 and accompanying text (observing the Court's reluctance to endorse fully the zealousness criterion).

³⁹⁶ There can be little doubt that Mrs. Gilmore would actually have been more zealous than her son in pursuing his legal claims, given that Gary Gilmore elected not to pursue his legal remedies at all. Similarly, the Sierra Club would, without doubt, have litigated the legality of the proposed recreation facility as ambitiously as those who used the affected national park. On the other hand, no criminal defendant is ever thrown out of court—or summarily convicted—for not vigorously pursuing his claims. The state retains the burden of proof beyond a reasonable doubt even if the defendant puts on no defense at all. In short, zealousness, like the other standing elements or proxies, has no independent doctrinal significance to justiciability.

³⁹⁷ *Sierra Club*, 405 U.S. at 735 n.8 (quoting the complaint).

not hold true of Mrs. Gilmore, it might be true of other ideological litigants concerned with the rights of the criminally accused, who might have been encouraged if Mrs. Gilmore had been given standing. Thus, while a particular convicted criminal is generally only concerned with securing whatever relief she believes she is entitled to, the American Civil Liberties Union, for example, if given standing to press the rights of all criminals who sit on their rights, might have a very different and, presumably, much broader, agenda. The ACLU might, for example, attempt to raise cases in the most favorable order, and it might choose to vary the breadth of particular claims with the ultimate objective of affording maximum reach to the substantive provisions of the Bill of Rights. I certainly do not intend to attack that agenda; instead, I intend to demonstrate that the labels or metaphors that the Court has employed in devising standing are often ill-chosen. That alone would be no more cause for concern than is bad poetry, which although unpleasing, causes relatively little damage. The problem is that the Court has tended to lose sight of the purposes underlying its own metaphors and instead has raised them to the level of quasi-constitutional doctrine. More importantly, while we can decline to read bad poetry, potential federal court litigants cannot avoid the Supreme Court's standing precedents.³⁹⁸

The same analysis reveals that the third-party standing doctrine is critical in preserving the power of legislative inertia. Without the presumptive rule against third-party standing, interest groups and other ideological litigants could routinely subvert congressional inertia by forcing decisions in the federal courts, even in the absence of a Condorcet-winning preference. Because Congress, unlike federal appellate courts, is relatively well-equipped to enact Condorcet-winning preferences, a contrary standing rule would enable ideological litigants to supplant the status quo, which might be a prior Condorcet-winning rule, with a desired non-Condorcet rule. If the purpose of third-party standing is to preserve Congress's power of inertia, we need to consider what happens when Congress affords ideological litigants the authority to pursue the claims of others in federal court. We have already seen that in the housing context, the Court has allowed Congress to rebut its presumptive rule that individuals lack the right to enforce the rights of others by statute.³⁹⁹ Such cases have led commenta-

³⁹⁸ In fact, as demonstrated below, *see infra* part III.D, Congress may also no longer be able to avoid the Supreme Court's standing precedents either.

³⁹⁹ *See supra* note 264.

tors to conclude that this doctrine is largely prudential in nature.⁴⁰⁰ As such, Congress would appear to have the power to override it.

That insight might help to reconcile the denial of standing in *Sierra Club* with the conferral of standing in the frequently contrasted case, *United States v. Students Challenging Regulatory Agency Procedures*.⁴⁰¹ In *SCRAP*, a group of law students and an environmental interest group challenged the failure of the Interstate Commerce Commission (ICC) to suspend a railroad rate increase. They claimed that the new rate structure would increase the cost of recyclable goods relative to nonrecyclable goods, which in turn would both increase the use of natural resources and the disposal of waste in and around Washington, D.C.⁴⁰² Despite this unusually attenuated, and rather dubious, causal chain, the claimants could credibly argue that they had Congress's imprimatur. Thus, the plaintiffs argued that the ICC, in denying the suspension, failed to comply with the National Environmental Policy Act (NEPA), which required a "detailed environmental impact statement" before a rate increase could be approved.⁴⁰³ While NEPA was silent on the question of standing, the statute's substantive provisions provided at least a credible basis upon which to maintain that Congress intended standing to be conferred broadly.⁴⁰⁴ At the very least, congressional silence on the question of standing would have meant that in denying standing, the Court would have had to construe the requirement of an environmental impact statement in NEPA as not intended to protect the interests of the claimants. In essence, the Court interpreted NEPA's requirement of an environmental policy statement as intended to protect individuals' "aesthetic and

⁴⁰⁰ See *infra* note 513 and accompanying text.

⁴⁰¹ 412 U.S. 669 (1973).

⁴⁰² The Court described the "attenuated line of causation" as follows:

a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

id. at 688.

⁴⁰³ See *id.* at 679.

⁴⁰⁴ See Fletcher, *supra* note 171, at 258-60 ("A perfectly plausible—and I believe the best—reading of NEPA is that anyone who can make a colorable claim . . . should have standing.").

environmental well-being,⁴⁰⁵ no less than their financial well-being.⁴⁰⁶

In contrast, the *Sierra Club* plaintiffs principally relied for standing upon section 10(a) of the APA. While the Sierra Club apparently cited a number of substantive statutes in its complaint, the Supreme Court only noted these statutory arguments in a footnote⁴⁰⁷ and in the text stated that “[t]he Sierra Club relies [for standing] upon § 10 of the Administrative Procedure Act (APA).”⁴⁰⁸ The Court’s treatment of the Sierra Club’s statutory claims suggests that they were sufficiently attenuated on standing that the Court did not need to resolve those standing claims on the merits. This position may well have been bolstered by the nature of the substantive statutory provisions on which the Sierra Club relied. With the exception of the Sierra Club’s claim that the Forest Service and the Department of the Interior failed to hold public hearings in violation of their own regulations,⁴⁰⁹ none of the statutory claims, in contrast with those raised in *SCRAP*, appeared to suggest a right of public enforcement. Moreover, the public hearing provisions were not created by statute, but rather by administrative regulation. The cost of denying standing, therefore, may well have been lower in *Sierra Club* than in *SCRAP* because the plaintiffs in the latter case had relied upon a federal statute that was at least arguably susceptible to a construction affording them protection. Denying standing when faced with such a statute would be tantamount to holding that

⁴⁰⁵ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

⁴⁰⁶ See *SCRAP*, 412 U.S. at 686.

⁴⁰⁷ See *Sierra Club*, 405 U.S. at 730 n.2. The Court stated:

As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special-use permit for construction of the resort exceeded the maximum acreage limitation placed upon such permits by 16 U.S.C. § 497, and that issuance of a “revocable” use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park, in alleged violation of 16 U.S.C. § 1, and that it would destroy timber and other natural resources protected by 16 U.S.C. §§ 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U.S.C. § 45c requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

Id.

⁴⁰⁸ *Id.* at 732.

⁴⁰⁹ See *id.* at 730 n.2.

Congress did not intend the statute under review to protect plaintiff's claimed interests.

In distinguishing *Sierra Club*, the *SCRAP* Court spoke largely in terms of third-party standing, claiming that the difficulty in *Sierra Club*, which was overcome in *SCRAP*, was that the plaintiffs had failed to allege that *they* were adversely affected by the government's conduct.⁴¹⁰ The Court's distinction, if adhered to, would appear to relegate the third-party standing doctrine to the status of an empty pleading requirement. After all, the Sierra Club certainly has sufficient resources with which to secure as a member users of virtually every national park or to send one of its members to every national park that is the subject of its planned litigation. The Court's third-party standing language notwithstanding, applying the shadow-case analysis to these cases reveals that something greater may have been at stake.

In *SCRAP*, the litigants alleged that the ICC failed to comply with a particular federal statute, the language of which suggested a right of public enforcement.⁴¹¹ In *Sierra Club*, the plaintiffs presented statutory and regulatory challenges that, with the possible exception of the regulatory public hearing provisions, they claimed harmed others.⁴¹² Aside from the public hearing provision, denying standing in *Sierra Club* did not, therefore, require the Court to determine whether Congress intended to confer standing upon individuals directly harmed by the statutory violations that the Sierra Club alleged. Instead, by holding that the Sierra Club did not have the right to enforce the rights of persons who may be harmed in the future, the Court allowed itself to wait for a proper shadow case before construing the cited statutes. In a proper shadow case, someone who used the park could force the Court to determine whether the particular statute on which the Sierra Club relied was intended to confer standing to a park user.

In contrast, in *SCRAP*, given that the plaintiffs alleged that they themselves were harmed, there was no obvious shadow case. Denying standing in *SCRAP* would necessarily have meant that, as

⁴¹⁰ See *SCRAP*, 412 U.S. at 686-87. The Court explained: "In *Sierra Club*, . . . we went on to stress the importance of demonstrating that the party seeking review be himself among the injured No such specific injury was alleged in *Sierra Club*." *Id.* at 687.

⁴¹¹ See Fletcher, *supra* note 171, at 260-63 (arguing that the different outcomes in *SCRAP* and *Sierra Club* may turn on whether Congress intended that the underlying statutes protect the plaintiffs' claimed rights).

⁴¹² See *supra* note 407.

a matter of substantive statutory interpretation, the requirement of an environmental impact statement under section 102(2)(C) of NEPA was not intended to protect individuals whose use of public recreational areas might be adversely affected by the resulting government activity.⁴¹³ Alternatively stated, a denial of standing

⁴¹³ While not discussing standing directly, then-Professor Frank Easterbrook has offered a very different analysis from that set out in the text. *See generally* Frank H. Easterbrook, *supra* note 119. Easterbrook posits that because of the collective aggregation problems that Arrow's Theorem poses, courts have no legitimate basis for "construing" statutes beyond their express wording. *Id.* at 547. He argues that when faced with a set of facts that are not directly embraced by the statute that a party cites as the basis for relief, judges should, instead of construing the statute and making a determination on the merits whether it affords relief, refrain from construing the statute at all. *See id.* at 544-51. In other words, Easterbrook rejects the prevalent assumption that parties to a case, by citing a statute as a basis for relief, are thereby entitled to a judicial construction of that statute. At the outset of his article, Easterbrook acknowledges that some would argue that the decision not to construe a statute is tantamount to an act of construction, and that, as a result, he is "talking nonsense." *Id.* at 534-35. In fact, if the analysis presented in the text is correct, Easterbrook's argument, although certainly not nonsense, is nonetheless flawed.

