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Standing at the Crossroads: The Roberts Court in Historical Perspective

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ARTICLES

STANDING AT THE CROSSROADS: THE ROBERTS COURT IN HISTORICAL PERSPECTIVE

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This Article advances a provocative and ironic thesis concerning the incentives of the Roberts Court respecting standing doctrine, which results from the Court's increasingly stable center of ideological gravity and the alignment of that ideology with the overwhelming majority of United States Courts of Appeals. With additional core conservative appointments, the Court will be motivated to broaden standing doctrine as did the Warren Court, the very Court whose historical legacy it seeks to counteract, as a means of working in combination with the lower federal judiciary to move doctrine in its preferred doctrinal direction.

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To support this thesis, this Article develops and presents two new sets of data. Adapting the Martin-Quinn scoring system, the first data set tracks the ideological center of gravity and the stability of dominant coalition structures on the Supreme Court itself from 1937 through 2005. The second data set is the product of original research drawn from the Federal Judges Biographical Database, compiled by the Federal Judicial Center. These data track the ideological balance of the federal circuit courts, for each year from 1933 through 2006 based upon the party of appointing President. This Article transforms these two sets of data into a readily comparable form and presents them together in a chronological table covering the Supreme Court and the circuit courts from 1933 through 2006.

This Article relies upon these data to explain the conditions under which the Supreme Court has historically developed and transformed its principal doctrinal gatekeeper, namely standing, in an effort to control developing constitutional doctrine in concert with the lower federal courts. The Article then places the Roberts Court in a broader theoretical and empirical perspective that tracks the Court's internal coalition structures and accounts for the historical relationship between ideological dominance on the Supreme Court and the majority of the federal circuit courts. The analysis helps not only in assessing the significance of the recent appointments of John Roberts as Chief Justice and Samuel Alito as Associate Justice, but also of potential future appointments in effecting doctrinal change.

INTRODUCTION

After eleven years, the longest period in Supreme Court history with no change in membership, the Roberts Court began in the year 2005, and had two new Justices in early 2006. John Roberts commenced the October 2005 Term as the seventeenth Chief Justice, replacing William Rehnquist.[1] And on January 31, 2006, Associate Justice Samuel Alito was sworn in to replace Sandra Day O'Connor,[2] the first woman on the Court and the Justice widely regarded as having occupied the Rehnquist Court's centrist position.[3]

Given the unique role that the Supreme Court plays in our system of governance,[4] it should not be surprising that these two appoint-

1 Chief Justice Roberts was sworn in on September 29, 2005. *See* Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice: Senate Republicans Are Unanimous, Democrats Evenly Split*, WASH. POST, Sept. 30, 2005, at A1.

2 David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21.

3 *See id.* ("Justice Alito succeeds Justice Sandra Day O'Connor, the first woman on the court and its swing vote on abortion rights and other social issues."). The Alito nomination followed Bush's failed nomination of Harriet Miers, a political advisor with no judicial experience and little track record concerning the most important and contentious issues likely to face the Supreme Court. *See* Mark Silva & Jan Crawford Greenburg, *Bush Makes a Choice to Cheer Conservatives*, CHI. TRIB., Oct. 31, 2005, at A1 ("Many conservatives were outraged [that] Bush had nominated Miers instead of a conservative jurist such as Alito, and considered Alito among several of the best choices available for the court.").

4 With respect to questions of federal law, the Supreme Court sits at the apex of no fewer than sixty-three independent judicial pyramids. These include fifty state judicial hierarchies and thirteen federal circuit courts of appeals. *See* Robert A.

ments have invited substantial academic handwringing.[5] Commentators generally agree that on the nine-Justice Supreme Court, the two appointments have produced a single-increment move, ideologically, to the right.[6] While the two Chief Justices, Rehnquist and Roberts, occupy roughly the same ideological, or policy, space,[7] Justice Alito has thus far proved a reliably more conservative jurist than did Justice O'Connor, whom he replaced.[8]

Whereas O'Connor generally occupied the Court's centrist, or median, position, occasionally joined by, or switching off with the Court's other moderate conservative, Anthony Kennedy,[9] the early evi-

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Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399, 1408 (2005) ("The U.S. Supreme Court stands as the ultimate interpreter of federal law, reviewing issues of federal law that arise in lower federal courts or in state courts."). Supreme Court decisions affect not only constitutional interpretation in such high profile areas as abortion, affirmative action, the First Amendment, separation of powers, and constitutional criminal procedure, but also give meaning to federal statutes, administrative regulations, and treaties.

5 For examples of contemporaneous articles speculating on the importance of these appointments, see Joan Biskupic, *Bush Appointees Signal Court's New Direction*, USA TODAY, Dec. 20, 2006, at A13; Linda Greenhouse, *With O'Connor Retirement and a New Chief Justice Comes an Awareness of Change*, N.Y. TIMES, Jan. 28, 2006, at A10; Erwin Chemerinsky, *Making Confirmation Hearings Meaningful*, 115 YALE L.J. POCKET PART 52 (2006), http://yalelawjournal.org/2006/01/chemerinsky.html.

6 *See, e.g.*, Charles H. Whitebread, *The 2005–2006 Term of the United States Supreme Court: A Court in Transition*, 28 WHITTIER L. REV. 3, 6 (2006) ("The replacement of Rehnquist with Roberts did not shift the Court's ideological balance much, but the substitution of Alito for O'Connor clearly pushed the Court to the right."). The data for the first year of the Roberts Court Term has proved consistent with this prediction. *See infra* Part II.C.

7 Rick Klein, *Bush Picks Roberts for Chief Justice O'Connor Is Likely to Remain for Now*, BOSTON GLOBE, Sept. 6, 2005, at A6 ("[C]onfirming Roberts to replace Rehnquist is unlikely to alter the political balance on the high court in the same manner that having him step in for O'Connor would.").

8 Charlie Savage, *With Alito, Kennedy Would Have Pivotal Role: On Contentious Issues, Justice's Vote Would Be Decisive, Scholars Say*, BOSTON GLOBE, Nov. 4, 2005, at A3 (relying upon interviews with legal scholars Cass Sunstein, Jack Balkin, and Richard Fallon to advance the thesis that the Alito appointment moves the judicial median position from O'Connor to Kennedy). The data for the first year of the Roberts Court Term has proved consistent with these predictions. *See infra* Part II.C.

9 *See* Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1305 (2005). The authors rely upon their newly developed statistical method, discussed *infra* Part II.B, to assert:

> Virtually all contemporary commentary stresses the critical role Justice O'Connor (and, to a lesser extent, Kennedy) plays on the current Court by casting key votes in many consequential cases. The Martin-Quinn approach confirms this commentary, showing that O'Connor has been the Court's median since the 1999 Term.

dence suggests that Alito, who joined the Court with an established fifteen-year record as a conservative member of the United States Court of Appeals for the Third Circuit, has thus far continued embracing the same general judicial philosophy on the Supreme Court.[10] That ideology is more closely aligned with such core conservatives on the Rehnquist Court as the former Chief Justice and Associate Justices Scalia and Thomas, than with Justice O'Connor's moderate conservative jurisprudence.[11]

It now appears that the Roberts Court is one Justice shy of what conservatives had long hoped for, namely a core conservative majority that would ensure predictable rulings in such key areas of constitutional law as abortion, equal protection, and criminal procedure. With an additional conservative judicial appointment, replacing one of the four remaining liberal Justices—Souter, Stevens, Ginsburg, or Breyer—or the moderate-conservative Justice Kennedy, the Supreme Court is poised for a fundamental reworking of several notable constitutional doctrines in a more conservative direction.

While generally sound, this conventional wisdom remains incomplete in a critical respect. Placing the Roberts Court in its proper historical perspective reveals an important feature that has received surprisingly little attention. The Supreme Court's increasingly promi-

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Martin et al., *supra*, at 1305.

10 *See infra* Table 3, year 2005.

11 This is not to suggest that the conservative wing of the Rehnquist Court invariably voted as a bloc. While Rehnquist developed an early reputation as the lone dissenter from sometimes liberal Burger Court rulings, *see* John Yoo, *National Security on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1149 (2006) ("As a young Justice, [Rehnquist] was known as the 'Lone Ranger' for his solitary dissents."), over time, commentators came to view Justices Scalia and Thomas, who joined the Court after Rehnquist, as more reliably conservative, *see* Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81, 98 (2006) (relying upon the Martin-Quinn scores to support the claim that "Justices Scalia and Thomas, generally considered the most reliably conservative members of the Rehnquist Court, anchor the right end, and Justices Stevens and Ginsburg, the left"). And even these two predictable conservatives occasionally parted company. *See The Supreme Court, 2005 Term—The Statistics*, 120 HARV. L. REV. 372, 375 (2006) (calculating that Scalia and Thomas agreed in 80% of all nonunanimous cases for the 2005 Term). But occasional disagreements do not detract from the general claim that on the Rehnquist Court, the Chief Justice and Associate Justices Scalia and Thomas formed a stable and predictable conservative coalition. Most commentators agree that if the two most recent appointments—Roberts and Alito—fall generally along the ideological space that the Rehnquist Court conservatives occupied, this will leave Justice Kennedy alone in the Court's median position. *See* Savage, *supra* note 8. Indeed, there is already early case evidence supporting this result. *See infra* Appendix A, year 2005 (demonstrating Kennedy to be the median jurist in the first year of the Roberts Court).

nent conservative center of gravity coincides with an overwhelmingly conservative set of federal courts of appeals. While this alone is important, it becomes all the more so when one other consideration is added. The historical evidence demonstrates that the Supreme Court has proved willing to relax rules governing access to the federal judiciary, and to the Court itself, when such rules threaten to undermine an aligned federal judiciary's power to press its emerging doctrinal mandate. This even rarer coincidence of judicial characteristics has happened only one prior time in the post–New Deal period, and that was during the Warren Court.

This Article's thesis is ironic: with respect to standing doctrine, which affects federal judicial access and the timing of doctrinal transformation, the Roberts Court is likely to resemble the Warren Court, the very Court whose historical legacy it seeks to counteract. Further core conservative appointments to the Roberts Court will place stress upon strict standing doctrines developed in the Burger and Rehnquist Courts, as the Supreme Court, working in alignment with the conservative lower federal judiciary, seeks to move substantive constitutional doctrine in its preferred ideological direction. Over time, an increasingly conservative Roberts Court will seek to relax the strictest features of standing doctrine to facilitate its broader doctrinal agenda.

To support this thesis, this Article presents two new sets of data. Adapting the Martin-Quinn scoring system,[12] the first data set tracks the ideological center of gravity and the stability of dominant coalition structures on the Supreme Court itself from 1937 through 2005. The second data set is the product of original research drawn from the Federal Judges Biographical Database, compiled by the Federal Judicial Center.[13] The newly constructed data set provides the party of presidential appointment of all federal circuit court judges, by circuit, from 1933 through 2006.[14] This Article transforms these data into a readily comparable form and presents them together in a chronological table for the entire period.[15] Based upon these data, the Article then correlates the two critical phenomena in the Supreme Court: the presence or absence of a stable coalition structure and the alignment of a dominant center of ideological gravity with the dominant ideology of the majority of the federal courts of appeals.

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12 *See infra* Table 3.

13 *See* Fed. Judicial Ctr., History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf (last visited Jan. 27, 2008).

14 *See infra* Appendix C.

15 *See infra* Table 3.

These new data are critical to evaluating the Roberts Court because they demonstrate the conditions under which the Supreme Court has historically transformed standing doctrine to control the conditions of developing constitutional doctrine. The data reveal that the Supreme Court has developed and strengthened standing doctrine to further its perceived doctrinal mandate under either of two sets of conditions, first when the Court has sought to control the lower federal courts whose ideological dominance is out of keeping with its own, and second, when the Court has suffered a loose internal coalition structure that has made it difficult to predict how combining the members' individual preferences will translate into developing constitutional doctrine. Placing the Roberts Court in a proper historical perspective, which tracks the Court's internal coalition structures and which accounts for the relationship between ideological dominance on the Supreme Court and that of the majority of the federal circuit courts, helps not only in assessing the significance of the Roberts and Alito appointments, but also of potential future appointments in affecting doctrinal change.

Given the provocative nature of this Article's thesis, a few observations are appropriate. First, for much of its history, standing has generally been viewed as a conservative judicial doctrine. The Supreme Court's most recent pronouncement on standing, *Massachusetts v. EPA*[16]—in which Justice Stevens, writing for a majority of five, granted Massachusetts standing to challenge the EPA's denial of a petition for rulemaking governing the emission of greenhouse gases[17]—is certainly consistent with this ideological view of standing doctrine. And yet, placing the doctrine in a longer historical perspective reveals the

16 127 S. Ct. 1438 (2007).

17 *Id.* at 1458. Justice Stevens developed the somewhat novel, if not altogether consistent, theory that Massachusetts' inability to regulate greenhouse gas emissions effectively on its own supported its claim to standing as a means of protecting its sovereign interests, *see id.* at 1454 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)), while simultaneously reasoning that the threat that greenhouse gas emissions would further erode the Commonwealth's coastal property bolstered its claim to standing, *see id.* Chief Justice Roberts and Justice Scalia, joining each other's opinions and joined by Justices Thomas and Alito, dissented. The Chief Justice emphasized the difficulties of ascribing Article III causation given the seemingly attenuated linkages between the EPA's failure to regulate carbon emissions on new automobiles and the specific erosion along the Massachusetts coastline. *See id.* at 1471 (Roberts, C.J., dissenting) (dubbing the case "*SCRAP* for a new generation"). Justice Scalia defended the Agency's reading of the Clean Air Act to exclude greenhouse gas emissions as a form of "air pollution" subject to its regulatory powers, and further defended the Agency's prudential decision to delay regulation in light of other federal initiatives targeting the reduction of greenhouse gases. *See id.* at 1473–74 (Scalia, J., dissenting).

limitation of casting standing in strict ideological terms. The New Deal Court developed standing as a means of insulating progressive regulatory reform from attack in a conservative lower federal judiciary that it feared was committed to obstructing progressivism based upon a recently discredited set of constitutional barriers.[18] Of course a doctrine's purpose can shift without ever having its original purpose, or ideological content, restored. To defend its claim, this Article assesses the historical functions that standing has served, and the conditions that have previously motivated the Supreme Court to transform standing doctrine.

Second, historical events could certainly overtake the predictive thesis on the future direction of standing doctrine, assuming for example that a Democrat is elected President in 2008. If Democratic control lasted only a single term, as occurred for example with the Carter administration,[19] such an election could interrupt, but not avert, eventual doctrinal change. Of course, this Article makes no predictions concerning future presidential elections. Moreover, while one further conservative appointment would undoubtedly strengthen the Court's conservative center of gravity, further conservative appointments might be needed before that majority appreciates the benefits of a relaxed standing doctrine. If, for example, Justice Scalia, perhaps joined by Chief Justice Roberts,[20] remains committed to a particular normative theory of standing developed in an earlier period, it is possible that they will continue to apply the doctrine strictly, even if relaxing it would further other doctrinal concerns.

Finally, it is important to emphasize that even aside from any predictions concerning the future direction of standing doctrine, this Article remains important for two independent reasons. First, the data and analysis presented here substantially corroborate the social choice account of standing doctrine, thus providing an important means of testing that theory against alternative standing analyses.[21]

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18 *See infra* Part I.B (providing a historical analysis of New Deal standing).

19 *See infra* Table 3, years 1977–80 (demonstrating that, while having no affect on the Supreme Court (Carter had no Supreme Court appointments), President Carter effected a temporary increase in Democratic controlled federal courts of appeals, which eventually were restored to the prior level of Republican control after Reagan assumed the presidency, specifically by the year 1986).

20 In his dissenting opinion in *Massachusetts v. EPA*, the Chief Justice expressed his continuing support for the formulation of standing expressed in Justice Scalia's controversial opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See Massachusetts*, 127 S. Ct. at 1463–64 (Roberts, C.J., dissenting) (citing *Lujan*, 504 U.S. at 560–61).

21 I have previously offered historical and doctrinal analyses that further corroborate this theoretical account of standing. *See* MAXWELL L. STEARNS, CONSTITUTIONAL

Second, the newly constructed data have potential applications for a broad range of inquiries concerning the historical relationship between the Supreme Court and the lower federal judiciary.[22]

This Article proceeds as follows. Part I provides an overview of standing doctrine. After explaining the theoretical underpinnings of standing, that Part will discuss the development of standing in the New Deal, the broadening of standing in the Warren Court, and the redeployment and strengthening of standing in the Burger and Rehnquist Courts. Part II will present the two new combined databases and explain the underlying methodology. It will then revisit the history of standing by tying the essential periods of historical development to the judicial phenomena revealed in the data. The data not only corroborate several arguments developed in Part I to explain standing, but also provide an essential framework for considering how future appointments on the Court are likely to alter existing standing rules in an effort to affect substantive constitutional doctrine. Part III will discuss the implications of the data for the emerging Roberts Court and how relaxing standing is likely to promote that Court's emerging doctrinal agenda. That Part then takes up potential objections to the arguments developed in this Article. The Article then briefly concludes.

PROCESS 215–301 (2000); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 348–404 (1995) [hereinafter Stearns, *Historical Evidence*]; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1320–29 (1995) [hereinafter Stearns, *Justiciability*].

22 These data, for example, could be used to study claims concerning the Supreme Court's changing docket size, including, but not limited to, the notable reduction in cases decided in recent years, *see* Erwin Chemerinsky, *A Look Back at the Rehnquist Era and an Overview of the 2004 Supreme Court Term*, 21 TOURO L. REV. 731, 733 (2006) (noting a fifty percent decline in docket during Rehnquist period); congressional expansions or contractions of Supreme Court review of various federal claims, including, for example, habeas petitions, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 28, 40, 42 U.S.C.); and the historical transition toward an increasingly discretionary Supreme Court docket, *see* Supreme Court Case Selections Act, Pub. L. No. 100-352, §§ 2(a)–(b), 3–4, 102 Stat. 662, 662–63 (1988) (codified at 28 U.S.C. §§ 1254, 1257 (2000)) (providing the Supreme Court with broader discretionary control over its docket).

I. A BRIEF HISTORY OF TIMING[23]

A. *The Conceptual Problem of Standing*

The standing doctrine is among the most controversial and written-about doctrines in all of United States constitutional law. Henry Monaghan once wrote that justiciability under Article III governs the "who" and "when" of federal court litigation.[24] As this subpart will demonstrate, the most important modern incarnation of Article III justiciability, namely standing, combines these inquiries, and others, into a general set of rules that govern how cases testing important questions of federal law are properly timed. Standing thus affects the circumstances under which litigants present claims that affect the most contentious and high profile bodies of substantive constitutional doctrine.

In the 1970s and 1980s, as standing became an increasingly prominent constraint on developing bodies of federal constitutional law, the doctrine remained the focus of sustained academic attention and criticism.[25] The 1990s witnessed a renewed assault on standing doctrine after the Rehnquist Court, for the first time, imposed its judicially crafted constitutional standing limitations on Congress itself.[26]

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23 With apologies to Nobel Laureate Stephen Hawking. *See* STEPHEN HAWKING, A BRIEF HISTORY OF TIME (1988).

24 Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973).

25 To take but one example, as Professor Gene Nichol has explained, "In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical." Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 68 (1984); *see also id.* at 68 n.3 (citing extensive literature critical of standing doctrine).

26 In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), Justice Scalia, writing for a majority, held that Congress lacked the power to confer citizen standing on persons whose injury was highly attenuated, meaning that it bore little correlation to an injury cognizable at common law, even though the Endangered Species Act, upon which the claimants relied, conferred standing upon citizens generally. *Id.* at 576. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Court later construed the same statute to confer standing upon two irrigation districts and two ranchers who sought to limit the statute's application to prevent land development where their claim did have a common law analogue, even though their claim was in tension with the overall thrust of the statute to preserve the habitats of endangered species. *See id.* at 161–66. More recently, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), Justice Ginsburg, writing for the majority, began to mark a retreat from the doctrine announced in *Lujan* and conferred standing to challenge emissions violations under the Clean Water Act even though the claimed injuries were arguably as attenuated as the rejected claims in *Lujan*, the violations did not produce any identifiable environmental harm, and, with one possible exception, the violations did not cause any direct harm to a claimant. *Id.* at 187; *see also infra* Part III.B.2 (discussing

In doing so, the Court called into question Congress' power to facilitate a regime of private attorneys general to complement agency enforcement of federal regulatory schemes, most notably in the area of environmental law.[27]

While standing doctrine has had pervasive effects on substantive constitutional doctrine, commentators have widely criticized standing for its seemingly inconsistent applications. A general wisdom concerning standing doctrine holds that every articulated rule comes equipped with its own unprincipled exceptions. Parties cannot enforce the rights of others,[28] except when they can.[29] Litigants cannot present diffuse claims,[30] unless they are allowed to.[31] Congress must strictly adhere to the Supreme Court's constitutional standing rules,[32] unless it is afforded some flexibility.[33] In general, jurists and commentators maintain that the pervasive inconsistencies in the application of standing doctrine overwhelmingly support claims to an

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the claimants' assertion of harm to property values). Not surprisingly, Justice Scalia, joined by Justice Thomas, dissented. *Laidlaw*, 528 U.S. at 198 (Scalia, J., dissenting).

27 For a discussion of the sustained academic criticism of *Lujan*, see Stearns, *Historical Evidence*, *supra* note 21, at 327 n.16.

28 *See* City of L.A. v. Lyons, 461 U.S. 95, 110 (1983) (denying standing to a one-time chokehold victim who was seeking to enjoin the Los Angeles Police Department practice to prevent harm to others when he himself had not been so detained); Gilmore v. Utah, 429 U.S. 1012, 1014–17 (1976) (Burger, C.J., concurring) (denying standing to a mother seeking to challenge her son's conviction and death sentence on various constitutional grounds).

29 *See* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 102–03 (1979) (conferring standing on housing testers who were not themselves seeking to secure housing).

30 *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227–28 (1974) (denying standing to prevent the seating of elected members of Congress who were serving in the military reserves allegedly in violation of the Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 170 (1974) (denying standing to compel the publication of the CIA budget under the Statements and Accounts Clause).

31 *See* United States v. Students Challenging Regulatory Agency Procedures (*SCRAP*), 412 U.S. 669, 685–90 (1973) (conferring standing upon students seeking to challenge the suspension of a railroad rate increase on the ground that the result threatened to compromise the environment in and around Washington, D.C.); Flast v. Cohen, 392 U.S. 83, 101–07 (1968) (conferring standing to challenge the tax-exempt status of a sectarian college due to a spending power nexus to claims associated with the Establishment Clause).

32 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–76 (1992) (denying standing under the Endangered Species Act where the plaintiffs did not satisfy the requirement of constitutional injury).

33 *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 187 (2000) (conferring standing under the Clean Water Act despite the attenuated nature of the injury in fact and redressability).

underlying political motivation that drives individual case results.[34] While legal scholars have relied upon large numbers of available cases to support such claims,[35] a brief review of some prominent standing decisions from the Burger and Rehnquist Court periods is sufficient to illustrate the claimed inconsistencies.

Let us begin with some prominent and controversial standing denials. In *City of Los Angeles v. Lyons*,[36] a one-time Los Angeles chokehold victim was denied standing to enjoin the Los Angeles Police Department from all future chokeholds, notwithstanding his claim that as a former chokehold victim, he had a good chance of being so held in the future.[37] In *Gilmore v. Utah*,[38] Gary Gilmore's mother was denied standing to challenge her son's conviction and death sentence based upon several claimed constitutional errors, even though absent her suit, her son, who was willing to rest on his claims, was certain to be executed.[39] In *Schlesinger v. Reservists Committee to Stop the War*,[40] a group of concerned citizens was denied standing[41] to challenge the seating of members of Congress who served in the military reserves allegedly in violation of the Constitution's Incompatibility Clause,[42] even though absent their suit, it appeared that no one had standing to raise the constitutional challenge.[43] In *Allen v. Wright*,[44] the parents of African American school children were denied standing to challenge an exception to an IRS tax policy that effectively granted tax-exempt status to private schools alleged to have engaged in various forms of racial discrimination where those schools fell under the umbrella of an already tax-exempt organization, despite the claim that the policy subsidized white flight from the public schools that the claimants' children attended to the allegedly discriminatory private schools in violation of equal protection.[45]

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34 *See* Stearns, *Justiciability*, *supra* note 21, at 1326 n.66 (discussing various scholarly works that claim that standing doctrine is motivated by the political desire to avoid hard cases or to issue preliminary assessments on the merits).

35 For a comprehensive review of the standing case law, see STEARNS, *supra* note 21, at 215–301, and Stearns, *Historical Evidence*, *supra* note 21, at 323–40.

36 461 U.S. 95 (1983).

37 *Id.* at 110.

38 429 U.S. 1012 (1976).

39 *Id.* at 1014–17 (Burger, C.J., concurring).

40 418 U.S. 208 (1974).

41 *Id.* at 227–28.

