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Standing Back from the Forest: Justiciability and Social Choice

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In this Article, Professor Stearns employs the theory of social choice to present a comprehensive analysis of standing and the closely related doctrine of stare decisis. Professor Stearns begins by demonstrating that the Supreme Court, along with all appellate courts, is subject to a phenomenon referred to in the social choice literature as cycling, in which for any proposed outcome in a given case or across cases, an alternative exists that has majority support. Professor Stearns then demonstrates that stare decisis is the social choice equivalent of a prohibition on motions for reconsideration of defeated alternatives, a common cycle-prevention technique, and that stare decisis presumptively prevents Supreme Court justices from taking the requisite number of pairwise contests over time and across cases to reveal cyclical preferences. In turn, stare decisis enhances the stability of Supreme Court case law. While stare decisis improves the rationality of Supreme Court decisionmaking, it also produces an unintended and deleterious byproduct. With stare decisis in place, the evolution of Supreme Court doctrine will depend, to a large extent, upon the order in which cases are presented or, in the language of social choice, will be "path depen-

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dent." Stare decisis thus provides interest groups with strong incentives to manipulate the order in which cases are brought before the Supreme Court and lower federal courts. Professor Stearns further demonstrates that the standing cases, which can be restated as a set of three substantive legal rules—no right to enforce the rights of others, no right to prevent diffuse harms, and no right to an undistorted market—substantially ameliorate the problem that stare decisis creates. These standing ground rules do so by presumptively preventing ideological litigants from opportunistically manipulating the critically important path of case decisions in the Supreme Court and in lower federal courts. Professor Stearns then links the standing rules to the Arrovian fairness criteria, which are grounded in the majoritarian norm, concluding that while stare decisis improves the Supreme Court's overall rationality, standing improves the Court's overall fairness. Professor Stearns further provides a social choice explanation, consistent with his thesis on standing, for the Supreme Court's power of docket control and for adherence to stare decisis within, but not among, federal circuit courts.

In the companion article, Standing and Social Choice: Historical Evidence, 144 U. PA. L. REV. 309 (1995), which the final part of this Article previews, Professor Stearns provides comprehensive historical and case support to demonstrate that the thesis set out in this Article is more robust than are alternative theories of standing, including political explanations. He also demonstrates the manner in which the functions that the standing doctrine has served have changed over time. Professor Stearns posits that the liberal New Deal Court conceived and employed standing to discipline conservative lower federal courts, rather than to prevent itself from addressing the merits of challenges to New Deal initiatives, as is commonly believed. He then demonstrates that the later, more conservative, Burger and Rehnquist Courts were uniquely multipeaked. As a result, those Courts transformed standing from its New Deal roots into the substantive set of ground rules described above in an effort to render ideological path manipulation more difficult.

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INTRODUCTION

A. The Big Red Dot

While Charlottesville, Virginia is properly revered by many as both an historical tourist attraction and a charming college town, with the exception of its two widely visited presidential homes, Monticello and Highland,[1] it is not particularly well known for its museums. Perhaps for that reason, I was less upset than was my friend when, during the fall of my third year of law school, my long-planned weekend visit to New York City was visited with constant rain. Although displaying no enthusiasm, my friend was willing to indulge me when I suggested that we visit the Whitney Museum, which is located on the Upper East Side and features modern and contemporary American art. Upon entering, I noticed that a tour was about to begin. Because I did not know much about modern art, I suggested that we join.

The tour guide first brought us to a painting that covered a large wall. The backdrop was completely white and in the center was a big red dot, several feet in diameter. My friend and I looked at each other, somewhat bewildered, as the tour guide led us to the next painting without saying a word. The next painting was the same size, again with a completely white background, but, instead of having one big red dot in the center, it had two somewhat smaller red dots, the first slightly to the upper right of center and the second slightly to the lower left of center. I had begun to question my choice of activity when the tour guide silently brought us to yet another wall-size painting. This one was a single frame comic strip. Stepping closer to the painting, I could see that it consisted entirely of painted dots in

1. Highland, also known as Ash Lawn, was James Monroe's home and Monticello was, of course, the home of Thomas Jefferson.

various colors. Standing farther back, the dots blurred and a meaningful image emerged.

The tour guide explained that if we walked right up to the wall-size comic strip, we would, depending upon how close we got, see some version of the second painting that she had shown us, depicting two colored dots against a plain white background. If we got closer still, we would again see the first painting that she had shown us, depicting a single colored dot against a solid white background. The tour guide then explained that the artists who created the first two paintings intended them to be statements on perspective. While neither of those paintings depicts a particularly meaningful image, that is only because the artist has rather cleverly forced us to stand too close. As the third painting demonstrated, however, when the artist permits us to stand farther back, a very meaningful image emerges, even though it, like the first two paintings, is composed entirely of painted dots against a white background.

Before I teach the standing doctrine in my introductory course in Constitutional Law, I tell my story about the Whitney Museum. The tour guide's analysis is, of course, as significant for jurisprudence as it is for the paintings she described. That analysis aptly describes the familiar lawyerly process of packaging individual cases in a meaningful way for the benefit of a target audience, whether that happens to be a judge, law review managing board, senior partner, or professor. No single case can tell a meaningful story. Like the artist who controls both the substantive image on canvas and the distance or perspective from which the audience views that image, the effective lawyer packages individual cases in a way that suggests both a sufficiently compelling story to justify the client's favored outcome and a perspective that renders her story more credible than that offered by her opponent.[2]

It was not until I began to explore the possibility of using an economic methodology to devise a positive evolutionary theory of standing that I realized the double significance of my classroom anecdote. While attempting to form a reasonably coherent story directly from the standing cases has proved to be a valuable classroom exercise, I now realize that it is an impossible task. My mistake was in failing to encourage my students to stand back far enough to gain an appropriate perspective. To paint a positive picture of the standing doctrine, it will not suffice simply to step back far enough to avoid the trees, representing the individual standing cases, in an effort to see the forest, representing this seemingly incoherent doctrine. Instead, we will need to stand back from the forest itself. To explain standing, we need to step back far enough to introduce into our field of vision first, bodies of case law that traditionally have been treated separately from

2. After telling this story, I instruct my students to read the assigned standing cases and to try to tell a positive story that reduces—if it does not eliminate—the apparent inconsistencies in those cases.

standing;[3] second, an economic methodology referred to in the literature as social choice;[4] and finally, an appropriate historical perspective.[5] None of these, standing alone, can provide a complete picture.

Analyzing the relationship between standing and such non-standing bodies of case law as tort and criminal procedure is essential for two reasons. First, the analysis helps to provide the necessary legal context within which to assess this seemingly enigmatic doctrine. Second, the comparison will suggest a novel mechanism for explaining away many of the seemingly irreconcilable results in actual standing cases. The suggested methodology involves positing for each of the standing cases under review a hypothetical contrast or "shadow" case. The shadow case is that case in which a litigant could raise the substantive legal claims for which standing was either granted or denied, without the possibility of a credible standing challenge.[6] Rather than directly comparing the results of the actual standing cases, we instead compare the relationships between the actual cases and their shadow

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3. While others have explored the relationship between, for example, criminal procedure cases and standing, *see, e.g.,* William A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 277-78 & n.267 (1988) (relating standing to *Miranda* opinion), this Article relates criminal procedure to standing in a yet unexplored manner. *See infra* note 7, and notes 269-283 and accompanying text (describing shadow case analysis).

4. Describing social choice as a variant of economic analysis is somewhat misleading. Many branches of economic literature that have emerged independently and that have developed their own vocabularies observe and analyze nearly identical or closely related economic phenomena. Thus, for example, while the "empty core" is generally considered a game theoretic concept, the empty core is really another way of describing what welfare economists describe as the absence of a Nash equilibrium among multiple players and what social choice theorists describe as the absence of a Condorcet winner. *See* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice,* 103 YALE L.J. 1219, 1238 (1994) ("The empty core problem is a generalization of the Condorcet Paradox."); *id.* at 1237 n.68 ("[T]he core is empty when there is no Nash equilibrium."); *see also* Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective,* 67 CHI.-KENT L. REV. 707, 726 n.63 (1991) (describing identity of empty core and Condorcet Paradox); Herbert Hovenkamp, *Rationality in Law & Economics,* 60 GEO. WASH. L. REV. 293, 331-33 (1992) (describing cycling that results from empty core).

5. Yet another difficulty with the assignment, as this Article demonstrates, is that without a complete overview of the substantive corpus of constitutional law, one cannot fully appreciate the dynamics that gave rise to standing in the New Deal and that caused its radical metamorphosis in the Burger and Rehnquist Courts. At the same time, however, one cannot begin to study the relevant bodies of substantive constitutional law without first understanding judicial review and the justiciability doctrines, including standing. While Part III will provide an overview of the three principal standing case categories to test this Article's thesis, the companion piece, Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence,* 144 U. PA. L. REV. 309 (1995), will provide more comprehensive empirical support, including a review of the necessary historical context for evaluating standing. Due to the simultaneous publication of these articles, cross-references will be to parts, rather than to pages.

6. A criminal defendant, for example, can raise any and all claims for relief, including constitutional claims, even if in doing so she requires that the court "make law" by applying a broad-based constitutional provision, for example, due process or equal protection, to a previously unknown set of facts. In contrast, an interest group dedicated to furthering the equal protection and due process rights of criminal defendants would not likely be afforded standing to raise the same claims that the criminal defendant could raise without a credible standing barrier. The criminal defendant's suit is the obvious shadow case for the case presented by the ideologically driven interest group. For illustrations involving actual Supreme Court cases, *see infra* note 7 and *infra* part II.B.

cases. This methodology removes many of the apparent incongruities in the standing doctrine.[7]

An introduction to social choice theory, set out in the next section, will serve two purposes. First, it will explain the evolution and function of both stare decisis and standing in economic terms. While this Article is about standing, I will demonstrate that because stare decisis and standing, properly understood, are flipsides of the same coin, we need to devise an economic model of stare decisis before we can devise an economic model of standing.[8] Stare decisis, which prevents the Supreme Court from issuing

7. While this analysis will be set out in greater detail, *infra* notes 269-283 and accompanying text, a brief example, based upon two actual standing cases, will illustrate the point. In the first case, plaintiff, the mother of a convicted capital murderer, filed a lawsuit in which she claimed that her son's conviction and death sentence violated several constitutional guarantees, including due process of law and the prohibition on cruel and unusual punishment. Because plaintiff's son had chosen not to appeal his conviction and sentence, he was certain to be executed if plaintiff were denied standing. *See* Gilmore v. Utah, 429 U.S. 1012 (1976). In the second case, plaintiffs, a group of homeowners residing in a single neighborhood, sought a declaratory judgment holding that a federal statute limiting the tort liability of a prospective nuclear power plant to be built near their neighborhood violated the Due Process Clause of the Fifth Amendment, and an injunction preventing construction until the merits of the case were resolved. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). In *Gilmore,* the Supreme Court effectively denied standing even though its decision inevitably resulted in Gary Gilmore's execution. *See infra* notes 51 and 262 (explaining procedural context of *Gilmore*). In *Duke Power,* the Supreme Court granted standing even though plaintiffs did not show that success on the merits—namely, striking the federal statute that limited the planned nuclear plant's liability—would prevent the plant from being built at the proposed location.

When directly compared, the case results seem incongruous, at least if we assume, as the Court suggested, that the injury-in-fact analysis was dispositive. The apparent incongruity is removed, however, when we realize that in directly comparing the case results, we have left out a critical intermediate step. In the *Gilmore* case, the obvious shadow case, in which the very same constitutional challenges to Gary Gilmore's conviction and sentence could be raised with no possible standing problem, is Gary Gilmore's direct appeal and subsequent collateral attacks. In contrast, there is no apparent alternative party who could at any time challenge the constitutionality of the federal liability-limiting statute in a lawsuit that would protect the interests of the *Duke Power* plaintiffs. Thus, when we compare the relationships between the actual suits and their shadow suits, rather than comparing the standing cases directly, the seeming inconsistency evaporates. As demonstrated below, the results of many standing cases, when analyzed in this manner, can be explained as lying along a spectrum ranging from those cases in which a readily available shadow case prevents standing and those cases in which litigants appear to be standing in their own shadows. *See infra* notes 269-283 and accompanying text.