When a party cites a statute that fairly obviously does not cover the facts of a given case—to use Judge Easterbrook's example, when a municipality claims that a dog leashing law requires the leashing of a cat—the court has two options: (1) it can construe the statute, holding that a cat is not a dog under the statute, and thereby deny relief on the merits; or (2) it can simply decline to construe the statute at all. But, because the party has cited the dog leashing law, the court, in its opinion, will, if it takes Easterbrook's preferred second option, state something to the effect of: "We decline to construe the dog leashing law because it has no application in this case involving an unleashed cat." In contrast, the traditional approach, option one, would result in the following ruling: "We decline to afford relief based upon the dog leashing law because a cat is not a dog." From the standpoint of future litigants and future courts construing the announced precedent, the two rulings are identical.

With a minor exception noted below, which is analogous to the foregoing analysis of *Sierra Club* and *SCRAP*, the above analysis must be distinguished from that of standing in constitutional cases. When the basis for a claim that would require the Supreme Court or the lower federal courts to make new law is derived from a constitutional clause, as opposed to a statute, the Court *can* avoid substantively construing the cited constitutional provision by holding that the claimant lacks standing. The denial of standing satisfies the Court's obligation to resolve the case, while, at the same time, it leaves open the underlying substantive issue either for Congress to resolve or for itself to resolve in a case in which it cannot avoid making law, for example in a criminal appeal or collateral attack, because there is no shadow case. *See Stearns, supra* note 2, part II.B (describing shadow case analysis). But when the basis for a claim is a federal statute, a determination that the claimant lacks standing necessarily means that, on the case facts, the statute does not afford relief. A denial of standing in the statutory context—or, alternatively, Judge Easterbrook's rule of nonconstruction, which is essentially the same thing—is an assessment of the merits of the underlying claim. At the very least, this means that the cost of denying standing in a case in which the claimant relies upon a federal statute (independent of § 10(a) of the APA) is higher than the cost of denying standing in a case in which

in *SCRAP* would have meant that, as a matter of substantive law, the plaintiffs did not fall within the relevant zone of interest of NEPA's procedural provisions. But because the *SCRAP* plaintiffs claimed to be using public lands that would be harmed by the rate increase, the obvious question such a ruling would raise is whom that provision was intended to protect.⁴¹⁴ In contrast, in *Sierra Club*, because the plaintiffs failed to allege that they themselves were harmed, the standing denial did not require the Court to issue a substantive determination on the scope of the underlying statutes for purposes of standing. An alternative ruling in *Sierra Club* might have invited future litigation aimed at testing the standing limits of federal statutes, the violations of which did not affect claimants. This result would reintroduce the very path manipulation that standing was intended to prevent. In other words, while the distinction between *Sierra Club* and *SCRAP* appears illusory, the value of that distinction is restored when we consider the impact of a contrary ruling in *Sierra Club* on future ideological litigants.

Moreover, in cases in which the plaintiffs rely for standing upon a substantive federal statute, independent of section 10(a) of the APA, the violation of which they contend causes them direct harm, a standing denial is inevitably the same as a holding that the plaintiffs do not fall within the zone of interest of the statute under review. Because the *Sierra Club* did not make such an allegation,

the claimant relies upon the Constitution. This may explain why the Burger Court more frequently denied standing in constitutional than in statutory cases. See Logan, *supra* note 264, at 48 (observing that "[a] review of the major Burger Court standing decisions suggests that a plaintiff asserting a constitutional rather than a statutory claim is far more likely to be denied standing," and collecting cases).

It is important to note a minor exception, which follows from the analysis of *Sierra Club* and *SCRAP*, to the above analysis. If one person attempts to vindicate a statutory right of a third party, for example, if a person who dislikes cats but was not harmed by the unleashed cat in question were to bring suit against the cat's owner, relying upon the dog leash law, the court could effectively deny standing *without* construing the statute. That is the situation in *Sierra Club*. A court could hold that, the merits of the statutory claim aside, this claimant has no right to force the resolution of whether the dog leash law covers a cat. At that point, the statutory standing denial parallels a constitutional standing denial. In short, a court might decide not to allow this form of pet manipulation. In *SCRAP*, however, a standing denial necessarily would have meant that the particular claimants, on the case facts, lacked a claim under the statute that they cited. It is not surprising that, because nonconstruction in that case would have been tantamount to construction, the Court afforded the claimants standing.

⁴¹⁴ Cf. Fletcher, *supra* note 171, at 258-60 (arguing that the *SCRAP* Court properly focused on the question whether Congress intended the NEPA to protect the claimants).

the standing denial in *Sierra Club* was less costly in terms of judicial creation of positive law than a standing denial in *SCRAP* would have been.⁴¹⁵

This discussion has illustrated two important points underlying the presumptive rule against enforcing the rights of others. First, the rule's purpose is neither to ensure zealous advocacy nor to ensure concreteness of injury at some abstract level. Instead, the rule is intended to preserve the autonomy of the legislature to make, or not to make, positive law unless and until an appropriate consensus is formed. This concern is especially acute on a multi-peaked Court because such a Court cannot ensure with any reasonable degree of accuracy that its rulings will be other than

⁴¹⁵ For a more recent and hairsplitting standing opinion, which, although not based upon the inability to enforce the rights of others, aptly illustrates the same proposition, consider *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991). In that case, the Court held that the plaintiffs, challenging experiments on primates, had standing to challenge the removal of their action from state to federal court, even though they lacked standing to pursue their underlying legal claim. *See id.* at 76-78. To understand the holding, consider the purpose of the underlying removal statute. The plaintiffs argued that the removal statute, 28 U.S.C. § 1442(a)(1), was intended to allow only federal officials, and not federal agencies, such as the defendant, the National Institutes of Health (NIH), to remove suits filed in state court to federal court that would have had proper jurisdiction in the first instance. *See id.* at 76. The Court agreed on the merits and determined that, even though the plaintiffs would not have had standing to pursue the underlying claim in federal court, they did have the right to have that claim presented (and probably dismissed) in the Louisiana court in which they filed. *See id.* at 87-89. The Court rejected the NIH's argument that the plaintiffs' lack of standing to press the merits of their underlying claim rendered futile the proposed remand to state court. *See id.* at 88-89 (observing that state court standing requirements might differ from federal court standing requirements). In short, whatever the merits of the plaintiff's underlying claim, following an improper removal there can be no question that the plaintiffs fall within the removal statute's relevant zone of interest.

In *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517 (1991), in contrast, the Court denied standing to the plaintiffs, postal workers who were challenging an exception to the postal monopoly, on the ground that the postal monopoly had not been created for the benefit of the postal workers. *See id.* at 524-26. Again, because the plaintiffs relied for standing upon a federal statute, this time a federal statute that created the United States Postal Service, the Court, in ruling on the question of standing, could not avoid ruling on whether the plaintiffs fell within that statute's zone of interest. In contrast with Easterbrook's analysis, *see supra* note 413, the standing denial, which appears to be an act of nonconstruction, is identical to an act of construction because the plaintiffs relied upon a statute. While there is no obvious shadow case in which an alternative party could have brought the same suit in a future action without a credible standing threat, the fact remains that the Court had to make a substantive determination as to whether, in creating the postal service and affording it monopoly status, Congress intended to protect United States postal employees.

arbitrary and irrational in thwarting the will of a present majority of its members. Second, because third-party standing rests, ultimately, on separation-of-powers concerns, the doctrine, however it is formally characterized, is necessarily presumptive, or prudential, in nature, at least with respect to Congress.⁴¹⁶

This analysis suggests that the Court should be less inclined to dismiss on standing grounds cases in which plaintiffs rely upon a federal statute the violation of which harms them, than cases in which plaintiffs rely for such claims upon the Constitution or section 10(a) of the APA. In addition, the Court should be less inclined to dismiss on standing grounds cases in which plaintiffs rely upon statutes, the violation of which harms third parties. In nonstatutory standing cases, the Court, relying upon such metaphors as zealousness and injury in fact, considers whether it should shift the burden of legislative inertia. In statutory standing cases in which plaintiffs claimed to have been harmed, in contrast, the Court's standing determination is inevitably a substantive ruling on whether plaintiffs fall within the relevant zone of interest of the statute under review. At the very least, denying standing when a plaintiff advances a direct claim of injury based upon a federal statutory violation is, therefore, a more costly judicial endeavor. As the next two sections will demonstrate, additional complexities arise when plaintiffs rely upon the Constitution for standing outside the criminal procedure context.

B. *No Right to Prevent Diffuse Harms*

Because interest groups can manipulate the path of case law in more than one way, a presumptive prohibition against enforcing the rights of others is not alone sufficient to prevent advertent path manipulation by ideological, non-Condorcet interests. Not only can such interest groups try to locate a claimant sitting on her rights,

⁴¹⁶ This analysis is different from that offered by Craig Gottlieb, *see* Gottlieb, *supra* note 255, at 1071 (classifying, *inter alia*, separation of powers as a prudential, rather than constitutional, underpinning of standing). While Gottlieb contends that separation of powers is not a legitimate constitutional concern in standing cases, I am instead suggesting that separation of powers, whether characterized as a constitutional or prudential element of standing, is intended to protect Congress's power to legislate or not to legislate as it sees fit. As such, separation of powers is the critical underpinning of modern standing. While the concern might prevent federal agencies and lower federal courts from conferring standing on constitutional grounds, it would subvert the doctrine's intent to prevent Congress from conferring third-party standing by statute.

but also they can claim a right that, while affecting members, does so in an indirect and highly attenuated manner. In the prior article,⁴¹⁷ I outlined in detail the principal cases in this category. In *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*,⁴¹⁸ for example, the Supreme Court denied the claimant standing to challenge a land grant to a sectarian college. The ruling in *Valley Forge*, as with any denial of standing, can readily be transformed into a substantive ruling: Plaintiffs lack the right to prevent the government from transferring real property, owned by the citizenry at large, to a sectarian college allegedly in violation of the First Amendment Establishment Clause, because the resulting harm to any particular taxpayer is too small. *Flast v. Cohen*,⁴¹⁹ which preceded *Valley Forge*, represents a nearly opposite substantive holding. In allowing the plaintiffs to challenge the grant of tax revenues to a church on Establishment Clause grounds, the *Flast* Court held that individuals do have the right to prevent federal tax dollars from being spent to benefit a church.⁴²⁰ The Court reasoned that, while the resulting injury to any particular taxpayer may be small, there is a peculiar nexus between the expenditure of tax dollars and the First Amendment Establishment Clause. As demonstrated below, when plaintiffs seek standing based upon the Constitution to prevent a generalized harm, *Valley Forge* more closely represents the rule and *Flast*, the exception. As the prior section suggests, the interesting, and as yet unanswered question, lies in the extent of Congress's power to transform otherwise generalized harms, by statute, into individual rights.⁴²¹

The two most widely noted cases in this grouping are *Schlesinger v. Reservists Committee to Stop the War*⁴²² and *United States v. Richardson*.⁴²³ In *Schlesinger*, the Court denied standing to an organization attempting to unseat members of Congress who were members of the military, based upon the Article I Incompatibility Clause, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance

⁴¹⁷ See Stearns, *supra* note 2, part I.B.