42 *See* U.S. CONST. art. I, § 6, cl. 2.

43 *See Schlesinger*, 418 U.S. at 235 (Douglas, J., dissenting).

44 468 U.S. 737 (1984).

45 *Id.* at 754.

In contrast, the Supreme Court granted standing in each of the following cases despite apparent conceptual difficulties respecting the claimants' injuries. In *Duke Power Co. v. Environmental Study Group, Inc.*,[46] the Court conferred standing upon property owners who sought to strike down a federal statutory liability limit for a proposed nuclear power plant to be built near their homes, even though they did not allege and could not prove that striking down the challenged provision would halt the plant's construction.[47] In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[48] the Court granted standing to a group of George Washington Law School students who alleged that the failure to suspend a railroad rate increase would cause harm to their enjoyment of natural resources in and around Washington, D.C., in violation of the National Environmental Policy Act, despite a peculiar and attenuated set of causal links between the claimed legal violation and the claimed injury.[49] In *Regents of the University of California v. Bakke*,[50] a white medical school applicant who challenged a state medical school's racial set-aside of sixteen out of one hundred seats was granted standing to present his equal protection challenge even though he did not allege, and could not prove, that he would have been admitted to the medical school in the absence of the challenged program.[51]

Standing doctrine is notable not only for such apparent doctrinal inconsistencies, but also because the animating purposes and form of standing doctrine have changed substantially over time. While the modern standing doctrine, as embodied in the case law in the Burger and Rehnquist Courts, combines constitutional and prudential elements, and more recently has limited Congress' power to confer standing,[52] the earlier doctrine developed in the New Deal Court comprised largely prudential constraints on judicial powers that Congress had the authority to strengthen or relax as it saw fit. Because this doctrinal transformation is central to this Article's main thesis with respect to the Roberts Court, we now trace the development of

46 438 U.S. 59 (1978).

47 *Id.* at 81.

48 412 U.S. 669 (1973).

49 *Id.* at 685–90.

50 438 U.S. 265 (1978).

51 *See id.* at 275–76, 281 n.14 (opinion of Powell, J.).

52 In *Lujan*, the Court extended its judicially constructed standing elements—injury in fact, causation, and redressability—to the question of congressional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). For a summary of the relevant cases, and the resulting inconsistencies, see sources cited *supra* note 26.

standing from the New Deal Court period through the Rehnquist Court.

B. Standing in the New Deal Court

Following a series of notable Supreme Court decisions in 1935 that thwarted his New Deal program,[53] President Franklin Delano Roosevelt proposed his infamous Court-packing plan.[54] This plan would have increased the size of the Court from nine to fifteen members by authorizing the President to appoint an additional Justice for every member over the age of seventy who remained on the Court.[55] The plan is generally credited for having motivated a change in the judicial direction the Court itself, and specifically for Justice Owen Roberts' "switch in time that saved nine."[56] This change in judicial direction ultimately thwarted the Court-packing plan itself.[57] By 1937, FDR no longer needed to change the size of the Court, however, to effect a profound change in its composition. Instead, during the course of his long administration, FDR ultimately replaced eight of

53 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 628–32 (1935) (preventing FDR from removing the commissioner of the independent Federal Trade Commission); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601–02 (1935) (striking down the National Industrial Recovery Act (NIRA) and the mortgage moratoria in the Frazier-Lemke Act).

54 For a more detailed discussion, see STEARNS, *supra* note 21, at 220–23.

55 *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 139–41 (15th ed. 2004); *see also* Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court?*, 57 ALB. L. REV. 1043, 1047 (1994) (describing the Court-packing plan).

56 Specifically, by providing the critical fifth vote to sustain a minimum wage law for women in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), Justice Roberts retreated from a seemingly indistinguishable vote cast one year earlier in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), thus signaling a new alliance that would treat progressive regulatory reform more favorably.

57 In addition to *West Coast Hotel*, the Court issued *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937) (rejecting a formalist interpretation of the Commerce Clause to permit congressional regulation of production). In this same period, the Court also abandoned its recently reified nondelegation doctrine. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935). While the Court had marked a consistent retreat from disallowing broad delegations earlier, it formally endorsed broad delegations in *Yakus v. United States*, 321 U.S. 414, 426 (1944). *See* J. Harvie Wilkinson, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1154 (1994) (discussing the abandonment of the nondelegation doctrine). During this period, the Court also announced the end of the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had allowed a conservative parallel federal common law to compete with the common law of the states. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938).

the nine seats, including replacing one seat twice.[58] Only Justice Roberts himself remained on the Court throughout the entirety of the FDR administration.[59]

This rapidly changing Court, and its corresponding change of doctrinal direction, motivated a set of rules that governed federal judicial access. While standing doctrine has long been associated with the Article III case or controversy requirement, more recently, Supreme Court historians have called this understanding into question.[60] An impressive cohort of legal scholars now identify Louis Brandeis and Felix Frankfurter as the architects of the modern standing doctrine, and link the rise of the progressive regulatory state to this important doctrinal innovation.[61] The emerging consensus on the historical origins of standing doctrine helps to clarify the form that New Deal standing took and the time frame during which it was developed.[62] At the same time, this explanation of the standing doctrine's historical origins introduces its own set of anomalies.

The emerging New Deal Court that FDR forged was characterized by a progressive judicial philosophy that came to operate in tension with legal doctrines favored by a dominant conservative lower federal judiciary.[63] The New Deal standing doctrine limited the power of the

58 *See infra* Appendix A (identifying all of the Supreme Court appointments for the relevant period in a chronological timeline).

59 *See infra* Appendix A.

60 *See generally* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1417–57 (1990).

61 Professor Winter's rather recent, and once revisionist, assertion that standing was developed in the New Deal period and was the brainchild of Felix Frankfurter and Louis Brandeis, *see id.* at 1441–52, has since become part of the canon of Constitutional Law. *See* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 333 n.48 (1992) (expressing surprise at the speed with which his once novel historical account has been "consigned to the general stock of conventional wisdom").

62 To be clear, the emerging consensus has invited a new counter-revisionism that seeks to ground standing doctrine in an earlier period. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 704–07 (2004) (arguing that the modern standing doctrine is not inconsistent with practices in the Founding period). Resolving this historical question is unnecessary for our immediate purposes. This Article's essential thesis holds whether we view the New Deal period as the point of origin for the standing doctrine, or instead as a period that renewed a once prorogued standing doctrine.

63 Table 3, for example, reveals that when FDR took office, all but one circuit were dominated by Republican appointed judges. *See infra* Table 3, year 1933. While this conservative majority was reduced over time, it persisted until nearly the end of his second administration. *See infra* Table 3, years 1933–39. Commentators have identified 1937 as a landmark year for the transformation of at least two important conservative constitutional doctrines. *See, e.g.*, Richard A. Epstein, *The Mistakes of*

lower federal courts to persistently challenge the Supreme Court's own rapidly changing set of substantive constitutional doctrines, most notably involving due process, the Commerce Clause, the nondelegation doctrine, and *Erie*. Collectively, these emerging liberal doctrines helped facilitate progressive federal and state regulatory intervention into a failing market economy.[64] The New Deal Court developed modern standing doctrine from an available metaphor imbedded within the earliest federal court cases. The metaphor, to "stand," conveyed the requirement that, to invoke a federal court's equitable powers, a litigant, or her representative, had to stand at the bar of the court.[65] The New Deal Court built upon this prudential limit on federal equitable power to construct a set of doctrines that combined to further an altogether different set of purposes. The new standing doctrine, which operated as a set of presumptive, or default, rules—rules that Congress was fully empowered to change—simultaneously protected Congress' progressive regulatory reform and newly developing substantive Supreme Court doctrines that insulated such reform

1937, 11 GEO. MASON L. REV., Winter 1988, at 5, 7–20 (discussing changes in Due Process and Commerce Clause doctrines). The data for 1937 reveal that the circuit courts continued to be heavily dominated by conservative judicial appointees. *See infra* Table 3, year 1937.

64 *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437 (1988) (observing that "courts favorably disposed toward the New Deal reformation developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention," and that "[s]uch doctrines were used enthusiastically by judges associated with the progressive movement and the New Deal, most prominently Justices Brandeis and Frankfurter, who reflected the prevailing belief that traditional conceptions of the rule of law were incompatible with administrative regulation").

65 *See generally* Winter, *supra* note 60, at 1382–83 (describing the conceptual origins of the standing metaphor). Then Professor (now federal appeals court judge) William Fletcher has observed that "[t]he 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." William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988). While linking modern standing doctrine to progressivism explains why early federal practice did not imbed modern justiciability norms, it nonetheless raises its own anomaly. This theory does not explain why the more conservative Burger and Rehnquist Courts, which were more skeptical of the benefits of the progressive regulatory state, entrenched, and indeed constitutionalized, standing, rather than cutting it back. *See* Stearns, *Justiciability*, *supra* note 21, at 1323. The social choice model of standing helps resolve this question by linking the more modern doctrinal form that standing has taken to the difficulty that these later Courts had in anticipating their own abilities to process collective preferences into predictable doctrinal outputs. *See generally* sources cited *supra* note 21.

from attack in federal courts of law. The standing doctrine, in particular, insulated the Supreme Court's newly developing constitutional doctrine from the risk of repeated challenges in conservative lower federal courts.

Under the New Deal standing doctrine, Congress retained the power to confer or deny standing in specific statutes as it saw fit.[66] The doctrinal innovation involved handling standing in the absence of any statutory directive. Under the New Deal Court's standing doctrine, absent federal statutory guidance, claimed injuries with an analogue in the common law of contract, property, or tort were presumed justiciable, while other claimed injuries were presumed nonjusticiable.[67] This novel standing doctrine effectively limited the power to challenge the emerging regulatory state, which created harms that were not necessarily or invariably correlated with common law understandings of injury. And it did so without having to revisit the merits of adverse lower court holdings concerning newly developing constitutional doctrine that facilitated a progressive regulatory agenda.

C. Standing in the Warren Court

The circumstances that gave rise to the Warren Court were certainly more fortuitous than the somewhat blunt use—or at least

66 For statutory illustrations, see, for example, Communications Act of 1934, 47 U.S.C. § 402(b)(6) (2000) (conferring standing upon "any . . . person . . . aggrieved or whose interests are adversely affected by any order of the [Federal Communications] Commission"); Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 8, 9 (repealed 1957) (precluding veterans from challenging agency denials of benefits in federal court). For a discussion of the presumptive nature of New Deal standing rules, which linked justiciability to whether the claimed injury found an analogue in the common law of tort, contract, or property, but which allowed Congress to change its standing presumptions, see Fletcher, *supra* note 65, at 226–27 & nn. 34–39.

67 *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940) (granting standing to evaluate a claimed injury that the Commission was not legally obligated to consider); Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137–47 (1939) (denying standing to challenge the TVA's regulatory conduct where the plaintiff did not claim a legal right grounded in property, contract, or tort); Ala. Power Co. v. Ickes, 302 U.S. 464, 480 (1938) (denying standing to challenge federal loans and grants to competing municipal utilities and holding that the plaintiff had no right to be immune from lawful municipal competition). For a later decision from the Vinson Court era that follows the same general approach, see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (linking the standing inquiry to infringement of comparable common law injury). For an informative article that reviews this historical period, see Fletcher, *supra* note 65, at 225–27.

threat—of political force that gave rise to the New Deal Court.[68] In 1952, fifteen years after the landmark year 1937, which witnessed a dramatic turnabout in longstanding Supreme Court doctrines,[69] the newly elected Republican President, Dwight D. Eisenhower, declared his intent to appoint Justices whose mission would be to restore the Supreme Court to a more modest role. Although Eisenhower ultimately appointed five Justices during his two term administration,[70] historical events undermined his efforts and instead produced a strikingly contrary result.[71] Two of President Eisenhower's five Supreme Court appointments, the new Chief Justice, Earl Warren (replacing Vinson), and Associate Justice William Brennan (replacing Minton), provided the political and intellectual leadership for what became a second liberal Supreme Court revolution. And yet, while both the New Deal and Warren Courts are each rightly characterized as liberal, contrasting their doctrinal agendas reveals the inherent limitation of relying upon simple ideological labels to capture evolving judicial norms. The liberal transformation from New Deal progressivism to an emerging judicially enforceable, rights-driven jurisprudence proved dramatic not only for developing doctrine, but also for the ground rules governing the processes through which such doctrine is made.

By the end of the Eisenhower administration, holdovers appointed by FDR and Truman joined the recently appointed Chief Justice Warren and Associate Justice Brennan to forge a new dominant liberal bloc. This emerging bloc effectively transformed an era of progressive judicial restraint into one of new liberal judicial activism. The liberal Warren Court bloc was reinforced with further

68 For a more detailed discussion, see STEARNS, *supra* note 21, at 373 nn.49–50, and sources cited therein.

69 *See* sources cited *supra* notes 56–57.

70 In addition to appointing Earl Warren and William Brennan, discussed in the text, Eisenhower appointed John M. Harlan (replacing Jackson), Charles E. Whittaker (replacing Reed), and Potter Stewart (replacing Burton). For a timeline of Supreme Court appointments, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW, at lxxxii–xcii (5th ed. 2005); *see also infra* Appendix A (charting the composition of the Supreme Court and the Martin-Quinn score of each Justice from 1937–2005).

71 The Earl Warren appointment was the result of a political compromise that secured Eisenhower the Republican nomination in 1952 against Warren, who had been a competing candidate. *See* STEARNS, *supra* note 21, at 231. Eisenhower promised the first Supreme Court vacancy to Warren, not anticipating (and hoping to avoid) the result that the vacancy was for Chief Justice. *See id.* For an informative discussion, see RICHARD HODDER-WILLIAMS, THE POLITICS OF THE US SUPREME COURT 27–33 (1980). For a discussion of the Brennan appointment, see Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515 (1994–1995).

appointments during the Kennedy and Johnson administrations and lasted into the Nixon administration.

The Warren Court is most well known for innovative substantive doctrines involving the First Amendment, constitutional criminal procedure, and individual rights.[72] The justiciability doctrines developed to protect the power of Congress and state legislatures to enact progressive regulatory reforms threatened to inhibit new constitutional claims that did not depend upon legislative enactment. Instead, the emerging Warren Court jurisprudence turned on novel judicial constructions of open-ended constitutional clauses, including most notably the Due Process and Equal Protection Clauses. Standing doctrines that presumptively restricted entry to the federal courts in the absence of an injury with an analogue to those cognizable at common law threatened to thwart, rather than to further, this new liberal rights-driven agenda. As a result, the Warren Court was motivated to relax—and specifically to broaden—the once-restrictive standing rules. Because the Warren Court's liberal jurisprudence rested on a significant expansion of judicially recognized rights, it also required more open access to the federal judiciary.

While most widely known for developing liberal bodies of substantive constitutional law, the Warren Court is also known for having broadened standing and justiciability more generally. In the 1962 decision, *Baker v. Carr*,[73] the Warren Court effectively reversed long-standing precedent, dating to the landmark 1849 decision, *Luther v. Borden*,[74] which had held that a federal court challenge to the claimed lawful state government in Rhode Island is nonjusticiable under the clause that guarantees "a Republican Form of Government."[75] While the merits of the *Luther* decision are debated—as is whether the original holding supports the broad doctrine ascribed to it[76]—for decades the Court read *Luther* to bar as nonjusticiable claims that would have allowed a federal court to entertain virtually any challenge to state lawmaking procedures on grounds that they do not satisfy the require-

72 *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 432–33 (1998) (discussing the Warren Court's legacy).

73 369 U.S. 186 (1962).

74 48 U.S. (7 How.) 1 (1849).

75 U.S. CONST. art. VI, § 4; *see Luther*, 48 U.S. (7 How.) at 46–47.

76 *See* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1193–95 (2002) (discussing the history of *Luther* and concluding that "[t]he Court did not hold that all complaints under the Guarantee Clause raised political questions").

ments of the Guarantee Clause.[77] Most notably, the Court extended this to bar, among other claims, challenges to state apportionment formulas on the ground that these claims presented nonjusticiable political questions.[78] In *Baker*, the Warren Court marked a peculiar retreat that honored *Luther* in the breach. Specifically, Justice Brennan, writing for a majority, reasoned that while the political question doctrine continued to bar challenges to historical reapportionment formulas that disadvantaged voters in densely populated districts when the claim was premised upon the Guarantee Clause, it did not bar such challenges resting instead on equal protection.[79] In addition, on the specific question of standing, the *Baker* Court determined that the disadvantaged voters had standing to press their equal protection challenge.[80]

In 1965, the Warren Court issued the famous decision *Griswold v. Connecticut*.[81] The *Griswold* case is most famous for holding that the State of Connecticut could not bar access to contraceptives for married couples without violating the newly propounded right of privacy.[82] The privacy right was later transformed from protecting the physical aspects of marital intimacy to protecting intimate decision-making in matters respecting procreation,[83] thus forming the basis for the right to abort.[84] *Griswold* is also important, however, for its liberal holding respecting third party standing. The *Griswold* Court held that because the married couple might be less effective in pressing their own privacy claim, their physician had standing as an accessory to the

77 *See id.* at 1194–95.

78 *See id.* at 1195 (observing that *Luther* and its progeny "eventually metamorphosed into a full-blown ban on Republican Form of Government claims beginning in 1912"). To be clear, the political question doctrine and standing doctrine form separate, yet overlapping, considerations. The point here is not to equate the two, but rather to show that the Warren Court relaxed both doctrines as a means of increasing federal judicial access with respect to claims that were in furtherance of its rights-driven agenda—in this instance, the right to have one's vote afforded proper weight. *See id.* at 1194.

79 *See* Baker v. Carr, 369 U.S. 186, 226–29 (1962).

80 *See id.* at 206.

81 381 U.S. 479 (1965).

82 *See id.* at 485–86.

83 In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court applied equal protection principles to extend the *Griswold* holding to cover access to contraceptives by nonmarried couples. *See id.* at 453–55.

84 *See* Roe v. Wade, 410 U.S. 113, 153–54 (1973).

underlying offense in providing them with contraceptives to raise that claim on their behalf.[85]

And, in 1968, the Warren Court issued the famous standing decision *Flast v. Cohen*.[86] In *Flast*, the Supreme Court distinguished the 1923 decision, *Frothingham v. Mellon*,[87] which had prevented a claimant from invoking federal equitable powers to enjoin enforcement of the Maternity Act of 1921, based upon a claim that enforcement would unconstitutionally expend federal tax dollars.[88] The *Flast* majority distinguished *Frothingham* and granted standing to a taxpayer who challenged the expenditure of federal funds to a religious organization based upon the peculiar nexus between citizen taxpayer status and a claimed violation of the Establishment Clause.[89]

Finally, consider *Trafficante v. Metropolitan Life Insurance Co.*[90] While *Trafficante* was decided in the early part of the Burger Court, this unusual unanimous decision is largely consistent with the more expansive Warren Court justiciability jurisprudence. In *Trafficante*, the Supreme Court relied upon the Civil Rights Act of 1968,[91] a federal statute, to confer standing upon two residents of a housing complex, one black and one white, suing as private attorneys general.[92] The Court observed that under the statute even "those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered."[93] In one of the most expansive assertions concerning statutory standing, Justice Thurgood Marshall relied upon *Trafficante* one year later, in *Linda R.S. v. Richard D.*,[94] for the following proposition: "But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[95]

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85 *Griswold*, 381 U.S. at 481 ("The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.").

86 392 U.S. 83 (1968).

87 262 U.S. 447 (1923).

88 *See id.* at 486–89.

89 *See Flast*, 392 U.S. at 104–06. The Court later retreated from the broad *Flast* standing analysis in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 488–90 (1982).

90 409 U.S. 205 (1972).

91 Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, 42 U.S.C.).

92 *Trafficante*, 409 U.S. at 206–07, 210–12.

93 *Id.* at 210.

94 410 U.S. 614 (1973).

95 *Id.* at 617 n.3 (citing *Trafficante*, 409 U.S. at 212 (White, J., concurring)). While we will next consider standing in the Burger and Rehnquist Courts, it is worth

D. Standing in the Burger and Rehnquist Courts

While President Nixon's four Supreme Court appointments did not emerge as consistently conservative picks, on balance, they moved the Court in a more conservative direction. Nixon appointed Chief Justice Warren Burger (replacing Earl Warren) and Associate Justices William Rehnquist (replacing John Harlan), Lewis Powell (replacing Hugo Black), and Harry Blackmun (replacing Abe Fortas).[96] In part as a result of the appointments themselves—Harry Blackmun moved

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noting here that as part of the Rehnquist Court's standing jurisprudence, it imposed stringent limits on Congress' power to confer standing upon private attorneys general. Thus, in *Lujan*, Justice Scalia, writing for a narrow majority, insisted that claimants who rely upon federal statutes conferring standing must still demonstrate the constitutional prerequisites of injury in fact, causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The *Lujan* Court went on to state that "[n]othing in this contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Id.* at 578 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)). The Court further stated:

> Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community), and injury to a company's interest in marketing its product free from competition. As we said in *Sierra Club*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from *abandoning* the requirement that the party seeking review must himself have suffered an injury."

Id. (final emphasis added) (alterations in original) (citations omitted) (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)). Commentators generally regard *Lujan* as working a fundamental transformation in the power of Congress to define new injuries and to allow private attorneys general to pursue claims based upon those injuries in federal court. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan *? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 209–15 (1992).

96 *See infra* Appendix A. This Appendix identifies all appointments in a chronological timeline. Because the discussion to follow requires an analysis of the relationships between coalitions on the Burger and Rehnquist Courts, this subpart will include a discussion of data presented more formally in Appendix A. References to data taken from this Appendix will include the relevant column numbers (or Chief where appropriate) and years. Unless otherwise specified, the remaining descriptions in this subpart will follow the scoring system developed in Part II.B. Under this system, scores lower than -0.75 are liberal, scores between -0.75 through 0.75 are moderate, and scores higher than 0.75 are conservative. For a more detailed description of this scoring system and how it relates to the original scoring system developed by Andrew Martin and Kevin Quinn (the "Martin-Quinn scoring system"), see *infra* Part II.B. In addition, where helpful, references will contrast the original Martin-Quinn formulation with the modified presentation developed in Part II.B.

to the Court's liberal wing,[97] and Lewis Powell emerged as the often controlling moderate conservative[98]—the Burger Court approached doctrinal change in fits and starts. While the Court nibbled at the edges of liberal Warren Court precedents, it was not able to move doctrine in a predictably more conservative direction.[99] And indeed, as suggested in the discussion of *Trafficante*,[100] some early Burger Court cases are most easily understood as continuing the Warren Court legacy.[101]

President Ford appointed John Paul Stevens, who, although starting out as a moderate, emerged by the late 1980s as a solid member of the Court's liberal wing.[102] The Carter administration made no Supreme Court appointments.[103] President Reagan's four appointments had a similarly mixed legacy. Reagan elevated Associate Justice Rehnquist to Chief Justice (replacing Burger),[104] appointed Associate Justices Sandra Day O'Connor (replacing Potter Stewart and emerg-

97 *See infra* Appendix A, column 3, years 1970–93. Based upon the newly developed scoring system, *see supra* note 96, Blackmun ranked conservative from 1970–75, moderate from 1976–84, and liberal from 1985–93.

98 *See infra* Appendix A, column 2, years 1971–86 (demonstrating that Powell was conservative from 1971–75, moderate from 1976–77, conservative from 1978–83, moderate in 1984, conservative in 1985, moderate in 1986; thus clearly justifying the description "moderate conservative").

99 *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 12 (1994) (offering a consistent description of the Burger Court); STEARNS, *supra* note 21, at 235 (providing illustrations of hybrid Burger Court decisions). *See generally* THE BURGER COURT (Vincent Blasi ed., 1983) (discussing the Burger Court's treatment of First Amendment, individual rights, and economic issues and comparing those analyses with the Warren Court's jurisprudence).

100 *See supra* notes 90–95 and accompanying text.

101 In addition to the standing cases, consider *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (extending the right to use contraceptives to unmarried couples based upon equal protection), and *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (finding a fundamental right to terminate a pregnancy), which extended the famous Warren Court decision, *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating a Connecticut statute criminalizing the use of contraceptives by married couples based upon right to marital privacy).

102 *See infra* Appendix A, column 5, years 1975–2005. The data demonstrate that Stevens initially began voting liberal according to the Martin-Quinn scoring system beginning in 1976, but voted moderate using this Article's scoring system from 1976 through 1988. Thereafter, he voted consistently liberal under both systems.

103 *See infra* Appendix A, years 1977–80.