8. This Article is concerned primarily with stare decisis over time within a single appellate court, in this case the Supreme Court. Scholars employing economic analyses to analyze stare decisis have distinguished hierarchical stare decisis from horizontal stare decisis. *Compare* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?,* 46 STAN. L. REV. 817 (1994) (analyzing hierarchical stare decisis), *with* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis,* 65 CHI.-KENT L. REV. 63 (1989) (providing alternative economic analysis of horizontal stare decisis); Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis,* 24 SETON HALL L. REV. 736 (1993) (providing game theoretic analysis of horizontal stare decisis). This Article is concerned with yet another variant. Hierarchical stare decisis involves the obligation of lower courts to obey higher court precedents. Horizontal stare decisis involves the obligation of different components of the same court to obey each others' precedents. This can include the obligation of trial court judges to adhere to precedents established by prior trial judges on the same court or, in federal practice, the obligation of circuit court panels of three to follow precedents laid down by prior panels of three within the same circuit. This Article is concerned primarily with a third form of stare decisis, namely the self-imposed obligation of the deciding judges on the same court, with the primary focus on

decisions that cycle over time and across cases,[9] creates an adverse consequence crucial to the development of the modern standing doctrine that until now has been overlooked.[10] Stare decisis, the social choice equivalent of a proscription on reconsideration of a rejected motion,[11] renders the substantive evolution of Supreme Court case law dependent on the order, or "path," in which cases are presented. This phenomenon, referred to in the social choice literature as path dependency, ensures that the order in which cases are presented for review affects not only the relative timing of decisions but, more importantly, the substantive content of decisions. Because stare decisis ensures that the substantive evolution of legal doctrine is path dependent, social choice becomes crucial in explaining standing. The modern standing doctrine has evolved in a manner that renders the inevitable path dependency of legal doctrine, which results from adherence to stare decisis, more fair by preventing ideological litigants from manipulating the path in which cases are presented for consideration. This Article demonstrates that the modern standing doctrine substantially ameliorates—although it does not eliminate—the ability of litigants to control the substantive evolution of legal doctrine by controlling the critically important path of legal decisions.[12] This Article's evolutionary thesis also explains

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justices of the Supreme Court, to adhere to that Court's own precedents. To distinguish this form of stare decisis from the other two, I will refer to it throughout the Article is "intertemporal stare decisis." This Article will further explore another aspect of stare decisis, namely why in federal practice we observe intra- but not inter-circuit adherence to precedent. *See infra* notes 140-151 and accompanying text.

9. "Cycling," a term used in both the game theory and social choice literature, occurs in the absence of a Nash equilibrium among three or more participants. In game theory, a cycle occurs when there is an empty core; in social choice, a cycle occurs when a collective decisionmaking body is faced with non-Condorcet winning preferences and employs a decisional process that is designed to identify available Condorcet winners. In fact, the game theoretic and social choice versions of cycling describe the same essential phenomenon, described in greater detail and with appropriate illustrations below. *See infra* part I.A; *see also* Stearns, *supra* note 4, at 1237-38; John S. Wiley, Jr., *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 557-61 (1987) (defining "empty core" and "cycle").

10. I have found no articles that trace the evolution of stare decisis to intertemporal cycling, nor have I found any articles that trace the evolution of standing to the path dependency that adherence to stare decisis creates.

11. As demonstrated *infra* notes 106-112 and accompanying text, one device commonly employed to prevent cycling is limiting the requisite number of pairwise contests relative to the number of options. To reveal a cycle, an institution must be permitted the same number of pairwise contests as options. Thus, if a rule permits only *n minus 1* pairwise contests for *n* options, the institution will achieve a stable outcome, but will not reveal potential cycles. Proscriptions on reconsideration of rejected motions serve that function and thus prevent institutional cycling. I have employed the word "contests," rather than "votes" because, as demonstrated *infra* notes 112-120 and accompanying text, when collective decisionmaking bodies condone such informal practices as logrolling and vote trading, the participants can engage in the requisite number of iterations, or contests, through informal means to reveal cycles, even when a formal no-reconsideration rule prevents the requisite number of votes to reveal cycles.

12. While a complete definition of "fairness," as that term is understood in the social choice literature, is premature, a brief explanation at this point may be helpful. Within the social choice literature, "fairness" is a complex term of art. The fairness concept, which is grounded in a majoritarian norm, includes adherence to a set of five assumptions commonly associated with majority rule. *See infra* part I.C (defining and applying Arrovian fairness criteria). This Article will demonstrate that,

why federal circuit courts adhere to their own precedents, but not to each others', and why the Supreme Court is afforded discretionary control over its docket.[13]

Second, social choice theory explains in evolutionary terms both the significant structural differences between the collective decisionmaking processes of appellate courts, including the Supreme Court, and legislatures, including Congress, and the role of standing in furthering the objectives that those structural differences serve. The Article will also explain in social choice terms the importance to our system of government of preserving a distinction that, although once widely accepted among academics, is now rejected by many as passé at best and more often as an indication of naïveté among those of us who continue to insist upon it.[14] Specifically, the Article will explain in social choice terms the importance of limiting the bases for judicial decisionmaking to legal principles rather than pure preferences.[15] The Article will also explain, in evolutionary terms, why legislators, including members of Congress, cannot be held to the same standard.[16] In fact, despite the modern erosion of this principle, which standing serves to slow down, the social choice analysis demonstrates that important decisional rules in both Congress and the Supreme Court have evolved in a manner that both relies upon and furthers this critical distinction. These

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properly understood, standing furthers the Arrovian fairness objectives by preventing minority, or non-Condorcet, interests from forcing their preferences into law through the federal courts, and by, instead, requiring that such interests—at least presumptively—seek codification of their preferences in Congress. *See infra* notes 80-84 and accompanying text (defining Condorcet winners as those options that prevail against all other available options in unlimited pairwise contests). In doing so, standing furthers the Arrovian fairness objectives, associated with majority rule, because Congress is better equipped in two critical respects than are the federal courts, including most notably the Supreme Court, to respond rationally when faced with preferences for which there is no Condorcet winner. First, Congress, unlike the Court, is able to remain inert when faced with non-Condorcet winning preferences. *See infra* Part II. Second, members of Congress, unlike Supreme Court justices, have the institutional means with which to commodify or cardinalize their preferences. *See id.* (explaining how vote trading, or logrolling, enables legislators to place relative weights upon their preferences, rather than merely permitting them to rank those preferences ordinally).

13. *See infra* notes 128-129 and accompanying text.

14. In his recent book, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (1994), Professor Stephen L. Carter put the point very nicely: "As for those of us who believe in trying to preserve the autonomy of the law . . . well, we are regarded by left and right alike as dinosaurs, politically out of step, theoretically naive." *Id.* at 92.

15. For another article that relies upon this distinction, see Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court,* 96 YALE L.J. 82, 89 (1986) ("[W]e . . . strongly lean toward a view of adjudication as an exercise in judgment aggregation; indeed, we understand most plausible schools of jurisprudence to embrace this view.") (footnote omitted). While I have previously assumed that courts engage in judgment aggregation and that legislatures engage in preference aggregation, *see* Stearns, *supra* note 4, at 1250 n.108, 1259-76, this Article will demonstrate that the formal *and informal* decisional processes employed in appellate courts and in legislatures have evolved in a manner that relies upon, and that substantially furthers, this critical distinction. *See infra* notes 112-124 and 213-217 and accompanying text.

16. *See infra* notes 213-224 and accompanying text (explaining importance of locating non-Condorcet preferences outside formal legislative decisionmaking processes through vote trades and logrolls).

structural differences, coupled with the historical framework described below, lay the foundation for the evolutionary analysis of standing.

To be clear, the now-common rejection of this once widely accepted distinction does not disprove my thesis on standing; in fact, the opposite is more nearly correct. The increasingly common rejection of this distinction helps to explain why standing, which until the 1970s was a rather peripheral judicial doctrine, was suddenly, and unwittingly, moved to center stage. Specifically, relying upon a social choice framework, this Article, and its companion, *Standing and Social Choice: Historical Evidence,* will demonstrate that the fractionalization, or "multipeakedness,"[17] that has occurred in the Supreme Court beginning in the 1970s and continuing to the present, when coupled with the litigant incentives revealed by social choice, largely explains the modern evolution of the standing doctrine.[18]

B. Overview and Thesis

Perhaps the only worthwhile generalization ever made about standing was Justice Douglas's ironic assertion that "[g]eneralizations about standing to sue are largely worthless as such."[19] From its inception, this judicially created doctrine has been viewed by academics with ridicule, skepticism, and even scorn.[20] And yet, if the number of articles on the subject is any indication, standing has been a continuous source of academic intrigue. Despite the numerous articles[21] and books that have tackled standing, no general consensus has formed concerning either the doctrine's purpose or its legitimacy. Any attempt to devise a positive analysis of standing may therefore be viewed by some as the legal academic equivalent of searching

17. Multipeakedness provides a visual conceptualization of a cycle and, specifically, of an institution plagued with cyclical preferences. *See infra* Table 1, part I.A.

18. The modern standing evolution includes (1) the severance of standing from the questions of whether plaintiff has a cause of action and whether plaintiff falls within the zone of interest of the relevant statute; (2) the incorporation of an injury-in-fact requirement, and related causation and redressibility requirements, into both Administrative Procedure Act § 10(a) standing cases and constitutional standing cases; and (3) the Court's recent effort to incorporate an Article II litmus test into the Article III standing inquiry. The functions that the modern standing doctrine serves are described briefly *infra* at notes 24-32 and accompanying text, and explored in substantially more detail throughout the Article.

19. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970). For an analysis of the quoted statement, see *infra* note 207 (explaining self-reference problem).

20. *See infra* notes 66 and 68 and authorities cited therein.

21. While a complete list of citations in support of this proposition is unnecessary, a recent LEXIS inquiry yielded 117 articles over the last 10 years in which the term "standing" appears in the title.

for, or worse yet, entering a black hole.[22] Employing, for the first time,[23] an economic methodology to explain the evolution of standing may raise even greater skepticism. A brief statement about what this Article will do—and will not do—is therefore in order.

This Article will tell a story about the evolution of modern standing and provide a functional analysis of that doctrine based upon social choice theory. The analysis will demonstrate that standing serves a unique function in our judicial system that has not been, and is not now, served by prior or existing legal doctrines. For example, this Article, in contrast with many other works on standing, will demonstrate that the functions served by standing are not replicated by such related doctrines as ripeness, mootness, the proscription against advisory opinions, and the political question doctrine. The Article will also demonstrate that standing is not simply an expedient mechanism for Supreme Court docket control, a substitute for determining whether plaintiff has a cause of action, or a device employed by the Court to avoid resolving difficult cases. While I will identify standing cases in which the Court would have been better served by employing one or more of the above doctrines, I will argue that these, and other, misuses of standing do not justify abandoning the doctrine.

Properly understood, standing serves three unique—and extremely worthwhile—functions. First, a social choice analysis reveals that standing substantially reduces, although it does not eliminate, the ability of litigants to manipulate the substantive evolution of legal doctrine by controlling the order, or "path," of case decisions.[24] In doing so, standing renders the substantive evolution of legal doctrine more fair, as that term is understood in social choice,[25] by ensuring that all litigants play by a certain set of basic ground rules with respect to the timing of issue presentation to the Supreme Court and lower federal courts.

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22. For those who doubt the severity of such a prospect, consider the following description:

> [P]erhaps an astronaut who fell into a black hole would be able to make money at roulette by remembering where the ball went before he placed his bet. . . . Unfortunately, however, he would not have long to play before he was turned into spaghetti.

STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 149 (1988).

23. I have located no articles attempting to offer a comprehensive law and economics analysis of standing and certainly no articles linking standing to the problems revealed by the theory of social choice.

24. Standing does not prevent path dependency because the Supreme Court's decisional processes ensure that the order in which issues are presented will inevitably affect the substantive evolution of legal doctrine. Instead, standing reduces the extent to which litigants can opportunistically benefit from path dependency in federal circuit courts and in the Supreme Court by ensuring that litigants await a concrete legal dispute affecting them in a reasonably direct manner before forcing a federal court to resolve particular substantive legal issues.

25. *See infra* notes 153-161 and accompanying text (explaining fairness in social choice terms).

Second, standing helps to preserve a critical, although increasingly neglected,[26] aspect of separation of powers.[27] In contrast with appellate courts, which are obligated to decide cases properly before them,[28] legislatures are free not to decide issues presented to them for consideration in the form of bills.[29] In other words, legislatures, unlike courts, have the institutional power of inertia. Standing substantially reduces the extent to which litigants can force the creation of positive law in federal courts, including the Supreme Court, thereby shifting the burden of inertia when Congress remains silent on a particular issue. At the same time, standing protects Congress' power to leave issues of law undecided unless and until an appropriate legislative consensus has formed.[30]

Third, and finally, the modern standing doctrine preserves an important distinction between the appropriate nature of judicial and legislative lawmaking. While legislatures, including Congress, and appellate courts, including the Supreme Court, are both unquestionably empowered to create positive law, their lawmaking functions nevertheless remain distinct. Whereas Congress, for example, has full authority under the Constitution to create law within its delegated powers, except as prohibited by independent

26. For an analysis demonstrating that Mistretta v. United States, 488 U.S. 361 (1989), which upheld the statute that created the United States Sentencing Commission, constitutes a direct assault on the inertia-based separation of powers distribution between Congress and federal courts, see *infra* part II.A.

27. While commentators have both defended and challenged the linkage between standing and separation of powers, this Article will offer a very different picture of that relationship than has been offered in the literature thus far.

28. To anticipate an early objection, one might argue that the Supreme Court's discretionary docket effectively prevents the Court from having to resolve any particular cases. In fact, however, this Article's analysis, linking the modern standing doctrine to the path dependency created by adherence to stare decisis, further provides a positive explanation for affording the power of docket control to the Supreme Court. *See infra* notes 127-129 and accompanying text (linking power of certiorari to adherence to precedent within but not across circuits). The Article demonstrates that standing is essential in preventing path manipulation in the lower federal courts and in the Supreme Court, even with the power of certiorari in place.

29. *See* Stearns, *supra* note 4, at 1258-71 (applying Arrovian range criterion to Supreme Court and Congress).

30. As demonstrated *infra* Part II, an appropriate consensus need not be a majority; instead, Congress, like other legislative bodies, is well equipped to act upon Condorcet winners, namely those options that prevail against all others in pairwise contests, in the absence of a pure majority winner. *See, e.g.*, Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 156 (1992) [hereinafter Levmore, *Bicameralism*] (explaining that bicameralism is preferable to unicameralism with a supermajority voting requirement in identifying strong Condorcet winners, defined as Condorcet winners present in both houses of Congress); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971 (1989) [hereinafter Levmore, *Parliamentary Law*] (describing evolution of parliamentary rules that are conducive to identifying and acting upon Condorcet winners); William H. Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 AM. POL. SCI. REV. 349 (1958) (evaluating Congressional voting rules that are, and are not, conducive to identifying Condorcet winners). In contrast with these authors, I will argue that such informal processes as logrolls and vote trades are more important than formal voting rules in ensuring that available Condorcet winners prevail in legislative bodies. *See infra* notes 213-217 and accompanying text.

constitutional restrictions,[31] the Supreme Court is often viewed as overreaching when it creates law on other than an ad hoc and as-needed basis, dictated by the need to resolve cases properly before it. This Article will explain in structural terms the negative consequences that may follow when this distinction is eroded, and will further explain that while other justiciability doctrines, including ripeness, mootness, and the proscription on advisory opinions, also help to preserve this distinction, standing does so in a manner that these doctrines do not.[32]

And now, a comment on what this Article will not do. This Article will not attempt to demonstrate that all standing cases can be reconciled, although it will demonstrate that many of the notorious inconsistencies are overstated. In fact, as Judge Easterbrook, who provided the first systematic assessment of Supreme Court decisionmaking based upon Arrow's Theorem, has demonstrated, entirely consistent decisionmaking is an impossible goal for the Supreme Court or, for that matter, any appellate court, to achieve.[33] Judge Easterbrook's insight is no less relevant when analyzing Supreme Court standing cases than when analyzing any other body of Supreme Court precedent.[34] Given the impossibility of ensuring consistency in any area of Supreme Court precedent, the inconsistent application of standing is not a sufficient basis on which to reject the doctrine's legitimacy.[35] The companion article, *Standing and Social Choice: Historical Evidence,* which the final section of this Article previews, will trace the historical evidence in detail to demonstrate that the doctrinal evolution of standing substantially mirrors this Article's theoretic predictions about standing.[36]

C. *The Legal and Conceptual Origins of Standing*

A useful way to introduce the concept of "standing" is to consider the injury prong of a prima facie negligence case. A widely accepted tenet of

31. In contrast with Congress, which receives its lawmaking power through express constitutional delegation, state legislatures have plenary lawmaking power for which no state constitutional delegation is required. *See* James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure,* 74 CALIF. L. REV. 491, 553 n.329, 554 (1986) (comparing California legislature with Congress).

32. For a comparison of the manner in which standing and these other justiciability doctrines further the above distinction, see *infra* notes 275-283 and accompanying text.

33. *See* Frank H. Easterbrook, *Ways of Criticizing the Court,* 95 HARV. L. REV. 802 (1982); *see also* Stearns, *supra* note 4, at 1283-85.

34. For an illustration, based upon actual standing cases, of the impossibility of ensuring consistency see *infra* notes 87-111 and accompanying text.

35. As demonstrated *infra* note 283 and accompanying text, those who would argue that the occasional improper use of a legal doctrine justifies its abandonment have committed the nirvana fallacy.

36. *See* Stearns, *supra* note 5. I have chosen to treat standing in two companion articles rather than one, because the subject matter naturally lends itself to a division between developing the appropriate analytic model, which is the subject of this Article, and providing empirical support for predictions drawn from that model, which is the subject of the second piece.

tort law holds that if A witnesses B's negligent conduct, which does not cause harm to anyone, A will be prevented from suing B for negligence. Judge Cardozo aptly summarized the point when he wrote, "Proof of negligence in the air . . . will not do."[37] Instead, A must wait until B injures her or someone she has a legal right to protect, before suing.

We could, of course, readily envision an alternative regime. Courts could allow A to sue B before B causes anyone, including A, actual harm. Assuming A is willing to incur the costs of suing, the hypothetical regime, which would presumably impose some liability upon B for his noninjurious negligence, would have the obvious benefit of making B's negligent conduct potentially more costly *before* B causes anyone harm. Indeed, if we lived in the idyllic world that exists only in academic discourse, in which all persons are equipped with complete information and can transact—or litigate—at no cost, the hypothetical legal regime would appear preferable to the present regime. Certainly no one except B, our tortfeasor, benefits from her negligent conduct.[38] It would seem odd, therefore, to suggest that courts have included the injury element in a prima facie negligence case because they are solicitous of B's freedom to engage in potentially harmful conduct. B has no apparent "right" to continue engaging in negligent conduct until someone is harmed. Why not then allow A to prevent B's tortious conduct in court before B injures someone?

The presence of substantial litigation costs and of limited judicial resources obviously plays an important role in selecting our seemingly inferior tort regime. Some persons who engage in negligent conduct will continue in their negligence without ever causing actual harm. Others will conform their conduct to an appropriate level of care before harming anyone. Requiring as a prerequisite to a lawsuit in tort that the plaintiff suffer actual harm therefore reduces litigation costs and conserves judicial resources. At the same time, if appropriate sanctions for negligence are imposed upon tortfeasors who do cause injury through their negligent conduct, those fortunate tortfeasors who have not yet caused an injury will be appropriately deterred.

While the prima facie injury requirement in tort is a useful metaphor in introducing the concept of standing, as with all metaphors, the differences

37. Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928) (quoting SIR FREDERICK POLLOCK, THE LAW OF TORTS 455 (11th ed. 1920)); Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920) (quoting SIR FREDERICK POLLOCK, THE LAW OF TORTS 472 (10th ed. 1916)).

38. I am assuming Judge Learned Hand's definition of negligence. Under the Hand formula, a person is negligent if she fails to take a precaution the cost of which is less than or equal to the risk of harm times the adverse consequence of that harm should it occur. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). While it is true that the failure to take nonnegligent precautions saves societal resources, as a matter of definition such savings are more than offset by the present value of the potential harm.

are more interesting, and perhaps more important, than the similarities.[39] There are at least two critical differences between the injury prong of a prima facie tort case and the injury-in-fact element of the modern standing doctrine.[40] First, the duty of B, the tortfeasor, to exercise an appropriate level of care is only one source of A's legal rights. Standing is often viewed as a judicial vehicle employed to fend off attacks on mounting and pervasive governmental regulation that began with the New Deal and that significantly expanded during the Great Society in the 1960s.[41] Today, federal and state regulations intrude upon areas of our lives that were at one time deemed beyond regulatory reach,[42] and federal regulation intrudes upon areas once deemed the exclusive subject of state and local control.[43] This proliferation of government regulatory intrusion has brought substantial opportunities both for regulatory abuse and for novel legal challenges to the permissible scope of governmental power.[44] But the pervasiveness of arguably illegal government regulation can no more justify imposing a standing barrier than can the desire to protect a tortfeasor's right to engage in noninjurious negligence justify the inclusion of an injury requirement as part of a prima facie negligence case. And while the injury-in-fact prong of the modern standing doctrine, like the injury prong of the prima facie tort case, might reduce litigation costs, it would be difficult to rest the entire doctrine on that basis. After all, one would be hard pressed to argue that the judicial resources saved by standing denials outweigh the costs imposed by arguably illegal government regulation. As with our noninjurious tortfeasor, there is no apparent reason to protect the government's arguably illegal efforts to intrude upon our lives. Indeed, one could argue that the

39. The point was perhaps put best by the poet Wallace Stevens, who said, "Both in nature and in metaphor identity is the vanishing-point of resemblance." WALLACE STEVENS, THE NECESSARY ANGEL: ESSAYS ON REALITY AND THE IMAGINATION 72 (1951).

40. As the standing doctrine is presently formulated, a plaintiff must allege injury in fact, causation, and redressibility. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750-52 (1984).

41. *See infra* note 69 and authorities cited therein; *see also* Stearns, *supra* note 5, part II.A.

42. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding federal statutes that prohibit private discriminatory conduct once deemed beyond regulatory control); Katzenbach v. McClung, 379 U.S. 294 (1964) (same); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage statute and restricting substantive due process right to contract, which had previously rendered such regulation unconstitutional).

43. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal agriculture statute regulating farmer's wheat crop primarily intended for farm use and home consumption). In its most recent term, the Supreme Court suggested that some Tenth Amendment limits remain on Congressional Commerce Clause powers. *See* United States v. Lopez, 115 S. Ct. 1624 (1995) (striking federal criminal statute prohibiting the possession of guns within specified distance of public schools).