⁴¹⁸ 454 U.S. 464 (1982).

⁴¹⁹ 392 U.S. 83 (1968).

⁴²⁰ See *id.* at 88.

⁴²¹ See *infra* part III.D (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

⁴²² 418 U.S. 208 (1974).

⁴²³ 418 U.S. 166 (1974).

in Office.”⁴²⁴ The Court reasoned that because all citizens were injured equally by Congress’s allowing these Representatives to be seated, plaintiff’s injury was not sufficiently concrete for standing purposes.⁴²⁵ In a similar holding, issued the same term, the *Richardson* Court denied standing to a taxpayer who claimed that the Central Intelligence Agency Act of 1949, by providing that Central Intelligence Agency (CIA) expenditures not be made public, violated Article I, Section 9, Clause 7, which provides, “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”⁴²⁶ The Court specifically rejected as a basis for conferring standing the plaintiff’s argument that, if he were denied standing, no one would have the power to challenge the constitutionality of the statute.⁴²⁷ The Court concluded that the Framers had not set up an “Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.”⁴²⁸ Instead, the Court noted, our representative form of government, while slow to action, provides alternative means of redress to dissatisfied citizens, namely the political process.⁴²⁹

More important to the social choice analysis is Justice Powell’s observation in his *Richardson* concurrence:

Due to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform. But this has not always been the case, as experiences under the New Deal illustrate.⁴³⁰

While he went on to discuss the difficulties that the *Lochner* era posed for New Deal programs, Justice Powell would soon become a central figure in another critical lesson illustrating the problems that arise when the federal judiciary becomes the linchpin of social reform. By threat and force, President Roosevelt eventually transformed a *Lochnerian* Court into an institution that willingly ratified his New Deal programs. In the New Deal Court, standing

⁴²⁴ U.S. CONST. art. I, § 6, cl. 2.

⁴²⁵ See *Schlesinger*, 418 U.S. at 226-27.

⁴²⁶ *Richardson*, 418 U.S. at 168 (quoting U.S. CONST. art. I, § 9, cl. 7).

⁴²⁷ See *id.* at 179.

⁴²⁸ *Id.*

⁴²⁹ See *id.* at 177.

⁴³⁰ *Id.* at 191 (Powell, J., concurring).

was a device used by a united front to keep lower federal courts in line.⁴³¹ But Justice Powell would soon become well aware, and perhaps in *Richardson* the lessons were already starting to register, that standing could be used to serve a very different, but no less important, purpose. That purpose was to prevent the irrationality of a fractionalized and multi-peaked Court's own creation. Stated differently, the Burger Court began to use standing not to discipline others, and specifically lower federal courts, but rather, to discipline itself by lowering the incidence of non-Condorcet rulings, and to discipline ideological litigants who sought to manipulate the agenda of a multi-peaked Court.

As with the presumptive prohibition against enforcing the rights of others, however, Congress's power to rebut that presumption, thus converting generalized rights into individual rights enforceable in court by statute has long been assumed. Perhaps the best noted examples illustrating this proposition are the Freedom of Information Act,⁴³² which transforms government accountability into the status of individual right; the Fair Housing Act cases,⁴³³ in which the Court has affirmed Congress's power to confer upon individuals the right to have housing information disseminated fairly and without regard to race;⁴³⁴ and cases that have upheld the broad-based standing provisions contained in several federal environmental statutes,⁴³⁵ again affirming Congress's power to transform a generalized interest in the environment into an individual right.⁴³⁶

Without repeating the analysis set out in the prior sections, it is fair to state that these cases and statutes strongly suggest that the

⁴³¹ See *supra* text accompanying notes 282-83.

⁴³² 5 U.S.C. § 552 (1988).

⁴³³ See *supra* note 264.

⁴³⁴ For the principal cases construing the FHA, see *supra* note 264 and accompanying text.

⁴³⁵ See, e.g., *National Recycling Coalition, Inc. v. Browner*, 984 F.2d 1243, 1248 (D.C. Cir. 1993) (finding that plaintiffs had standing, under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972 (1988), to challenge Environmental Protection Agency guidelines for government procurement of certain products); *Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1322 (7th Cir. 1992) (finding that plaintiffs had standing under RCRA to oppose a landfill that had at least potential to cause them harm). For other federal environmental statutes with broad-based standing provisions, see *Toxic Substances Control Act*, 15 U.S.C. § 2619 (1988 & Supp. V 1993); *Federal Water Pollution Control Act*, 33 U.S.C. § 1365 (1988 & Supp. V 1993); *Safe Drinking Water Act*, 42 U.S.C. § 300j-8 (1988).

⁴³⁶ For a more extensive list of federal statutes that contain generalized standing provisions, see Logan, *supra* note 264, at 60 n.96.

principal basis for standing has, until quite recently in any event,⁴³⁷ rested primarily on the Article III Case or Controversy Clause and the desire of the federal courts to protect the power of Congress to make or not to make law as it deems appropriate. Thus, when Congress chooses to make law, even by converting the rights of others or generalized rights into individual rights for standing purposes, the Court has generally not limited that exercise of legislative power through the imposition of an abstract standing requirement or otherwise.⁴³⁸ But, as the final subsection of Part III will demonstrate,⁴³⁹ Congress's power to afford standing to citizens to present otherwise generalized claims has recently been drawn into question. Before revisiting the question of congressional grants of standing, however, it will be helpful to consider the final standing case category, which helps to explore further the separation-of-powers and social choice dimensions of this important doctrine.

C. *No Right to an Undistorted Market*

As demonstrated in the prior subparts of this Part, the Supreme Court often employs technical language in its standing cases to give those rulings with a procedural rather than substantive gloss. A careful analysis of the standing cases, therefore, requires that we pierce the language to identify the underlying substantive legal rulings that the standing denials represent. The point is perhaps best illustrated by comparing three actual standing cases, in which the Supreme Court ultimately held that the plaintiff has no right to the benefits of a market that is undistorted by an unconstitutional regulatory practice, even if she credibly alleges that removing an unconstitutional market distortion will ultimately inure to her benefit. In two cases, the Court appears to have issued opposite rulings. These cases will further illustrate the social choice and separation-of-powers dimensions that underlie the Supreme Court's standing precedents.

⁴³⁷ See *infra* part III.D (discussing *Lujan*).

⁴³⁸ Perhaps the Court's clearest articulation of this principle is Justice Marshall's statement in *Linda R.S. v. Richard D.* that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." 410 U.S. 614, 617 n.3 (1973).

⁴³⁹ See *infra* part III.D.

In *Allen v. Wright*,⁴⁴⁰ the parents of African-American school children, who were attending public schools throughout the United States, alleged that, absent an illegal Internal Revenue Service (IRS) tax policy that based the tax status of private schools on the status of the umbrella organization of which they were a part, rather than on their individual merits, their children would have had a greater likelihood of receiving an integrated public school education.⁴⁴¹ The *Allen* plaintiffs alleged that, based upon this tax policy, the IRS had afforded tax-exempt status to numerous private schools engaging in racially discriminatory practices throughout the United States.⁴⁴² The plaintiffs did not allege that any of their children had applied to, or had been denied admission into, the private schools that had been given tax-exempt status.⁴⁴³ In fact, all of the plaintiffs' children attended public schools.⁴⁴⁴ Instead, the plaintiffs alleged that, if the tax policy were struck down on Equal Protection Clause grounds, their children would have had a greater likelihood of receiving an integrated public school education.⁴⁴⁵ The *Allen* Court held that the plaintiffs lacked standing, observing that the number of links in the causal chain between the allegedly unconstitutional tax policy and the students' denial of an integrated education was too attenuated to satisfy the Court's causation test.⁴⁴⁶ Extending the analysis used in the prior section on third-party standing, we can translate the denial of standing in *Allen* into a substantive legal ruling. The *Allen* Court effectively ruled that parents of African-American school children attending public schools have no legal right to a public and private education marketplace that is undistorted by allegedly unconstitutional tax incentives, even where plaintiffs allege that removing the market distortion would ultimately inure to their children's benefit.⁴⁴⁷

⁴⁴⁰ 468 U.S. 737 (1984).

⁴⁴¹ See *id.* at 746.

⁴⁴² See *id.* at 744.

⁴⁴³ See *id.* at 746.

⁴⁴⁴ See *id.*

⁴⁴⁵ See *id.*

⁴⁴⁶ See *id.* at 759.