104 During his tenure as Chief, Rehnquist remained conservative, as he had been while Associate Justice, *see infra* Appendix A, column 8, years 1971–85, but over time staked out a less extreme conservative position, *see infra* Appendix A, Chief column, years 1986–2004.

ing as a moderate conservative),[105] Antonin Scalia (replacing Rehnquist upon his elevation to Chief Justice and emerging as a dominant force on the conservative wing),[106] and Anthony Kennedy (replacing Lewis Powell and joining O'Connor as a moderate conservative).[107] The first President Bush made two appointments, Associate Justice David Souter (replacing William Brennan, and also moving toward the liberal wing)[108] and Clarence Thomas (replacing Thurgood Marshall and joining the Court's conservative wing).[109]

Finally, President Clinton appointed Associate Justices Ruth Bader Ginsburg (replacing Byron White and joining the liberal wing)[110] and Stephen Breyer (replacing Harry Blackmun and joining the liberal wing).[111] The cumulative effect of these appointments, which ended when Breyer joined the Court in 1994 and which left the

105 *See infra* Appendix A, column 9, years 1981–2004. The data reveal that O'Connor voted conservative for years 1981–90, moderate from 1991–92, conservative in 1993, moderate from 1994–95, conservative from 1996–97, and moderate from 1998–2004. As with Justice Powell, *see supra* note 98, and Justice Kennedy, *see infra* note 107, the data amply support describing Justice O'Connor as a moderate conservative.

106 *See infra* Appendix A, column 8, years 1986–2004. The data reveal that Scalia began, and has remained, a solid conservative throughout his Supreme Court career, and the Martin-Quinn scores additionally reveal that his degree of conservatism has generally increased steadily over time.

107 President Reagan appointed Justice Kennedy following the failed nominations of Robert Bork and Douglas Ginsburg. George J. Church, *Far More Judicious*, TIME, Nov. 23, 1987, at 16, 16. For Justice Kennedy's ideological record, see *infra* Appendix A, column 2, 1987–2005. The data reveal that Kennedy was a conservative from 1987–90, a moderate in 1991, a conservative in 1992, a moderate from 1993–98, a conservative from 1999–2002, and a moderate from 2003–05. Once again, Justice Kennedy is aptly described as a moderate conservative. *See supra* note 98 (describing Justice Powell as moderate conservative); *see also supra* note 105 (describing Justice O'Connor as moderate conservative).

108 *See infra* Appendix A, column 4, years 1990–2005. Justice Souter voted as a conservative in 1990, as a moderate from 1991–96, and as a liberal beginning in 1997. It is notable that under the Martin-Quinn scoring system Souter's liberal scores have steadily risen throughout his career.

109 *See infra* Appendix A, column 6, years 1991–2005. Justice Thomas voted as a conservative throughout his career and, using the Martin-Quinn scoring system, has a notably stronger conservative score than does Justice Scalia, *see infra* Appendix A, column 8, years 1991–2005, for every year that both have served on the Supreme Court.

110 *See infra* Appendix A, column 7, years 1993–2005. Ginsburg voted as a moderate from 1993–95, and as a liberal, with an increasing liberal score under the Martin-Quinn index, every year thereafter.

111 *See infra* Appendix A, column 3, years 1994–2005. Justice Breyer voted as a moderate from 1994–95, and as a liberal, with relatively more consistent scores under the Martin-Quinn index as compared with Justice Ginsburg for the same period, *see infra* Appendix A, column 7, years 1994–2005.

Court unchanged for eleven years until John Roberts became Chief Justice in October 2005, created a Court with seven Republican appointees and two Democratic appointees. And yet the historical record reveals that the party of presidential appointment is of only limited value in capturing probable ideological positioning of individual Justices over time once they have joined the Court.[112]

The most notable characteristic of the Supreme Court during the Burger and Rehnquist periods is the emergence of three persistent, but nondominant blocs.[113] Unlike the Warren Court in which the liberal bloc was generally dominant for an extended period, the Burger and Rehnquist Courts were characterized by less predicable alliances that often defied expectations, as the liberals, moderates, and conservatives grappled with doctrines that sometimes tested old—and sometimes forged new—alliances.[114]

As a result of the new coalition structures within the Supreme Court itself, the Burger and Rehnquist Courts redeployed standing to further a different set of purposes than those motivating the establishment of New Deal standing or than those motivating the broadening of standing in the Warren Court. The Burger and Rehnquist Courts redeployed standing to limit the power of ideologically motivated litigants to favorably order cases during a period in which the Court's loose internal coalition structures rendered substantive constitutional doctrine increasingly dependent upon the order of case presenta-

112 For an article evaluating Martin-Quinn scores to assess presidential appointment strategies resulting from the prospect of ideological drift, see Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891 (2007). Professor Farnsworth questions the significance of findings of ideological drift in light of, among other concerns, presidential expectations based upon the appointee's prior experience and strategic considerations at the time of the appointments themselves. *See id.* at 1900–03. Resolving these important questions is not necessary to this Article's thesis. The purpose of Table 3, *infra*, which relies upon the Martin-Quinn scores, is not to assess the ideological positioning of individual jurists over time, which the authors refer to as drift, but rather to assess the stability of ideological coalitions within the Supreme Court and to compare the Court's ideological center of gravity with that of the federal courts of appeals in particular historical periods.

113 It is worth noting the essentially consistent results that emerge from comparing the newly developed ideological scoring system applied to particular Justices in this subpart, and discussed more fully in Part II.B., with the categorizations of individual Justices, based upon general ideological reputation and case analysis, in STEARNS, *supra* note 21, at 236 tbl. 5.1. For a discussion based upon the data developed in Table 3, see *infra* Part I.D.4.

114 *See generally* STEARNS, *supra* note 21, at 234–44 (discussing the various unpredictable alignments of Justices that emerged on the Burger and Rehnquist Courts in the context of social choice theory).

tions.[115] To further these objectives, these emerging conservative Courts gave the standing doctrine, along with the related justiciability doctrines, ripeness and mootness, a constitutional cast that included borrowed and adapted common law tort elements of injury in fact, causation, and redressability, to further a very different set of objectives.[116] A proper historical perspective thus demonstrates that, from its inception in the New Deal Court, the standing doctrine has evolved as a fluid response to changing dynamics affecting the Supreme Court's ability to further its emerging doctrinal mandate.[117] In the Burger and Rehnquist periods, in contrast, the Court transformed standing into a set of rules that disciplined its own docket, along with those of the lower federal courts, at a time when the Court itself faced unique difficulties in transforming the doctrinal preferences of its members into predictable and coherent opinions and doctrines.[118]

We have already reviewed some prominent standing decisions from this historical period.[119] Reconsidering two Burger Court standing cases will help to illustrate some of the conceptual difficulties that conventional analyses have confronted in grappling with this impor-

115 For a more thorough development of this thesis, see *id.* at 249–301; *see also infra* Part I.D (discussing the development of the Burger and Rehnquist Courts' restrictive standing requirements and explaining those requirements as a means of raising barriers to litigant path manipulation).

116 *See* STEARNS, *supra* note 21, at 166–70 (discussing standing elements drawn from tort).

117 To be clear, like Congress, the Supreme Court is a "they," not an "it." *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 240–49 (1992). As a result, the notion of a perceived doctrinal mission characterizes the combined understanding of an emerging dominant bloc of Court members, rather than that of any individual member or of the institution as a whole. Indeed, appreciating that institutions operate through the interests of their members is a central insight of public choice. *See* MAXWELL L. STEARNS & TODD ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (forthcoming 2008) (manuscript ch. 1). The essential argument developed in the text is simply that as a dominant Supreme Court coalition emerges, either as a result of a series of carefully planned presidential appointments, or through a combination of more fortuitous events, the emerging dominant coalition often perceives a set of doctrinal mandates. *See id.* These mandates, which are motivated by perceptions that existing doctrines are problematic, then motivate the dominant coalition to reconceive related rules, like standing and justiciability, which affect the Court's ability to bring about substantive doctrinal change.

118 For a discussion of the necessary complementarity of standing and certiorari, which demonstrates why docket control is alone insufficient to further the goal of preventing litigant path manipulation, see STEARNS, *supra* note 21, at 194–97, explaining the ability to effectively force certiorari through manufactured circuit splits absent the combination of docket control and standing.

119 *See supra* notes 36–51 and accompanying text.

tant doctrine. A simple doctrinal analysis reveals that flipping the analytical paradigms used to assess standing in *Bakke* and in *Allen* would have produced opposite results in each case. Applying the doctrinal framework used to grant standing to Mr. Bakke on the *Allen* facts would have resulted in granting standing to the *Allen* plaintiffs, while applying the doctrinal framework used to deny to the *Allen* claimants on the *Bakke* facts would have resulted in denying standing to Bakke. This seeming malleability of analytical frameworks merely serves to reinforce political accounts of standing doctrine even though a more careful analysis of these and other standing cases demonstrates such explanations to be nonrobust.[120] Exploring the limitations of the political account, however, helps to explain the important role of standing doctrine in controlling the timing of developing Supreme Court doctrine.

Justice O'Connor, writing for the *Allen* Court, denied standing on the ground that the injury to the claimants' children, who attended public schools, was analytically attenuated from the challenged IRS tax policy.[121] Because the claimants' children had not applied to or been denied admission to the schools alleged to have engaged in discriminatory practices, any benefit that the claimants' children would receive from striking the policy depended upon: (1) the number of schools receiving tax-exempt status; (2) the effect of withdrawing tax-exempt status on any particular school's policies respecting race; (3) the decisions of parents concerning where to place their children as a result of a potential change in school racial policies or based upon the financial implications of maintaining prior policies; and (4) the possibility that a sufficient number of parents and schools would change their placement decisions or racial policies to have any discernible effect on public school enrollment at the schools that those children attended.[122]

In contrast, in *Bakke*, the Court employed an alternative analytical framework that resulted in finding that the claimant had suffered a justiciable injury for purposes of standing. Writing an opinion that expressed the Court's judgment, parts of which no other Justices joined,[123] Justice Powell reasoned that even though it was quite possible that Bakke would not have been admitted in the absence of the

120 For a broader presentation that demonstrates the robust nature of the social choice account briefly summarized here, see *supra* note 21 and the citations therein.

121 *See* Allen v. Wright, 468 U.S. 737, 756–57, 766 (1984).

122 *See id.* at 758.

123 For a discussion that analyzes Justice Powell's *Bakke* opinion, see Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961–73, 1076–78 (2005).

race-based affirmative action program, Bakke nonetheless suffered a justiciable injury for purposes of standing as a result of his inability to compete for all 100 seats without regard to his race.[124]

The *Allen* claimants alleged that the challenged IRS policy effectively prevented the markets for public and private school education from sorting in a manner that would afford their children a better opportunity for an integrated public school education, one unimpeded by allegedly unconstitutional federally subsidized white flight.[125] The *Allen* Court instead denied standing on the ground that the causal linkage between the challenged law and the ultimate benefit of an integrated education rendered the claimed injury attenuated.[126] While the *Allen* Court identified no fewer than four links in the chain of causation from injury to redress,[127] an equal number of theoretical hurdles stood between the challenged affirmative action program in *Bakke* and Bakke's ultimate objective of admission to medical school. In spite of that, the *Bakke* Court conferred standing on the ground that the Board of Regents had failed to afford Bakke a fair opportunity to compete.[128]

Flipping the analyses to achieve opposite results is now an easy task. Defining the *Allen* injury as an opportunity injury—without regard to the result, claimants sought only an opportunity for an integrated public education that was unencumbered by the allegedly unconstitutional IRS policy—would result in conferring standing. Conversely, defining the *Bakke* injury as one for ultimate admission exposes a comparably problematic number of causal linkages: (1) whether U.C. Davis would substitute some other, less vulnerable, program in place of the racial set-aside; (2) whether any new policy would affect the outcomes for particular minority and nonminority applicants at U.C. Davis; (3) whether the changed policy would encourage more highly qualified nonminority applicants to apply to U.C. Davis; and (4) whether the altered pool of all applicants at U.C. Davis and other medical schools would affect Bakke's ultimate prospect for admission to U.C. Davis. Consistent with *Allen*, defining the *Bakke* injury as a claim for ultimate relief in the form of admission—one

124 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 (1978) (opinion of Powell, J.).

125 *See Allen*, 468 U.S. at 743–44.

126 *See id.* at 757–59.

127 *See id.* at 758.

128 *See Bakke*, 438 U.S. at 280 n.14 (opinion of Powell, J.).

unimpeded by these or other causal theoretical impediments to ultimate relief[129]—would result in denying standing.

Such examples of doctrinal inconsistency would be less problematic but for standing doctrine's pervasive influence over entire bodies of high profile substantive constitutional doctrine. In addition to equal protection, the subject of the immediately preceding cases, standing has shaped doctrinal developments in such wide ranging areas as the right of privacy,[130] the First Amendment,[131] constitutional criminal procedure,[132] and environmental law.[133] This list is not exhaustive. To understand how the Supreme Court uses its timing-based justiciability doctrines to affect the development of substantive doctrine, we must now consider an alternative social choice account of standing doctrine.

1. A Social Choice Account of Standing in the Burger and Rehnquist Courts

What follows is a very different conception of standing than the critical assessments that have dominated the literature.[134] The following analysis, grounded in the theory of social choice, offers a robust account that reconciles most, if not all, of the claimed inconsistencies among doctrines and cases, and thus provides a necessary foundation for the analysis to follow. The description that follows will build upon the analyses of standing in the prior subparts. That analysis explained (1) how the ideological divergence between the New Deal Court and the federal courts of appeals motivated the creation of standing as a set of default rules, and (2) how the Warren Court's ideological realignment with the circuit courts and its need for broader judicial

129 *See* STEARNS, *supra* note 21, at 33–34 (positing six potential links in the chain of causation).

130 *See* Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (providing standing to a physician, as an accessory in the distribution of contraceptives, to raise patients' privacy claim).

131 Others have noted the analytical relationship between First Amendment chilling and overbreadth doctrines and standing. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 261 (1994).

132 *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 404–09 (1991) (allowing a juror, excluded on the grounds of race, standing to raise a challenge under Batson v. Kentucky, 476 U.S. 79 (1986), on behalf of a white criminal defendant); *see also* Campbell v. Louisiana, 523 U.S. 392, 398 (1998) (same as applied to the racially motivated exclusion of a prospective grand jury foreman).

133 For a general discussion, see Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321 (2001).

134 For a discussion of that critical literature, see Stearns, *Justiciability*, *supra* note 21, at 1326–27 & n.66.

access to facilitate a rights-driven jurisprudence motivated a more relaxed standing doctrine. We will now consider how the loose coalition structures that came to characterize the Burger and Rehnquist Courts motivated yet another critical transformation in standing doctrine, this time resulting in not merely reestablishing the prudential limitations of standing, but also in establishing constitutional prerequisites to standing that the Supreme Court eventually imposed even on Congress itself.

The social choice account not only reconciles seemingly inconsistent doctrine, but also provides standing with an important normative foundation. This is ultimately rooted in fundamental aspects of separation of powers and thus the legitimacy of the processes through which constitutional doctrine is created. The analysis reveals that standing doctrine is conceptually linked to another important doctrine, namely, stare decisis or precedent. While precedent arises at numerous levels within our pyramidal judicial system, standing doctrine is conceptually linked to horizontal stare decisis, meaning the Supreme Court's self-imposed presumptive obligation to adhere to its previously announced rulings.[135]

The social choice model of standing explains horizontal stare decisis as a partial, or presumptive, solution to the potential doctrinal instability that would otherwise result from a Court whose members' preferences possess imbedded cycles.[136] At the same time, it also identifies an important practical difficulty that arises as a consequence of using presumptive horizontal stare decisis as a means of stabilizing doctrine. While stare decisis limits the formalization of cyclical doctrine at least for finite periods and under specified conditions—ones that find reflection in actual Supreme Court cases[137]—it also has the potential to ground substantive doctrine in the order in which cases are presented for review. Case orderings thus affect not only the relative timing of case resolutions, but also, and more problematically, the substantive doctrine that develops as cases are resolved. With modest assumptions based upon actual Supreme Court cases, it is possible to demonstrate that case *A* followed by case *B* produces opposite results from case *B* followed by case *A*.

Social choice analysis thus demonstrates that in a presumptive horizontal stare decisis regime, the substantive evolution of legal doc-

135 Although stare decisis is not an inexorable command, the Supreme Court presumptively adheres to its own earlier decisions. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–69 (1992) (discussing stare decisis and applying the doctrine to Roe v. Wade, 410 U.S. 113 (1973)).

136 For a discussion of cycling, see *infra* note 152.

137 *See infra* Part I.D.2.

trine is potentially path dependent. Path dependence means that substantive outcomes, here of case law, depend at least in part upon the order, or path, in which cases are presented and decided. In a precedent-based system, legal doctrine is at least theoretically subject to a fortuitous determinant, namely, the relative timing of cases, a factor that has no apparent normative significance to how any particular legal dispute should be resolved or to the precedent that any given case should be relied upon to establish.[138] Social choice analysis thus reveals an inevitable tradeoff confronting any legal system. To purchase doctrinal stability, a legal system must rely at least presumptively upon precedent. Precedent invites the risk that the fortuity of path dependence will affect substantive developing legal doctrine. In contrast, to purchase fully independent resolutions of the merits of each legal dispute, and thus to avoid any path dependent influence on developing substantive doctrine, a legal system must reject the presumptive obligation of precedent. In doing so, however, the legal system would invite the risk of a less stable, and thus less reliable, doctrine.

While path dependence raises a conceptual problem for the seeming legitimacy of emerging doctrine, a more nuanced social choice analysis reveals that legitimacy is restored provided that the critical path of case law is determined by rules grounded in normatively defensible criteria. If indeed there is a pathology that pervades a precedent-driven legal regime like that in the United States, it is not the fortuity of grounding substantive outcomes in the order in which cases happen to be presented. Rather, it is the possibility, or threat, that the timing of case orderings is the product of deliberate control rather than of fortuitous events.

Because Supreme Court doctrine is potentially path dependent, meaning that substantive doctrine is partly a function of the order of case presentations, interest groups are motivated to manipulate, or time, case orders in an effort to move substantive doctrine in their preferred direction. Behaving rationally, such groups will seek to engage in path manipulation, meaning that they will prefer to order cases so as to favorably affect and control the ever important decision-

138 *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817–21 (1982) (observing the absence of a normative justification for path dependent influence on developing doctrine). While Judge Easterbrook is certainly correct that fortuitous timing has no normative connection to the merits of particular legal cases or precedents, it nonetheless has a strong normative basis in ensuring the processes through which cases are transformed into precedents are fair. For a more detailed discussion, see STEARNS, *supra* note 21, at 63–67 (distinguishing the arbitrariness of outcomes from the fairness of process through which outcomes are generated).

making path. If case *A* followed by case *B* produces better doctrinal results than case *B* followed by case *A*, an effective interest group will seek opportunities to present case *A* first, thus affecting a desired path of precedent.

In short, precedent produces path dependence and path dependence invites path manipulation. Not surprisingly, the threat of litigant path manipulation invites its own set of judicial defense measures that social choice theory helps to identify.[139] These defenses take the form of rules setting out criteria that govern the conditions under which cases can be presented for decision. In this analysis, standing doctrines can be recast as a set of ground rules through which the Supreme Court makes it more difficult for ideologically motivated interest groups to favorably order cases before the lower federal courts, and ultimately before the Court itself. These rules apply with particular force when the perceived motivation for case orderings is to influence developing substantive legal doctrine, rather than to seek the necessary resolution of a legal dispute into which the litigants have found themselves unwittingly drawn.

The Supreme Court standing doctrine, as developed in the Burger and Rehnquist Courts, accomplishes this important task by demanding a set of identifiable preconditions to litigating in federal court. The constitutional elements of standing require that the claimant suffer: (1) an injury in fact, (2) that the defendant has caused, and (3) that a court can redress through ordinary judicial relief.[140] In addition, the Court's prudential standing rules require: (1) that the alleged injury affect the claimant rather than a third party[141] and (2)

139 To that extent, the theory of doctrinal evolution grounded in social choice finds parallels in an influential theory of biological evolution, inspired by the children's classic LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE (1871). The Red Queen theory posits that evolutionary developments that succeed for members of a given species create opportunities for counter-evolutionary strategies by members of competitor predatory species. *See* MATT RIDLEY, THE RED QUEEN 17–18 (1993). The result is a never ending race that ultimately leaves the successful members of both species, like Alice and the Red Queen who ran faster and faster just to keep pace with their surroundings, precisely where their predecessors had started. *See id.* at 18 (illustrating with polar bears and arctic seals). It is an intriguing coincidence that C.L. Dodgson, who used Lewis Carroll as a pen name, was a professor of mathematics with a particular interest in the discipline that eventually became known as social choice. *See* DENNIS MUELLER, PUBLIC CHOICE III, at 3, 84, 159, 170 (2003).

140 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (fair traceability and causation); *id.* at 751 (injury).

141 *See, e.g.*, Gilmore v. Utah, 429 U.S. 1012, 1013–17 (1976) (Burger, C.J., concurring).

that the claim be concrete and specific to the individual, rather than diffuse and general to the public at large.[142] These combined constitutional and prudential standing rules increase the probability that the factual determinants giving rise to the federal court litigation, which very well might produce a precedent affecting the future path of constitutional doctrine, are fortuitously determined rather than deliberately timed and controlled.

The critical insight that emerges from the social choice analysis of standing, therefore, is that while developing doctrine remains path dependent as a result of the presumptive adherence to precedent, with proper standing rules in place, the path itself is more likely to be determined by fortuitous events beyond any particular litigant's control. As a result, despite the influence of fortuitous timing in affecting substantive legal doctrine, standing improves the overall fairness, and thus legitimacy, of the processes through which constitutional doctrine is created. After evaluating two cases from the Burger Court that illustrate the potential impact of case orderings on substantive doctrinal development, we will reconsider standing doctrine as a means of limiting the potential threat of interest group path manipulation.

2. Three Irreconcilable Majorities over Two Cases

The cases of *Crawford v. Board of Education*[143] and *Washington v. Seattle School District No. 1*[144] both involved efforts to sort the competing concerns over integrating public schools and allowing parents to elect public neighborhood education for their children, especially in the lower grades. In both cases, successful initiatives prevented more local decisionmakers—judges in *Crawford* and school boards in *Seattle School District*—from enacting ambitious integrative policies that went beyond the limited requirements of the Fourteenth Amendment Equal Protection Clause, and in *Seattle School District*, whatever additional obligations the state constitutional counterpart imposed.[145]

In *Crawford*, the Court evaluated a California constitutional amendment that prevented a state court from ordering integrative busing unless the court first determined that a federal court would so order to remedy a violation of the Federal Equal Protection Clause.[146]

142 *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974).

143 458 U.S. 527 (1982).

144 458 U.S. 457 (1982).

145 The *Seattle School District* Court also considered whether integrative busing was necessary to comply with the state's counterpart equal protection requirement. *Id.* at 476–80.

146 *Crawford*, 458 U.S. at 529.

The *Crawford* Court held that this limitation on busing did not violate federal equal protection requirements.[147] In *Seattle School District*, the Court considered a Washington referendum that prevented a local school board from ordering integrative busing unless it first determined that the federal or state constitutions so require.[148] The *Seattle School District* Court held that the referendum did violate federal equal protection.[149]

Justice Marshall, who alone dissented in *Crawford*, stated that he believed that the two cases were indistinguishable.[150] Marshall voted consistently with this intuition by voting to strike down both challenged laws, thus dissenting in *Crawford* and joining the majority in *Seattle School District*. Justice Powell, who wrote for the *Seattle School District* dissent, and who was joined by Chief Justice Burger, then Associate Justice Rehnquist, and Justice O'Connor, did not expressly state that the cases were indistinguishable. He did, however, reject those arguments presented to distinguish the cases.[151] Like Marshall, this group of four Justices voted consistently with the intuition that the cases were indistinguishable by voting to uphold both challenged laws, thus dissenting in *Seattle School District* and forming part of the majority in *Crawford*. To fully appreciate the anomaly that the *Crawford* and *Seattle School District* cases represent, consider the following lineups over both cases:

TABLE 1. *CRAWFORD*

Majority	*Concurrence*	*Dissent*
Powell*	Brennan	Marshall*
Burger*	Blackmun	
Rehnquist*		
O'Connor*		
Stevens		
White		

147 *Id.* at 540–42.

148 *Seattle Sch. Dist.*, 458 U.S. at 466.

149 *Id.* at 467–70.

150 *Crawford*, 458 U.S. at 551–61 (Marshall, J., dissenting).

151 *See Seattle Sch. Dist.*, 458 U.S. at 495 (Powell, J., dissenting).

TABLE 2. *SEATTLE SCHOOL DISTRICT*

Majority	*Concurrence*	*Dissent*
Blackmun		Powell*
Marshall*		Burger*
Brennan		Rehnquist*
White		O'Connor*
Stevens		

* The asterisks identify those Justices who expressed the view that the two cases were constitutionally indistinguishable through their case votes and in the rationales set out the opinions that they authored or joined.