44. For a recent example, see Dolan v. City of Tigard, 114 S. Ct. 2309, 2319 (1994) (applying heightened scrutiny to hold that city violated Fifth Amendment's Takings Clause when it conditioned grant of building expansion permit upon relinquishment of land to create bike path, storm drainage channel, and greenway).

pervasiveness of government regulation during the last half-century is a reason to open wide the courthouse doors.[45]

Public choice scholars inform us that when the burdens of government regulation are widespread and the benefits are concentrated, rational persons who are disadvantaged by such regulation are likely to free ride on the legal challenges of others who are similarly affected, rather than to challenge the government intrusion themselves.[46] If everyone were to free ride in this manner, such governmental intrusion, legal or illegal, would proceed unabated. More importantly, even if a once sympathetic New Deal Court created the standing doctrine to stave off unwelcome challenges to experimental government programs designed to reverse the Depression, one would expect a later Supreme Court, exhibiting greater faith in private orderings and a corresponding distrust of governmental regulation, to abandon this doctrine, or at least to limit its reach.[47] And yet, as an historical matter, nearly the opposite has occurred. As the Court became more sympathetic to private orderings during the latter part of the Burger Court era and throughout the Rehnquist Court era, the standing doctrine became a more, rather than less, frequently employed vehicle to prevent challenges to government regulatory conduct. This anomaly suggests, at the very least, the need to take a few steps back.

There is, of course, a second difference between the injury requirements in standing and in tort. While common law courts require an injury as part of a prima facie negligence action, it by no means follows that injury in fact should be a requisite element for statutory or constitutional causes of action, which do not owe their existence to common law courts. Instead, the novelty of many federal and state regulations might render the common law injury requirement ill-suited to meet the consequences of widespread and intrusive government regulation.

Setting those concerns aside for now, the tort analogy remains helpful in introducing the standing doctrine. Whether or not such a policy is wise, standing is often understood as a device used by federal courts to fend off challenges to governmental conduct that are brought primarily on an ideological basis.[48] This can take any number of forms. For example, based upon standing, the Supreme Court has held nonjusticiable a suit by a former

45. Richard Epstein, for example, has advocated precisely this position. *See, e.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 216-17 (1993) (arguing against standing limitations on citizen and taxpayer challenges to constitutionality of government regulation).

46. *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 21 (1971) (describing "free rider" phenomenon).

47. Indeed, the failure to explain this phenomenon is among the greatest deficiencies in the present standing literature. For a preliminary analysis that explains this historical anomaly, which is taken up in greater detail in Stearns, *supra* note 5, see *infra* notes 289-291 and accompanying text.

48. I will explain in Part I.A that while standing does in fact reduce purely ideological litigation, commentators have failed to identify the reason behind the general presumption against such litigation, namely that a contrary rule would enable ideological litigants to manipulate the critically important path of case presentation.

chokehold victim who alleged that the Los Angeles Police Department's continued chokehold practice violated his due process rights and those of the class he represented;[49] a suit by parents of African American school children who alleged that an IRS procedure afforded discriminatory private schools tax-exempt status in violation of federal statutes and the Constitution;[50] an application for stay of execution by Gary Gilmore's mother, who alleged that her son's conviction and death sentence violated several constitutional guarantees;[51] a suit by a federal taxpayer who alleged that the CIA's failure to release budget information violated the Constitution's Statement and Account Clause;[52] and a suit by United States citizens who alleged that certain members of Congress were serving in the Armed Forces Reserve in violation of the Constitution's Incompatibility Clause.[53] Most recently, the Supreme Court denied standing to environmentalist plaintiffs who challenged a regulation on interagency consultation issued under the Endangered Species Act, even though a section of the Act expressly granted such plaintiffs standing.[54] In each of these well-noted cases, the Supreme Court based its denial of standing, at least in part, on its assessment that plaintiff had failed to allege a sufficiently concrete injury or that the litigation was being conducted on an essentially ideological basis.

The merits of these individual rulings aside, commentators have found difficult, if not impossible, the task of reconciling them with others in which the Supreme Court has allowed standing. For example, the Supreme Court rejected standing challenges in a case involving a white medical school applicant who alleged that because of his race he had been unconstitutionally denied consideration for all available medical school seats, even though he did not allege that he would have been admitted had he been considered;[55] a case in which property owners challenged the constitutionality of a federal statute limiting the liability of nuclear power plants in an effort to halt the planned construction of two such plants near their homes, even though they did not allege that a victory on the merits would necessarily prevent the construction;[56] and a suit by a group of environmentalist law students alleging that a railroad rate increase, if approved, would cause harm to the air in Washington, D.C., notwithstanding the unusually attenu-

49. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

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

51. Gilmore v. Utah, 429 U.S. 1012 (1976). While this case was not disposed of on standing grounds, two separate concurrences, one by Chief Justice Burger (joined by Justice Powell), the other by Justice Stevens (joined by Justice Rehnquist), make clear that it was decided based upon standing principles. *See id.* at 1013, 1017.

52. United States v. Richardson, 418 U.S. 166 (1974).

53. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

54. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

55. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.4 (1978) (opinion of Powell, J.).

56. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75-77 (1978).

ated, and rather dubious, causal chain from the challenged conduct to the alleged harm.[57]

Relying upon these and other seemingly irreconcilable results, scholars have debated since the inception of standing, first, whether standing serves any valid function not already served by other, more well-established, legal doctrines;[58] second, whether standing, as the Supreme Court has repeatedly stated, has any logical foundation in the case or controversy requirement set out in Article III of the Constitution;[59] and finally, whether standing is merely a vehicle employed by a politicized Supreme Court either to avoid reaching the merits of difficult cases or, precisely the opposite, to provide a preliminary and low-cost indication of how it might rule on the merits at some future time.[60]

The Supreme Court, in its efforts to clarify the standing doctrine, has only added confusion. Resting the standing doctrine on both "prudential" and constitutional grounds, the Court has generated substantial debate among scholars, and in its own ranks, as to whether Congress has the power to grant standing when the Court has denied it. Thus, while Justice O'Connor, for example, has argued that standing is designed to protect Congress' power to monitor the executive branch as it sees fit,[61] Justice Scalia has denied Congress the power to vest standing in private attorneys general to monitor executive agency conduct.[62] While both Justices agree that standing has something to do with separation of powers, their separation of powers analyses lead them to precisely opposite outcomes when Congress confers standing by statute. Justice O'Connor, who believes that the case or controversy foundation for standing is intended to protect

57. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 683-90 (1973).

58. The most obvious alternative to a denial of standing—and certainly the one that has drawn the most academic attention—is a determination that, on the merits, claimant does not have a cause of action. For a recent article taking the position that standing is a substitute for the question whether plaintiff has a cause of action, see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III,* 91 MICH. L. REV. 163 (1992). The present Article demonstrates, however, that standing and cause of action are necessarily distinct inquiries. This follows directly from the analysis below, demonstrating that judicial decisionmaking rules render the evolution of legal doctrine path dependent. Depending upon the order in which cases are presented for review, the same court might reach different outcomes on the question whether to infer a particular statutory or constitutional cause of action. *See infra* part I.B. As a result, the legal inquiry into cause of action is subject to the same litigant path manipulation as are other bodies of substantive case law.

59. The Court has repeatedly emphasized that standing has both constitutional and prudential bases, the former linked to Article III and the latter to a number of concerns which will be explored throughout this Article. For a recent comment arguing that the Court has not adequately distinguished the constitutional and prudential foundations of standing, see Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns,* 142 U. PA. L. REV. 1063 (1994). For a critique of Gottlieb's analysis, see *infra* note 277 and accompanying text.

60. *See infra* note 66 and authorities cited therein.

61. *See* Allen v. Wright, 468 U.S. 737, 760 (1984). Justice Blackmun's dissenting opinion in Lujan v. Defenders of Wildlife, 504 U.S. 555, 601-06 (1992), which Justice O'Connor joined, is consistent on this point with O'Connor's analysis for the *Allen* majority.

62. *See Lujan,* 504 U.S. at 571-78.

Congress, would freely uphold Congress' power to grant standing even to ideological plaintiffs. Justice Scalia, on the other hand, who believes that standing has constitutional roots in Articles II and III, has found limits on Congress' power to confer standing upon private litigants when, in doing so, Congress would require federal courts to monitor the executive branch. Justice Kennedy has attempted to find some middle ground between these seemingly irreconcilable positions, denying Congress' power to delegate its executive monitoring function unless Congress somehow articulates the nature of the private attorney general's claimed injury.[63] And if this is not confusing enough, consider yet a fourth position offered by Justice Breyer, who, as a professor, joined the chorus of academics who argue that when a plaintiff relies upon a federal statute, the standing inquiry is no different than the inquiry whether the plaintiff should succeed on the merits of her case.[64]

As demonstrated below, academics have proved no better than sitting justices in finding common ground when discussing this enigmatic doctrine.[65] Thus, despite the large volume of articles analyzing standing cases, no one has satisfactorily explained the functions that the doctrine serves;[66]

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63. *See id.* at 579-81 (Kennedy, J., concurring):

> In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id. at 580 (citation omitted).

64. *See* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW & REGULATORY POLICY: PROBLEMS, TEXT, & CASES 1094 (2d ed. 1985). He does not make this claim in the third edition.

65. *See infra* notes 66, 69, and 235 and authorities cited therein.

66. Indeed, academic commentary on standing reflects a seemingly irreconcilable divergence. Many academics take the position that the Supreme Court employs standing to avoid or delay resolving difficult questions of law, often as a matter of prudence or restraint. *See, e.g.,* Louise Harmon, *Fragments on the Deathwatch,* 77 MINN. L. REV. 1, 61 n.120 (1992) ("Standing, however, is only one of many judicial inventions designed to avoid constitutional decisionmaking."); Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts,* 30 WM. & MARY L. REV. 499, 513 (1989).

> Sensitive to its status as the antidemocratic branch of government in a nation founded on the principle of majority rule, the Court seeks to avoid unnecessary constitutional decisions and to eschew judicial intervention unless the litigant seeking it makes a compelling case that he is so entitled. In recent years the Court has implemented these policies chiefly through its standing doctrine. (footnote omitted)

Id. at 518 ("The jurisdictional policy against standing to assert generalized grievances is sensitivity to the separation of powers, which in this context refers to a policy of restricting the exercise of judicial power by avoiding unnecessary constitutional decisions."); *see generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 115-27 (1962) (asserting that justiciability doctrines including standing promote federal judiciary's "passive virtues" as the least majoritarian branch). In Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979), the Supreme Court lent credence to the prudential avoidance position, stating, "even when a case falls within [appropriate] constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated . . . ."

Others take the position that standing is an inevitably normative inquiry that merely substitutes one substantive determination, albeit in the guise of a procedural ruling, for another. *See, e.g.,* Robert A.

why the doctrine began to evolve into its present form beginning in the 1970s, long after a liberal court created standing to stave off unwelcome challenges to New Deal regulatory programs;[67] and why, despite the near-universal criticism that standing has generated, it has become an increasingly frequent vehicle for case resolution.[68]

By offering a substantially different methodology than has been offered thus far to explain standing, one grounded in law and economics, this Article hopes to dispel some of this confusion. The analysis, based upon social choice theory, will explain standing in evolutionary terms. To be clear, I do not mean the historical evolution, which, although frequently discussed,[69] has failed to produce a satisfactory explanation of the modern

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Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis,* 25 VAND. L. REV. 479, 480-81, 512 (1972) (positing that courts often employ standing as a disguised merits determination); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment,* 62 CORNELL L. REV. 663, 663 (1977) (same); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance,* 40 STAN. L. REV. 1371, 1373 (1988) (observing that some commentators "have concluded that the doctrine of standing is either a judicial mask for the exercise of prudence to avoid decisionmaking or a sophisticated manipulation for the sub rosa decision of cases on their merits") (footnote omitted). Among the best articles demonstrating the inevitably normative and substantive nature of standing determinations is Fletcher, *supra* note 3.