⁴⁴⁷ Justice Stevens's dissenting opinion in *Allen* is closest to the characterization of the plaintiffs' claim offered in the text:

[The Court's] causation analysis is nothing more than a restatement of elementary economics: 'when something becomes more expensive, less of it will be purchased. . . . If racially discriminatory private schools lose the "cash grants" that flow from the operation of the statutes, the education they provide will become more expensive and hence less of their services

The Court had employed a similar causal-chain analysis to deny standing in two earlier cases, *Warth v. Seldin*,⁴⁴⁸ and *Simon v. Eastern Kentucky Welfare Rights Organization*.⁴⁴⁹ In *Warth*, the Supreme Court denied standing to a group of residents and organizations in Rochester, New York, who alleged that a zoning ordinance in the neighboring town of Penfield prevented them from securing housing in Penfield, thus discriminating against them in violation of the Fourteenth Amendment Equal Protection Clause on the basis of their income and racial minority status. The plaintiffs alleged that as a result, their property taxes in neighboring Rochester had increased.⁴⁵⁰ As in *Allen*, the plaintiffs did not allege that, had the zoning ordinance been struck down, they would have necessarily been successful in their efforts to secure low- or moderate-income housing in Penfield.⁴⁵¹ They did claim, however, that the zoning ordinance caused them to secure less desirable, and more expensive, housing elsewhere. Again, piercing the Court's analysis of the plaintiffs' alleged injury in fact reveals that the Court, in denying standing to the *Warth* claimants, engaged in an important substantive legal determination, rather than a merely technical procedural ruling. In effect, the Court held that the plaintiffs do not have the right to a housing market that is not distorted by an allegedly unconstitutional zoning ordinance. Alternatively stated, the Court held that, even if we were to assume that Penfield's ordinance violated the Fourteenth Amendment Equal Protection Clause and that the housing market might improve for the plaintiffs

will be purchased.

Id. at 788.

⁴⁴⁸ 422 U.S. 490 (1975).

⁴⁴⁹ 426 U.S. 26 (1976).

⁴⁵⁰ See *Warth*, 422 U.S. at 496.

⁴⁵¹ Thus, the *Warth* Court, per Justice Powell, stated:

We find the record devoid of the necessary allegations. . . . [N]one of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials. . . . Instead, petitioners claim that respondents' enforcement of the ordinance against third parties—developers, builders, and the like—has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford. The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing. . . . But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

Id. at 504-05 (citation omitted).

if the ordinance were struck down, the plaintiffs suffered no legal injury.⁴⁵²

Finally, in *Simon*, the Court denied standing to a group of indigents challenging an IRS tax policy affording tax-exempt status to hospitals that provided only emergency medical services to the poor, allegedly in violation of the Internal Revenue Code.⁴⁵³ As in both *Allen* and *Warth*, the plaintiffs did not allege that if the IRS policy were struck down, they would necessarily have secured medical services in the private hospitals that were afforded tax-exempt status.⁴⁵⁴ Instead, they alleged that if the tax-exempt status were removed, and that if conferring tax-exempt status were conditioned upon providing indigents with medical services, more medical services might become available to them in the future.⁴⁵⁵ In denying standing, the Court again focused on third-party links in the causal chain, including hospitals not party to the lawsuit, and concluded that, even if the tax-exempt status were removed, there would have been no guarantee that the hospitals in question would provide more medical services to the poor.⁴⁵⁶ Again, stating this as a substantive ruling rather than a standing determination, the *Simon* Court held that plaintiffs have no legal right to a market for medical services for the poor that is undistorted by tax incentives created by IRS operating policies in violation of the Internal Revenue Code.⁴⁵⁷

By transforming each of these standing determinations into a substantive legal rule, I do not intend to suggest that any of them are necessarily incorrect. In fact, each of the rulings might be very well-grounded. In the absence of a judicial ruling striking the IRS

⁴⁵² Or, as this subsection's heading states, plaintiffs have no right to a housing market that is undistorted by an ordinance that violates the Equal Protection Clause of the Fourteenth Amendment.

⁴⁵³ See *Simon*, 426 U.S. at 28. While the *Simon* claimants relied upon a federal statute, rather than a constitutional provision, the analysis suggests that given the breadth of the tax code and the potential range of litigants that a contrary standing determination would have invited to challenge IRS policies in violation of the Code, *Simon*, no less than *Allen* and *Warth*, is intended to reduce advertent litigant path-manipulation.

⁴⁵⁴ The Court, per Justice Powell, offered an analysis similar to that in *Allen* and in *Warth*. See *Simon*, 426 U.S. at 41-46.

⁴⁵⁵ See *id.* at 43.

⁴⁵⁶ See *id.* at 45-46.

⁴⁵⁷ Applying the zone-of-interest analysis introduced, *supra* part III.A, the Court's holding can also be translated as follows: The *Simon* plaintiffs do not fall within the zone of interest of the Code provisions that the IRS's operating policies allegedly violate.

tax provisions and the Penfield zoning ordinance, the question remains where such lawmaking responsibility properly rests. The most obvious place, of course, is in Congress. This is especially true in the *Allen* and *Simon* cases, where the allegedly illegal rule is an IRS tax policy, which Congress has full authority to reverse by statute. While less obvious, Congress also has the authority to expand the substantive reach of the Fourteenth Amendment Equal Protection Clause to include claims that the Supreme Court has denied.⁴⁵⁸ To that extent, these cases can be readily contrasted with the landmark decision *Marbury v. Madison*.⁴⁵⁹ While Chief Justice Marshall did not speak in these terms, the *Marbury* Court effectively held that where Congress acts by statute in a manner that violates the Constitution, the Supreme Court will, in a proper case, invalidate that congressional action by striking the statute.⁴⁶⁰ In contrast, *Allen* and *Simon*, and, to a lesser extent, *Warth*, held that where Congress fails to act and where its failure to act allegedly results in a constitutional violation, the Court generally will not invalidate the congressional inaction, thereby creating positive law on Congress's behalf.⁴⁶¹ Instead, the Court, unless forced to create positive law in a case where it cannot decline to do so, will prefer to wait for an appropriate consensus to form in Congress. Because the Court is unable to ensure that its rulings will implement Condorcet-winning preferences, its reluctance to overcome

⁴⁵⁸ See *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding Congress's power to expand the reach of the Equal Protection Clause in a manner that the Court had expressly rejected in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959)). Thus, while the Court has repeatedly held that wealth is not a suspect classification for equal protection purposes, Congress presumably could define wealth as a suspect classification, thus creating a stronger basis with which to challenge Penfield's zoning ordinance. However, the most recent Supreme Court term's equal protection cases might suggest some limit on Congress's power to expand the reach of equal protection rights under the Fourteenth Amendment. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995) (imposing strict scrutiny for federal affirmative action programs and overruling *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), which had upheld an FCC affirmative action program based on intermediate scrutiny); see also *Miller v. Johnson*, 115 S. Ct. 2475, 2490 (1995) (applying strict scrutiny in evaluating a racially gerrymandered congressional district drawn to satisfy Department of Justice administrative preclearance under the Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1972bb-2 (1988 & Supp. IV 1992)).

⁴⁵⁹ 5 U.S. (1 Cranch) 137 (1803). I suggested a preliminary analysis along the lines offered in the text in Stearns, *supra* note 12, at 1261-62 n.158.

⁴⁶⁰ See Stearns, *supra* note 12, at 1261 n.158.

⁴⁶¹ See *id.*

congressional inertia, except when absolutely necessary, is easy to understand.

Finally, it is worth noting that, while William Fletcher has argued that all standing cases can be recast in third-party standing terms,⁴⁶² the above analysis demonstrates the distinction between the cases in these two groupings. Denials of third-party standing are premised on the existence of a shadow case in which some other potential litigant can raise the identical claim without a credible standing barrier. These cases, in contrast, are premised on the notion that, with slightly altered facts, these claimants would be better situated to present a more judicially cognizable claim. In *Allen*, for example, the plaintiffs would have been able to present a more cognizable claim challenging the IRS policy if their children had applied to and been rejected from the discriminatory private schools receiving favorable tax treatment. Similarly, in *Warth*, the plaintiffs would have been able to present a more cognizable claim challenging the Penfield ordinance if they had themselves applied for a variance and been denied that variance based upon race or upon a wealth classification.⁴⁶³ Finally, in *Simon*, the plaintiffs would have been able to present a more cognizable claim challenging the IRS policy if a hospital with tax-exempt status, as party to the suit, admitted that it would change its indigent access policy if it lost that status. The Court did not deny standing in these cases because the plaintiffs were less well-suited than some other person; it denied standing because the underlying legal issue would be better presented in a case with different facts.

These results, of course, raise the question as to why the Court viewed the facts alleged in these cases as deficient for standing purposes. If the analysis in these articles is persuasive, the Court is seeking facts that appear closer to the traditional bipolar litigation end of the spectrum than to the interest group path manipulation end of the spectrum, which is typified in the third-party standing and diffuse-harms categories.⁴⁶⁴ But because the Court has employed metaphors that capture only part of the relevant standing image, it has rendered decisions that appear inconsistent. As set out below, the inconsistency arises because the cases in this third

⁴⁶² See Fletcher, *supra* note 171, at 245.

⁴⁶³ That is not to suggest that the plaintiffs would necessarily have prevailed had the facts differed as suggested in the text. It is only to suggest that they would more likely have been afforded standing.

⁴⁶⁴ See *supra* part III.A-B.

category in which standing is either granted or denied are distinguishable, not in kind, but in degree. Superimposing ill-fitting metaphors to categorize these cases, therefore, creates the anomaly revealed below⁴⁶⁵ that, with little work, the language in a case in which standing was granted can be used to recharacterize the case such that standing should have been denied; and the reverse holds true as well.

The *Allen*, *Simon*, and *Warth* cases undoubtedly appear troublesome to many readers. In these cases, the Court has used standing to deny seemingly powerful legal claims related to the integration of public schools, the provision of medical services, and the availability of housing for minorities and the poor. The cases seem particularly troublesome when they are contrasted with those cases in which the Court, notwithstanding congressional silence, has willingly created very detailed and code-like interpretations of broad-based constitutional clauses, including the Equal Protection Clause, which was at issue in these cases.⁴⁶⁶ Why, then, did the Court decline to make positive law on the scope of the Equal Protection Clause when faced with congressional inertia on issues as important as those presented in these cases? And why did it decline to address the underlying legal claims when, in the very act of denying standing, the Court inevitably made an alternative substantive legal ruling, namely that plaintiffs have no right to the benefits of a market that is undistorted by allegedly unconstitutional laws? Again, to understand the anomaly, we need to consider the options that the *Allen* and *Simon* Courts faced.

The *Allen* and *Simon* Courts faced two alternatives. First, those Courts could have allowed the litigants to force the federal judiciary to monitor the IRS's internal operating policies, even though that is generally a function of Congress and even though the Courts could not guarantee that in doing so it would issue a rational ruling that did not thwart the present will of a majority of the Court's own members. Second, those Courts could have issued a more modest substantive ruling, on which a majority of justices could agree, that claimants do not have the right to come into court to have removed

⁴⁶⁵ For illustrations, see *infra* text accompanying notes 467-76.