Setting aside the merits of the two cases, the voting lineup reveals three overlapping, and ultimately irreconcilable, majorities: (1) a majority in *Seattle School District* voting to strike down the challenged state initiative; (2) a majority in *Crawford* voting to uphold the challenged state constitutional amendment; and (3) a majority (those with asterisks) across *Seattle School District* and *Crawford* voting to treat the two cases consistently, such that either both equal protection challenges are sustained (per *Crawford*) or rejected (per *Seattle School District*).

Social choice theory demonstrates that unless decisionmakers permit at least as many binary comparisons as options, it is not possible to know whether the outcome ultimately chosen is socially preferred to another based upon the criterion of simple majority rule over choices presented.[152] Limiting comparisons relative to the number of options creates the risk that the order of choices will control outcomes. The regime does so by preventing a comparison of the eventual prevailing option against an option that was defeated in an earlier round. The result is to produce seeming majority support

152 *See, e.g.*, Arthur Lupia & Mathew D. McCubbins, *Lost in Translation: Social Choice Theory Is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585, 594–601 (2005); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685–86 & n.53 (1997). Consider the following preferences, which cycle over unlimited binary comparisons: *ABC, BCA, CAB*. Assuming sincere voting, two votes over three options could yield any of the three available outcomes, such that *A* v. *B* (*A* wins) then *A* v. *C* (*C* wins) yields *C*; *B* v. *C* (*B* wins) then *A* v. *B* (*A* wins) yields *A*; and *C* v. *A* (*C* wins) then *B* v. *C* (*B* wins) yields *B*. In contrast, by switching the order of the second and third ordinally ranked preferences for the third listing, from *CAB* to *CBA*, the same exercise demonstrates that *B* dominates alternatives *A* and *C* in direct binary comparisons by simple majority rule. For a more comprehensive introduction to the methodology of social choice that illustrates cycling and noncycling preferences and that evaluates the implications for institutional structure and reform, see STEARNS, *supra* note 21, at 41–94.

for an outcome that a thwarted majority disfavors to an otherwise available alternative.[153] Not surprisingly, appellate courts, which are institutionally obligated to resolve those cases properly before them, have developed mechanisms that prevent indeterminate outcomes. In groups of cases that threaten cyclical indeterminacy, the most important such mechanism is presumptive stare decisis or precedent.[154]

Limiting the number of binary choices relative to options ensures an outcome even when none has majority support over all others. In doing so, the regime gives the appearance, but not necessarily the actuality, of a meaningful social choice. A common rule that achieves this objective prevents reconsideration of alternatives defeated in the past. This rule has the benefit of producing a certain result, but achieves that result by grounding its selection in the order in which votes are presented. The presumptive obligation of horizontal stare decisis is the Supreme Court's version of this time-honored cycle-breaking rule. Not surprisingly, this rule risks grounding doctrine, at least in part, in the order of decisions.[155]

The *Seattle School District* and *Crawford* cases illustrate the problem. Imagine that respect for horizontal precedent was merely an available argument, rather than a presumptive obligation. As a theoretical matter,[156] the three irreconcilable majorities that cut

153 Thus, in each of the previous examples, a thwarted majority prefers the outcome defeated in the first round of voting to the outcome selected in the second round of voting. *See supra* note 152. Reviving the previously defeated option and pitting it in a direct comparison against the victor in the second round would reveal a cycle, such that *ApBpCpA*, where *p* means preferred to by simple majority rule.

154 To be clear, the analysis does not suggest that appellate courts, including the Supreme Court, are obligated to resolve cases in the manner preferred by litigants, including resolving the merits of presented claims. Rather it suggests that appellate courts, unlike legislatures, lack the power to remain inert simply because they lack a majority consensus as to how to resolve a properly docketed case. Even improperly docketed cases are collectively resolved through various formal dismissal mechanisms. For a more detailed discussion, see STEARNS, *supra* note 21, at 65 n.*.

155 *See supra* notes 152–53 (formal illustration of this rule).

156 Specifically, I am assuming that even without a presumptive obligation to abide earlier decisions as precedent, treating whichever case was decided first as persuasive authority is fair game. Certainly this is the manner in which civilian regimes handle prior cases despite the general understanding that they eschew formal precedent. *See* JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 47 (3d ed. 2007). And certainly earlier cases, like treatises, law review articles, and amicus briefs, are permissible sources that courts rely upon for their persuasiveness. The difference between allowing precedent as one of a number of available arguments and a precedent-based regime is that in the latter, the fact of precedent presumptively binds a subsequent court without regard to the merits of that earlier resolution.

across *Seattle School District* and *Crawford* would disclose the absence of a normative justification for preferring one set of potential case resolutions to another. The resulting threat of indecision would run afoul of the Supreme Court's institutional obligation to decide the two cases and to set precedent in a manner that promotes reliance upon the rule of law.[157] While the implicit set of intransitive preferences can be expressed in various ways, most simply, a theoretical cycle exists over the three overlapping majorities that cannot simultaneously be satisfied.[158] It is not possible simultaneously to uphold the challenged amendment in *Crawford*, to strike down the challenged referendum in *Seattle School District*, and to ensure that *Crawford* and *Seattle School District* are resolved in a manner that satisfies the overlapping majority favoring consistent case treatments.

157 Certainly the Supreme Court did not have an institutional obligation to grant certiorari in either or both cases and sometimes issues a DIG (dismissal of certiorari as improvidently granted) to remove cases from its docket. *See* STEARNS, *supra* note 21, at 65 n.*. For an explanation as to why standing and certiorari are both necessary, but neither sufficient, to minimize the risk of litigant path manipulation in a precedent-based Supreme Court, see *id.* at 194–97. For our immediate purposes, it is sufficient to note that once the Court grants certiorari, absent a defect warranting a DIG, the Court, like all appellate courts lacking discretionary docket control, retains the institutional obligation to resolve those cases.

158 While this analysis does not suggest that Justices invariably vote sincerely, it explains how path dependence can be expressed as a cost of insincere voting. Expressing views in written opinions is potentially costly to jurists who later seek to avoid being bound by their previously expressed views. The incentive to forge seemingly problematic distinctions as a means of avoiding the application of precedent merely underscores the claim that the order in which cases are presented affects evolving substantive doctrine. This analysis also suggests a complementary justification for standing, grounded in the Gibbard-Satterthwaite Theorem. This theorem suggests that, regardless of a preference aggregation rule, there will always be a potential incentive to present one's preferences insincerely, at least under specified conditions that correlate to the problem of cycling. *See generally* NICOLAUS TIDEMAN, COLLECTIVE DECISIONS AND VOTING 143–48 (2006). Appellate court judges issue a form of bond, equivalent to published segments of larger ordinal rankings with respect to various legal policy questions, when they resolve cases through written opinions. Given the potential incentive to misstate or strategically state preferences regardless of decisional rule, this theorem supports the intuition that there is a corresponding judicial incentive to minimize such disclosures unless and until absolutely necessary. In this account, the standing rules, which increase the likelihood that fortuitous circumstances rather than careful timing compel the resolution of a case, might also serve the complementary function of limiting judicial disclosures of ordinal ranking until the necessary showing to trigger such disclosure has been demonstrated.

For any proffered outcome, a simple majority of the Court prefers yet another.[159]

Under the Supreme Court's decisionmaking rules, however, adherence to precedent has been elevated from an available argument to a presumptive doctrinal obligation.[160] The regime of horizontal stare decisis presumptively eliminates one of three possible theoretical questions that these two cases would have raised had they been decided sequentially rather than simultaneously, namely, how a majority would resolve the second case had it been decided as a matter of first impression and thus without the first case as a precedent. The resulting regime, which permits only two votes over the three available issues, produces a stable set of outcomes and resulting doctrines, but in doing so risks grounding those outcomes and doctrines in the order in which the two cases are presented.

3. Standing in the Burger and Rehnquist Courts Revisited

We can now assess the very different function that standing doctrine served in the Burger and Rehnquist Courts as compared with the functions it served in the New Deal and Warren Courts. Assuming that the Court is occasionally prone to possessing cyclical preferences, then the price of a presumptive stare decisis regime is to ground substantive doctrine in the order of case presentations. Although it is unlikely that interest groups, or Supreme Court Justices for that matter, appreciate the theoretical insights that emerge from social choice,

159 If we assume that the Justices voted sincerely based upon their views on the merits of the two cases, and if *Seattle School District* arose first, then after the Washington State Initiative was struck down, the majority who believed the cases should be treated alike would have ruled to strike the *Crawford* amendment as well. Alternatively, if *Crawford* arose first, then after the California amendment was upheld, the majority who believed the cases should be treated alike would have also ruled to uphold the *Seattle School District* initiative. Because the two cases were decided at the same time, with neither a binding precedent on the other, given the Justices' collective preferences on the individual case dispositions, the cases were decided in opposite fashion. While any of the three results would have suppressed one of the three overlapping majorities, in the actual cases, the result was to suppress the majority who expressed the view that they should have been decided in like manner. For a more detailed discussion, see STEARNS, *supra* note 21, at 24–30.

160 For a jointly authored opinion describing the doctrinal obligation of horizontal stare decisis, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–69 (1992) (discussing stare decisis as applied to Roe v. Wade, 410 U.S. 113 (1973)).

they well understand the practical significance of case orderings.[161] Interest groups have a strong incentive to time cases for maximum effect. A rational Supreme Court will seek to minimize the perception that the timing of doctrine, which affects its evolving substantive content, is being manipulated and controlled, and will do so by developing mechanisms that ground case timing in random historical developments.[162] The various standing rules that the Burger and Rehnquist Courts developed readily translate into a set of constraints that improve the probability that random events, rather than advertent path manipulation, are the primary determinants of the inevitable path creating law within our precedent-based regime.

This is perhaps best expressed by considering the most obvious techniques that ideologically motivated litigants, or interest groups, could employ if they possessed an unfettered ability to time cases for maximal doctrinal effect. To fully appreciate the role of standing, it will now be helpful to place it in a broader context of timing-based justiciability doctrines that includes ripeness and mootness.[163] These relatively blunt barriers to justiciability prevent claims based upon fact patterns that are hypothetical or in some sense not adequately developed (ripeness), and claims that are no longer live (mootness).[164] With no barriers to litigating cases that are not ripe or that are moot, litigants could construct hypothetical facts or resurrect facts from past cases, and in so doing, place laws they seek to challenge in their most doctrinally problematical light. Ripeness and mootness doctrines thus establish important first level barriers to path manipulation. At the

161 *See, e.g.*, STEARNS, *supra* note 21, at 181–90 (discussing the role of case orderings in the development of equal protection doctrine affecting gerrymandering, racial desegregation, and sex-based distinctions).

162 As we shall see, however, rules targeted against path manipulation will not prevent ideologically devoted litigants from seeking redress in the federal courts when those litigants satisfy standing requirements. Thus, for example, Jennifer Gratz, who successfully challenged the University of Michigan undergraduate affirmative action program before the Supreme Court, *see* Gratz v. Bollinger, 539 U.S. 244, 175–76 (2003), has since become active in fighting affirmative action more generally. *See* Peter Slevin, *Court Battle Likely on Affirmative Action*, WASH. POST, Nov. 18, 2006, at A2 ("Jennifer Gratz, who earned headlines for suing the University of Michigan over admissions policy in a case decided by the Supreme Court in 2003, returned home to lead the fight [for Proposition 2, which ended race-based affirmative action in Michigan], backed by Ward Connerly, who bankrolled similar battles in California and Washington.").

163 For a more detailed social choice analysis of ripeness and mootness doctrines as they relate to standing, see STEARNS, *supra* note 21, at 251–56.

164 *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807–08 (2003) (ripeness); City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 283–86 (2001) (mootness).

same time, however, these doctrines leave open other channels that motivate a set of justiciability barriers concerning presently live claims, meaning claims that are ripe and not moot. While even the more nuanced standing doctrines remain imperfect barriers to path manipulation, the social choice account explains their emergence as a rational response to identifiable pressures on the Burger and Rehnquist Courts.[165]

Absent any restrictions, interest groups seeking, for example, to secure the maximum constitutional protections for the criminally accused could scan records of cases producing criminal convictions in search of the most favorable facts that could be used to test the limits of the relevant constitutional protections. As favorable precedents are established, the same litigants could then work toward bringing increasingly challenging facts within the scope of newly established constitutional protections. The simple prudential prohibition—no right to enforce the rights of others[166]—imposes an important first step that limits this obvious technique for path manipulation. At the same time, however, this prudential standing rule encourages repackaging of substantive claims into an alternative justiciable form. Without regard to how the claim affects the actual convicted criminal, a litigant can claim that she is personally harmed by simply knowing that a member of society has been convicted and sentenced in violation of his or her federal constitutional rights. Unless the litigant is lying, the claim has transformed what had been a third party claim into a first party claim,[167] albeit one that can also be used to further the objectives of litigant path manipulation.

These prudential standing rules—no right to enforce the rights of others and no right to raise diffuse harm claims[168]—combine to impose significant barriers to the most obvious possibilities for manipulating the relative timing of presently live claims. In addition, these two prudential standing rules, and one other discussed below,[169] are significantly bolstered by the three constitutional prerequisites to

165 Of course, the relevant question is not whether the doctrines are perfect, but rather whether they are better than available alternatives in reducing path manipulation. *See* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1230 n.33 (1994) (discussing the importance of avoiding the nirvana fallacy in social choice analysis).

166 *See supra* note 141 and accompanying text.

167 *See* Fletcher, *supra* note 65, at 290–91 (observing that unless one takes the view that claimants are lying about their claimed injuries, standing determinations are necessarily substantive conclusions about what can or cannot be litigated).

168 *See supra* notes 141–42 and accompanying text.

169 *See infra* notes 175–81 and accompanying text.

standing. The constitutional elements of standing, drawn from a prima facie tort action,[170] further increase the likelihood that a proffered claim is motivated by the desire to seek meaningful redress for injury, in spite of (rather than because of) the potential that the case itself might prove a useful vehicle for developing preferred substantive constitutional doctrine. By demanding "injury in fact," "causation," and "redressability," standing doctrine seeks a set of factors that correlate to traditional bipolar litigation.[171] The presumption is that such suits are motivated by factual events that have arisen due to circumstances beyond the claimant's control, have inflicted real harm, and are susceptible to meaningful judicial redress.[172] This is not to suggest that litigants capable of satisfying these criteria are immune from any concerns of an ideological motivation.[173] Rather, these presumptive and constitutional criteria generally signal a reduced probability that the primary motivation underlying the suit is to make law rather than to obtain relief.

As stated above, even this complex set of nuanced standing rules leaves open one important and subtle potential vehicle for litigant path manipulation that helps explain a remaining prudential standing barrier. We can now recast problematic cases such as *Allen* and *Bakke*, which are particularly important in assessing political accounts of standing doctrines. The two cases are notable in that neither involved a third party injury or a legally diffuse claim. The *Allen* claimants, or their children, suffered the claimed injury.[174] Despite the size of the group, their claim distinguished them from the population at large.[175] In addition, both sets of claimants sought relief for their own claimed

170 *See* STEARNS, *supra* note 21, at 269–71.

171 *See supra* note 140 and accompanying text.

172 Criminal defendants are paradigmatic bipolar litigants, at least assuming that they have generally committed the underlying offenses for which they are charged. While they create the factual predicates to their arrests and trials, except in rare cases they do not engage in the underlying criminal activity for purposes of developing precedent, but rather to obtain a benefit with the hope of evading the legal system. Once in the system, however, they are motivated to secure relief, rather than to produce favorable law benefiting criminal defendants generally. *See* STEARNS, *supra* note 21, at 163–64 (relating criminal procedure cases to standing doctrine).

173 *See supra* note 162. Moreover, there remains one important category—no right to an unregulated market—in which all other criteria are met, and yet the Court has found such claims nonjusticiable. *See infra* notes 178–79 and accompanying text.

174 Allen v. Wright, 468 U.S. 737, 739–40 (1984).

175 For a case distinguishing group size from the question of whether a claim is legally diffuse, see *FEC v. Akins*, 524 U.S. 11, 22–23 (1998) (observing that not all injuries that are widely shared are abstract and thus legally diffuse).

injuries, rather than for those of another interested party. And yet, the Court granted standing in *Bakke*[176] but denied it in *Allen*.[177]

These two cases have been criticized because, as previously shown, the opportunity injury analysis from *Bakke* would have resulted in granting the *Allen* claimants standing, while the causal chain analysis from *Allen* would have resulted in denying Bakke standing.[178] The anomaly disappears, however, once we recognize that although the two cases fall within the same analytical category—a claimed right to an undistorted market—they rest on different points along an important analytical spectrum.

If cases that test the presumptive barriers against third party standing and diffuse harm standing rest at the end of the standing spectrum in which path manipulation is presumed, traditional bipolar litigation rests at the opposite end in which claims for relief, rather than the desire to make law, are presumed. The *Allen* and *Bakke* cases are analytically difficult because they rest in the middle of this analytical spectrum.[179] These cases possess features that suggest the possibility of path manipulation on the one hand and the desire for judicial relief specific to their claim on the other. It is important to emphasize that this analysis suggests nothing about the merits of either case, but rather, focuses on the relationship between the nature of the litigants and the characteristics of the claims that they are pursuing.

While the *Bakke* precedent lasted a full generation and has since spawned two majority decisions reaffirming the split *Bakke* result—allowing the affirmative use of race to promote the compelling interest in diversity in higher education but disallowing the use of racial quotas—for a self-proclaimed twenty-five year period,[180] it remains important to distinguish Bakke from *Bakke*, the litigant from the case. Bakke possessed all the requisite characteristics of an individual claiming a violation of constitutional law that caused him an identifiable, specific, and concrete harm. Mr. Bakke wanted to become Dr. Bakke, and a particular medical school's racial set-aside policy, which he

176 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 281 n.14 (1978) (opinion of Powell, J.).

177 Allen v. Wright, 468 U.S. 737, 754 (1984).

178 *See supra* notes 119–29 and accompanying text.

179 For a more detailed discussion, including graphical depictions, see STEARNS, *supra* note 21, at 271–81.

180 *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also* Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003) (striking down the University of Michigan undergraduate affirmative action program).

alleged violated equal protection, appeared to obstruct his path. In contrast, the *Allen* claimants, who pressed a claim that rested at the core of race-based equal protection doctrine, one dating to *Brown v. Board of Education*,[181] presented a set of case facts with features that pulled toward the opposite end of the spectrum, thus favoring a presumption of path manipulation. The case would not result in an obvious identifiable benefit to the claimants' children or necessarily alter the claimed racist policies in the private schools whose conduct was implicated in the litigation. If the claimants succeeded, however, it was clear that the result would be to effect a change in a legal policy with obvious nationwide consequences.

The social choice analysis demonstrates that while these cases are not different in kind, they are notably different in degree. The *Bakke* facts effectively pulled the Court's intuitions toward inferring that Bakke's overriding purpose was to secure relief in spite of any precedent, however important, the case might produce. In contrast, the *Allen* facts effectively pulled the Court's intuitions in the direction of inferring an overriding motivation to create a favorable precedent, again however important, when the case itself was likely to have little if any discernible effect in remedying concrete harm to claimants, their children, or the relevant institutions in their communities.

The analysis thus far provides the theoretical underpinnings that explain the transformation of standing doctrine from its inception in the New Deal into its present form as developed in the Burger and Rehnquist Courts. For the social choice model to explain this important historical transformation of standing doctrine, identifiable characteristics in those later Courts must have rendered them specially prone to the possibility of path manipulation. The next section identifies those features that motivated this doctrinal transformation. The Part that follows then evaluates this summary of the Supreme Court's timing-based justiciability barriers against two new sets of combined data and then explores the implications for the political economy of the Roberts Court.

4. The Burger and Rehnquist Courts in Social Choice Perspective

In important individual cases and groups of cases over time, the Burger and Rehnquist Courts were prone to issuing opinions that masked underlying cyclical preferences. This phenomenon was not limited to pairings or groups of cases. Even within individual cases, this occurred when separate majority resolutions of those issues that

181 347 U.S. 483 (1954).

the Justices explicitly or implicitly agreed with led to one result were thwarted by a contrary majority resolution for the case as a whole.[182] As seen in the preceding discussion of *Seattle School District* and *Crawford*, this also occurred when the resolutions of more than one case thwarted the preferences of one of several overlapping majorities concerning a specific case outcome as a result of horizontal precedent.[183] While such anomalies certainly arose in earlier periods,[184] the question is why such results became more notable in the Burger and Rehnquist Courts.

The analysis reveals, and the data developed in the next Part support the intuition, that these Courts were unusual in a particular respect. Specifically, they possessed no fewer than three persistent yet nondominant jurisprudential camps. As a result of this phenomenon, in significant individual cases and groups of cases over time, these Courts were prone to issuing results that masked internal cycling or that manifested path dependence. This tendency toward outcomes that reflected sometimes unstable underlying group preferences was primarily attributable to the peculiar historical circumstances of the Burger Court and had lingering effects throughout the Rehnquist Court period. Only now in the emerging Roberts Court does it appear plausible that with at least one more conservative judicial replacement, the Supreme Court's risk of producing such results in important cases will be substantially reduced. Combined with the mission to move doctrine in a more conservative direction with the help of the aligned lower federal judiciary, this will place stress on existing strict standing rules.

While the Nixon appointees, who ultimately gave rise to the Burger Court, cut into the Warren Court's dominant liberal bloc, they failed to supersede that bloc with a controlling bloc of core conservatives. Instead, the Burger Court, and ultimately the Rehnquist Court as well, was characterized by three persistent but nondominant camps, whose jurisprudence tended to operate in fits and starts. The camps included holdovers from the liberal Warren Court era, new appointees who hoped to retrench on landmark Warren Court precedents to restore the Supreme Court to a more modest judicial role, and an emerging centrist bloc who rejected the dominant ideologies of the left and right in favor of a more balanced, procedurally oriented, case-

182 *See* STEARNS, *supra* note 21, at 97–156 (collecting individual cases); *id.* at 157–211 (collecting groups of cases).

183 *See supra* Part I.D.2.

184 *See, e.g.*, Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). For a social choice analysis of *Tidewater*, see STEARNS, *supra* note 21, at 111–17.

by-case approach. This bloc sought to combine a generally conservative understanding respecting newly claimed rights with a respect for precedent and the processes through which those precedents were developed.[185]

The principal difficulty that confronted the Burger Court conservatives was not the continuing liberal coalition. Any transitional Supreme Court will include some holdovers who predictably dissent from opinions that signal the Court is moving in a substantially new doctrinal direction. Instead, the problem came from a split that emerged within the emerging conservative bloc itself. This split was primarily attributable to the defining characteristics of the Warren Court's rights-based liberalism, in contrast with the progressive liberalism of the earlier New Deal era.

The Warren Court relied upon a liberal understanding of the Fourteenth Amendment's Due Process Clause, in combination with incorporated provisions from the Bill of Rights, to broadly expand individual rights in such areas as voting, free expression, privacy, and constitutional criminal procedure. For the Burger Court to retrench upon such landmark precedents as *Miranda v. Arizona*,[186] *Mapp v. Ohio*,[187] and *New York Times Co. v. Sullivan*,[188] to name only a few, required a two-part determination. First, the Court had to determine that the original case was wrongly decided, and second, it had to determine that even if wrongly decided, the case should not be retained as a matter of horizontal precedent. The difficulty that gave rise to loose coalition structures in the Burger and Rehnquist Courts was that ultimately the growing conservative bloc split between core conservatives, those willing to reevaluate and to overrule disfavored liberal precedents, and moderate conservatives, those disinclined to expand upon existing liberal rulings, but also reluctant to discard precedents that they might not have supported as an initial matter.[189]

The emergence of a procedurally oriented, moderate conservative bloc complicated the perceived doctrinal mission of the Burger Court by rendering outcomes of contentious cases substantially less predictable. To be sure, even when the Court failed to produce a

185 For a detailed analysis, see STEARNS, *supra* note 21, at 215–49.

186 384 U.S. 436 (1966).

187 367 U.S. 643 (1961).

188 376 U.S. 254 (1964).

189 Consider, for example, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in which Justice Powell, writing for a majority, declined to find the Texas public school funding scheme a violation of equal protection, but in doing so signaled no retreat from those cases that had already used equal protection to announce judicially identified fundamental rights. *Id.* at 28–36.

majority ruling, the centrist bloc itself most often formed its own stable center of gravity over the resulting fractured sets of opinions. This result was certainly reinforced by the narrowest grounds rule.[190] It might be no coincidence that *Marks v. United States*,[191] the opinion reifying the narrowest grounds rule, was authored by none other than Lewis Powell, the often pivotal moderate conservative who just one year later produced the still-adhered-to formula in *Bakke* governing race conscious affirmative action programs in higher education, and who did so in an opinion the critical parts of which no other Justice joined.[192] The narrowest grounds doctrine later empowered another group that included moderate conservatives—Associate Justices O'Connor, Kennedy, and Souter—to rearticulate, while not overturning, the doctrine of *Roe v. Wade*,[193] in the landmark challenge *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[194] In doing so, this coalition thwarted the wishes of the Court's liberal members who preferred the stricter trimester formulation that *Roe* established,[195] and of the Court's conservative members who would have preferred to overrule *Roe* outright.[196]

Certainly it is possible to hypothesize cases in which the liberal and core conservative blocs would prefer to reach the merits without regard to centrist concerns over procedural technicalities or adherence to precedent. They might do so because the strategy is a worthwhile risk in an effort to effectuate their preferred doctrinal result in the particular case, or because signaling relaxed precedent is valuable for future cases with greater prospects for success on the merits.[197]

The larger point, however, is that a Court characterized by three persistent yet nondominant ideologies is more likely to generate a variety of substantive doctrinal approaches to important legal problems, with the effect of increasing the likelihood of masked intransitive preferences. Moderate conservatives almost by definition

190 For a general discussion, see Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 335–38 (2000).

191 430 U.S. 188 (1977).