It is my position that while standing determinations are inevitably substantive, that observation begins, rather than ends, the inquiry whether standing was properly denied in a given case. While inevitably a substantive determination, a standing denial is most often a *different* substantive determination than that which would result from a grant of standing followed by a ruling on the merits of the underlying issue of law. The question of standing is in essence about the appropriate process through which law—and specifically constitutional law—is made. The shadow case analysis presented in this Article provides a novel mechanism for assessing the role of standing in promoting fair constitutional process and in determining whether the substantive standing inquiry in a given case is preferable to a substantive determination on the merits of the underlying legal issue. *See infra* part II.B.

67. *See* Fletcher, *supra* note 3, at 227.

68. While I found no available statistics, the following excerpt from comments by Judge Wald of the District of Columbia Circuit is informative:

> Recently standing has again become a paramount focus of our court. In a significant number of cases no party, including the government, raises the standing issue but the court, sua sponte, conducts its own inquiry and often ends up dismissing the case. No plaintiff before our court can afford any longer to be unprepared to defend standing, and a defendant must be prepared in any case to explain why it was not raised. Last year we denied standing in about one-third of our published opinions on the issue.

Patricia M. Wald, *The D.C. Circuit: Here and Now,* 55 GEO. WASH. L. REV. 718, 720 (1987).

69. Thus, for example, Steven Winter has demonstrated that early American and contemporaneous English practices were consistent with both a public and private rights model of litigation. *See* Winter, *supra* note 66, at 1394-1409. Winter argues that "standing" emerged in large part as a metaphor intended to capture the circumstances in which the federal courts could appropriately cabin their equitable discretion, *id.* at 1420-22, and that, as such, the term became a useful heuristic during the New Deal when Justices Brandeis and Frankfurter sought to limit challenges to favored regulatory programs. *Id.* at 1455. Winter's essential thesis is that the Supreme Court has taken its standing metaphor, which connotes a private person's right to "stand" in court to raise her claim, too literally:

> The key to understanding—and to unlocking the barrier of standing law—lies in an appreciation that the term "standing" is a metaphor. Its origin no doubt comes from the physical practices of the courtroom: A court will only hear a participant if he or she *is* standing. "Standing" is therefore a natural metaphor for when a court will consider a litigant's claim; the metaphor is *motivated* by our experience.

Id. at 1382-83 (footnotes omitted). As with all metaphors, Winter argues, the adverse consequence has been that standing tends to hide other dimensions of the metaphor's object, in this instance, those

standing doctrine. Instead, the analysis will demonstrate that based upon some reasonable assumptions, coupled with the substantial changes in the

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features consistent with a nonprivate rights litigation model. *See id.* at 1383 ("The power of a metaphor is that it colors and controls our subsequent thinking about its subject."); *id.* at 1386-87 ("Metaphor is successful in structuring understanding—that is, metaphor is interactive and has *ontological* effect—because in organizing our view of the target domain it both highlights similarities with the source domain and suppresses and hides dissimilarities, which become a species of epistemic 'noise.' "). Winter explains that beginning with the landmark standing decision in Frothingham v. Mellon, 262 U.S. 447 (1923), the effect of employing the standing metaphor was to replace the once-prevalent litigation model that vindicated both public and private rights with a litigation model that vindicated only private rights. *Winter, supra* note 66, at 1446.

Winter's historical argument that public-interest litigation was prevalent at the time that the Constitution was adopted is sufficiently well documented that there is no need to retrace it in this Article. Thus, in a recent article, Professor Nichol observed that

> [i]n separate, major, and compelling efforts, Louis Jaffe in 1965, Raoul Berger in 1969, and Steven Winter in 1988 have demonstrated that injury was not a requisite for judicial authority in either the colonial, framing, or early constitutional periods. The Judiciary Act of 1789, like several contemporaneous state statutes, allowed "informer" actions. English practice included prerogative writs, mandamus, *certiorari,* and prohibition, all designed to "restrain unlawful or abusive action by lower courts or public agencies," and requiring only "neglect of justice," not individual injury. Stranger suits and relator practice countenanced the assertion of judicial power without the existence of a direct personal stake in the controversy.

Gene R. Nichols, Jr., *Justice Scalia, Standing, and Public Law Litigation,* 42 DUKE L.J. 1141, 1151-52 (1993) (footnotes omitted). Several articles, not limited to those that Professor Nichol cites, support his summary. *See, e.g.,* Louis L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 462-67 (1965); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?,* 78 YALE L.J. 816 (1969); Fletcher, *supra* note 3; Henry P. Monaghan, *Constitutional Adjudication: The Who and When,* 82 YALE L.J. 1363 (1973); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III,* 74 CALIF. L. REV. 1915 (1986); Sunstein, *supra* note 58, at 173-76; *see also* Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions,* 99 YALE L.J. 341, 341-44 (1989) (demonstrating that *qui tam* doctrine, under which individuals bring actions on behalf of the government, has existed throughout United States history).

And yet, while there is compelling historical evidence against insisting upon a private-rights model as a matter of constitutional law, or even as a prudential matter, standing has become increasingly entrenched. Neither the cited articles nor the myriad articles that trace the same historical data suggest a positive methodology that explains why the Supreme Court developed standing as it did, when it did. Moreover, this type of historical evidence is of only limited value in assessing standing. The fact remains that whatever the contemporaneous practices at the framing, the public-rights model fell out of fashion relatively early in our nation's history. *See* Winter, *supra* note 66, at 1414 (positing that "[a]s public agencies such as district and county attorneys were established [in the 1840s and 1850s], the need decreased for private attorneys general").

The more poignant historical anomaly is of far more recent vintage. Professor Fletcher, for example, 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." Fletcher, *supra* note 3, at 225; *see also id.* at 227 ("[G]enerally speaking, federal litigation in the 1960's and 1970's increasingly involved attempts to establish and enforce public, often constitutional, values by litigants who were not individually affected by the conduct of which they complained in any way markedly different from most of the population."). But what he, and the other commentators cited above, have generally failed to recognize—or, at least, have not chosen to focus on—is that these two historical phenomena are not complementary. If it is true, as history suggests, that standing emerged during the New Deal to stave off unwelcome challenges to novel regulatory programs, the question remains why a more conservative Court emerging in the 1970s and 1980s did not significantly cut back or eliminate standing to welcome litigants who sought to challenge novel regulation in the name of public and primarily constitutional values. This Article and its companion, Stearns, *supra* note 5, are intended in large part to explain that anomaly.

Supreme Court beginning in the Burger and Rehnquist Court eras, one could predict that a rational Supreme Court would have created standing when it did, in close to its present form.[70]

Part I introduces several social choice concepts that lay the foundation for analyzing the standing doctrine. That Part also explains the doctrine of stare decisis in economic terms, and explains why stare decisis creates incentives for litigants to attempt to control the evolution of substantive legal doctrine by controlling the order or path of legal decision. Part II applies social choice analysis to the Supreme Court and Congress and explains the conditions under which one might predict the evolution of standing.[71] Part II then demonstrates that the functions served by standing are not replicated by associated justiciability doctrines. That Part also demonstrates the importance of standing in furthering a critical and often overlooked distinction between legislative and judicial lawmaking functions in our constitutional scheme. Finally, Part III presents a preliminary assessment of the historical evidence in light of this Article's analytic framework.[72]

I
THE THEORY OF SOCIAL CHOICE

A. The Condorcet Paradox, Stare Decisis, and Path Dependency

Underlying most social choice scholarship, one of the most voluminous bodies of social science scholarship, is a deceptively simple concept known as the Condorcet Paradox.[73] Assume that three law review articles editors, Anita, Barbara, and Celine, must choose a single article to accept for publication in an upcoming issue. The editors have narrowed their choices to what they consider to be the three best submissions. The first article, entitled *The Klutz Factor,* is a critique of the comparative negligence doctrine; the second article, entitled *Thus Spake Hal,* analyzes the legal significance of recent developments in artificial intelligence; and the third article, entitled *From Coase to Coast,* is a law and economics critique of beach reclamation laws. After a long meeting discussing the merits of

70. Stearns, *supra* note 5, previewed in Part III, demonstrates that the theoretic evolution of standing set out in this Article closely mirrors the historical evolution of standing.

71. In the companion article, *id.,* I rely upon the analysis set out in this Article to trace the doctrinal evolution of standing beginning with the New Deal and focusing on the Burger and Rehnquist Court eras. I then recast that history in a social choice framework and apply a methodology for comparing the results of actual standing cases that substantially diminishes many of the cited inconsistencies within modern standing doctrine. While a comprehensive historical overview is beyond the scope of this Article, which is intended to lay out a conceptual framework for evaluating standing based upon social choice, I provide a preliminary assessment of the historical support in Part III.

72. *See also* Stearns, *supra* note 5.

73. This section will introduce several social choice concepts that relate to the substance of this Article. For interested readers, I have offered a more thorough presentation of social choice in Stearns, *supra* note 4.

each piece, the editors decide that it might be worthwhile to rank their individual preferences for the three pieces ordinally. The results follow:

Anita: *The Klutz Factor, Thus Spake Hal, From Coase to Coast*

Barbara: *Thus Spake Hal, From Coase to Coast, The Klutz Factor*

Celine: *From Coase to Coast, The Klutz Factor, Thus Spake Hal*

Realizing that none of the articles has majority support, Anita suggests that the editors choose which article to publish by taking a series of pairwise votes until a winner emerges. Barbara and Celine agree. In the choice between *The Klutz Factor* and *Thus Spake Hal, The Klutz Factor* wins two to one, with Barbara losing to Anita and Celine. In the choice between *The Klutz Factor* and *From Coase to Coast, From Coase to Coast* wins two to one, with Anita losing to Barbara and Celine. Anita, somewhat mystified as to how her own suggested process backfired, requests that the editors take a final pairwise vote between *Thus Spake Hal* and *From Coase to Coast.* Celine, who is delighted with the outcome, explains that the final vote would be a waste of time. Because the voting thus far revealed that the group prefers *From Coase to Coast* to *The Klutz Factor* and *The Klutz Factor* to *Thus Spake Hal,* it is quite clear that the group also prefers *From Coase to Coast* to *Thus Spake Hal.* Barbara, who shares Anita's recollection that both she and Anita had stated the opposite preference, prevails upon Celine to allow the final vote. When the final vote is cast, *Thus Spake Hal* beats *From Coase to Coast,* with Celine losing to Anita and Barbara.

The Condorcet Paradox reveals a critical difference between individual and collective decisionmaking. When asked to rank the three articles ordinally, each of the articles editors provides a rational, or transitive, ranking.[74] For each editor, the ordinal ranking A preferred to B preferred to C implies A preferred to C. When the group's preferences are aggregated in the series of pairwise votes, however, the transitivity is lost. Notwithstanding the group's apparent ordinal ranking A preferred to B preferred to C, the group simultaneously prefers C to A. The Condorcet Paradox reveals that in a group composed of three or more individual decision makers whose preferences satisfy the transitivity criterion, transitivity may be defeated when those preferences are aggregated.[75] When a group's preferences resemble those in the law review hypothetical, unlimited pairwise voting leads to a "cycle" in which for any given outcome, there is always an

74. In social choice, transitivity and rationality are synonymous. *See* Stearns, *supra* note 4, at 1250-51.

75. In 1951, Kenneth Arrow published his now-famous book *Social Choice and Individual Values,* for which he was later awarded the Nobel Prize. Arrow, who was then unaware of the Marquis de Condorcet's work, set out to determine a social-welfare function to be used by a central planning authority. He instead proved the impossibility of devising a fully rational mechanism for collective preference aggregation. In essence, Arrow proved that there is no mechanical solution to the Condorcet Paradox that does not substitute some other, potentially more serious, problem for collective decisionmaking. It is in that sense that Arrow's Theorem is a generalization of the Condorcet Paradox. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

alternative proposal that has majority support.[76] Because a present majority is available to substitute any given outcome with a preferred outcome, no stable outcome can emerge. Instead, absent some external restraint, the group will cycle indefinitely.