⁴⁶⁶ Thus, in its criminal procedure, busing, and privacy cases, for example, the Court willingly thwarted congressional silence on the meaning and scope of the Fourth Amendment prohibition against unreasonable searches and seizures, the Fifth Amendment right to remain silent, the Sixth Amendment right to counsel, and the Fourteenth Amendment Due Process and Equal Protection Clauses. See Stearns, *supra* note 2, part II.A.

an allegedly illegal market distortion. The latter option does not prevent the underlying issues from ever reaching the Court. If, for example, the parents of an applicant to a private school who was rejected based upon race brought suit seeking to strike the tax-exempt status, the Court would presumably address the merits of the underlying claim. Using the Court's own metaphors, this hypothetical case, like the traditional case in which the Court resolves the legal claims of a convicted criminal on appeal, possesses those qualities that resemble the tort elements of injury, causation, and redressability. The hypothetical case does not resemble an attempt by an ideological litigant to shift the burden of legislative inertia onto the federal courts. Neither of the options that the Court faced was ideal, but the standing denial more closely accords with limiting judicial lawmaking to ad hoc and as-needed decision-making.⁴⁶⁷

While the Court, in effect, chose what it considered to be the least bad of two imperfect options in these cases, the inconsistency with which it applied its standing analysis makes it difficult to predict how the Court will rule in any given case. Consider, for example, the following two standing cases issued within two days of each other, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*⁴⁶⁸ and *Board of Regents v. Bakke*.⁴⁶⁹ In *Duke Power*, the plaintiffs, residents of a neighborhood adjacent to a proposed nuclear power plant and an environmental interest group, challenged the constitutionality of the Price-Anderson Act, which set a \$560 million liability cap for nuclear accidents.⁴⁷⁰ The plaintiffs did not allege that if the Act's liability limit were struck down, the proposed construction would not proceed.⁴⁷¹ Instead, the plaintiffs alleged a substantial likelihood that the construction might not proceed if the potential cost of nuclear accidents had not been artificially reduced by the liability cap, which, they further alleged violated their due process rights by preventing full recoveries in the event of a nuclear accident.⁴⁷² As in the previous cases, the plaintiffs sought to have the Court remove an allegedly unconstitutional

⁴⁶⁷ See *id.*

⁴⁶⁸ 438 U.S. 59 (1978).

⁴⁶⁹ 438 U.S. 265 (1978).

⁴⁷⁰ See *Duke Power*, 438 U.S. at 67.

⁴⁷¹ See *id.* at 74-75 (referring to the findings of the district court in *Carolina Env'tl. Study Group, Inc. v. United States Atomic Energy Comm'n*, 431 F. Supp. 203, 219 (W.D.N.C. 1977)).

⁴⁷² See *id.* at 69.

market distortion. Unlike the Courts in *Allen*, *Simon*, and *Warth*, however, the *Duke Power* Court, focusing on both the imminent nature of the potential reduction in the value of the plaintiffs' homes, and the much greater potential damage that would result in the event of a nuclear accident, granted standing.⁴⁷³

Similarly, the *Bakke* Court granted the plaintiff, a white medical school applicant who had twice been rejected from medical school, standing, even though he did not allege that had he been allowed to compete for all of the seats (including the sixteen seats that had been set aside for minority applicants), he would have been admitted.⁴⁷⁴ To justify the grant of standing, the Court defined Mr. Bakke's injury narrowly. Rather than characterizing the injury as the denial of admission into the medical school, the Court determined that Mr. Bakke was injured in his exclusion from competition for all one hundred medical school seats and that this amounted to a violation of the Equal Protection Clause.⁴⁷⁵ The difficulty is that the very same reasoning could have been used to achieve a contrary result in both *Allen* and *Simon*.

If the *Allen* Court, for example, had defined the plaintiffs' injury, not as the denial of an integrated education (an assertion which the plaintiffs could not support because of the attenuated causal chain), but rather, as the denial of appropriate market incentives to foster integration—which the plaintiffs claimed—the plaintiffs' injury would be no less concrete than that in *Bakke*. The same analysis applies in *Simon*, where, if the Court had defined the relevant injury, not as the right to receive medical services (an assertion which, again, the plaintiffs could not support because of

⁴⁷³ See *id.* at 72-81.

⁴⁷⁴ See *Board of Regents v. Bakke*, 438 U.S. 265, 280 n.14 (1978). The California Supreme Court ordered Bakke's admission before the case reached the Supreme Court, analogizing the equal protection claim to one arising under Title VII and thus shifting the burden to the state to prove that, absent the minority admissions programs, Mr. Bakke would not have been admitted. On petition for rehearing before the Supreme Court, the California Board of Regents conceded that they could not meet that burden. See *id.* at 280-81.

⁴⁷⁵ See *id.* For a recent example of a case in which the Court granted standing despite an attenuated causal chain, see *Northeastern Fla. Gen. Contractors v. Jacksonville*, 113 S. Ct. 2297, 2301 (1993) (conferring standing upon a contractor challenging a racial set-aside program using *Bakke*-style analysis in which injury is defined as the ability to compete rather than the ability to obtain a contract); see also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (conferring standing to challenge an alleged racially motivated denial of a variance even though the requested relief would not guarantee that the project would be built).

the attenuated causal chain), but instead as the right to a market for indigent medical services that is undistorted by illegal tax incentives, the causal chain would again be no less attenuated than that in *Bakke*. Flipping the analysis around and broadening Mr. Bakke's claimed injury reveals the same doctrinal incongruity. Had the *Bakke* Court focused on the requisite links in the causal chain before Mr. Bakke would have been admitted to medical school, it might have found, as it did in *Allen* and *Simon*, that his alleged injury was insufficient to support standing.⁴⁷⁶

Why, then, did the Court grant standing to the *Duke Power* plaintiffs and to Mr. Bakke when it denied standing to the *Allen* and *Simon* plaintiffs? Again, we need to consider the options that the Court faced. These cases are best viewed as points along a spectrum; they are not different in kind, but they are different in degree. Differences in degree, however, can be both comprehensible and important. The *Duke Power* Court could have denied standing, ruling that the homeowners and environmental groups have no right to a marketplace unaffected by an arguably illegal distortion—the Price-Anderson Act's liability cap—even if, without that cap, the proposed construction might not proceed. Similarly, the *Bakke* Court could have ruled that Mr. Bakke has no right to an education market that is undistorted by a state's arguably unconstitutional selection criterion, even if he might benefit by the removal of that criterion.

To understand the cases above, we must disregard the Court's rhetoric on such matters as injury in fact, causation, and redressability, and focus instead on what these catch phrases are intended to capture. The social choice analysis reveals that these terms are metaphors intended to capture those circumstances in which plaintiffs have adequately alleged the need for the Court to consider shifting the burden of congressional inertia and to make positive law, even when the Court's preferences are multi peaked. Applying this analysis, we can place these cases, in their factual contexts, along a spectrum that will help to explain the seemingly disparate results. As demonstrated in Part III.A, third-party standing operates as a presumptive rule that prevents ideological litigants from forcing favorable precedents through path manipulation by locating

⁴⁷⁶ The reader is free to "flip" the *Duke Power* analysis. While the social choice analysis does not remove these anomalies, it provides a substantially stronger basis for explaining them than has been offered in the literature thus far. See *infra* text accompanying notes 480-82.

someone who has been sitting on her rights.⁴⁷⁷ While such cases as *SCRAP* and *Sierra Club*, which lie at the doctrine's outer edge, might obfuscate the doctrine's purpose, the purpose is restored when we consider those cases at the core, namely those in which convicted criminals, who are only interested in securing relief on their own behalf with no larger agenda, seek favorable rulings. When these convicted criminals raise constitutional challenges, the federal courts cannot avoid shifting the burden of legislative inertia and addressing the claims on the merits.

Thus viewed, *SCRAP* and *Sierra Club* might be viewed as representing the opposite extreme, that is, as efforts to secure favorable precedents where the justification for shifting the burden of legislative inertia is rather weak. Given the absence of concrete injuries and the ideological nature of the claims involved in *SCRAP* and *Sierra Club*, the political process seemed adequate to the task of resolving the issues presented. Moreover, congressional resolution of these issues is less susceptible to path manipulation than is judicial resolution. The cases presented in this subsection fall along a spectrum between those two extremes.

While it is true that in *Duke Power* relief on the merits, which was ultimately denied, would not guarantee that the proposed construction would cease, no shadow case existed in which the challenge could be raised in a sufficiently timely manner to protect the plaintiffs' interests. Moreover, the very fact that a nuclear power plant was being proposed for construction near the plaintiffs' homes created a *present* injury in the form of reduced property values. If the construction ultimately proceeded, the reduction in value was likely to be severe. Thus viewed, this case appears closer to those cases in which convicted criminals are attempting to force judicial creation of positive law to secure relief than it does to those in which the plaintiffs are attempting to manipulate the substantive evolution of legal doctrine by controlling the order of precedent.

Similarly, while the conferral of standing in *Bakke* would not have ensured that Mr. Bakke would be admitted to medical school, a contrary ruling on standing would certainly have prevented him from being admitted into medical school. The *Bakke* Court might have ruled as it did because Mr. Bakke, having twice applied and having twice been denied admission into medical school, was unlikely to study medicine if the Court did not address the

⁴⁷⁷ See *supra* part III.A.

merits of his claim. Again, applying the Court's own metaphors, Mr. Bakke's claim contained traditional notions of injury, causation, and redressability, thus justifying the Court's decision to consider shifting the burden of congressional inertia. Thus viewed, *Duke Power* and *Bakke* are hybrids between the criminal procedure cases, in which a convicted criminal challenges her conviction and sentence on appeal, and the *SCRAP* and *Sierra Club* cases, in which a claimant files a generalized claim knowing that relief is more likely to issue from a multi-peaked Court. While these cases contain elements of both extremes along the spectrum, the Court likely viewed them as closer in kind to those involving criminal appeals.