192 *See* Abramowicz & Stearns, *supra* note 123, at 961–73.

193 410 U.S. 113 (1973).

194 505 U.S. 833 (1992).

195 *See id.* at 929 (Blackmun, J., concurring in part and dissenting in part) (expressing continued support for the original *Roe* formulation).

196 *See id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.").

197 For several possible iterations taking this form that can produce a theoretical cycle, see STEARNS, *supra* note 21, at 239–44.

form more frequent coalitions with members of both the liberal and conservative blocs than other members of the Court. This tendency to switch off in forging particular case coalitions encourages moderates to develop innovative alternative doctrinal approaches that reconcile existing precedents with a more conservative development of future doctrine. Such an approach thus encourages a proliferation of doctrinal frameworks both within individual cases and over larger groups of cases. By increasing the number of analytical options available, these Justices also increase the likelihood that in selecting among options, the Justices will disclose majorities that prefer alternatives to existing doctrinal outcomes. A core insight of social choice is that the probability of cyclical group preferences increases with an increase in the number of options presented.[198] The proliferation of emerging doctrinal approaches, whether involving matters of jurisdiction,[199] the dormant Commerce Clause,[200] or equal protection,[201] has generated opinions in individual cases or groups of cases over time that, absent rules limiting disclosure of intransitive preferences, would expose embedded doctrinal cycles.[202]

The combined effect on the Burger and Rehnquist Courts was to render case outcomes and developing doctrines less predictable and, as a result of precedent, more dependent on such fortuitous matters as timing. As stated previously, fortuity is not itself normatively problematical provided that the system does not invite systematic manipulation that undermines the perception of fairness respecting the eventual case outcomes.[203] Given the possibility that path manipulation would play a greater role in affecting developing doctrine, the Burger and Rehnquist Courts were ripe for transforming standing doctrine from its New Deal roots into an alternative form. These Courts redeployed standing as a doctrinal barrier that made it more difficult for ideologically motivated interest groups to benefit from the possibility of path manipulation.

As previously mentioned, the social choice account places the modern standing doctrine in its proper historical context and

198 *See* STEVEN J. BRAMS, PARADOXES IN POLITICS 41–43 (1976); Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 905 n.36 (2006).

199 *See* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 603 (1949).

200 *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 669 (1981).

201 *See* Miller v. Albright, 523 U.S. 420, 433 (1998).

202 For a discussion of embedded cycles in each of these cases, see STEARNS, *supra* note 21, at 99–102, 107–09, 111–17 (discussing, respectively, *Tidewater*, *Kassel*, and *Miller*).

203 *See supra* Part II.C.1.

explains why the doctrine assumed its present form.[204] This analysis is but the first of two steps, however, in assessing the likely motivations of the Roberts Court with respect to standing and in assessing the broader impact on that Court of any resulting change in standing doctrine. To fully appreciate the political economy of the Roberts Court, it is important to now place the social choice account of the evolution of standing doctrine within the context of the broader historical perspective on the Supreme Court. The next Part provides the data for evaluating this relationship along this timeline from the New Deal to the Roberts Court.

II. THE STANDING TIMELINE FROM THE NEW DEAL COURT TO THE ROBERTS COURT

A. Introduction

The preceding analysis suggests that the Court is motivated to strengthen standing in two sets of circumstances: first when there has been a divergence between the ideological dominance of the Supreme Court and that of the federal courts of appeals (the New Deal standing story); and second, when the Supreme Court itself has been prone to a set of loose coalition structures that has invited the risk of litigant path manipulation (the Burger and Rehnquist Courts standing story). Together, these stories might imply that, absent an ideological divergence or a loose coalition structure within the Court itself, the Court will necessarily seek to relax standing. This is only likely to occur, however, when the existing standing rules undermine the perceived doctrinal mandate of the emerging bloc within the Supreme Court.

To evaluate the preceding analysis of the Supreme Court, we need to combine two sets of data: first, data on the nature of the Supreme Court's internal coalitions; and second, data on the relationship between the dominant ideology of the Supreme Court and that of the federal courts of appeals. The next subpart combines two sets of data in a chronological sequence that allows for such an assessment for the full period in which the Supreme Court has used standing to further its doctrinal agenda. These data further allow a proper historical assessment of the emerging Roberts Court.

204 *See supra* Part I.D.1.

B. Description and Presentation of Data

This subpart will track the history of the Supreme Court and its relationship to the federal courts of appeals based upon two sets of combined data. For most of the years listed, 1933 through 2006, Table 3 provides the following data: the President; the Chief Justice; the Supreme Court balance, including designations of liberal (*italicized*), moderate (normal typeface), and conservative (**bold**); and the number of federal circuit courts with majorities that are controlled by judges appointed by Democratic Presidents, Republican Presidents, or tied. For each year, the table first lists the number of circuits controlled by judges appointed by Democratic or Republican Presidents, or in which there is a tie, first based upon those judges on active status, and then in brackets including those on senior status.

Three appendices appear at the end of this Article: first, a table with additional background data informing the Supreme Court data; second, an explanation of the methodology used to generate the circuit court data; and third, additional data informing the circuit court data. Before proceeding, a brief summary will be helpful. The data on the circuit court judges is taken from the Federal Judges Biographical Database, compiled by the Federal Judicial Center.[205] The numbers are as of January 1 for each stated year, on the assumption that any new confirmations will have been completed by that date for a given circuit court term. Because of the specific subject matter governing its docket, and thus its reduced impact in affecting the motivation for the Supreme Court's timing-based justiciability rules, these data do not include the Federal Circuit.

With respect to the circuit courts, there is an important limitation to relying upon the party of the appointing President as a means of signaling ideological direction. It is well known that up until the Reagan administration, Southern Democrats included many conservatives, some of whom later joined the Republican party and others of whom remained Democrats even though their general ideological views were no longer in the mainstream of the Democratic party or its leadership.[206] In addition, the appointments process for federal judges often includes deference to the recommendations by senators

205 Federal Judges Biographical Database, http://www.fjc.gov/history/home.nsf (follow "Judges of the United States Courts" hyperlink; then follow "The Federal Judges Biographical Database" hyperlink) (last visited Jan. 27, 2008). The specific search criteria used are listed in Appendix B.

206 *See* Frank Upham, *The Role of Lawyers in Social Change: United States*, 25 CASE W. RES. J. INT'L L. 147, 150 (1993) (discussing the historical role of conservative Southern Democrats in the Senate in blocking liberal judicial appointments).

from the state in which the judge is expected to be seated.[207] It is not surprising, therefore, that within particular historical periods, certain circuits developed more liberal or more conservative reputations, largely as a result of the influence of the senators from the states in which the circuit sits, and thus to some extent despite the party of the appointing President. While these remain important concerns, to a substantial extent anomalous appointments can be expected to cancel each other out. Given the large numbers involved, such aberrations are not likely to fundamentally call into question the strong trends that these data reveal.

The data for the Supreme Court itself is taken and adapted from a database developed by two political scientists, Andrew Martin and Kevin Quinn.[208] The Martin-Quinn database is designed to identify the median Justice on each Supreme Court, by year, based upon a statistical method used to generate an ideal point for each Justice relative to the Court on which he or she sits.[209] While the methodological details are inessential to this Article's analysis, it is important to note that the statistical method, which relies upon Bayesian analysis, allows the authors to identify an ideal point for each Justice and to determine if that ideal point changes from year to year—or, in their language, if the ideal point "drifts"—during each Justice's tenure on the Court.[210] This methodology has allowed Martin and Quinn to generate numerical data that proves particularly helpful for this Article. The analysis demonstrates that Justices can drift in consequence of their own changing ideological predilections over time (for example Justice Blackmun's drift from moderate conservative to liberal),[211] or in consequence of a change in the nature or ideological content of

207 *See* Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1266 (discussing the Reagan administration's policy of deference to home senators in judicial selections).

208 The authors' methodology, analysis, and results are presented in two major papers: Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 137–45 (2002) (model); *id.* at 145–51 (results); *id.* at 152 (analysis); Martin et al., *supra* note 9, at 1296–304, 1307–15. In addition, they offer an explanation with helpful links, including the backup data for Appendix A and a Quicktime movie displaying the data from 1937 to 2005, at http://mqscores.wustl.edu (last visited Jan. 27, 2008).

209 Martin & Quinn, *supra* note 208, at 134.

210 For a more detailed description of the methodology, see *id.* at 134–37, 148 (setting out the methodology and illustrating drift).

211 *See infra* Appendix A, column 3, years 1970–93 (demonstrating that Blackmun scored a conservative high value of 1.858 in 1970 and a liberal low value of -1.812 in 1993, with 1976–84 showing moderate scores based upon the scoring system described in the text).

the cases presented to the Court (for example, Justice Frankfurter's drift from liberal to conservative).[212]

As with the circuit court data, a few limitations emerge from the Martin-Quinn scores. The scoring system operates with positive and negative numbers out to three decimal places with positive scores signaling degrees of conservatism and negative scores signaling degrees of liberalism.[213] This Article's analysis requires not merely a binary designation of liberal or conservative but rather a three-part division that also includes moderates. There is no uniform number that emerges from the Martin-Quinn scoring system that identifies moderates as such. Ideally, moderates would operate within one standard deviation of the overall point system that the scoring system entails, liberals would be further than a standard deviation to one side, and conservatives further than a standard deviation to the opposite side. Although substantially more nuanced than other systems that merely rank liberal or conservative, the Martin-Quinn scoring system was not developed to facilitate rankings over three general categories: conservative, moderate, and liberal. The numbers are intended primarily to convey ordinal relationships among the Justices and to locate the ideal points of individual Justices in specific terms, which the data demonstrate change over time, rather than relational assessments against some identified mean for the Supreme Court as a whole.

To devise a system for the necessary three-part division of liberal, moderate, and conservative, the following Table employs a proxy for standard deviation that is based upon an overall assessment of the relational scoring system. Most scores fall between -2.25 and 0 for liberals and between 0 and 2.25 for conservatives, although there are outliers on both ends. The overall point range, therefore, for most jurists is 4.5. This Article employs a point range that gives liberals, moderates, and conservatives a 1.5 distance within that range, but retains liberal and conservative status for more extreme positions at either end. Within this range, moderates score -0.75 to 0.75, liberals score anything lower than -0.75, and conservatives score anything above 0.75.

It is important to emphasize that the purpose of developing this scoring system is not statistical precision. Rather it is to allow a mean-

212 *See infra* Appendix A, column 3, years 1939–61 (demonstrating that Frankfurter scored a liberal low value of -1.187 in 1939 and a conservative high value of 1.798 in 1961, with numerous interspersed moderate years, but generally remaining conservative since 1956).

213 *See* Martin & Quinn, *supra* note 208, at 145–47. Appendix A employs the Post Mean variable from the resulting data, which the authors have used to inform their sequential models. *See id.* at 148 fig.1.

ingful and rigorous check against potentially simplistic characterizations that rest upon such intuitions as viewing the New Deal and Warren Courts as liberal and the Burger and Rehnquist Courts as conservative. The net effect is a set of categorizations for the Court as a whole that reflects common characterizations in the legal literature and in the popular media respecting the individual Justices, and that appear intuitive based on widely shared ideological conceptions among students of the Court.[214] In addition, when these data are used to determine trends concerning the ideological centers of gravity on the Supreme Court that are persistent over relatively longer periods of time, the scores provide the basis for meaningful comparisons with the data on the ideological centers of gravity, based upon the party of the appointing President, for the majority of the federal courts of appeals.

214 The results are not always immediately intuitive for Justices on Courts during prior periods, thus inviting the need for clarification where divergences arise. And yet, as seen in Part I.D, the newly developed point scoring system does quite well with notable appointees to the Warren, Burger, and Rehnquist Courts. *See supra* notes 96–111 and accompanying text.

TABLE 3. SUPREME COURT/CIRCUIT COURT ALIGNMENTS (ACTIVE, [TOTAL])

Year	President	Chief Justice	S. Ct. Balance			Circuit Court Balance		
			lib.	mod.	**con.**	Dem.	Rep.	Tied
1933	FDR	Hughes (since 1930)				1 [1]	9 [8]	1 [2]
1934						1 [1]	8 [8]	2 [2]
1935						1 [1]	8 [7]	1 [2]
1936						2 [2]	7 [7]	2 [2]
1937*			*3/4*	3	**3/2**	2 [2]	7 [6]	2 [3]
1938*			*4/5*	3/2	**2**	6 [5]	5 [4]	0 [2]
1939			*6*	1	**2**	6 [5]	4 [5]	1 [1]
1940			*3*	3	**3**	7 [6]	3 [4]	1 [1]
1941		Stone	*3*	5	**1**	8 [7]	3 [3]	0 [1]
1942			*4*	4	**1**	8 [8]	3 [3]	0 [0]
1943			*4*	4	**1**	8 [8]	2 [2]	1 [1]
1944			*4*	4	**1**	9 [9]	2 [2]	0 [0]
1945	Truman		*4*	5	**0**	9 [9]	2 [2]	0 [0]
1946		Vinson	*4*	3	**2**	9 [9]	2 [2]	0 [0]
1947			*4*	2	**3**	9 [9]	2 [2]	0 [0]
1948			*4*	4	**1**	9 [9]	2 [2]	0 [0]
1949			*3*	1	**6**	9 [9]	2 [2]	0 [0]
1950			*2*	1	**6**	9 [9]	2 [2]	0 [0]
1951			*2*	3	**4**	9 [9]	2 [2]	0 [0]
1952			*2*	1	**6**	9 [9]	1 [2]	1 [0]
1953	Eisenhower	Warren	*2*	3	**3**	9 [9]	1 [2]	1 [0]
1954			*2*	3	**3**	10 [9]	1 [2]	0 [0]
1955			*3*	2	**4**	9 [9]	2 [2]	0 [0]
1956			*3*	2	**4**	7 [7]	2 [3]	2 [1]
1957			*3*	2	**4**	6 [7]	4 [4]	1 [0]
1958			*3*	2	**4**	5 [7]	5 [3]	1 [1]
1959			*4*	2	**3**	5 [6]	6 [5]	0 [0]
1960			*4*	1	4	5 [5]	6 [6]	0 [0]
1961*	Kennedy		*3*	3/4	**3/2**	4 [4]	6 [6]	1 [1]
1962			*5*	3	**1**	4 [5]	6 [4]	1 [2]
1963	LBJ		*5*	2	**1**	4 [4]	7 [6]	0 [1]
1964			*3*	5	**1**	4 [5]	6 [5]	1 [1]
1965			*4*	3	**2**	3 [5]	6 [3]	2 [3]
1966			*4*	3	**2**	6 [7]	5 [3]	0 [1]
1967			*5*	3	**1**	7 [9]	2 [2]	2 [0]
1968			*5*	3	**1**	8 [9]	2 [2]	1 [0]

Year	President	Chief Justice	S. Ct. Balance			Circuit Court Balance		
			lib.	mod.	**con.**	Dem.	Rep.	Tied
1969**	Nixon	Burger	*1*	6	**1**	9 [10]	1 [1]	1 [0]
1970			*3*	4	**2**	9 [9]	2 [2]	0 [0]
1971			*3*	1	**5**	9 [8]	1 [2]	1 [1]
1972			*3*	1	**5**	7 [7]	4 [3]	0 [1
1973			*3*	2	**4**	6 [4]	5 [4]	0 [3]
1974	Ford		*3*	2	**4**	6 [4]	5 [4]	0 [3]
1975			*2*	3	**4**	5 [4]	6 [4]	0 [3]
1976			*2*	5	**2**	4 [4]	6 [6]	1 [1]
1977	Carter		*2*	5	**2**	2 [3]	7 [7]	2 [1]
1978			*2*	4	**3**	6 [5]	5 [5]	1 [1]
1979			*2*	4	**3**	5 [5]	6 [4]	0 [2]
1980***			*2*	4	**3**	8 [7]	3 [2]	0 [2]
1981***	Reagan		*2*	3	**4**	8 [8]	2 [2]	1 [1]
1982****			*2*	3	**4**	9 [8]	3 [3]	0 [1]
1983			*2*	3	**4**	8 [8]	3 [3]	1 [1]
1984			*2*	3	**4**	8 [9]	3 [3]	1 [0]
1985			*3*	1	**5**	5 [5]	5 [6]	2 [1]
1986		Rehnquist	*3*	2	**4**	4 [2]	8 [8]	0 [2]
1987			*3*	1	**5**	0 [0]	9 [10]	3 [2]
1988			*3*	1	**5**	0 [1]	10 [11]	2 [0]
1989	Bush I		*4*	0	**5**	0 [0]	11 [11]	1 [1]
1990			*3*	1	**5**	0 [0]	11 [11]	1 [1]
1991			*2*	4	**3**	0 [0]	11 [12]	1 [0]
1992			*2*	3	**4**	0 [0]	11 [12]	1 [0]
1993	Clinton		*2*	3	**4**	0 [0]	12 [12]	0 [0]
1994			*1*	5	**3**	0 [0]	12 [12]	0 [0]
1995			*1*	5	**3**	0 [0]	12 [12]	0 [0]
1996			*3*	2	**4**	0 [0]	11 [12]	1 [0]
1997			*4*	1	**4**	1 [0]	10 [12]	1 [0]
1998			*4*	3	**2**	2 [0]	10 12]	0 [0]
1999			*4*	1	**4**	3 [2]	9 [9]	0 [1]
2000			*4*	1	**4**	3 [3]	9 [9]	1 [0]
2001	Bush II		*4*	1	**4**	3 [2]	7 [10]	2 [0]
2002			*4*	1	**4**	4 [2]	6 [10]	2 [0]
2003			*4*	2	**3**	3 [1]	7 [11]	2 [0]
2004			*4*	2	**3**	2 [1]	9 [11]	1 [0]
2005		Roberts	*4*	1	**4**	2 [1]	9 [11]	1 [0]
2006						2 [1]	9 [11]	1 [0]

* Indicates transitional year in which outgoing (first listing) and incoming (second listing) judicial scores are reported.

** Indicates a year in which the Supreme Court had fewer than nine Justices as a result of Justice Goldberg's retirement and the delayed replacement with Justice Blackmun.

*** In 1980 and 1981, appointees were credited to the Fifth Circuit in anticipation of the 1982 split of that circuit into two circuits, the Fifth and Eleventh Circuits. The first year listed for the Eleventh Circuit is 1982.

**** Beginning this year, as a result of the newly created and staffed Eleventh Circuit, the circuits now total twelve, rather than the previous eleven.

C. *Analysis of Data*

While combined within a single table, the data presented in Table 3 are extensive. They track the ideological dominance of the federal courts of appeals from 1933 through 2006 and the ideological balance and dominance in the Supreme Court from 1937 through 2005. In addition, the Table affords the basis for ready comparison between the Supreme Court and the circuit courts for the entire period of overlap, 1937 through 2005.[215]

In the remainder of this Part, I will review the major junctures in this Table and relate them to the theory of standing set out in the prior part. To do so, I need to make a few general observations about the results. The characterizations liberal, moderate, and conservative (represented in the Table with fonts *liberal,* moderate, **conservative**) are artificial constructions. They are intended to capture the tendency of jurists to cast votes and to issue opinions for which particular values can be assigned using a uniform scale of measurement along a single normative liberal-to-conservative spectrum. One could avoid the need for gross categorizations of this sort by instead reporting the actual positive (**conservative**) or negative (*liberal*) scores that the Martin-Quinn index reports, which are presented along with a continuous Supreme Court timeline from 1937 to present in Appendix A. This alternative presentation, however, would undermine the ability to test the social choice analysis of standing, which requires an assessment of whether for any given period the Supreme Court is generally liberal, conservative, or divided.[216] In one important respect, this method would strengthen some of the general characterizations advanced in Part II concerning the ideological balance of the Supreme Court in the New Deal period, as compared with the system implemented here, which instead carves out a middle group of scores for the moderate position. Using the scoring system that this Article develops, the New Deal Court appears more evenly divided across three camps than it does liberal.[217] This method would prove problematic, however, in its

215 The information is not complete for every year, and notably the Martin-Quinn scores are only available from 1937 through 2005. The circuit court data covers all years in Table 3, with missing years from 1933 through 1936 and 2006.

216 At a minimum, this method of presentation would invite the need for an additional step—namely, grouping numbers into discrete categories—that is accomplished in Table 3.

217 Thus, the new system yields *3/4*-3-**3/2** for 1937 and *4/5*-3/2-**2** for 1938, whereas the Martin-Quinn index yields six liberals and three conservatives for both years. Appendix A allows for such comparisons for every year in Table 3. The double listed scores reflect transitional years in which the Martin-Quinn database reports two separate scores for the outgoing (first listed) and incoming (second listed) Justices.

failure to provide any basis for assessing claims that the Court was motivated to realign its standing rules when it was increasingly prone to issuing opinions that masked underlying intransitive preferences as a result of a membership split over three persistent but nondominant camps. And in any event, Appendix A, which contains all relevant Martin-Quinn numerical data underlying Table 3, remains available for such comparisons.

The difficulty concerning the early years is substantially abated when we consider the size of the coalition—here the conservatives—losing power in the New Deal Court. Consider for example, the listed years for the New Deal Court, 1937 through 1944, when President Harry Truman came into power. Even without data for the year 1935, we know from case law history that this was a landmark year in which a simple majority of one moderate, Owen Roberts, and four conservatives, known as the "Four Horsemen,"[218] struck down a number of model New Deal programs.[219] We also know that in the year 1937, aware of the threatened Court-packing plan,[220] the Court reversed course and sustained programs that under the earlier jurisprudential analysis it would presumably have struck down.[221]

The data on the circuit courts for that period are remarkable. In the first term of the FDR administration (1933–1937), the Republicans controlled between seven and nine of eleven circuits, while the Democrats controlled only one to two. This remained the case in the year 1937 in which the most significant New Deal set of doctrinal reversals took place.

Using the scoring system developed here, the early data for the Court from 1937 through 1939 show a split from *3/4*-3-**3/2** to *4/5*-3/2-**2** to *6*-1-**2** respectively. The numbers of liberals remained fairly constant at four for a period of years, and beginning in 1941, the number of conservatives remained fairly stable at one. While the number of centrists appears relatively high, it would belie general understandings and common sense to characterize this as anything other than a liberal court. From the perspective of the holdover conservatives, this was a Court that required only one of several available moderates to

218 The so-called "Four Horsemen" were Justices McReynolds, Butler, DeVanter, and Sutherland. *See* STEARNS, *supra* note 21, at 220–23.

219 For a helpful discussion of this historical period, see WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 42–48 (1995).

220 *See* STEARNS, *supra* note 21, at 220–23.

221 *See* Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21–22, 37–38 (1972) (discussing the historical significance of the Supreme Court's jurisprudential changes in 1937).

sustain a proffered liberal result. During this same period, the circuits were also simultaneously trending in a consistently more liberal direction as the FDR administration was building replacements of the prior conservative lower federal courts.

One might surmise from the data that the New Deal Court, having put standing in place to protect its doctrinal about face against continued attacks in the lower federal courts, would then abandon that doctrine in the early 1940s when the liberal appointees controlled not only the Supreme Court, but also the overwhelming majority of the circuit courts.[222] This seems implausible, however, for two reasons. First, once the default standing doctrines were established, they protected against categories of litigation that would have undermined the overall progressive liberal project of the increasingly Democratic controlled federal judiciary. Congress retained power to afford standing within particular statutes, but absent such specific statutory directives, the default doctrines limited access to federal courts as a means of claiming harm from progressive regulatory interference in the market.[223] While the data are consistent with the explanation that standing doctrine was initially developed to discipline conservative lower federal courts, it also remains consistent in this later period when we consider that there was no underlying change in doctrinal mandate that warranted doctrinal revision. This holds even though a general ideological convergence had by then emerged between the Supreme Court and the courts of appeals. Second, it is important to bear in mind that the relationship between the Supreme Court and the lower federal courts operates to some extent in a historical lag rather than in real time. The nature of litigation is such that cases often take considerable time to go from the district courts to the circuit courts and from the circuit courts to the Supreme Court. The Court is to that extent time-lagged and a largely passive recipient of appeals and certiorari petitions that reflect what has happened over the past two to three years in the lower federal courts.[224] While time lags make direct comparison within a given year more difficult, it is important also to recognize that the Court's members are acutely aware of appointments processes affecting the lower federal courts.