By illustrating the Condorcet Paradox graphically, we can introduce another social choice concept known as multipeaked preferences. Table 1 illustrates the discussion to follow. The vertical axis represents the number of utils that each law review editor associates with each option. To simplify the presentation, assume that each editor will receive three utils of satisfaction if her first choice prevails, two utils of satisfaction if her second choice prevails, and one util of satisfaction if her final choice prevails. The horizontal axis represents the articles under consideration, indicated by *Klutz, Hal,* and *Coase,* in Anita's order of preference. Anita's preference curve peaks at three utils for *Klutz,* then descends to two utils for *Hal,* and to one util for *Coase.* Barbara's preference curve peaks at three utils for *Hal,* descending to two utils for *Coase,* and one util for *Klutz.* Barbara's preference curve appears to discontinue at the midpoint of the graph's right wall, representing two utils for *Coase.* It then resumes at the midpoint of the graph's left wall, where it descends to one util for *Klutz.* To complete the visual conceptualization, imagine cutting the graph from the page and rolling it into a tube, then taping the left and right walls together. Barbara's curve, along with those for her colleagues, would then be continuous.[77] Finally, Celine's preference curve peaks with three utils at *Coase,* then continues in the upper left corner, descending to two utils for *Klutz* and then to one util for *Hal.*

The graph readily translates the law review editors' non-Condorcet preferences into a set of multipeaked preference curves. To see the problem that multipeaked preferences pose, consider trying to locate a stable resolution or, in economic terms, an equilibrium. Begin, for example, with point A*, representing Anita's preferred choice, *Klutz.* At that point, she receives

76. The same cycling phenomenon lies at the center of the game theory literature on the empty core. Both the Condorcet Paradox and the empty core involve the absence of a Nash equilibrium among three or more players. *See* Stearns, *supra* note 4, at 1233-47 (discussing relationship between core theory and Condorcet Paradox). For those who find the absence of a Nash equilibrium, or the absence of any equilibrium for that matter, difficult to visualize, consider what happens when you are attempting to walk across a room and another person is headed directly toward you. You and the person you are facing, each anticipating the other person's move, jolt in the same direction, preventing the passage. To compensate, you each jolt in the opposite direction, with the same result. After completing this unexpected and unsuccessful dance, you realize that there are two possible stable outcomes. If you move to your right and the other individual moves to your left *or* if you move to your left and the other person moves to your right, both of you can be on your way. This might require that one of you take command and say, "Pardon me," or "Please go first." The dance represents a state of disequilibrium. In this example, there was not merely one equilibrium, but instead, there were two possible equilibria. The same holds in driving, as demonstrated by the fact that in the United States, we drive on the right side of the road and in the United Kingdom, people drive on the left. Once either rule is in place, the outcome is stable (and, more importantly, it is safe).

77. As explained below, this further conceptualization is useful in visualizing the cycle.

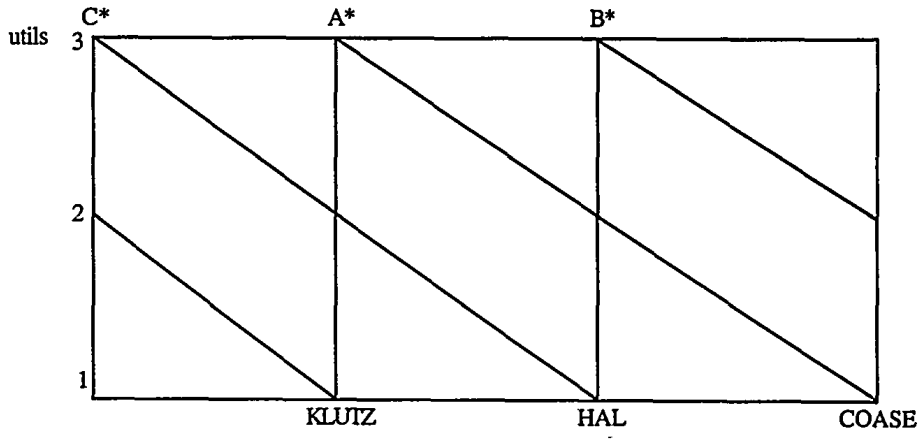

TABLE 1

three utils, Celine receives two, and Barbara receives one. Celine proposes substituting C*, representing her first choice, *Coase,* for A*, representing Anita's first choice and her second choice, *Klutz.* Both Celine, who moves from two to three utils, and Barbara, who moves from one to two utils, benefit from the move. This time, however, Barbara proposes substituting B*, or *Hal,* her first choice, for C*, or *Coase,* representing Celine's first choice and her second choice. Barbara, who moves from two utils to three utils, and Anita, who moves from one util to two utils, agree. If Anita then proposes to restore A*, or *Klutz,* for B*, or *Hal,* based upon the same reasoning, Anita and Celine will agree, thus completing the first cycle. The group has gone from A* to B* to C* and back to A*, thus touching, but never resting upon, each peak. The problem is that for any given peak, there is always a present majority that prefers moving to a different peak. As a result, no outcome is stable.

The Condorcet Paradox, which is graphically depicted by the multipeaked preferences, is not universal. For some group preferences in which there is no majority candidate, unlimited pairwise voting leads to a stable outcome. The 18th century French philosopher and mathematician, the Marquis de Condorcet, for whom the paradox is named, proposed a mechanism for aggregating collective preferences in the absence of a majority candidate, which is now referred to as the Condorcet criterion.[78] The resulting option is known as the Condorcet winner.[79] To illustrate the Condorcet criterion, we will need to alter our assumptions about Celine's preferences.[80] Under our new set of assumptions, the individually ranked preferences follow:

78. For a detailed discussion of the history of social choice and the Condorcet criterion, *see* Stearns, *supra* note 4, at 1221-25 (collecting authorities), 1247-52.

79. *See id.* at 1252-57.

80. The same point could be illustrated by altering the preferences of either of the other two articles editors.

Anita: *The Klutz Factor, Thus Spake Hal, From Coase to Coast*
Barbara: *Thus Spake Hal, From Coase to Coast, The Klutz Factor*
Celine: *From Coase to Coast, Thus Spake Hal, The Klutz Factor*

Celine's second and third choices have been reversed relative to her preferences from the first example. No other preferences have been changed. Now consider a series of unlimited pairwise votes. In the choice between *The Klutz Factor* and *Thus Spake Hal, Thus Spake Hal* wins two to one, with Anita losing to Barbara and Celine. In the choice between *Thus Spake Hal* and *From Coase to Coast, Thus Spake Hal* again wins two to one, with Celine losing to Anita and Barbara. A final pairwise vote between *The Klutz Factor* and *From Coase to Coast* is unnecessary because whichever choice were to prevail, *Thus Spake Hal* would beat it in a pairwise vote. *Thus Spake Hal,* the stable outcome of unlimited pairwise voting, is the Condorcet winner.

Condorcet proposed that in the absence of a majority winner, as in this example, the candidate that prevailed against all others in one-on-one comparisons, known as the Condorcet winner, was the best collective choice.[81] The intuition that underlies the Condorcet criterion is simple. If another available option can beat a chosen option in a pairwise contest, the decisional process that was employed undermines, in a very fundamental respect, the notion of majority rule.[82]

The Condorcet criterion can also be illustrated graphically. Table 2 illustrates the discussion to follow. Because the preferences of Anita and Barbara are the same as in the prior example, their preference curves are the same in both tables. In this example, however, we will change our assumptions concerning Celine's preference curve. While C*, representing *Coase,* remains her first choice, this time it appears in the upper right, rather than the upper left, corner. If the graph were cut out and the right and left walls taped together, the upper left and upper right corners would represent the same point. In this illustration, option C* appears in the upper right corner because, unlike in Table 1, where Celine's preference curve sloped downward to the right, Celine's preference curve now slopes downward to the left, with two utils at *Hal* and one util at *Klutz.*

Try again to locate an equilibrium. Assume that Anita proposes position A*, representing *Klutz,* which provides her with three utils and both

81. *See* Stearns, *supra* note 4, at 1222 n.8.

82. *See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 100 (1982) ("This notion [that available Condorcet winners should prevail] is closely related to the notion of equality and 'one man, one vote,' in the sense that, when an alternative opposed by a majority wins, quite clearly the votes of some people are not being counted the same as other people's votes."). It is for that very reason that Professor Levmore has asserted that "it is reasonable to proceed, as does virtually the entire collective choice literature, under the assumption that a Condorcet winner is very desirable," Levmore, *Parliamentary Law, supra* note 30, at 994-95 (footnote omitted), and that "the ability not to miss a Condorcet winner is a basic test when evaluating a voting procedure," *id.* at 995 n.69.

Barbara and Celine with one util each. Celine then proposes replacing A* with C*, representing *Coase.* Because C* provides Celine with three utils, rather than one util, and Barbara with two utils rather than one util, she and Barbara agree to the proposal. This time, Anita who suffers most, proposes replacing C*, or *Coase,* with B**, representing *Hal.* Because Barbara receives three utils rather than two utils, and Anita receives two utils rather than one util, they agree the motion. Unlike in the first example, however, this outcome is stable. While a move to A* will improve Anita's position and a move to C* will improve Celine's position, neither move will improve the position of a necessary second editor to gain majority support. The position A* leaves Barbara and Celine worse off relative to B**, with one util each, and the position C* leaves Anita worse off with one util rather than two utils, and Barbara worse off with two utils rather than three utils. Rather than moving from peak to peak to peak, an equilibrium forms in the valley at B**, representing the Condorcet winner.

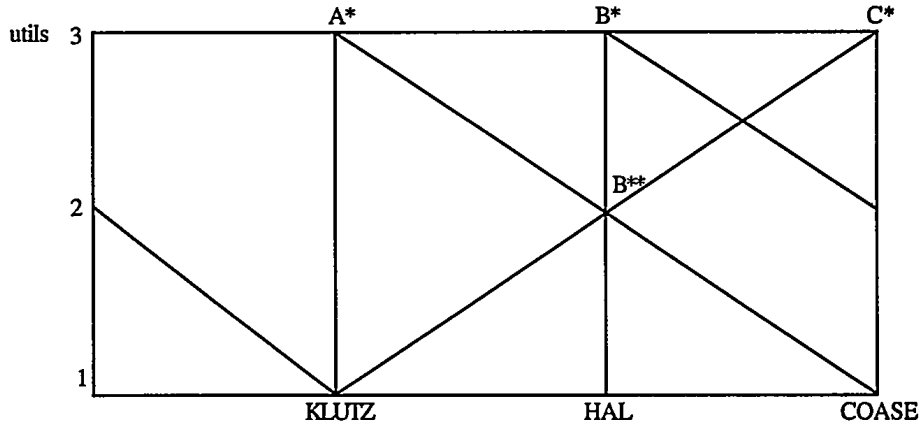

TABLE 2

The intuition underlying the Condorcet criterion is sufficiently compelling that social choice theorists often assess the competence of a collective decisionmaking body according to whether its procedures ensure that available Condorcet winners are chosen.[83] And yet, because of the deficiencies associated with the Condorcet criterion,[84] the decisional processes of some very important institutions are structured in a manner that thwarts the

83. *See, e.g.,* DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 58 (1958) ("[The Condorcet criterion] appeals, perhaps via mathematical symmetry, to our sense of justice. . . . Our own position is that our faith in the Condorcet criterion is stronger than in any other, but it is not an unqualified faith"); *see also supra* note 82 and accompanying text.