In contrast, the *Allen*, *Simon*, and *Warth* decisions appear somewhat closer to the other end of the spectrum in which ideological litigants are pressing generalized grievances because the chance of a favorable, non-Condorcet ruling is greater in the federal courts. This is partly reflected by the fact that the *Allen* and *Simon* plaintiffs, who were not seeking particular educational or medical benefits, were spread throughout the nation. I do not intend to suggest, in any way, that Mr. Bakke's claim or the *Duke Power* plaintiffs' claim was more important than the claims of the *Allen*, *Simon*, or *Warth* plaintiffs. In fact, in characterizing the injuries at stake in these cases, many would conclude that the rights to an integrated public school education, to the provision of medical services, and to the fair marketing of housing are more important, and perhaps more concrete, than the rights not to have property values diminished or to study medicine. That is the point; concreteness of injury is not an abstract inquiry. Instead, it is a metaphor, intended to capture a single but complex concept, namely the circumstances in which a litigant has provided a sufficiently compelling set of facts to justify forcing a multi-peaked court to shift the burden of legislative inertia.

At the opening of this Article, I set out a fairly difficult test for evaluating my social choice theory of standing.⁴⁷⁸ While one more major case remains to be discussed,⁴⁷⁹ it is now appropriate to revisit that test in light of the preceding historical and case evidence. To justify replacing the existing models of standing—including political explanations—with my social-choice-based theory,

⁴⁷⁸ See *supra* note 1 and accompanying text.

⁴⁷⁹ See *infra* part III.D (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

my theory would have to account for more, and more varied,⁴⁸⁰ data. This data includes the history surrounding the adoption and transformation of standing, and the cases themselves. Usually political explanations are irrefutable because in response to an apparent inconsistency, one need only say that "it's all political."⁴⁸¹ But here, even the political explanation of standing is weaker than that which I offer. The political explanation fails to place standing within a broader spectrum that includes other bodies of case law, including constitutional criminal procedure. It is also not terribly robust in explaining the nuances of the cases themselves.

I have not tried to prove that no inconsistencies in the cases exist, but I have used the shadow-case analysis to demonstrate that the inconsistencies are less pronounced than most academics admit and that some of the inconsistencies can be meaningfully modeled and evaluated. If the social choice theory of standing accounts for more dots than the next available theory, my model of standing is well worth considering. It is my position that the social choice model of standing better captures three critical sets of data: (1) the historical context in which the New Deal standing emerged and in which that doctrine was critically transformed during the Burger and Rehnquist Courts; (2) the jurisprudential independence of standing from related justiciability doctrines and the question of whether a plaintiff has a cause of action;⁴⁸² and (3) most importantly, the standing *and nonstanding* cases themselves. I believe that these two articles demonstrate that the social choice model of standing meets this stringent test.

Before revisiting congressional grants of standing, it is worth considering one plausible political explanation of standing. When teaching these cases in my introductory course in constitutional law, a bright student observed that one could readily tell the following alternative story: The Court, which is composed of mostly upper or upper-middle class white males, is more sympathetic to the plights of a medical school applicant denied admission because of so-called "reverse discrimination" or a property owner whose property value is threatened, than to those of parents of African-American public

⁴⁸⁰ See OLSON, *supra* note 72, at 13.

⁴⁸¹ Of course, the same feature undermines the scientific merit of political theories because the theories cannot be falsified. See POPPER, *supra* note 1, at 3.

⁴⁸² See Stearns, *supra* note 2, part II.B (discussing the second prong listed in the text). The first and third prongs were the focus of the current Article.

school children or of indigents seeking either housing or medical services. At the very least, the former claims would appear to have a greater possibility of affecting the justices or those close to them than would the latter claims. While such a political explanation of the Court's standing decisions—if we accept certain assumptions about the impact of background on judicial bias—may have intuitive appeal, it fails the test of accounting for as many dots, or cases, as does my proposed model. Applying a political model, we would not expect members of the Court to be particularly sympathetic to convicted criminals or even to criminal defendants. And yet, the Court routinely allows convicted criminals to bring to federal court countless—often frivolous—constitutional claims, which quite often require the Court to make new law. The analysis in these articles accounts not only for the cases that were the subject of the student's comment, but also for the voluminous body of case law under the general heading of constitutional criminal procedure.⁴⁸³ I do not intend to suggest that there is no possibility that bias played a role in these cases, but I am suggesting that the standing-is-politics explanation is substantially less robust than the social choice model of standing offered in these articles.

Nor do I intend to suggest that each of the cases discussed in Part III of this Article was correctly decided. Instead, I am suggesting that the correctness or lack thereof of these rulings does not depend upon whether they satisfy the requirements of concreteness of injury, causation, or redressability, at some abstract level. If we, instead, view these cases as lying along a spectrum representing the circumstances in which shifting the burden of congressional inertia is or is not compelled, it becomes easier to reconcile more standing cases and to understand the role that standing plays in our constitutional scheme.

D. *Congressional Grants of Standing Revisited:*
Lujan v. Defenders of Wildlife

If I am correct in asserting that the standing inquiry is about the question of when the plaintiff has adequately demonstrated the need for federal courts to shift the burden of legislative inertia, one question naturally arises: What happens when Congress, by statute, attempts to shift onto the federal courts the burden of its own

⁴⁸³ For a summary of this rich body of case law, see Stearns, *supra* note 2, part II.A.

inertia? Stated differently, what happens when Congress, by statute, tries to convert what was once a generalized grievance into an individual right? This Subpart will answer that question.

Contrasting *Allen* with the recent Supreme Court decision, *Lujan v. Defenders of Wildlife*,⁴⁸⁴ reveals the current tension in the Supreme Court's constitutional standing analysis. *Allen* suggests that in choosing between two alternative rulings, the Court will be affected by which option best preserves Congress's future decision-making authority, thus resting the constitutional dimension of standing on Article III. *Lujan* suggests instead that standing, effectively resting upon Articles II and III, prevents Congress from creating private attorney general statutes as a means to monitor executive branch conduct in federal court.

In *Lujan*, the Supreme Court invalidated, at least as applied, the citizen-suit provisions of the Endangered Species Act (ESA).⁴⁸⁵ Under the ESA, which divides the responsibilities for protecting endangered species between the Secretary of the Interior and the Secretary of Commerce, federal agencies whose activities might endanger such species are required to consult with the Secretary of the Interior.⁴⁸⁶ Reversing a prior joint regulation, which required interagency consultation for all agency activities that might jeopardize endangered species in the United States, on the high seas, and in foreign nations, the Secretary of the Interior and the Secretary of Commerce issued a revised joint rule reinterpreting the ESA and limiting the geographic scope of the statute for purposes of interagency consultation to those activities within the borders of the United States or on the high seas.⁴⁸⁷ The plaintiffs, environmental organizations and a group of citizens interested in preserving the habitats of particular endangered species abroad, sued the Secretary of the Interior, claiming that federal agencies were funding projects that jeopardized the habitats of particular endangered species abroad without having first consulted the Secretary of the Interior.⁴⁸⁸ The plaintiffs claimed that the revised joint rule, which did not require such consultation, given that the threatened habitats were within foreign nations, violated the ESA's substantive provisions on interagency consultation.⁴⁸⁹ They relied for stand-

⁴⁸⁴ 504 U.S. 555 (1992).

⁴⁸⁵ See *id.* at 571-73.

⁴⁸⁶ See *id.* at 558.

⁴⁸⁷ See *id.* at 558-59.

⁴⁸⁸ See *id.* at 559.

⁴⁸⁹ See *id.*

ing upon the following citizen-suit provision contained in the ESA: “[A]ny person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.”⁴⁹⁰

In denying the plaintiffs standing, Justice Scalia, writing in part for a majority and in part for a plurality of four, determined that the plaintiffs had failed to satisfy both the injury and redressability prongs of the Court’s standing formulation.⁴⁹¹ The majority rejected each of three injury theories: first, actual injury grounded in the plaintiffs’ interest in the species whose habitats were endangered by projects that received partial funding from federal agencies;⁴⁹² second, procedural injury resulting from the failure of the relevant agencies to consult with the Secretary of the Interior, as required by statute;⁴⁹³ and third, three nexus theories under which individuals with interests in endangered species, or who use any part of a contiguous ecosystem, are afforded standing when the habitats of those species or any part of the ecosystems are endangered.⁴⁹⁴ The plurality, which rejected the plaintiffs’ showing of redressability,⁴⁹⁵ did not employ the causation language that was the focus of the preceding subsection.⁴⁹⁶ As shown below, however, the distinction between causation and redressability is largely semantic.⁴⁹⁷

⁴⁹⁰ *Id.* at 571-72 (quoting 16 U.S.C. § 1540(g) (1988)).

⁴⁹¹ *See id.* at 557, 568.

⁴⁹² *See id.* at 562-64.

⁴⁹³ *See id.* at 571-72.

⁴⁹⁴ *See id.* at 565-67.

⁴⁹⁵ *See id.* at 568-71.

⁴⁹⁶ *See supra* part III.C.

⁴⁹⁷ The Court has attempted, without much success, to distinguish the causation—or fair traceability—prong from the redressability prong. In *Allen v. Wright*, 468 U.S. 737 (1984), Justice O’Connor explained:

The “fairly traceable” and “redressability” components of the constitutional standing inquiry were initially articulated by this Court as “two facets of a single causation requirement.” . . . To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate if the “redressability” component is to focus on the requested relief. Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents’

Joyce Kelly, one of the petitioners, averred by affidavit that she had traveled to Egypt in 1986, where she "observed the traditional habitat of the endangered Nile crocodile," and that, although she did not see the crocodile directly, she hoped to do so when she next traveled to Egypt.⁴⁹⁸ However, Ms. Kelly admitted that she had no specific plans to return.⁴⁹⁹ Amy Skilbred, another petitioner, averred that she had traveled to Sri Lanka, where she observed the habitat of the Asian elephant and the leopard, which she alleged was threatened by a project that the Agency for International Development (AID), a federal agency, funded.⁵⁰⁰ In a subsequent deposition, Ms. Skilbred admitted that, although she hoped to return to Sri Lanka, she had no specific plans because that country was engaged in a civil war.⁵⁰¹ Both plaintiffs alleged that the failure of the agencies funding the programs abroad to consult with the Secretary of the Interior, as required by statute, had injured them.

Writing for a majority, Justice Scalia stated that, even assuming, which he found questionable, that "these affidavits contain facts showing that certain agency-funded projects threaten listed

children might not be traceable to IRS violations of law—grants of tax exemptions to racially discriminatory schools in respondents' communities.