222 Notice the liberal ascent in Democratic control of the circuit courts reaching eight out of eleven by 1941 and nine out of eleven by 1944, where it remained until the Warren Court. *See supra* Table 3, years 1941–52.

223 *See supra* Part I.B.

224 *See* Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185, 187 (2002) ("Normally, a Supreme Court case involves events that occurred years ago, and legal issues that have percolated through the lower courts.").

This is likely especially true of appointments to the federal courts of appeals. As a result, while the passive data most readily available—namely incoming cases on appeal and through petitions for certiorari—is backward looking, individual Justices are likely also to be, at least to some extent, forward looking.

The resulting complexity might appear to render the ability to set out any robust claims based upon the sort of numerical data presented in Table 3 impossible. I would suggest, however, that this is not only excessively pessimistic, but also contrary to the valuable insights that one gains into the analysis of justiciability—especially standing—when we compare the social choice analysis summarized in Part I with the data assembled in Table 3.

As we have already seen, the explanation that standing doctrine was originally motivated by a divergence in judicial philosophy between the emerging New Deal Court and the conservative circuit courts is well corroborated in the data. How about the broadening of standing doctrine in the Warren Court period? The analysis suggests that as the liberal Warren Court's center of gravity began to converge with the more liberal federal courts of appeals, it was motivated to broaden standing to further its emerging rights-driven jurisprudence.[225] That jurisprudence operated in tension with the limited understanding of justiciability, founded largely on notions of common law injury, that undergirded the New Deal Court's standing jurisprudence.[226]

The Warren Court began with the appointments of Earl Warren and William Brennan in 1953.[227] The data suggest that as the Court began to move left, the strength of the conservative block increased, with four dominant conservatives in the years 1955–1958.[228] The circuit court history demonstrates overwhelming dominance of Democratic appointed circuit court jurists, with nine to ten out of eleven circuits controlled by Democratic appointees. This began to shift as Eisenhower increasingly appointed circuit court judges. But once again, the time lag is important in assessing the data. Assuming a two- to three-year informational time lag, the sense of Democratic convergence dominating both the Supreme Court and the circuit courts would have lasted into the late 1950s. The data become more difficult to interpret at this point because just when the Republicans took con-

225 *See supra* Part I.C.

226 *See supra* Part I.B.

227 *See supra* Part I.C.

228 These included Minton, Reed (then Whittaker), Jackson (then Harlan), and Burton. *See infra* Appendix A columns 4, 7–9, years 1953–58.

trol of the majority of the circuit courts, the Democrats resumed control of the White House for a period lasting from 1961 through 1969. What is most noticeable is the emerging ideological dominance of the liberal Warren Court in the late period, from 1966 through 1968, with the dominance of Democratic controlled circuit courts in the same period. It is during this period, and carrying over to the early Burger Court period, that the Court announced some of its notably broad standing decisions.[229]

Now consider the somewhat earlier period in which the Warren Court liberal majority increased while the circuit courts reverted temporarily to Republican control. The social choice theory of standing might imply that the Warren Court would have imposed stricter limits on standing doctrine in this period as the conservatives came to dominate the lower courts, but this did not occur. By the time of this shift, beginning around 1958, the Warren Court's doctrinal mandate was underway. And the liberal coalition was generally gaining strength. Given the strength of the liberal coalition (which included crossover moderates),[230] this Court was also less likely to be concerned about splits that emerged from the divided circuit courts since it had the power to correct them on review. The nature of the newly identified rights in the Warren Court required improved judicial access, rather than protection from judicial interference, as had been the case with the New Deal Court, which, following its rapidly changing doctrinal transformations from 1935 through 1937, used standing to discipline the lower federal courts from limiting the reach of those doctrinal changes.[231]

The data also create interesting interpretive questions concerning the Warren Court itself. In the early years especially, the data suggest that the Court lacked a dominant center of gravity and might have been prone to cyclical preferences. And yet while the Court was split over three gradations (using the scoring system developed here), it was not likely subject to the same sort of coalition instability that later came to characterize the Burger and Rehnquist Courts. That is largely because of the nature of the substantive constitutional ques-

229 *See supra* Part I.C. It is notable that Justice Douglas authored *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 206 (1972), for a unanimous Court with a separate concurrence by Justice White joined by Justices Blackmun and Powell. *Id.* at 212 (White, J., concurring).

230 *See supra* Table 3, years 1953–68; *infra* Appendix A, columns 8–9, years 1962–68 (demonstrating the diminution of the conservative coalition by 1962 to one or two members—Harlan, and sometimes Stewart—for the remainder of the Warren Court).

231 *See supra* Part I.B.

tions that the Court was called upon to address. Many of the contentious cases in this period involved the jurisprudential approach to take in assessing the longstanding debate over whether the Fourteenth Amendment incorporates the substantive provisions of the Bill of Rights and how far to construe such rights.[232] The underlying tensions involved the source of the underlying rights more so than the propriety of a regime of judicially identified rights.[233] Provided a majority agreed on incorporating a particular right or in extending the scope of an existing right, even if doing so required more than a single rationale, the Court coalesced in a liberal direction. In this regime, the split over frameworks did not threaten to undermine the Court's overall mission of using judicial power as a means of providing guidance, increasingly with reference to the Bill of Rights, to the lower federal judiciary.[234]

The data support a very different thesis, however, concerning the Burger and Rehnquist Courts lasting from 1969 through 2004. The data on the circuit courts in this period are striking. They begin with lopsided Democratic control at the beginning of the Burger Court period and gradually move in the direction of increased Republican control.[235] While the Carter administration made no Supreme Court appointments, it reinstated Democratic control in a number of circuits. The net effect was to slow down what otherwise would appear to be a smooth progression of Democratic to Republican control within the lower federal judiciary. After the Rehnquist Court began, however, the steady progression favoring Republican control resumed quickly, thus continuing the process of eventual conservative control of the lower federal courts. In contrast with the Burger Court, therefore, the data show that the Rehnquist Court coincides with a notable conservative ascent within the federal courts of appeals.

This historical series of events creates an anomaly for conventional political accounts of standing. Because the Rehnquist Court was increasingly conservative and because the standing doctrine had

232 *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968); Gideon v. Wainright, 372 U.S. 335, 341–45 (1963).

233 *See, e.g.*, *Duncan*, 391 U.S. at 149 n.14.

234 *See, e.g.*, *id.* at 150 (discussing the increasing historical relevance of the Bill of Rights in evaluating what qualifies as fundamental for purposes of incorporating rights against states).

235 It is worth noting that the years 1971–72 report a dominant conservative coalition of five, *see supra* Table 3. Beginning in this period the Court issued *Trafficante* (1972), *Eisenstadt* (1972), and *Roe* (1973), demonstrating once again the need to inform these data with specific knowledge of judicial developments in relevant historical periods.

been developed to further a progressive liberal judicial philosophy from being threatened in conservative controlled lower federal courts, assuming a strict political motivation, why did the Rehnquist Court not abandon, or at least retreat from, strict standing doctrine? One possible answer is that the Rehnquist Court's conservatism was targeted against a different liberal philosophy than New Deal progressivism. Instead, it was aimed at retrenching the Warren Court's liberal rights-driven jurisprudence. The Rehnquist Court's standing doctrine was thus motivated to limit access to the federal courts to further bolster judicially created rights. The data reveal a fundamental difficulty, however, with this account, and in doing so further bolster the social choice account.

From quite early on in the Rehnquist Court, and continuing throughout, the conservatives overwhelmingly controlled the lower federal courts. Had the Supreme Court had the wherewithal to retrench substantively on liberal doctrine, it would not have invited the resistance in the lower federal courts that motivated the original standing doctrine or needed the doctrine to ensure against newly created rights. And yet, the Rehnquist Court continued the Burger Court project with respect to standing, which was to bolster the doctrine and give it a constitutional foundation.[236] The alternative social choice account, which the data generally support,[237] suggests that the real motivation for reintroducing strong-form standing doctrine was to reduce the doctrinal risks associated with path dependence in the Supreme Court itself. The persistence of the three jurisprudential camps—liberal holdovers from the earlier Warren era (or appointments who for one reason or another moved in that direction);[238] core conservatives, meaning those willing to overturn disfavored precedents;[239] and moderate conservatives, those who preferred case-by-case determinations of disfavored precedents, often ruling on narrow procedural grounds[240]—increased the risk of indeterminate doc-

236 *See supra* Part I.D.

237 The hardest years for this account are 1987–90, which show a solid five-Justice conservative bloc. This bloc, however, includes Justices O'Connor and White, whose voting records over the longer term did not prove consistently conservative. *See infra* Appendix A, columns 7, 9, years 1987–89.

238 This bloc has included a combination of the following Justices: Brennan (then Souter), Blackmun (then Breyer), Stevens, and Ginsburg (replacing the sometimes moderate, sometimes conservative White). *See infra* Appendix A (providing timeline).

239 This bloc has included a combination of the following Justices: Rehnquist, Scalia, Thomas, and sometimes White. *See* Appendix A.

240 This bloc has included one or more of the following Justices: Powell (then Kennedy), O'Connor, and sometimes White (replaced by the liberal Ginsburg). *See* Appendix A.

trine. This persistent judicial structure did so by increasing the relevant options as part of the choice set when older liberal precedents were invited for challenge.[241]

In addition, as discussed more fully below, it is a mistake to imagine that rights-driven jurisprudence is inherently liberal and that limited judicial access is inherently conservative. Remember that precisely the reverse held true in the New Deal Court period.[242] Even today, some rights claims, including property rights and religion claims, are conservative, and denials of access would favor liberals on those issues. If the Court managed to retrench on the Warren Court's liberal reading of the Fourteenth Amendment's Due Process Clause in favor of an earlier view associating due process with economic rights, then the balance once again could shift in the same direction, such that broadening judicial access would favor conservative jurisprudence over a significant set of issues. The predictably favorable resolution on the merits that a conservative Supreme Court and lower federal judiciary would ensure would then prevent a relaxed standing doctrine from favoring a liberal jurisprudence on others.

The data generally bear this theory out. Throughout both the Burger and Rehnquist Court periods, there is a diminution in control by any single ideological bloc as compared with the latter half of the Warren Court period. While the numbers appear to move in the direction of increased conservative membership, using the Martin-Quinn scoring system, core conservatives held sway for a limited number of years in the early Rehnquist period (1987–1990), but then gave way to a series of years in which the liberals and moderates collectively held a majority. Most notably, beginning in 1997 and continuing through 2002, the split among the coalitions was lopsided, with heavy membership (four in each instance) in the liberal and conservative camps, and only Justice O'Connor, sometimes Kennedy, holding the middle.[243] It is noteworthy that a single moderate jurist is sufficient for a lack of predictability in a *4*-1-**4** Court. One remarkable feature of the Rehnquist Court has been the stability of just such a regime (occasionally switching to *4*-2-**3**), since roughly 1997.[244]

The social choice account suggests that the more robust explanation of standing throughout this period is that the Burger Court

241 *See supra* note 198 and accompanying text.

242 *See supra* Part I.B.

243 The data reveal that from 1997 through 2004, Justice O'Connor assumed the position of moderate from 1998 through 2004, while Justice Kennedy assumed the position of moderate in the years 1997–98 and 2003–04. *See* Martin et al., *supra* note 9, at 1305.

244 *See supra* Table 3, years 1974–2004.

sought to control both the lower federal courts, which for some significant set of years continued to favor liberal control,[245] and itself against the increased risk of issuing unpredictable outcomes that resulted from carefully timed or sequenced litigation. While the Rehnquist Court witnessed a dramatic shift favoring conservative control of the lower federal courts, interrupted but never overtaken by Clinton's lower court appointments, it did not resolve the issue of internal loose coalitions. The Court thus elected to retain and bolster standing doctrine at a time when it was not able to fully benefit from what otherwise would prove a strong conservative alliance with the lower federal courts. Instead, it limited access to the federal judiciary in general as a means of disciplining its own loose coalitions in addition to litigants who would seek the benefit of manipulating case orders to affect substantive doctrine.

III. THE FUTURE OF STANDING DOCTRINE

A. *The Roberts Court in Historical Perspective*

The combined data include numbers for the 2005 Roberts Court Term. The evidence supports the expectation that Justice Alito has provided a fourth core conservative, joining Roberts (who assumes roughly the same position as Rehnquist), Scalia, and Thomas. The Court now appears to be split *4*-1-**4**, in contrast with the split in the prior two years of *4*-2-**3**.[246] While the conservative coalition is undoubtedly strengthened, the Court nonetheless remains unstable and subject to the whims of the single remaining moderate conservative. Now imagine instead that the Court witnesses a replacement of a liberal (perhaps Stevens or Ginsburg) or the remaining moderate conservative (Kennedy) with a core conservative. At this point, there will be a predictable conservative majority aligned with an overwhelmingly conservative controlled set of lower federal courts.[247] This Court would not need to discipline the lower federal courts, its ideological

245 A majority of the circuit courts remained in Democratic control until 1969–74, although the numbers were steadily declining, and during 1978 and 1980–84, the Democrats regained control as a result of the Carter administration, after which the numbers again progressed toward Republican control. *See supra* Table 3.

246 *See supra* Table 3, years 2003–04.

247 The numbers in Table 3 are significant. The present composition of the Roberts Court is *4*-1-**4**, as Alito replaced one of the two moderate positions with a conservative position. Replacing one of the liberals or moderates with a conservative would change this to either *3*-1-**5** or *4*-0-**5**. And of course more than one Republican replacement would move that balance even further in favor of conservative control. As for the circuit courts, nine out of twelve are dominated by Republican appointed judges (with two dominated by Democratic appointed judges and one tie), and if we

allies. Nor would it be much concerned about the predictability of its own outcomes. On the most critical issues that the Court would face, it would be capable of anticipating core conservative rulings. Relaxing standing would facilitate the flexibility to accomplish this by allowing lower federal courts to operate as full partners with the predictably conservative Supreme Court.

This is not to suggest that with one more conservative appointment the Roberts Court will suddenly mark a wholesale retreat in standing doctrine. Rather, if the Republicans continue control of the White House, and make one or two more appointments to the Supreme Court, replacing liberals or moderates with conservatives, while also continuing to actively maintain their numbers (perhaps even improving them from a conservative perspective) in the circuit courts, the Court will no longer be motivated to continue standing doctrine in its present strict form.[248] In this regard, the doctrinal anomalies—or claimed inconsistencies—of standing doctrine will prove a significant benefit in allowing the Court to signal change without a formal abandonment.[249] As previously stated, for every articulated rule, there appears to be a readily available exception.[250] Signaling increased flexibility in the application of standing doctrine does not require ending longstanding doctrine. Rather, it requires emphasizing features of existing doctrine that are broader within particular cases.

To some extent, the Court has recently used standing doctrine in this manner. Consider, for example, *Bennett v. Spear*,[251] a case in which the Court afforded standing to limit the application of the Endangered Species Act in a manner that threatened to impose economic harms to ranchers and developers.[252] By construing citizen standing sufficiently broadly to embrace claims that operate in direct opposition to the overall thrust of the statute—one aimed, after all, at species preservation, not pocketbook protection *against* species pres-

include senior judges, the number shifts to eleven to one in favor of Republican appointed control. *See supra* Table 3, years 2004–06.

248 As previously suggested, despite the stress that a core conservative majority on the Supreme Court, aligned with a conservative lower federal judiciary, would place on standing doctrine, depending upon the strength of some jurists' commitments to particular standing theories—for example, Justice Scalia's commitment to a theory grounded in Article II—further conservative Supreme Court appointments might be necessary to change standing doctrine. *See supra* note 20 and accompanying text.

249 And of course formal abandonment would make reinstating the doctrines more difficult should circumstances later change.

250 *See supra* notes 28–33 and accompanying text.

251 520 U.S. 154 (1997).

252 *See id.* at 167–71.

ervation—the majority signaled that for a certain class of economic injuries, standing is broadly construed, even though for more attenuated claims of injury, even if they push in the overall direction of the statute, as in *Lujan v. Defenders of Wildlife*,[253] standing will be strictly enforced.[254] Notice also that this broadening of standing did not require overruling *Lujan*. Rather, it required a broader application of the zone of interest test, a doctrine well embedded within the doctrine of statutory standing.[255]

The Court could similarly emphasize aspects of standing that are more generous as a means of facilitating other conservative or economic rights-driven jurisprudence within the lower federal courts, and thus eventually on the Court itself. And notice that based upon the strength of the ideological alignment between the Supreme Court and the lower federal courts, the Court could also use the liberalization of standing to facilitate substantive doctrinal expansions in the lower courts without having to bear the full political pressure that results from such doctrinal change, as for example did the New Deal Court.

There is precedent for this sort of tactic as well. In the 1996 decision, *Hopwood v. Texas*,[256] a split panel of the United States Court of Appeals for the Fifth Circuit struck down the University of Texas School of Law's affirmative action policy, where that policy involved the segregated use of files based upon race.[257] The *Hopwood* majority determined that *Bakke* was not good law because Justice Powell's split holding, which struck down the challenged quota-based affirmative action program and which permitted the use of race to further diversity in higher education, was set out in an opinion, the controlling parts of which only the author had agreed to.[258] In contrast, Judge Weiner, specially concurring, admonished the majority that it was not the job of the Fifth Circuit to anticipatorily overturn even disfavored Supreme Court precedents.[259] One might imagine that the Supreme Court would have granted certiorari to reassert its authority to deter-

253 504 U.S. 555, 578 (1992).

254 *See Bennett*, 520 U.S. at 167–72, 175–76.

255 *See* STEARNS, *supra* note 21, at 265–68, 288–89.

256 78 F.3d 932 (5th Cir. 1996).

257 *Id.* at 962.

258 For a discussion of what constitutes holding and dicta within this opinion, see Abramowicz & Stearns, *supra* note 123, at 1058–60.

259 *See Hopwood*, 78 F.3d at 963 (Weiner, J., concurring) ("[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.").

mine when its precedents should be discarded,[260] but it did not do so in *Hopwood*, apparently content to allow the Fifth Circuit to get out in front and limit the reach of a precedent that an emerging conservative majority disfavored.[261]

A relaxation of standing, similar to the Warren Court's broadening of then existing standing rules, would facilitate this sort of interaction in which the Court would benefit from active engagement in limiting the liberal rights-driven jurisprudence, perhaps even retrenching upon it, and possibly furthering a more conservative rights-driven jurisprudence. Loosening the valves that control access to the lower federal courts would facilitate this mutually beneficial partnering relationship, thus taking stress off the Supreme Court for bringing about doctrinal change, while still facilitating desired doctrinal results. Failing to take such cases on review would provide a powerful signal to more reticent sister circuits, allowing them to follow those circuits that have taken the lead in moving doctrine in their preferred conservative direction. And when circuit courts reach the seeming limits of where Supreme Court doctrine will allow them to go, at least assuming the lower federal courts—in contrast with the Fifth Circuit in *Hopwood*—respect such limits, the Court is obviously free to enter the fray through grants of certiorari with far greater control in predicting the outcomes of those cases it elects to decide than had characterized the Burger and Rehnquist Courts.

B. Some Objections Considered

This Article has relied upon newly constructed data to support the social choice account of standing doctrine and to offer predictions about future directions of standing doctrine in the Roberts Court. Making predictions about judicial behavior is inherently risky, and

260 The Court has made such pronouncements in the past. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

261 Of course, *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (sustaining the University of Michigan School of Law affirmative action program, which employed a moving target centered on creating a "critical mass" of specified minorities, against an equal protection challenge), and *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (striking down the University of Michigan undergraduate affirmative action program, which employed a point scoring system for race, as violating equal protection), ended all of that by essentially codifying the *Bakke* regime. *See Grutter*, 539 U.S. at 325; *Gratz*, 539 U.S. at 271.

this is no different. Just as econometrics is often most robust in explaining the past, as unanticipated contingencies have the potential to throw even the most sophisticated models off course, so too here, any number of factors could derail the prediction that the emerging ideological alignment between the Supreme Court and the circuit courts would motivate a relaxation of standing. Certainly this is true, and I can only anticipate some objections here. This Article obviously cannot address unpredictable historical events. The theory is dependent upon several assumptions, and if those do not succeed, then the predictions also might not come to pass. This Article offers no prediction on the presidential races of 2008 or thereafter. If a Democratic President makes the next series of Supreme Court appointments, and if he or she also moves the Supreme Court and circuit courts back in the direction of a more even balance or even of liberal control, then the predictive theory advanced here will not apply.[262] Or at least it would not apply in the near future. Of course, as the Carter administration showed, it is also possible that a one term Democratic administration would mark only a temporary retreat from a broader trend.[263] If so, this would only render this Article's prediction premature. And yet, even if the assumptions in the preceding analysis do hold, there remain important objections to consider. I have addressed some briefly in the preceding Parts, but will tackle them more systematically here. The three principal objections are that (1) standing is a conservative doctrine designed to limit liberal rights-driven jurisprudence; (2) existing statutory standing rules favor conservative jurisprudence, especially as related to congressional grants of standing; and (3) the Supreme Court is generally resistant to announcing radical doctrinal change. We will now take each objection in turn.

1. Standing as a Conservative Doctrine Targeting Liberal Rights Jurisprudence

The thesis that this Article advances is likely to be counterintuitive to many readers. Standing has been a prominent feature of the jurisprudence of the Burger and Rehnquist Courts. The general wisdom is that the doctrine is associated with restricting liberal rights-based jurisprudence, and is to that extent a conservative doctrine, or set of doctrines. If these premises are correct, then it would seem peculiar indeed to imagine that with a stronger push in a conservative direction, not only on the Supreme Court itself but also in the federal

262 Of course the benefits of the data and the historical analysis of standing based upon social choice theory would remain unaffected.

263 *See supra* Table 3, years 1977–80.

courts of appeals, the Court would then be motivated to relax standing. The response to this argument is twofold. First, this characterization of standing is at best partial and ahistorical. As this Article has shown, standing was created in the New Deal Court to advance a progressive liberal regulatory agenda and was only later transformed into a set of tools to advance the interests of a conservative Supreme Court.[264]

This of course is not a complete answer, however. Even assuming that this story about the transformation of standing is correct, the question remains whether relaxing standing doctrine today would further judicial objectives of value to conservatives. I believe that the answer to that question is "yes."

First, it is mistaken to equate rights-driven jurisprudence with political or ideological liberalism and retrenchment of rights-driven jurisprudence with conservatism. The New Deal jurisprudential era provides a ready counter to such a characterization. Prior to the radical doctrinal transformations in the New Deal, the Supreme Court had relied upon a rights-driven understanding of due process to advance a host of economic liberties—freedom of contract and freedom of property centrally among them—to restrict regulatory intervention into private market orderings.[265] Few judges today are advocating a return to the *Lochner* era, but certainly among conservative academic commentators, this is an increasingly prominent and respectable position.[266] But even if we do not go so far as to suggest an effort to revive economic substantive due process, there exist other "conservative" rights. These include, at a minimum, the right to develop property and the right to engage in particular religious practices.[267] In at least one instance, the Court has already broadened standing to further such claims.[268]

The Supreme Court could also confer standing to challenge various liberal spending programs that contravene religious or other conservative objections. To that extent, a variation on the liberal *Flast*

264 *See supra* Part I.B–D.

265 *See* LEUCHTENBURG, *supra* note 219, at 42–48.

266 For an intriguing article that supports this position, see Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005, § 6 (Magazine), at 42 (discussing the "Constitution in Exile" movement).

267 For a recent article that describes the policy shift within the Bush administration Department of Justice to emphasize claims related to denials of religious liberty over claims related to race-based discrimination, see Neil A. Lewis, *Justice Dept. Reshapes Its Civil Rights Mission*, N.Y. TIMES, June 14, 2007, at A1.

268 *See* Bennett v. Spear, 520 U.S. 154, 179 (1997) (conferring standing to allow a challenge to the application of the Endangered Species Act based upon the financial concerns resulting from potential limitations on development).

standing decision from the Warren Court period might eventually find reflection in the emerging Roberts Court. It is even possible that federalism jurisprudence might find refuge in the Court's recent standing decision, *Massachusetts v. EPA*,[269] if, for example, the Court conferred standing upon states claiming that federal civil rights laws benefit all persons without regard to minority racial status or that federal environmental statutes, as seen in *Bennett*, must be enforced to accommodate local economic concerns.

Of course the federal judiciary can expedite reversals of liberal rights by broadening standing as well. While this might not appear an effective long-term strategy, relaxing standing rules will encourage efforts to articulate new rights, or to apply previously announced rights, on new facts. These cases might also allow the courts in which the claims are raised to retrench, rather than to expand, such rights by denying the claims. In the course of doing so, courts can also suggest in dicta broader retrenchments that will invite other claims to raise more ambitious rights-restricting challenges.