84. Thus, Professor Levmore explains, "The Condorcet concept has at least two well-known defects: Preferences do not necessarily, or even usually, deliver a Condorcet winner, and the concept does not take into account intensity of preference." Levmore, *Parliamentary Law, supra* note 30, at 995 n.69. As demonstrated *infra* notes 87-111 and accompanying text, appellate courts, including the Supreme Court, employ non-Condorcet-winning voting rules because they would otherwise be unable to

Condorcet criterion, thus failing to ensure that available Condorcet winners prevail.[85] Appellate courts, including the Supreme Court, fall into this category.[86] While that might seem odd, a hypothetical drawn from three actual Supreme Court standing cases helps to explain the apparent anomaly in the Supreme Court's decisional structure.[87]

In *Frothingham v. Mellon,*[88] the Supreme Court denied standing to a plaintiff who alleged that the Maternity Act of 1921 violated the Takings Clause of the Fifth Amendment by spending his tax dollars in violation of the Constitution. Without reaching the merits of the constitutional challenge, a majority of the Court held that because plaintiff's alleged injury was shared by all taxpayers, it was therefore *de minimis* and insufficient to support standing.[89] In *Flast v. Cohen,*[90] a majority of the Court narrowly distinguished *Frothingham,* granting standing to a taxpayer who challenged under the Establishment Clause the constitutionality of providing federal tax revenues to a religious organization. The *Flast* Court thus carved out an exception to *Frothingham,* holding that a challenge to the expenditure of tax revenues under the Establishment Clause establishes a sufficient nexus between the taxpayer's constitutional claim and the government's spending action to create standing.[91] Finally, in *Valley Forge Christian College v.*

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ensure an outcome in cases for which they lack Condorcet-winning preferences. *See also* Stearns, *supra* note 4, at 1258-71.

85. For a detailed discussion of the significance of the tension between the Cordorcet critieron and the collective obligation to produce outcomes in the evolution of legal rules, see MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS & COMMENTARY, ch. 2 notes and questions (forthcoming 1996).

86. *See* Stearns, *supra* note 4, at 1258-71.

87. The following analysis employs three standing cases, which illustrate why the Supreme Court, along with virtually all appellate courts, has adopted a non-Condorcet voting rule. I have chosen standing cases to illustrate this point, given that the discussion will also help to introduce some preliminary standing concepts. The underlying purpose of this discussion, however, is to illustrate the social choice dimension of Supreme Court voting rules. I introduce the standing case law in greater detail in Part III and provide a more comprehensive overview in Stearns, *supra* note 5.

88. 262 U.S. 447 (1923).

89. Steven Winter has pointed out that while *Frothingham* is often cited by academics as the first modern standing decision, it was preceded one year earlier by Fairchild v. Hughes, 258 U.S. 126 (1922), an opinion authored by Justice Brandeis, which prevented a taxpayer from maintaining a lawsuit on the ground that "[p]laintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding." *Id.* at 129; *see* Winter, *supra* note 66, at 1375-76. Winter posits that the *Frothingham* Court did not deny standing based upon justiciability concerns arising under Article III, but rather, demanded standing as a prerequisite to invoking the Court's equitable powers. *Id.* at 1446-47. In effect, however, "[w]hat *Frothingham* had accomplished through its equity reasoning was to recreate the private rights model as the only available form." *Id.* at 1447.

90. 392 U.S. 83 (1968).

91. *Id.* at 105-06. In contrast with many commentators, Professor Fletcher argues that the *Flast* nexus test, as characterized in the concurring opinions, would force the Court to engage in precisely the correct inquiry: "Is the nature of the establishment clause guarantee such that a federal taxpayer should be permitted to sue to enforce it?" Fletcher, *supra* note 3, at 268. This follows from Professor Fletcher's position that standing determinations are inevitably determinations on the merits. *See id.* at 229, n.46 ("I argue . . . that a standing decision in fact determines whether a plaintiff has a right to judicial relief in any court, state or federal. This conclusion follows from the argument that a standing

Americans United for Separation of Church and State,[92] a sharply divided Court relied upon *Frothingham* and distinguished *Flast,* denying standing to a taxpayer who alleged that the federal government had unconstitutionally donated surplus land to a sectarian college.[93] Over the dissent of four justices, the Court held that the *Flast* nexus exception to the general *Frothingham* prohibition against taxpayer standing did not apply to land grants pursuant to Congress's Property Clause powers.[94] To understand why the Supreme Court employs a decisional rule that does not satisfy the Condorcet criterion, consider the following hypothetical case.

Assume a federal statute that grants a tax exemption for capital gains from land sales by secular nonprofit organizations, but that denies this exemption for capital gains from land sales by religious organizations, whether or not for profit. Further, assume that when land is held in trust by one nonprofit for use by another, the Internal Revenue Service has an internal operating policy of granting or denying this statutory capital gains exemption according to the tax status of the trustee rather than the tax status of the beneficiary.[95] A group of taxpayers then brings a federal lawsuit challenging the IRS policy as applied to the sale of a particular building, which a wealthy tax lawyer had bequeathed to a nonprofit secular organization to be held in trust for two years, then sold. According to the terms of the will, the proceeds of the sale were to be used to purchase a new church for the congregation of which the testator had been a member and which had been outgrowing its church facilities prior to his death.

Based upon the internal operating policy, the IRS exempted the proceeds donated to the church from the capital gains tax, ruling that the trust was primarily dedicated to the secular purpose of asset administration under a will. At no time during the pendency of the trust were the assets formally used to benefit a church, nor did the trust corpus ever come under church control. Only after the dissolution of the trust did the proceeds fall into the

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determination is a determination on the merits."). While I agree that standing determinations are inevitably substantive, I will argue that this insight neither renders the standing inquiry improper nor collapses the question of standing with the merits of the underlying case. *See infra* notes 282-283 and accompanying text.

92. 454 U.S. 464 (1982).

93. While the plaintiffs in both cases sued under the Establishment Clause, the *Valley Forge* Court distinguished *Flast* by resting, instead, upon the Property Clause, which the government had raised in its defense. *Id.* at 479-80.

94. To summarize the progression of these three cases, the Court held: first, taxpayers do not have standing; second, taxpayers have standing to challenge government spending that allegedly violates the Establishment Clause; and third, taxpayers do not have standing to challenge grants of government land that allegedly violate the Establishment Clause.

95. This detail is loosely based upon another standing case, Allen v. Wright, 468 U.S. 737 (1984), in which parents of black school children attending public schools challenged an IRS policy that afforded tax-exempt status to private schools according to the tax status of their umbrella organizations, without regard to their individual qualification. Plaintiffs alleged that as a result of this policy, the IRS was granting tax-exempt status to private schools that engaged in racial discrimination. *Id.* at 743-45. For an analysis of *Allen,* see *infra* part III.C.

hands of the church. Assume that after the district court rejected the government's motion to dismiss for lack of standing, it granted plaintiff relief on the merits, ordering the IRS to reverse its ruling and to tax the sale proceeds. Further assume that, after the circuit court affirmed, the Supreme Court granted the government's petition for writ of certiorari to resolve the standing issue.

To determine whether plaintiff has standing, this hypothetical Court must decide two subissues. First it must decide whether *Valley Forge* effectively overruled *Flast,* in which case, under *Frothingham*, plaintiffs' status as taxpayers is insufficient to support standing. Second, assuming that the Court determines that *Valley Forge* did not overrule *Flast* and that *Flast* remains good law, the Court must then decide whether a challenge to the IRS policy exempting a capital gains tax for secular nonprofits whose proceeds from the sale of property are later given to a church falls within the rule of *Flast* or *Valley Forge.* Assume that the Court is evenly divided into the three camps, each with three justices.[96] The first camp will be represented by Justice Scalia, the second camp will be represented by retired Justice Blackmun, and the third camp will be represented by Justice O'Connor.

Assume that the Scalia camp generally opposes taxpayer standing and considers the result in *Flast* to be incorrect. While Justice Scalia respects the doctrine of stare decisis, he also believes that the doctrine does not apply in this case because he views *Flast* and *Valley Forge* as constitutionally indistinguishable. He believes that *Valley Forge* effectively overruled *Flast,* and thus eliminated the Establishment Clause exception to the *Frothingham* prohibition on taxpayer standing. Justice Scalia concedes, however, that if the Court rejects his position on *Flast* and retains the Establishment Clause exception to the general prohibition on taxpayer standing, then this taxpayer challenge to the IRS policy satisfies the *Flast* nexus test. Justice Scalia believes that there is no economic distinction between a constitutional challenge to the expenditure of general tax revenues and a constitutional challenge to a tax exemption for which the shortfall is met from general tax revenues.

Second, assume that Justice Blackmun, who dissented in *Valley Forge,* is generally sympathetic to taxpayer standing claims. Justice Blackmun views *Valley Forge* as a relatively narrow exception to a more general rule represented by *Flast.* He would prefer to grant taxpayers standing to challenge any government tax policies that allegedly violate the Establishment Clause. Justice Blackmun agrees with Justice Scalia that, if *Flast* remains good law, plaintiffs in the present case satisfy the *Flast* nexus test.

96. This simplifies the analysis without changing it. The same analysis would hold for any combination of three camps in which any two-camp combination contains the requisite five votes for a majority.

Finally, assume that Justice O'Connor agrees with Justice Blackmun that *Valley Forge* did not overrule *Flast,* and that both cases remain good law. Unlike Justice Blackmun, however, Justice O'Connor does not believe that the challenge to the IRS policy satisfies the *Flast* nexus test. Instead, she believes that *Flast* was properly limited in *Valley Forge* to cases involving actual government expenditures.

Each of the three positions is summarized below:

Scalia: *Flast* overruled; *Flast* nexus test met.
Preferred Ruling: Reversed
Blackmun: *Flast* not overruled; *Flast* nexus test met.
Preferred Ruling: Affirmed
O'Connor: *Flast* not overruled; *Flast* nexus test not met.
Preferred Ruling: Reversed

The preferences reveal the following anomaly. Two of the three groups, representing six of the nine justices, would prefer to reverse the lower court ruling and to deny taxpayer standing in this case. On an issue-by-issue basis, however, the Court's members would vote to retain *Flast,* with the Scalia camp losing to the Blackmun and O'Connor camps, and to find the *Flast* nexus test satisfied, with the O'Connor camp losing to the Scalia and Blackmun camps. This would result in an affirmance.[97]

Thus if the Court votes directly on the desired outcome, the result is to reverse, but if it votes on each issue necessary to achieve that outcome, the result is to affirm. This hypothetical is not intended to provide a thorough analysis of taxpayer standing and of the status of the *Flast* exception to *Frothingham* in the aftermath of *Valley Forge.* It does, however, begin to explain why Supreme Court decisionmaking, like that of other appellate courts, is not structured to ensure that available Condorcet winners prevail.

As previously stated, social choice theorists often consider the ability of a collective decisionmaking body to ensure that Condorcet winners prevail to be a critical benchmark in determining its institutional competence.[98] While there are several voting methods that identify Condorcet winners, they all lead to the same result when a Condorcet winner is present.[99] As a

97. For other cases illustrating the anomaly depicted in this hypothetical, which I refer to as shifting-majority cases, see Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). For a discussion of these and similar cases, see also Easterbrook, *supra* note 33, at 820 n.41 (discussing *Tidewater*); Stearns, *supra* note 4, at 1256-57 (discussing *Kassel*). For a related discussion, see John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides,* 79 KY. L.J. 439, 456-58 (1990-91). Note that Professor Rogers uses the term "shifting-majority" to describe a different phenomenon than that discussed in the text. He uses the term to describe cases like Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), in which the Court's ruling consists of two separate majorities. I prefer the term "split-majority" to describe the *Bakke* ruling, and the term "shifting-majority" to describe cases like *Kassel.*

98. *See supra* note 82 and authorities cited therein.

99. Thus, Professor Riker explains:

> There are many rules that utilize paired comparisons of alternatives to discover a Condorcet winner. If a Condorcet winner exists, then all these methods come out the same

result, we need only consider one Condorcet-producing rule to analyze the difficulty that adopting such a rule would pose for the Supreme Court.