Id. at 753 n.19 (citation omitted). Justice O'Connor suggests that causation involves the relationship between the illegal activity and the asserted injury and that redressability involves the relationship between the asserted injury and the desired remedy. One might assume, however, that any particular remedy is likely to be effective precisely to the extent that the asserted injury has been caused by the illegal conduct that the claimants seek to have corrected. Thus, while it is true that reversing the IRS tax exemption might not entirely integrate the public schools, it will, by definition, change the conduct of those private schools and parents of private school children, whose conduct is on the margin. The schools that are on the margin will alter their discriminatory policies if the tax policy is changed, and the parents who are on the margin, if faced with a school's decision to raise its tuition rather than to change its discriminatory policies after the tax exemption is removed, will send their children to public schools. How many schools and parents are on the margin is an empirical question, but it is one that is not necessary for the Court to resolve. The point is that, in striking the IRS tax exemption for discriminatory private schools, those schools and parents who are on the margin will predictably alter their conduct. Whatever the overall effect upon the integration of public schools, one can characterize it equally in terms of causation and redressability. Thus, one could say that the IRS tax exemption improperly caused the schools and parents on the margin to engage in conduct that tended to inhibit public school desegregation, or, that the IRS tax exemption, once struck, redressed the plaintiffs' injury to the extent that it encouraged schools and parents on the margin to alter their conduct, which had inhibited public school desegregation.

⁴⁹⁸ *Lujan*, 504 U.S. at 563.

⁴⁹⁹ *See id.* at 563-64.

⁵⁰⁰ *See id.* at 563.

⁵⁰¹ *See id.* at 563-64.

species,⁵⁰² the petitioners lacked the requisite injury to justify granting them standing under the statute. Justice Scalia held for the Court that “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”⁵⁰³ Justice Scalia also rejected the petitioners’ claim that the citizen-suit provision of the ESA created in all persons a right to challenge the failure of a funding agency to consult with the Secretary of the Interior, thereby rejecting the analysis used by the Eighth Circuit to deny the government’s motion for summary judgment on standing.⁵⁰⁴ Because Justice Scalia’s characterization of this argument for the majority is critical for the analysis to follow, I will quote it in full:

To understand the remarkable nature of [the Eighth Circuit holding] one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to a denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government’s benefit, by providing a cash bounty for the victorious plaintiff.⁵⁰⁵ Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental “right” to have the Executive observe the procedures required by law. We reject this view.⁵⁰⁶

This characterization is critical to understanding the present rift within the Supreme Court over identifying standing’s constitutional underpinnings. In criticizing the portion of the majority opinion

⁵⁰² *Id.* at 564.

⁵⁰³ *Id.*

⁵⁰⁴ *See id.* at 572.

⁵⁰⁵ Relying upon the preceding sentence, Professor Sunstein has argued that, by creating a modest bounty for successful environmental plaintiffs (and other plaintiffs relying upon a federal statute to vindicate similarly generalized injuries), Congress might readily circumvent the difficulties that *Lujan* creates. *See* Sunstein, *supra* note 148, at 232-33.

⁵⁰⁶ *Lujan*, 504 U.S. at 572-73.

quoted above, Justice Blackmun, joined by Justice O'Connor (who authored the *Allen* decision), stated:

The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." . . . In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.⁵⁰⁷

If, as Justices Blackmun and O'Connor suggest, the constitutional basis of standing lies in the Court's desire to protect Congress's power to monitor the executive branch, it follows that courts should treat a claim of standing based upon a constitutional provision differently from a claim of standing based upon a federal statute. By conferring standing to enforce claimed substantive rights based upon broad constitutional provisions, the Court effectively shifts the burden of congressional inertia. In doing so, it may effectively prevent Congress, to the extent that the underlying ruling is grounded in constitutional interpretation, from acting in the future, should a Condorcet-winning legislative preference arise. In contrast, when faced with a federal statute that confers standing to press an otherwise generalized grievance against the executive branch, that is no longer a concern. Superimposing an abstract injury-in-fact requirement as a precondition to congressional grants of standing, ironically, has the effect of protecting Congress's power to enact Condorcet-winning statutes by striking

⁵⁰⁷ *Id.* at 602 (Blackmun, J., dissenting). As if these two positions were not confusing enough, Justice Kennedy has offered a third:

In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id. at 580 (Kennedy, J., concurring). While Kennedy tries to strike a middle ground between the Scalia and Blackmun opinions, his suggestion would appear to render *Lujan* fairly inconsequential because Congress could avoid the result by simply defining injured persons as including those who intend to travel to locations in which federal agency funding, in violation of the ESA, threatens the habitats of endangered species. Fairly read, Justice Scalia's opinion for the Court does not appear to countenance this form of subterfuge for its more rigid injury requirement, based upon analogues from the common law.

Condorcet-winning statutes. If that sounds nonsensical, that is the point.

Thus viewed, Justice Scalia's assertion that "there is absolutely no basis for making the Article III inquiry [on injury in fact] turn on the source of the asserted right"⁵⁰⁸ flips the Supreme Court's standing analysis on its head. If the constitutional foundation of standing lies in the desire to protect Congress's power to legislate, the source of the asserted right is *critical* to the standing inquiry, and the *Lujan* result is troublesome. If, instead, the constitutional foundation of standing somehow rests upon the desire to protect the executive's power to execute the laws, then whole bodies of constitutional precedent become difficult to comprehend. Thus, while Justice Scalia relied upon *Marbury v. Madison*⁵⁰⁹ for the proposition that "[t]he province of the court . . . is, solely, to decide on the rights of individuals,"⁵¹⁰ he neglected to note the passage that appears in the following paragraph of the same case:

if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?⁵¹¹

Since *Marbury*, the Court's power in a proper case to invalidate executive branch actions that violate the Constitution or federal statutes has been assumed. As the quoted language demonstrates, the *Marbury* Court itself observed that, if the conferral of the original power in the Supreme Court to grant mandamus had not violated Article III, *Marbury*, because it involved a ministerial, rather than a political act, would have been a proper case to compel the executive to comply with the law.⁵¹² One might be inclined to distinguish the right claimed in *Lujan* from that asserted in *Marbury* on the ground that *Marbury*'s right to a commission was concrete.

⁵⁰⁸ *Id.* at 576.

⁵⁰⁹ 5 U.S. (1 Cranch) 137 (1803).

⁵¹⁰ *Lujan*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

⁵¹¹ *Marbury*, 5 U.S. (1 Cranch) at 170.

⁵¹² For a much more recent case demonstrating the Court's willingness to compel executive conduct as required by law, see *United States v. Nixon*, 418 U.S. 683, 702 (1974) (ordering President Nixon to release tapes that he withheld in response to a properly issued subpoena).

That of course begs the question whether Congress has the power to transform otherwise abstract injuries into cognizable individual claims, thus rendering those injuries concrete, at least as a matter of law. But whether or not Congress has that power, which I—and others⁵¹³—would suggest it does, should not turn on whether judicial enforcement of an otherwise constitutional statute requires courts to intrude upon executive enforcement of the laws. In any event, the greatest difficulty with *Lujan* lies not so much in its constraining Congress's power to define new claims of injury as it does in its utter confusion as to the constitutional underpinnings of standing. That confusion, while troublesome, is not difficult to comprehend. The Court again fell victim to its own language, transforming what was intended as a metaphor into a rigid constitutional requirement.

The injury-in-fact requirement of the Supreme Court's standing doctrine is intended to protect Congress's power to govern. Critical to that power, as social choice reveals, is the power not to make law unless and until an appropriate consensus forms. Because the federal courts, unlike Congress, lack the power of institutional inertia, they invite challenges by litigants who are dissatisfied with the outcomes of this important congressional power. This is especially true when courts, including the Supreme Court, signal that less than majority support is sometimes adequate to force favorable judicial outcomes. Because the Court cannot guarantee a rational result when there is no Condorcet winner, its decisions, precisely because they thwart the will of a present majority, invite ideologically driven litigation. In fact, the generality of this invitation, coupled with path dependent voting procedures, promotes what could fairly be termed a "race to the bottom" in which ideological litigants, on all sides of any given issue, seek to prevent fortuity—or opponents—from determining the critical path. Rather than permit this form of litigant free-for-all, the Court, at a

⁵¹³ See, e.g., Logan, *supra* note 264, at 42 (positing that "[i]n the statutory context, the Court should uniformly follow the approach it has used in a series of cases construing the Fair Housing Act, one which accords great deference to Congress' power to provide judicial redress to parties asserting even novel claims with attenuated causal relationships"); Pierce, *supra* note 148, at 1181 (observing that Justices Kennedy and Souter, in their concurrences in *Lujan*, "recognize that regulatory regimes often create judicially enforceable statutory rights that differ from traditional common law rights"); Sunstein, *supra* note 148, at 177-78 (asserting that "[t]here is absolutely no affirmative evidence that Article III was intended to limit congressional power to create standing").

time when it mattered most and when it was least able to control the outcomes of its precedents,⁵¹⁴ elevated standing to a critical status. This doctrine serves to discourage advertent litigant path manipulation. At the same time, by preventing litigants from forcing cases upon the federal courts that would require them to supplant the status quo with judicially created positive law, it preserves the power of Congress to govern. Such phrases as injury in fact, causation, and redressability played a role in this process, but—contrary to Scalia's *Lujan* analysis—not because they are requirements with independent jurisprudential significance. Instead, they played a role because those cases in which the Court is unable to avoid creating positive law correlate with claims that satisfy these traditional tort principles that emerged in the context of traditional bipolar litigation.

Until *Lujan*, it was assumed that while these metaphoric terms limited the power of litigants to force judicial creation of positive law, they did so to protect Congress's ability to govern. Even the Court's teeter-totter on the question whether standing rests upon prudential or constitutional bases was not terribly problematic as long as the relevant constitutional basis rested solely upon the requirements of Article III. By giving these terms an alternative, and previously unasserted, constitutional status,⁵¹⁵ the *Lujan* Court flipped the object of these metaphors—the circumstances in which parties have alleged appropriate facts to justify forcing the courts to shift the burden of legislative inertia—on its head. Even so, the social choice framework, used to criticize *Lujan*, might provide insights to explain it.