2. Existing Standing Rules Favor Conservative Jurisprudence, Especially as Related to Congressional Grants of Standing

One might further object that unlike liberal rights, conservative rights do not require relaxed standing. The argument harkens back to the famous dictum in *Linda R.S.*, namely that Congress can, by statute, allow standing where it would not exist but for the statute itself.[270] This proved important to liberal rights jurisprudence to the extent that liberal claims of standing are rooted in rights that lack strong counterparts in the common law of tort, contract, or property. There are many cases that illustrate this proposition, but here I will mention just a few: the right to prevent harm to habitats of endangered species,[271] the right to prevent enforcement of regulatory action that will harm the environment,[272] and the right to enforce a statute against a claimed discriminatory practice.[273] In each example, the claimed right is one that arguably lacks a strong common law analogue and instead is premised either on an extension of principles drawn from

269 127 S. Ct. 1438 (2007).

270 Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973); *see supra* note 95 and accompanying text.

271 *See* Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000 & Supp. IV 2004).

272 *See* Clean Air Act, 42 U.S.C.A. §§ 7401–7671q (West 2003 & Supp. 2007); Clean Water Act, 33 U.S.C.A. §§ 1251–1387 (West 2001 & Supp. 2007).

273 *See* Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2000).

an existing constitutional provision, for example equal protection, or a legislatively constructed claim.

Certainly this has characterized many claims that were newly developed in the Warren Court era and often extended or modified in the later Burger and Rehnquist Courts. At one level, that fact might counsel in favor of an incentive to limit standing as the Court moves forward. And yet, in some cases, the vindication of any articulated right that we can characterize as liberal requires thwarting a potential counter-right that we can characterize as conservative. Standing to prevent federal subsidization of discriminatory private schools thwarts the right of private schools to engage in whatever policies they seek to further, perhaps motivated by religious belief, unimpeded by federal regulatory or judicial interference. Standing to prevent discrimination in housing runs in tension with the claimed right of property owners to select with whom they wish to deal in decisions to lease or sell. Standing to prevent federal subsidization of developments harming the habitats of endangered species thwarts developers' rights to construct on private lands or the government's power to fund programs abroad unimpeded by claimed nuisance law suits. But even if each of these claims could be couched in common law terms, that merely underscores the potential benefits of a relaxed standing doctrine or at least of permitting broader standing than existing federal statutes might allow. And as we have seen, by broadening statutory standing, a conservative Supreme Court can redirect liberal statutory schemes to elevate conservative interests, which had previously been at most a counterbalancing consideration, even at the expense of thwarting the statute's main objectives.[274]

A more difficult issue is whether the existing constitutional standing rules benefit conservative jurisprudence in the event that a liberal Congress affords broader access to the federal courts through liberalized standing. Certainly in the environmental area, this has often been a method of augmenting governmental enforcement of federal regulatory regimes respecting clean air, water, and endangered species.[275] The Supreme Court has, to some extent, vacillated on whether its constitutional rules apply as strictly to Congress as they do to those relying upon broad constitutional provisions as the basis for standing.[276] Although not without limitations,[277] Congress generally

274 *See supra* note 268 and accompanying text.

275 *See* Clean Air Act, 42 U.S.C. § 7604 (2000) (citizen suit provision); Clean Water Act, 33 U.S.C. § 1365 (2000) (same); Endangered Species Act, 16 U.S.C. § 1540(g) (2000) (same).

276 *See generally* Stearns, *supra* note 133 (discussing standing in *Lujan* and *Laidlaw*).

has the power to avoid the prudential standing barriers, and can thus confer standing on third parties and render legally diffuse claims specific to individual litigants. The question, however, remains whether allowing Congress flexibility in defining injury in fact, causation, and redressability would undermine conservative jurisprudential goals. For example, to the extent that conservative jurisprudence is consistent with vindicating substantive claims related to property rights, traditional tort-based criteria might tend to further that objective.

There are two countervailing considerations. First, it is possible that the price of broadening access to the federal judiciary more generally to receive the benefits of allowing these courts to get in front and take pressure off the Supreme Court in moving doctrine in a more conservative direction will include some flexibility in the realm of statutory standing. This might be true even if some specific applications allow a more liberal set of litigants to seek to expand the reach of broad federal regulatory programs. At least for some conservative jurists, jurisprudential conservativism might include allowing Congress to make statutory policy in such areas even if it facilitates some results with which the Court disagrees.[278] Second, there is at least some data to support the view that relaxing traditional standing criteria in the statutory context will allow advancement of more traditional, and perhaps conservative, rights.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[279] for example, Justice Ginsburg, writing for a majority, conferred standing upon a group of private litigants under the Clean Water Act who challenged a wastewater treatment plant's failure to comply with requirements of an emissions permit.[280] One of the difficulties in the case was that the permits were apparently based upon a calculation error, and as a result, the claimed violations did not produce any documented environmental harm.[281] For Justice Ginsburg, such a showing was unnecessary. Instead, the issue was simply noncompliance with the permit.[282] In contrast, Justice Scalia, writing in dissent, con-

277 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992).

278 *Cf. id.* at 579–81 (Kennedy, J., concurring) (noting that "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 refusing to foreclose the possibility that arguably tenuous claims of injury based upon an "ecosystem nexus" or "animal nexus" could nonetheless constitute a justiciable injury in fact sufficient to satisfy constitutional standing requirements).

279 528 U.S. 167 (2000).

280 *See id.* at 173–74.

281 *See* Stearns, *supra* note 133, at 378 n.180.

282 Ginsburg stated:

tinued to insist upon a chain from the permit violation to an environmental harm to harm to the individual, and on that basis rejected the various claims to standing.[283] While Scalia rejected all claims to standing, it is worth considering one substantive argument for standing that sought to vindicate a claim grounded in a conservative right, specifically the right to avoid a diminution in the value of property resulting from the publicity attendant the permit violations.[284] At least if we accept Scalia's rejection of this argument for standing as an indication, in order for Congress to allow an individual standing to challenge private action that violates a federal statute, even to pursue a personal financial injury, it might be necessary to broaden standing rules relative to *Lujan*.

Of course one might imagine any number of contexts in which individual claimants will seek to further conservative interests through the process of litigation, even if they are not the direct beneficiaries, as for example might occur following a government decision to restrict access to the public square to place a crèche, the Ten Commandments, or some other set of religious symbols; to facilitate the free exercise of a religious practice involving groups in which the claimant is not a member (analogous to allowing claimants to pursue challenges to discriminatory housing to receive the benefits of living in an integrated community); or to allow private development that might have a benefit in gentrifying a blighted neighborhood, but where the benefits are sufficiently dispersed that only an interest group, or an ideologically motivated litigant, would bring the claim. It is always difficult to predict the precise shape that future litigation will bring, but these examples suffice to counter any argument of a necessary inconsistency between employing broadened statutory standing and the pursuit of conservative rights.

> The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with [the required] permit.

Laidlaw, 528 U.S. at 181.

283 Thus, Scalia stated: "While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury." *Id.* at 199 (Scalia, J., dissenting).

284 *See id.* at 202.

3. The Supreme Court's Resistance to Announcing Radical Doctrinal Change

A final argument against this Article's predictive thesis is that the Supreme Court itself benefits from the very doctrinal flexibility that has led commentators to criticize standing doctrine. Announcing a broad set of standing rules might prevent the Court from using standing to limit access to the federal courts at some time in the future. This is especially likely should the balance of federal judicial power once again change in a disfavored direction from the perspective of conservative jurists.

This is almost certainly correct, and the proper response requires that we revisit this Article's more limited predictive claim. Recall that I am not arguing that the Supreme Court will be motivated to abandon standing in wholesale fashion. In fact, the very flexibility of the doctrines will allow the Court to effectuate the objectives that I claim without the need to signal radical doctrinal revision of standing in particular, or justiciability more generally. Recall also the criticism that every standing doctrine comes equipped with exceptions. Broadening standing merely requires emphasizing those cases that are more expansive or even that language within particular cases that signals a more expansive scope to standing doctrine. An important implication of this analysis is that the Roberts Court can select to emphasize and deemphasize particular aspects of standing doctrine *without* effectuating any fundamental transformation in standing case law. For example, as between *Lujan*, which suggests limited congressional prerogatives to effectuate standing in nontraditional (no common law analogue) areas, and *Laidlaw*, which suggests the opposite, the Court can more favorably cite the latter. As between *Allen*, which suggests that the Court will not confer standing to second-guess regulations alleged to violate equal protection that are claimed to adversely affect markets affecting individuals, and *Bakke*, which suggests the opposite, the Court can emphasize the latter. The Court can prefer third party standing cases like *Miller v. Albright*,[285] that allow parties not technically subject to a rule but who are nonetheless practical parties of interest,[286] to *Gilmore v. Utah*, which gives legal formalism a higher status.[287] And the Court can emphasize decisions that permit Congress power to define broad interests as enforceable individual rights,

285 523 U.S. 420 (1998).

286 *Id.* at 433 (plurality opinion).

287 429 U.S. 1012, 1013–15 (1976) (Burger, C.J., concurring) (rejecting standing of petitioner's mother seeking relief on his behalf).

like *Laidlaw*, rather than decisions that suggest the contrary, like *Lujan*.

The critical point is that the flexibility of standing doctrine will prove a strength in that it will allow the Court to claim doctrinal continuity, while sending a powerful signal to those who matter, namely lower federal court judges. These judges speak the Court's language and will happily take the intended bait. They will view such signals as an invitation to more aggressively invite claims testing the limits of a newly emerging conservative rights jurisprudence and to retrench, as much as the Supreme Court's substantive doctrines will allow, disfavored liberal rights held over from a very different judicial era.

The power to do this without formally announcing a change in doctrine is not a weakness of the thesis, but a strength. The Court will be motivated to work below the radar, allowing the partnering lower federal courts to do much of its bidding. When the circuit courts run up against clear limitations based upon existing Supreme Court precedent, the Supreme Court can then step into the fray, knowing that, unlike the New Deal Court, it has a friendly lower federal judiciary, ready to implement its new set of doctrinal mandates.

CONCLUSION

The standing doctrine is at once a set of substantive rules and a set of rules about how substantive doctrine is made. It is about the timing of decisions and the perceived fairness of rules governing who presents cases, what form the cases should take, and when they can be brought. A set of doctrines targeted to such ends is, not surprisingly, flexible. The doctrine changes in response to changing conditions, and has done so since its inception in the New Deal. This Article presents a seemingly radical yet simple idea. Given its increasingly strong conservative core and its ideological alignment with the lower federal judiciary, with one or more conservative appointments, the Roberts Court will have much the same incentives respecting the broadening of standing doctrine as a means to push substantive doctrine in its preferred direction as did the Warren Court. Whether or not this thesis truly is radical, one thing should now be clear: for nearly seventy years, the Supreme Court has retooled standing to further some other, larger doctrinal set of objectives. At bottom, this Article merely questions why the emerging conservative Roberts Court would be somehow immune from such incentives.

This Article began with the conventional account of the Roberts Court. That story suggests that the Court has thus far moved one increment to the right. While we can plot the Court along a contin-

uum and visualize such a simple spatial movement, we should not assume that the relationship between ideological increments on the Court and the incentives to move doctrine is strictly linear. Another one-ninth incremental move in the Court will produce the incentives—and the opportunity—for far more than a one-ninth incremental move in the ideological direction of doctrine. The result will be to exert pressure on the present strict form of standing doctrine, which otherwise will impede progress toward this result. This Article predicts that over time, the Court will succumb to such pressures in an effort to ease the path in advancing its desired doctrinal legacy.

APPENDIX A. MARTIN-QUINN SCORING INDEX FOR THE SUPREME COURT, 1937–2004

Seat	Chief	2	3	4	5	6	7	8	9	*Lib.*	Mod.	Con.
Year/ *President*	Hughes	Black	Cardozo	McReynolds	Brand	Butler	Sutherland/ Reed	Stone	Robert:			
FDR												
1937	-0.437	-2.857	-1.685	2.804	-0.514	1.762	1.962 S 0.959 R	-0.78	-0.041	*3-4*	3	**3-2**
			Frankfurter		Brand/ Douglas							
1938	-0.29	-3.132	-1.256	2.804	-0.476 B -2.612	2.02	-1.058	-0.75	0.366	*4-5*	3-2	**2**
						Murphy						
1939	0.296	-3.212	-1.187	2.56	-2.828	-1.527	-0.979	-0.752	1.009	*6*	1	**2**
1940	0.829	-3.233	-0.686	2.04	-2.95	-1.483	-0.609	-0.308	1.685	*3*	3	**3**
		Stone		Byrns		Jackson						
1941	0.403	-3.114	0.1	-0.18	-2.889	-1.435	-0.22	0.224	1.882	*3*	5	**1**
				Rutledge								
1942	0.268	-2.853	0.416	-1.078	-2.585	-1.579	0.183	0.271	2.138	*4*	4	**1**
1943	0.172	-2.526	0.421	-1.117	-2.212	-1.672	0.036	0.185	2.512	*4*	4	**1**
1944	0.512	-2.41	0.406	-1.279	-1.811	-1.389	-0.199	0.231	2.873	*4*	4	**1**
Truman									Burton			
1945	0.572	-2.03	0.659	-1.097	-1.638	-1.28	-0.004	0.629	0.481	*4*	5	**0**
	Vinson											
1946	0.427	-1.847	1.014	-1.341	-1.351	-1.702	0.252	1.025	0.539	*4*	3	**2**
1947	0.571	-1.727	0.894	-1.675	-1.465	-1.64	0.555	1.155	0.876	*4*	2	**3**
1948	0.864	-1.58	0.639	-1.762	-1.682	-1.521	0.683	1.3	0.136	*4*	4	**1**
				Minton		Clark						

Seat	Chief	2	3	4	5	6	7	8	9	*Lib.*	Mod.	Con.
1949	1.076	-1.626	0.365	1.117	-1.536	0.999	1.046	0.904	0.931	*2*	1	**6**
1950	1.183	-1.585	0.23	1.273	-1.41	1.049	1.149	0.79	0.948	*2*	1	**6**
1951	1.389	-1.472	0.077	1.331	-1.611	1.142	1.18	0.709	0.891	*2*	3	**4**
1952	1.304	-1.18	0.051	1.151	-2.266	1.097	1.253	0.925	1.187	*2*	1	**6**
Eisenhower	Warren											
1953	0.008	-1.514	0.37	0.818	-2.868	0.574	1.433	0.842	1.269	*2*	3	**3**
								Harlan				
1954	-0.436	-1.58	0.369	0.845	-3.458	0.16	1.443	0.865	1.238	*2*	3	**3**
1955	-1.041	-1.86	0.677	0.889	-3.907	0.07	1.004	1.089	1.245	*3*	2	**4**
				Brennan			Reed Whittaker					
1956	-1.202	-2.039	0.873	-0.592	-4.294	0.256	0.829 R 1.009 W	1.304	1.241	*3*	2	**4**
1957	-1.461	-2.098	1.242	-0.717	-4.58	0.602	1.043	1.596	1.095	*3*	2	**4**
									Stewart			
1958	-1.507	-1.981	1.558	-0.717	-4.804	0.536	1.343	1.722	0.883	*3*	2	4
1959	-1.474	-1.943	1.718	-0.869	-4.943	0.428	1.454	1.853	0.649	*4*	2	**3**
1960	-1.306	-1.815	1.788	-0.875	-5.064	0.779	1.271	1.941	0.529	*4*	1	**4**
Kennedy							Whittaker/ White					
1961	-1.401	-1.718	1.798	-0.727	-5.171	0.407	1.198Wk -0.037 Wt	2.229	0.481	*3*	3-4	**3-2**
			Goldberg									
1962	-1.275	-1.636	-0.769	-0.967	-4.255	0.206	-0.031	2.45	0.65	*5*	3	**1**
LBJ												
1963	-1.215	-1.412	-0.903	-0.826	-5.36	0.181	0.037	2.461	0.485	*5*	2	**1**
1964	-1	-0.933	-0.555	-0.683	-5.518	0.018	-0.054	2.273	0.649	*3*	5	**1**

Seat	Chief	2	3	4	5	6	7	8	9	*Lib.*	Mod.	**Con.**
			Fortas									
1965	-1.085	-0.575	-1.187	-0.845	-5.654	-0.053	-0.036	2.145	0.831	*4*	3	**2**
1966	-1.157	-0.297	-1.281	-0.995	-5.775	0.079	0.119	1.834	0.905	*4*	3	**2**
						Marshall						
1967	-1.156	-0.091	-1.091	-1.038	-5.89	-0.895	0.198	1.282	0.466	*5*	3	**1**
1968	-1.164	-0.001	-0.945	-0.91	-5.995	-0.908	0.155	0.777	0.664	*5*	3	**1**
Nixon	Burger											
1969	1.946	0.082	—	-0.829	-6.086	-0.847	0.291	0.664	0.622	*1*	6	**1**
				Blackmun								
1970	2.192	0.062	1.858	-0.931	-6.144	-0.885	0.606	0.569	0.605	*3*	4	**2**
	Powell							Rehnquist				
1971	2.442	1.487	1.811	-1.088	-6.209	-0.985	0.768	3.547	0.212	*3*	1	**5**
1972	2.262	1.277	1.462	-1.354	-6.222	-1.274	1.042	3.904	0.19	*3*	1	**5**
1973	2.213	1.228	1.313	-1.684	-6.266	-1.425	0.601	4.145	0.545	*3*	2	**4**
Ford												
1974	2.129	1.122	1.034	-1.955	-6.331	-1.468	0.607	4.216	0.414	*3*	2	**4**
					Stevens							
1975	1.978	0.941	0.86	-2.528	0.036	-2.038	0.517	4.31	0.532	*2*	3	**4**
1976	1.874	0.704	0.634	-2.811	-0.127	-2.342	0.322	4.257	0.486	*2*	5	**2**
Carter												
1977	1.548	0.445	0.262	-2.919	-0.017	-2.629	-0.069	4.198	0.315	*2*	5	**2**
1978	1.409	0.785	0.105	-2.895	-0.291	-3.004	-0.043	4.2	0.543	*2*	4	**3**
1979	1.172	0.787	-0.069	-2.856	-0.268	-3.266	0.145	4.216	0.476	*2*	4	**3**
1980	1.346	0.801	-0.155	-2.699	-0.265	-3.441	0.071	4.062	0.656	*2*	4	**3**
Reagan									O'Connor			
1981	1.461	0.867	-0.47	-2.68	-0.251	-3.563	0.021	3.915	1.457	*2*	3	**4**
1982	1.315	1.073	-0.544	-2.515	-0.544	-3.731	0.46	3.829	1.606	*2*	3	**4**
1983	1.492	0.932	-0.093	-2.817	-0.594	-3.781	0.737	3.759	1.545	*2*	3	**4**

Seat	Chief	2	3	4	5	6	7	8	9	*Lib.*	Mod.	**Con.**
1984	1.818	0.658	-0.217	-3.024	-0.488	-3.847	0.936	3.575	1.413	*2*	3	**4**
1985	1.954	0.774	-0.765	-3.12	-0.469	-3.923	1.146	3.375	1.198	*3*	1	**5**
	Rehnquist							Scalia				
1986	3.134	0.74	-0.927	-3.38	-0.578	-4.11	1.17	1.377	1.293	*3*	2	**4**
		Kennedy										
1987	2.729	1.111	-0.927	-3.457	-0.508	-4.26	0.931	1.523	1.466	*3*	1	**5**
1988	2.593	1.383	-0.963	-3.558	-0.632	-4.332	1.007	1.652	1.377	*3*	1	**5**
Bush I												
1989	2.415	1.29	-0.845	-3.603	-1.027	-4.302	0.779	1.827	1.33	*4*	0	**5**
				Souter								
1990	2.166	1.091	-1.15	0.94	-1.713	-4.141	0.537	1.972	0.958	*3*	1	**5**
						Thomas						
1991	1.869	0.729	-1.399	0.556	-2.095	2.563	0.508	2.282	0.53	*2*	4	**3**
1992	1.807	0.871	-1.548	0.153	-2.261	2.804	0.496	2.288	0.673	*2*	3	**4**
Clinton							Ginsburg					
1993	1.627	0.709	-1.812	-0.364	-2.466	3.131	-0.309	2.35	0.843	*2*	3	**4**
			Breyer									
1994	1.629	0.656	-0.481	-0.519	-2.825	3.291	-0.563	2.574	0.63	*1*	5	**3**
1995	1.601	0.544	-0.712	-0.553	-3.055	3.35	-05635	2.818	0.665	*1*	5	**3**
1996	1.457	0.659	-0.958	-0.596	-3.161	3.412	-0.842	3.038	0.778	*3*	2	**4**
1997	1.4	0.6	-1.037	-0.753	-3.127	3.404	-1.072	3.122	0.86	*4*	1	**4**
1998	1.602	0.695	-1.03	-0.883	-3.092	3.415	-1.317	3.13	0.729	*4*	2	**3**
1999	1.553	0.921	-1.013	-1.243	-3.018	3.33	-1.682	3.23	0.698	*4*	1	**4**
2000	1.551	0.845	-1.366	-1.4	-2.89	3.349	-1.791	3.268	0.441	*4*	1	**4**
Bush II												
2001	1.303	0.947	-1.371	-1.561	-2.834	3.294	-1.851	3.161	0.28	*4*	1	**4**
2002	1.132	0.802	-1.316	-1.689	-2.757	3.426	-1.916	2.902	0.206	*4*	1	**4**

Seat	Chief	2	3	4	5	6	7	8	9	*Lib.*	Mod.	**Con.**
2003	1.307	0.72	-1.216	-1.849	-2.871	3.427	-1.996	2.716	0.719	*4*	2	**3**
2004	1.426	0.555	-1.025	-1.878	-2.787	3.452	-2.015	2.505	0.135	*4*	2	**3**
	Roberts								Alito			
2005	1.382	0.400	-1.326	-1.667	-2.017	3.901	-1.329	2.202	1.407	*4*	1	**4**

APPENDIX B. JUDICIAL STATISTICS METHODOLOGY

The circuit court data was developed from the Federal Judges Biographical Database (http://www.fjc.gov/history/home.nsf) compiled by the Federal Judicial Center. All numbers are for January 1 of the year stated. This date was chosen because it was assumed that confirmations and terminations would not take place on January 1. Confirmations or terminations by this date would slightly alter the presented data to that extent.

The following are the specific search criteria within the database.

Total Number of Judges:

Searches were done using the following criteria:

- Court (each circuit selected separately)
- Party of Nominating President
- Confirmation Date (date before January 1 of the year listed)
- Termination Date (date after January 1 of the year listed)

For the 1960s and 1970s, to determine the number of judges still currently sitting, searches were also done using the following criteria:

- Court Type (U.S. Courts of Appeals)
- Party of Nominating President
- Confirmation Date (date before January 1 of 1969 or 1979)
- Limit Query to Sitting Judges (all sitting judges chosen)

For the 1980s and 1990s, to determine the judges who were currently sitting, searches generated lists for each circuit using the following criteria:

- Court (each circuit searched separately)
- Party of Nominating President
- Confirmation Date (date before January 1 of either 1989 or 1999)
- Limit Query to Sitting Judges (all sitting judges chosen)

We then looked up the nominating President and the dates of confirmation, beginning of senior status, and termination, and created charts, which were then counted manually to generate numbers, and these numbers were added together manually for each circuit.

Number of Senior Judges:

Searches were done using the following criteria:

- Court (each circuit selected separately)
- Party of Nominating President

- Confirmation Date (date before January 1 of the year listed)
- Retirement from Active Service (date before January 1 of the year listed)
- Termination Date (date after January 1 of the year listed)

For earlier years, where there were not many senior judges, a search was done for each year using the criteria:

- Court type (U.S. Court of Appeals)
- Confirmation Date (date before January 1 of the year listed)
- Retirement from Active Service date (date before January 1 of the year listed)
- Termination Date (date after January 1 of the year listed)

We then looked at each judge to determine the circuit and the party of the nominating President and created a chart for each year.

Beginning with years where there are judges appointed who are currently sitting (1960s), searches were also done using the following criteria:

- Court (each circuit selected separately)
- Party of Nominating President
- Confirmation Date (date before January 1 of the year listed)
- Retirement from Active Service (date before January 1 of the year listed)
- Limit Query to Sitting Judges (all sitting judges selected)

These numbers were manually added to the numbers of judges no longer sitting (i.e., with termination dates) generated by the searches described above.

For the Eleventh Circuit, there was no accurate way to use the search criteria of the database to generate numbers, most likely because many judges were transferred over from the Fifth Circuit in 1981. So, we instead generated a list of all judges who have ever served on the Eleventh Circuit (twenty-nine) and, by looking at their biographies, manually generated the numbers for both total and senior judges.

Number of Active Judges:

All of these numbers were generated by manually subtracting the number of senior judges from the total number.