While public-choice literature has frequently noted the extent to which Congress delegates in order to take credit for legislative successes at relatively low cost,⁵¹⁶ no one thus far has analyzed the effect of multi peaked judicial preferences on congressional delegation to private attorneys general. A Congress wishing to take

⁵¹⁴ See *supra* part II.A.

⁵¹⁵ The only time that an Article II justification for standing has been seriously advanced prior to *Lujan* was in an article written by Scalia in 1983. See Scalia, *supra* note 4, at 893-94 n.58 (positing that "congressional approval and even encouragement [of relaxed standing] cannot validate judicial disregard of the boundary between the second and third branches").

⁵¹⁶ See Aranson et al., *supra* note 185, at 56 ("[D]elegation reduces the legislator's marginal cost of private-good production, which, *ceteris paribus*, yields more legislation and more public-sector private-goods production."). See generally Lowi, *supra* note 184 (examining the political consequences of delegating power to administrative agencies).

credit for a legislative success at low cost might view a multi-peaked Supreme Court no less favorably than our hypothetical ideological plaintiff, who seeks to force a non-Condorcet-winning preference into law. The creation of something as technical as standing to litigate in federal court is precisely the sort of policymaking by obfuscation that promotes both credit taking and blame passing.⁵¹⁷ If the federal judiciary, including the Supreme Court, reaches a favorable outcome, Congress takes the credit for having created the vehicle for that result. If the judiciary does not reach a favorable outcome, it, rather than Congress, is likely to be the object of attack.

Thus viewed, *Lujan* might properly be seen as a limited revival of the nondelegation doctrine, this time with the federal judiciary, rather than federal agencies, as the feared regulatory object. In short, *Lujan* may have been the Court's warning signal to prevent Congress from continuing down the path of delegation through broad conferrals of citizen standing in cases requiring executive monitoring with respect to divisive policy issues. Whether or not such a ruling is wise, it might be no more harmful, or lasting, than the now moribund nondelegation doctrine.⁵¹⁸ If so, *Lujan* is grounded not so much on Congress's power—or lack thereof—to define novel causes of action, as many critics have warned,⁵¹⁹ but

⁵¹⁷ For a discussion of the delegation-as-avoidance technique in the public choice literature, see MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 108 (1981); THEODORE LOWI, THE END OF LIBERALISM 59 (1979); see also Aranson et al., *supra* note 185, at 63-67 (advocating revising the nondelegation doctrine based upon teachings of public choice, including those discussed in this Article).

⁵¹⁸ For an alternative public choice spin on *Lujan*, see Pierce, *supra* note 148, at 1193-95. The author posits:

The dissenting Justices [in *Lujan*] accused Justice Scalia of mounting "a slash-and-burn expedition through the law of environmental standing." In one sense, that characterization understates the potential significance of his opinion.

Id. at 1173. For Professor Pierce, the deeper significance lies in the fact that, by imposing the same stringent three-prong standing test in statutory standing cases as in nonstatutory standing cases, the *Lujan* Court may be signaling to regulatory agencies that only regulated entities, those parties whose "injuries" parallel injuries as defined at common law, will have power to challenge agency conduct in federal court. See *id.* at 1193-95. The effect, in turn, is to promote agency capture by the very entities that such agencies were intended to regulate, even in the face of a direct and contrary legislative intent. See *id.*

⁵¹⁹ See, e.g., Sunstein, *supra* note 148, at 222-23 (stating that, once it was determined that Congress had granted standing, "[t]here was no need to start with injury in fact and redressability, or even to address the issues at all").

rather, on concerns over congressional abdication of its lawmaking function to the federal courts.

In short, *Lujan* obfuscates the critical, and delicate, linkage between standing and separation of powers and muddies the so-called constitutional/prudential boundary that underlies modern standing. Thus, for example, while the Supreme Court has employed a strong presumption against third-party standing to prevent ideological litigants from raising claims better raised by parties who suffer an actual injury,⁵²⁰ it has affirmed Congress's power to confer standing upon ideological litigants notwithstanding an obvious hypothetical case in which a future first party could raise the same legal issue in a case that involves a concrete injury.⁵²¹ And yet, the *Lujan* Court denied Congress the power to define as injured persons those concerned about government activities that posed a threat to the habitats of endangered species abroad. While *Allen v. Wright*,⁵²² for example, suggests that, to the extent that standing, in its constitutional dimension, rests upon the Article III concern that Congress is the appropriate branch to monitor executive agency action, the *Lujan* Court employed standing to trump a federal statute that Congress designed to allow private attorneys general to monitor the executive branch in federal court. If standing rests upon Article III, *Lujan* appears ironic; the Court invalidated a congressional grant of standing to secure Congress's power to monitor the executive branch. Ultimately, whether the Court correctly decided *Lujan* turns upon whether Congress has the power to define abstract injuries as individual rights enforceable in federal court. Until *Lujan*, the answer seemed to be yes.

CONCLUSION

Professors often say that the law is a seamless web and that in any course, students cannot fully understand the materials covered at the beginning until they study those at the end. But the reverse also holds, and we all must start somewhere. For many professors

⁵²⁰ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (stating that the plaintiff must show direct injury or immediate danger of such an injury).

⁵²¹ See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (upholding a Fair Housing Act provision granting standing to plaintiffs who claimed that defendants unlawfully denied them truthful housing information because of their race, even though the plaintiffs were testers who were not interested in actually securing housing but were instead raising claims on behalf of others who failed to secure desired housing because of such discrimination).

⁵²² 468 U.S. 737 (1984).

of constitutional law, standing comes at the beginning, if for no other reason, than that several casebook authors have put it there.⁵²³ For this constitutional law professor, however, that placement has a logical foundation. Standing is a limiting principle on the power of judicial review, and that power, in all its dimensions, lies at the core of constitutional law.

In explaining the graph depicting a group with multipeaked preferences,⁵²⁴ I suggested that cutting out the rectangular image, rolling it into a tube, and taping the ends together would provide the graphic, and the cycles that it is intended to illustrate, with a greater visual quality. It might be helpful now to imagine treating the materials that a constitutional law class covers in the same manner. If that voluminous body of materials were properly cut, rolled, and taped, standing would occupy its proper place, at both the beginning and the end of the course.

Perhaps that explains why standing is likely to forever remain among the most enigmatic of Supreme Court doctrines. A doctrine that, perhaps uniquely, can only be characterized by metaphor is bound to become confused when the object of the metaphor changes over time. A united New Deal Court created standing to stave off unwelcome challenges to favored regulatory programs, primarily in the lower federal courts. Because that Court shared a common doctrinal foundation, or, in social choice, was unipeaked, at least with respect to the day's most pressing and controversial issues, the Court used standing not to avoid reaching the merits of difficult cases, but rather to keep lower federal courts, which had a different jurisprudential vision than that of the Supreme Court, in tow. Even in later Courts marked by shifts from one stable power center to another, standing remained on the sidelines. As long as a stable power center existed somewhere in the Court, the Court's

⁵²³ In fact, casebook authors are split on whether standing should appear at the beginning or toward the end. For early placements, see WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 94-116 (4th ed. 1993); STONE ET AL., *supra* note 190, at 87-106; TRIBE, *supra* note 79, §§ 3-14 to -21, at 107-55. For late placements, see DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 1045-77 (1993); GUNTHER, *supra* note 224, at 1598-1629; RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* 1088-1127 (4th ed. 1993). Without, in any sense, criticizing all of these excellent introductory texts, I hope that this Article demonstrates that on the narrow issue of where standing belongs in an introductory constitutional law textbook, the authors in the first group have the better intuition.

⁵²⁴ See *supra* note 17.

members were able to predict, with considerable certainty, the outcomes of divisive cases that they chose to address on the merits.

Standing has undergone its most powerful metamorphosis during the Burger and Rehnquist Court eras. On those Courts, the object of the metaphors underlying the standing doctrine fundamentally changed. There was no longer a stable center of power. As a result, the Burger and Rehnquist Courts, which consisted of shifting coalitions, generated outcomes that sometimes, and with increasing frequency, appeared to thwart the will of present majorities. This phenomenon, when coupled with the Court's prominent policymaking role beginning in the Warren Court era, which tended to promote ideologically driven litigation, possessed a synergistic quality. The Court's multi peakedness tended to invite, rather than inhibit, further ideologically driven federal court litigation, which in turn tended to increase unpredictable and irrational outcomes. The cycles continued, both literally and figuratively.

No single doctrine can render the Supreme Court an entirely rational decisionmaking body. In fact, I would argue that if any could, we should fight against its adoption. Arrow's Theorem demonstrates that, at bottom, the objectives of fairness and rationality are inevitably at odds in any given collective decision-making body. While *stare decisis*, by preventing the requisite number of votes to reveal intertemporal cycles, renders Supreme Court decisionmaking substantially more rational, standing, by ensuring that all litigants play essentially by the same ground rules and that fortuity, rather than path manipulation, presumptively governs the path affecting the substantive evolution of legal doctrine, makes Supreme Court decisionmaking substantially more fair. With both doctrines in place the Supreme Court remains an imperfect institution. But perfection cannot be the test.⁵²⁵ This Article has demonstrated the value of these doctrines, based upon a more modest test: The Supreme Court's decisional processes are both more rational and more fair with them in place than they would be without them.

What of the future of standing? The Supreme Court has been transformed many times in this nation's history, and we should expect that process to continue. A recently emerging "centrist" bloc, consisting of Justices O'Connor, Souter, Kennedy, Ginsburg,

⁵²⁵ See *supra* note 80 (describing the nirvana fallacy).

and Breyer, appears to be assuming, or at least poised to assume, majority status. At the same time, to the extent that there have been defections, the conservative bloc is gaining strength. Perhaps if a sufficiently large coalition forms in the middle or right of the now-multipeaked Court, the Court will again have confidence in its ability to aggregate rationally its preferences when deciding difficult cases. If so, the order in which cases are presented for review will become less important to the substantive evolution of legal doctrine than it has been in recent decades, and ideological litigants, at least those who are not in sync with the controlling bloc, will find the Supreme Court a less inviting forum for the resolution of divisive policy matters. We might then expect the Court to relegate standing to a less prominent role. Should that happen, it might be fun to take a few steps back and have a good look.