Note:

For the 1980s and 1990s, to determine the judges who were currently sitting, we generated lists for each circuit, using the following criteria

- Court (each circuit searched separately)
- Party of Nominating President
- Confirmation Date (date before January 1 of either 1989 or 1999)

We then looked up the nominating President and the dates of confirmation, beginning of senior status, and termination, and created charts, which were counted manually to generate numbers.

APPENDIX C. CIRCUIT COURT IDEOLOGY FROM 1933–2006

Year/Circuit	1		2		3		4		5		6		7	
Party	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.
1933	1[2]	2[2]	1 [1]	4[4]	2[2]	2[2]	0[0]	3[3]	1[2]	3[3]	0[0]	4[4]	2[3]	1[2]
1934	1[2]	2[2]	1[1]	4[4]	2[2]	2[2]	0[0]	3[3]	1[2]	3[3]	0[0]	3[3]	3[4]	1[2]
1935	1[2]	2[2]	1[1]	4[4]	2[2]	2[2]	0[0]	3[3]	1[2]	3[3]	1[1]	3[3]	3[4]	1[2]
1936	1[2]	2[2]	1[1]	4[4]	2[2]	2[2]	0[0]	3[3]	0[1]	3[3]	1[1]	3[3]	2[3]	1[2]
1937	1[2]	2[2]	1[1]	4[4]	2[2]	2[2]	0[0]	3[3]	1[1]	3[3]	1[1]	3[3]	1[3]	1[2]
1938	1[2]	2[2]	1[1]	4[4]	3[3]	2[2]	0[0]	3[3]	1[1]	3[3]	1[1]	3[3]	3[5]	1[2]
1939	1[1]	2[2]	1[1]	4[4]	5[5]	0[2]	0[0]	3[3]	2[2]	3[3]	2[2]	2[2]	3[5]	1[1]
1940	1[2]	1[2]	2[2]	4[4]	5[7]	0[2]	0[0]	2[3]	2[2]	3[3]	3[3]	2[2]	4[5]	1[1]
1941	2[3]	0[1]	1[1]	4[4]	5[7]	1[2]	1[1]	2[3]	2[2]	3[3]	4[4]	2[2]	4[5]	1[1]
1942	3[4]	0[1]	2[2]	4[4]	5[6]	0[2]	1[1]	2[3]	2[2]	3[3]	4[4]	2[2]	4[4]	1[1]
1943	3[4]	0[0]	2[2]	4[4]	5[6]	0[2]	1[1]	2[3]	2[2]	2[2]	4[4]	2[2]	4[4]	1[1]
1944	3[4]	0[0]	2[2]	4[4]	5[6]	0[2]	1[1]	2[3]	4[4]	2[2]	4[4]	2[2]	4[4]	1[1]
1945	3[4]	0[0]	2[2]	4[4]	4[5]	02]	1[1]	2[3]	4[4]	2[2]	4[4]	2[2]	4[4]	1[1]
1946	3[4]	0[0]	2[2]	4[4]	5[5]	0[2]	1[1]	2[3]	4[4]	2[2]	4[4]	2[2]	4[4]	1[1]
1947	3[4]	0[0]	2[2]	4[4]	6[6]	0[1]	1[1]	2[2]	4[4]	2[2]	4[4]	2[2]	4[4]	1[1]
1948	3[4]	0[0]	2[2]	4[4]	6[6]	0[0]	1[1]	2[2]	4[4]	2[2]	4[4]	2[2]	4[4]	1[1]
1949	3[4]	0[0]	2[2]	4[4]	6[6]	0[0]	1[1]	2[2]	4[4]	2[2]	4[4]	2[2]	3[3]	0[1]
1950	3[3]	0[0]	2[2]	4[4]	5[5]	0[0]	1[1]	2[2]	5[5]	1[2]	4[4]	2[2]	5[5]	0[1]
1951	2[3]	0[0]	2[2]	4[4]	7[7]	0[0]	1[1]	2[2]	5[5]	1[2]	4[4]	2[2]	6[6]	0[0]
1952	3[4]	0[0]	3[3]	3[4]	7[7]	0[0]	1[1]	2[2]	5[6]	1[2]	4[4]	2[2]	6[6]	0[0]
1953	3[3]	0[0]	3[3]	3[4]	7[7]	0[0]	1[1]	2[2]	5[5]	1[2]	4[4]	1[1]	5[5]	0[0]
1954	3[3]	0]0]	3[3]	1[4]	7[7]	0[0]	1[1]	2[2]	5[5]	1[2]	4[4]	1[1]	5[5]	0[0]
1955	3[3]	0[0]	3[3]	2[5]	7[7]	0[0]	1[1]	2[2]	3[4]	2[3]	4[4]	2[2]	5[5]	1[1]

Year/Circuit	1		2		3		4		5		6		7	
Party	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.
1956	3[3]	0[0]	3[3]	3[6]	7[7]	0[0]	1[1]	1[2]	2[3]	5[6]	4[4]	2[2]	5[5]	1[1]
1957	3[3]	0[0]	3[3]	3[6]	7[7]	0[0]	0[1]	2[3]	1[3]	5[6]	4[4]	2[2]	4[5]	1[1]
1958	3[3]	0[0]	2[2]	3[6]	7[7]	0[0]	0[1]	3[4]	1[3]	6[7]	4[4]	2[2]	3[4]	3[3]
1959	3[3]	0[0]	1[2]	4[7]	6[7]	0[0]	0[1]	2[3]	1[3]	6[6]	4[4[]	1[1]	2[3]	4[4]
1960	2[3]	1[1]	1[2]	4[8]	6[7]	1[1]	0[1]	3[4]	1[3]	6[6]	3[4]	2[3]	1[2]	4[4]
1961	2[3]	1[1]	1[2]	5[9]	6[7]	1[1]	0[1]	3[4]	1[3]	6[6]	3[4]	3[4]	1[2]	4[4]
1962	2[3]	1[1]	2[3]	5[8]	8[9]	0[1]	2[4]	3[4]	1[2]	6[6]	3[4]	3[4]	3[4]	4[4]
1963	2[3]	1[1]	4[5]	5[8]	7[8]	0[1]	2[2]	3[4]	3[4]	6[6]	1[3]	3[4]	3[4]	4[4]
1964	2[3]	1[1]	3[4]	5[8]	7[8]	0[1]	2[2]	3[3]	3[4]	6[6]	3[5]	3[4]	3[4]	4[4]
1965	1[3]	1[1]	4[5]	5[7]	8[9]	0[1]	2[2]	3[3]	3[4]	4[5]	3[5]	3[3]	3[4]	4[4]
1966	2[4]	1[1]	3[4]	5[7]	7[9]	0[1]	2[2]	3[3]	5[6]	4[5]	3[5]	2[3]	3[4]	4[4]
1967	2[5]	1[1]	4[5]	5[7]	7[10]	0[1]	4[4]	3[3]	9[10]	3[5]	5[6]	2[3]	4[6]	4[4]
1968	2[5]	1[1]	4[5]	5[7]	7[11]	0[1]	4[4]	3[3]	10[11]	3[5]	6[7]	2[3]	4[6]	3[4]
1969	2[3]	1[1]	4[5]	5[7]	7[12]	0[1]	4[4]	3[3]	11[12]	2[5]	6[7]	2[3]	5[7]	2[3]
1970	2[3]	1[1]	4[5]	5[6]	6[12]	2[3]	4[4]	3[3]	10[11]	5[8]	6[7]	2[4]	5[7]	1[3]
1971	2[2]	1[1]	4[5]	4[6]	5[11]	3[4]	4[4]	2[3]	10[11]	5[8]	5[6]	4[6]	5[7]	2[5]
1972	2[2]	1[1]	3[5]	5[10]	3[10]	5[6]	4[4]	3[5]	10[11]	5[8]	5[6]	3[5]	5[7]	3[6]
1973	2[2]	1[2]	3[5]	5[10]	3[9]	4[5]	3[4]	4[5]	10[11]	5[8]	5[6]	4[6]	5[6]	3[6]
1974	2[2]	1[2]	3[5]	5[10]	13[8]	6[7]	3[4]	4[5]	10[11]	5[8]	5[6]	4[6]	4[6]	3[6]
1975	2[2]	1[2]	2[5]	6[12]	3[9]	6[7]	3[4]	4[5]	10[11]	5[8]	5[6]	4[6]	3[3]	5[8]
1976	2[2]	1[2]	2[5]	7[12]	3[9]	6[7]	3[4]	4[5]	9[11]	6[9]	5[6]	4[5]	3[4]	4[7]
1977	1[2]	1[2]	2[4]	7[12]	3[8]	6[7]	3[4]	4[6]	6[10]	8[11]	5[5]	3[4]	3[4]	5[8]
1978	2[3]	1[2]	2[5]	7[12]	3[7]	6[7]	3[4]	4[6]	8[12]	7[11]	6[6]	3[4]	3[4]	5[7]
1979	2[3]	1[2]	2[4]	7[12]	3[6]	6[6]	3[4]	4[6]	6[12]	7[11]	5[6]	3[4]	3[4]	5[7]
1980	2[3]	1[2]	4[6]	5[11]	4[6]	6[6]	5[6]	4[6]	18[24]	7[11]	8[10]	3[4]	4[4]	5[7]
1981	3[4]	1[2]	4[4]	6[10]	4[6]	6[6]	6[7]	4[6]	18[25]	7[11]	7[10]	3[4]	4[4]	4[6]

Year/Circuit	1		2		3		4		5		6		7	
Party	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.
1982	3[3]	1[2]	4[4]	6[12]	4[6]	6[7]	6[7]	4[7]	8[11]	4[6]	7[10]	2[4]	3[4]	6[8]
1983	3[3]	1[2]	4[4]	7[12]	4[6]	6[7]	5[7]	5[7]	7[11]	6[8]	6[10]	4[5]	2[4]	7[9]
1984	3[3]	1[2]	4[4]	7[12]	4[6]	6[7]	5[7]	4[6]	7[11]	7[9]	6[10]	5[6]	2[4]	7[8]
1985	3[3]	2[3]	4[4]	7[11]	4[6]	6[7]	5[6]	6[8]	7[10]	7[10]	6[10]	6[7]	2[4]	6[8]
1986	3[3]	2[3]	4[4]	8[13]	4[6]	8[9]	5[6]	6[8]	4[7]	7[10]	5[9]	9[10]	2[4]	7[10]
1987	3[3]	3[4]	4[4]	9[13]	4[6]	5[8]	5[6]	6[8]	6[9]	8[11]	5[9]	10[12]	2[4]	8[10]
1988	3[3]	3[4]	3[4]	9[12]	3[6]	8[11]	5[6]	6[8]	6[9]	8[11]	5[9]	10[12]	2[4]	9[11]
1989	3[3]	3[4]	3[4]	9[12]	3[6]	8[12]	5[6]	6[8]	6[9]	9[12]	5[9]	10[12]	2[3]	9[11]
1990	2[3]	4[5]	3[4]	9[13]	2[5]	9[12]	4[6]	6[7]	5[9]	9[12]	5[9]	8[12]	2[3]	9[11]
1991	1[3]	4[5]	3[4]	10[14]	2[5]	9[12]	4[5]	7[8]	3[9]	11[13]	5[9]	9[13]	2[3]	9[11]
1992	1[3]	4[5]	3[4]	10[14]	3[5]	10[13]	4[5]	8[10]	2[8]	12[14]	5[9]	9[15]	2[3]	9[11]
1993	1[3]	5[7]	2[3]	10[15]	1[5]	11[14]	3[5]	9[11]	2[8]	11[13]	5[9]	9[15]	2[3]	9[12]
1994	1[3]	5[7]	3[4]	7[15]	1[3]	11[14]	4[6]	9[11]	2[7]	11[12]	6[9]	9[15]	2[3]	9[12]
1995	0[2]	5[7]	6[7]	7[14]	3[5]	11[14]	4[7]	9[11]	5[10]	11[12]	6[9]	8[15]	1[3]	8[12]
1996	1[3]	5[7]	6[7]	6[12]	3[5]	10[13]	4[6]	9[10]	6[9]	11[12]	5[9]	8[15]	3[5]	8[12]
1997	1[3]	5[7]	6[7]	4[11]	2[4]	10[13]	4[6]	9[10]	6[9]	11[12]	5[9]	7[15]	3[5]	8[12]
1998	1[3]	5[7]	5[7]	4[11]	3[5]	10[13]	4[6]	9[10]	6[9]	10[12]	8[11]	7[14]	3[5]	8[12]
1999	2[4]	4[7]	9[11]	3[10]	3[4]	9[13]	6[8]	7[9]	6[9]	10[12]	8[10]	7[14]	3[5]	8[12]
2000	2[4]	4[7]	10[12]	3[9]	4[5]	7[12]	5[7]	6[8]	5[9]	9[11]	7[10]	5[14]	3[5]	8[12]
2001	2[4]	4[7]	10[12]	2[9]	6[7]	6[12]	4[6]	6[8]	5[9]	9[11]	7[10]	7[14]	3[5]	8[11]
2002	2[4]	3[7]	10[12]	3[10]	6[7]	6[12]	5[7]	6[8]	5[9]	10[12]	6[10]	2[13]	3[5]	8[11]
2003	2[4]	4[7]	8[12]	4[11]	6[7]	6[12]	5[7]	7[9]	4[6]	10[12]	6[9]	4[15]	3[5]	8[11]
2004	2[3]	4[7]	7[11]	5[12]	6[7]	7[14]	5[7]	8[10]	4[6]	11[13]	6[9]	6[17]	3[5]	8[11]
2005	2[3]	4[7]	7[11]	6[12]	6[7]	8[15]	5[7]	8[10]	4[5]	11[13]	6[9]	6[16]	3[5]	8[12]
2006	2[3]	4[7]	7[11]	6[12]	6[7]	6[14]	5[7]	8[10]	4[5]	12[14]	6[9]	9[19]	3[5]	8[11]

Year/Circuit	8		9		10		11		D.C.		Total		
arty	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Tie
933	1[1]	4[5]	0[0]	2[2]	0[0]	2[2]			0[0]	5[5]	1[1]	9[8]	1[2]
1934	2[2]	2[4]	1[1]	2[2]	1[1]	2[2]			0[0]	5[5]	1[1]	8[8]	2[2]
1935	2[2]	2[4]	1[1]	2[1]	1[1]	2[2]			0[0]	5[5]	1[1]	8[7]	1[2]
1936	2[3]	2[4]	4[4]	1[1]	1[1]	2[2]			1[1]	4[4]	2[2]	7[7]	2[2]
937	3[4]	2[4]	4[4]	1[1]	1[1]	2[2]			1[1]	4[4]	2[2]	7[6]	2[3]
1938	3[4]	2[4]	6[6[	1[1]	2[2]	1[1]			5[[5]	0[2]	6[5]	5[4]	0[2]
1939	3[3]	2[4]	6[6]	1[1]	2[2]	1[1]			5[5]	0[2]	6[5]	4[5]	1[1]
1940	3[3]	2[4]	6[6]	1[1]	2[3]	1[1]			6[6]	0[1]	7[6]	3[4]	1[1]
941	4[4]	2[4]	6[6]	1[1]	3[4]	1[1]			6[6]	0[1]	8[7]	3[3]	0[1]
1942	5[5]	2[4]	6[6]	1[1]	3[4]	1[1]			6[6]	0[1]	8[8]	3[3]	0[0]
1943	5[5]	2[4]	6[6]	1[1]	3[4]	0[1]			6[6]	0[1]	8[8]	2[2]	1[1]
1944	5[5]	2[4]	5[5]	1[1]	3[4]	1[1]			5[5]	0[1]	9[9]	2[2]	0[0]
1945	5[5]	2[2]	6[6]	1[1]	3[4]	1[1]			5[5]	0[1]	9[9]	2[2]	0[0]
1946	5[5]	2[2]	7[7]	0[1]	3[4]	1[1]			6[6]	0[1]	9[9]	2[2]	0[0]
1947	5[5]	2[2]	7[7]	0[1]	3[4]	1[1]			6[6]	0[1]	9[9]	2[2]	0[0]
1948	5[6]	2[2]	7[7]	0[1]	3[4]	1[1]			6[6]	0[1]	9[9]	2[2]	0[0]
1949	5[6]	2[2]	6[6]	0[1]	3[3]	1[1]			5[6]	0[0]	9[9]	2[2]	0[0]
1950	5[6]	2[2]	7[7]	0[1]	4[4]	1[1]			5[6]	0[0]	9[9]	2[2]	0[0]
1951	5[6]	2[2]	7[7]	0[1]	4[4]	1[1]			8[9]	0[0]	9[9]	2[2]	0[0]
1952	5[6]	2[2]	7[7]	0[1]	4[4]	1[1]			8[9]	0[0]	9[9]	1[2]	1[0]
1953	5[6]	2[2]	7[7]	0[1]	4[4]	1[1]			8[9]	0[0]	9[9]	1[2]	1[0]
1954	4[5]	2[2]	6[7]	0[1]	4[4]	1[1]			7[8]	0[0]	10[9]	1[2]	0[0]
1955	3[5]	4[4]	6[7]	3[3]	4[4]	1[1]			6[7]	2[2]	9[9]	2[2]	0[0]
1956	2[4]	4[4]	4[7]	3[3]	4[4]	0[1]			6[7]	2[2]	7[7]	2[3]	2[1]
1957	2[4]	5[5]	4[7]	5[5]	4[4]	1[2]			6[7]	3[3]	6[7]	4[4]	1[0]
1958	2[4]	4[4]	3[7]	5[5]	3[4]	2[3]			6[6]	3[3]	5[7]	5[3]	1[1]

Year/Circuit	8		9		10		11		D.C.		Total		
Party	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Tie
1959	2[3]	4[3]	2[7]	6[6]	3[4]	2[3]			6[6]	3[3]	5[6]	6[5]	0[0]
1960	2[3]	5[6]	2[6]	7[7]	3[4]	2[3]			6[6]	3[3]	5[5]	6[6]	0[0]
1961	2[3]	4[6]	2[6]	7[7]	3[4]	2[3]			6[6]	3[3]	4[4]	6[6]	1[1]
1962	2[4]	4[6]	2[8]	7[7]	3[5]	2[3]			6[6]	3[3]	4[5]	6[4]	1[2]
1963	2[3]	4[5]	2[6]	7[7]	4[6]	2[3]			6[7]	3[3]	4[4]	7[6]	0[1]
1964	3[4]	4[5]	2[6]	6[7]	4[5]	2[3]			6[8]	3[3]	4[5]	6[5]	1[1]
1965	3[4]	4[4]	3[7]	6[7]	4[5]	2[3]			5[8]	3[3]	3[5]	6[3]	2[3]
1966	2[5]	4[4]	3[5]	6[7]	3[5]	2[3]			6[10]	2[3]	6[7]	5[3]	0[1]
1967	4[7]	4[4]	3[5]	6[7]	4[6]	2[3]			7[11]	2[3]	7[9]	2[2]	2[0]
1968	4[6]	4[4]	4[6]	5[7]	4[6]	2[3]			6[11]	2[3]	8[9]	2[2]	1[0]
1969	5[7]	3[4]	5[7]	5[7]	5[7]	2[3]			6[11]	2[3]	9[10]	1[1]	1[0]
1970	5[7]	3[4]	5[6]	8[10]	5[7]	2[3]			6[11]	2[4]	9[9]	2[2]	0[0]
1971	5[7]	3[4]	5[5]	7[10]	3[6]	2[4]			6[10]	3[5]	9[8]	1[2]	1[1]
1972	5[7]	3[5]	4[5]	7[12]	3[6]	4[6]			6[8]	3[5]	7[7]	4[3]	0[1]
1973	5[7]	3[5]	4[5]	8[13]	3[5]	4[6]			6[8]	3[5]	6[4]	5[4]	0[3]
1974	5[7]	3[6]	4[5]	9[12]	3[5]	4[6]			6[8]	3[5]	6[4]	5[4]	0[3]
1975	4[7]	3[6]	4[5]	8[12]	3[5]	4[5]			6[8]	3[5]	5[4]	6[4]	0[3]
1976	4[6]	4[7]	4[5]	9[12]	3[4]	4[5]			6[8]	3[4]	4[4]	6[6]	1[1]
1977	4[6]	4[7]	3[5]	8[13]	3[4]	4[5]			6[7]	3[4]	2[3]	7[7]	2[1]
1978	4[5]	4[7]	5[7]	8[13]	4[6]	3[5]			6[7]	3[4]	5[5]	5[5]	1[1]
1979	5[6]	3[6]	5[7]	8[13]	4[6]	3[5]			6[7]	3[4]	5[5]	6[4]	0[2]
1980	4[6]	3[5]	13[15]	7[13]	5[7]	3[5]			6[7]	3[4]	8*[7]	3*[2]	0[2]
1981	5[7]	3[3]	14[16]	7[13]	5[7]	3[5]			8[9]	3[4]	8[8]	2[2]	1[1]
1982	5[6]	3[3]	16[18]	7[13]	5[7]	3[5]	7[11]	5[7]	7[9]	3[4]	9[8]	3[3]	0[1]
1983	5[6]	4[5]	16[18]	7[13]	5[7]	3[5]	7[10]	5[7]	7[9]	2[4]	8[8]	3[3]	1[1]
1984	5[6]	4[5]	16[18]	6[13]	6[7]	3[4]	7[10]	5[7]	7[9]	4[7]	8[9]	3[3]	1[0]

Year/Circuit	8		9		10		11		D.C.		Total		
Party	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Tie
1985	5[6]	4[5]	16[17]	8[15]	4[6]	5[8]	7[10]	5[7]	7[9]	3[7]	5[5]	5[6]	2[1]
1986	4[6]	5[6]	16[17]	12[19]	4[6]	5[8]	7[10]	5[7]	6[8]	5[7]	4[2]	8[8]	0[2]
1987	4[7]	6[7]	13[16]	13[20]	4[6]	5[6]	6[10]	6[8]	5[8]	6[8]	0[0]	9[10]	3[2]
1988	4[6]	6[8]	13[16]	13[21]	4[6]	5[7]	5[9]	6[8]	5[7]	7[9]	0[1]	10[11]	2[0]
1989	4[6]	6[8]	13[16]	12[20]	4[6]	6[8]	5[9]	7[9]	5[6]	6[8]	0[0]	11[11]	1[1]
1990	3[6]	6[8]	13[17]	13[21]	4[5]	6[8]	4[7]	5[7]	4[6]	5[7]	0[0]	11[11]	1[1]
1991	3[6]	7[9]	14[17]	14[21]	4[5]	6[8]	4[7]	7[9]	4[6]	8[9]	0[0]	11[11]	1[0]
1992	3[6]	7[9]	14[17]	14[22]	4[5]	6[8]	3[7]	6[9]	4[6]	7[8]	0[0]	11[12]	1[0]
1993	3[6]	7[11]	17[17]	16[21]	4[5]	7[9]	3[7]	8[11]	4[6]	7[8]	0[0]	12[12]	0[0]
1994	2[6]	9[11]	12[17]	14[21]	2[5]	7[9]	3[7]	8[10]	3[4]	7[8]	0[0]	12[12]	0[0]
1995	3[7]	8[11]	12[18]	14[20]	2[6]	7[9]	4[8]	7[10]	4[5]	7[8]	0[12]	12[12]	0[0]
1996	3[7]	8[11]	10[17]	14[19]	4[8]	7[9]	4[8]	7[10]	4[5]	7[7]	0[0]	11[12]	1[0]
1997	3[7]	8[11]	10[19]	10[18]	5[8]	7[9]	3[8]	7[9]	4[5]	6[7]	1[0]	10[12]	1[0]
1998	3[7]	7[10]	9[17]	9[18]	6[8]	7[9]	5[10]	7[9]	5[6]	6[7]	2[0]	10[12]	0[0]
1999	3[7]	7[10]	13[22]	8[18]	5[7]	7[9]	5[9]	7[9]	5[5]	6[7]	3[2]	8[8]	0[1]
2000	3[7]	6[10]	15[23]	7[19]	5[7]	5[9]	5[9]	7[10]	4[4]	6[7]	3[3]	8[9]	1[0]
2001	4[8]	6[10]	19[27]	7[18]	5[7]	5[9]	5[9]	6[10]	4[4]	5[7]	3[2]	7[10]	2[0]
2002	3[7]	6[11]	17[27]	7[18]	5[7]	4[10]	5[8]	6[10]	4[4]	4[7]	4[2]	6[10]	2[0]
2003	4[7]	8[13]	17[27]	7[18]	5[7]	6[12]	5[8]	6[10]	4[4]	4[7]	3[1]	7[11]	2[0]
2004	2[7]	7[14]	17[27]	9[21]	5[7]	7[13]	5[8]	6[10]	4[4]	5[8]	2[1]	9[11]	1[0]
2005	2[6]	9[16]	16[27]	8[20]	5[7]	7[13]	5[8]	6[10]	4[4]	5[8]	2[1]	9[11]	1[0]
2006	2[6]	9[16]	16[27]	8[20]	4[7]	7[13]	5[7]	7[11]	3[4]	6[9]	2[1]	8[11]	1[0]