One such Condorcet-producing rule is an unlimited motion-and-amendment procedure.[100] Someone begins the process by proposing a motion for majority approval and other participants, subject to majority approval, can move to amend. When such an amendment is approved by a majority, the substituted motion takes the place of the original motion. The process can be repeated indefinitely. If a Condorcet winner exists, a motion-and-amendment procedure is certain to find it.[101]

Assume that to decide our hypothetical case, the Supreme Court adopts the unlimited motion-and-amendment procedure. Further assume that Justice Scalia moves first to hold that *Valley Forge* overruled *Flast,* rendering moot the question whether the *Flast* nexus test is satisfied in this case. Justice Blackmun moves to substitute a motion to hold that *Valley Forge* did not overrule *Flast,* which he and Justice O'Connor approve. Justice Blackmun then moves to amend his pending motion with a second motion to hold that the plaintiffs satisfy the *Flast* test. With the first issue resolved against him, Justice Scalia joins Justice Blackmun in approving the amended motion. Justice O'Connor, disturbed that the motions will result in an affirmance, a result desired only by the Blackmun camp, moves to amend and to substitute for the motion to retain *Flast* and to find the *Flast* test satisfied, a new motion to reverse the lower court ruling. This time, Justices O'Connor and Scalia approve the motion. Justice Blackmun, whose position on each of the two issues in the case has majority support, can renew the process of moving for majority support for each of the two requisite subissues for an affirmance on the question of standing. The problem is that with no limit on the permissible number of motions, the Court will continue to cycle indefinitely, leading to a stalemate.[102]

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way. If a Condorcet winner does not exist, however, these rules typically produce different results, no one of which, in my opinion, seems more defensible than another.

RIKER, *supra* note 82, at 69.

100. Although not labelled as such, this was the procedure employed in the law review managing board hypothetical. *See supra* notes 73-74 and accompanying text.

101. *See* RIKER, *supra* note 82, at 69. Thus, in the second variant of the law review hypothetical, *Thus Spake Hal* would emerge victorious using an unlimited motion-and-amendment procedure. *See supra* notes 73-74 and accompanying text.

102. For ease of reference, the iterations in the text are summarized below based upon the following definitions: (1) "*Flast*" means that *Valley Forge* did not overrule *Flast;* (2) "not-*Flast*" means that *Valley Forge* did overrule *Flast;* (3) "*Flast* met" means that plaintiff satisfies the *Flast* nexus test; (4) "*Flast* not met" means that plaintiff fails to satisfy the *Flast* nexus test; and (5) "reverse" means motion to reverse. The name of the justice proposing it appears before each motion and the potential ruling appears after every dispositive motion.

Scalia (not-*Flast*) *Holding*: Reverse

Blackmun (*Flast*) (nondispositive motion)

Blackmun (*Flast, Flast* met) *Holding*: Affirm

O'Connor (reverse) *Holding*: Reverse

In fact, notwithstanding the high regard with which social choice theorists generally hold Condorcet-producing rules, the decisional rules of institutions that do not have the power of indeterminacy when presented with an issue to resolve tend to evolve away from the Condorcet criterion.[103] They do so precisely because, as this hypothetical suggests, Condorcet-producing rules lead to cycling when there is no Condorcet winner, and therefore cannot ensure a collective resolution.[104] The question then arises how a collective decisionmaking body, when faced with a set of preferences for which there is no Condorcet winner, can ensure that it will achieve a collective outcome.

In contrast with Condorcet-producing rules, which, although varying in detail, all lead to the same outcome, non-Condorcet-producing rules vary both in detail and in outcome.[105] Consider, for example, a commonly employed variation of the motion-and-amendment procedure, in which defeated options cannot be reconsidered. In contrast with the unlimited motion-and-amendment procedure, the amended procedure is non-Condorcet producing.[106] Under this rule, the group will not be allowed to consider every conceivable pairwise contest. Thus, for three options, only two pairwise votes are permitted. After one option is defeated in the first pairwise vote, the group is unable to consider whether the defeated option would have prevailed against the winner of the second pairwise vote. Because of this restriction, someone must be given the power to set the agenda, meaning the power to determine the order in which options are presented for voting.[107] In the absence of a restriction on reconsideration and when no Condorcet winner is present, there is no need to give a participant agenda-setting power. With no restriction on reconsideration, the person who starts the motion process, as shown above, cannot affect the ultimate direction that the voting will take because the absence of a

103. *See* STEARNS, *supra* note 85, ch. 2 notes and questions. For an excellent analysis demonstrating a related proposition, that parliamentary rules typically evolve toward the Condorcet criterion when Condorcet winners are available, see Levmore, *Parliamentary Law*, *supra* note 30, at 1018-20.

104. Two common examples of institutions with decisional rules that, for this very reason, have evolved away from the Condorcet criterion are appellate courts, which are obligated to issue decisions in all cases properly before them, and elections, which must choose a winner even when faced with a field of three or more candidates, none of which is a Condorcet or majority winner. *See* STEARNS, *supra* note 85, ch. 2 (comparing Condorcet and non-Condorcet voting rules); Stearns, *supra* note 4, at 1258-71 (describing evolution of non-Condorcet appellate court voting rules); *id.* at 1265 n.173 (describing evolution of non-Condorcet election rules).

105. *See* RIKER, *supra* note 82, at 69.

106. This might be viewed as the social choice equivalent of the one-bite rule in tort, with one important difference: The question of when one gets bitten turns out to be more important than the question whether one gets bitten.

107. Stated differently, someone must be empowered to decide which pairwise vote will *not* be taken.

Condorcet winner prevents a stable resolution and ensures a cycle.[108] Alternatively, when there is a Condorcet winner, it is largely irrelevant who controls the agenda, because two-vote combinations for three available options generally will lead to the same outcome[109]—the Condorcet winner prevails.

With the restriction on reconsideration in place and in the absence of a Condorcet winner, however, the ability to control the agenda becomes extremely important. The person who controls the agenda, in fact, can control the outcome.[110] The taxpayer hypothetical illustrates the point.

Before walking through the motions, a brief clarification is in order. To affirm the grant of standing, the Court must rule in plaintiff's favor on both standing subissues: first, that *Valley Forge* did not overrule *Flast;* and second, that plaintiff satisfies the *Flast* nexus test. To reverse the grant of standing, on the other hand, the Court need rule against plaintiff on only one of the two standing subissues. In other words, either a ruling that *Valley Forge* overruled *Flast or* a ruling that plaintiff fails to satisfy the *Flast* nexus test is sufficient to deny plaintiff standing. A motion to reverse, therefore, can be translated as follows: "I move that the Court *either* hold that *Valley Forge* overruled *Flast or* that, whether or not *Valley Forge* overruled *Flast,* plaintiff fails to satisfy the *Flast* nexus test." Because a motion to reverse is the legal equivalent of an alternative motion to rule against plaintiff on *either* of the standing subissues, the no-reconsideration rule will prevent the group from considering a motion to reverse *after* the Court has ruled in plaintiff's favor on both of the two standing subissues. Applying the same logic, if the Court grants a motion to reverse, it will be precluded from voting in plaintiff's favor on more than one of the two standing subissues.

Assume that Justice Blackmun controls the agenda and moves to hold that *Valley Forge* did not overrule *Flast,* which he and Justice O'Connor approve. Justice Blackmun then moves to hold the *Flast* nexus test satis-

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108. In other words, absent this restriction, the power to set the agenda is meaningless because the nominal agenda-setter is unable to create a stable outcome by manipulating the order of decision. For any interim outcome, there is always majority support for an alternative, leading to a cycle.

109. *See* RIKER, *supra* note 82, at 69 (explaining that when a Condorcet winner is present, all Condorcet-producing voting rules lead to the same result). As demonstrated *infra* notes 219-222 and accompanying text, an exception exists in the context of unipeaked preferences in the absence of a rule that voting must begin at the maximum and work down incrementally or begin at the minimum and work up incrementally.

110. The discussion in the text assumes principled voting, an assumption that I relax, *infra* at notes 113-124 and accompanying text. While the following discussion in this section illustrates the power of the agenda-setter based upon a hypothetical regime in which particular justices are given the power to determine the order in which issues are presented to the Court, the point of the discussion is to lay the necessary foundation with which to analyze both a world without standing and the functions that standing serves. As shown in Part I.B, without a standing rule in place, in the absence of Condorcet-winning judicial preferences, ideological litigants could effectively seize agenda-setting power themselves, thus controlling the order of issue presentation and, ultimately, controlling the substantive evolution of legal doctrine, at least assuming that the Court adheres to the doctrine of stare decisis.

fied, which he and Justice Scalia approve. A motion to reverse would violate the prohibition on reconsideration for the reasons set out above. Only the Blackmun camp, a minority of the Court, favors the resulting affirmance.

Now consider what happens if Justice Scalia controls the agenda. Justice Scalia would like to reverse on the ground that, because *Valley Forge* overruled *Flast, Frothingham* governs the case and there is no taxpayer standing. The issue whether plaintiff satisfies the *Flast* test then becomes moot. Justice Scalia realizes, however, that if he immediately makes a motion to reverse, which would be approved, he leaves open the possibility that a future court will construe the holding to mean that plaintiff failed to satisfy the *Flast* test, but that *Flast* nevertheless remains good law.[111] As a result, Justice Scalia first moves to hold that plaintiff satisfies the *Flast* nexus test, which he and Justice Blackmun approve. He then moves to reverse, which he and Justice O'Connor approve. For the reasons set out above, the Court's ruling necessarily implies that plaintiff is denied standing because *Valley Forge* overruled *Flast.* Again, only the Scalia camp, a minority of the Court, favors that outcome.

Finally, assume that Justice O'Connor controls the agenda. Justice O'Connor would like to retain the *Flast* exception to *Frothingham,* but to reverse on the ground that plaintiff fails to satisfy the *Flast* nexus test. She is concerned that if she successfully moves to reverse, a future court might construe the holding as a rejection of *Flast.* As a result, she moves first to hold that *Valley Forge* did not overrule *Flast,* which she and Justice Blackmun approve. She then moves to reverse, which she and Justice Scalia approve. For the reasons set out above, the Court's holding necessarily implies that plaintiff is denied standing on the narrow ground that plaintiff failed to satisfy the *Flast* nexus test, but that *Flast* remains good law. Again, only the O'Connor camp, a minority of the Court, favors this outcome. In each example, the motion-and-amendment with no reconsideration procedure has resulted in a ruling that a present majority of the Court disfavors relative to an available alternative.

The analysis thus far reveals two critical facts about collective preferences for which there is no Condorcet winner. When faced with such preferences, the collective decisionmaking body has two options in trying to achieve a collective outcome. If the body employs a Condorcet-producing rule, it will cycle and thus be unable to reach a decision. Alternatively, if the body wishes to ensure that it does reach a collective decision, it must adopt a non-Condorcet-producing rule. In doing so, however, it will ensure that whatever decision it does reach is in a very meaningful sense arbitrary and irrational. By arbitrary and irrational, I mean only to suggest that whatever outcome results, a present majority will prefer an available alter-

111. For a discussion linking this analysis to the Arrovian range criterion, see *infra* notes 187-189 and accompanying text.

native, thus rendering that outcome inconsistent with the notion of majority rule.

One frequent criticism of social choice theory is that the assumptions required to illustrate the Condorcet Paradox are too strong.[112] Individuals do not, for example, generally rank their preferences ordinally, which I will refer to as "the ordinal-ranking assumption." Nor, if we do assume ordinal rankings, can we readily assume that people will vote strictly in accordance with those ordinal rankings, which I will refer to as "the principled-voting assumption."[113] This criticism largely misses the point of the underlying

112. *See, e.g.*, Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2142-43 (1990) (criticizing both ordinal ranking and principled voting assumptions, as defined in the text that follows).

113. By principled voting, I mean only to suggest that for any given pairwise vote, the decisionmaker's choice will be based upon a principled assessment of the relative merits of the two alternatives, according to the decisionmaker's ordinal rankings. I have argued previously that while under most widely accepted jurisprudential theories, judges are expected to vote in a principled manner, the same assumption does not hold for legislators. Stearns, *supra* note 4, at 1276-81. The social choice term for principled voting, based upon Arrow's Theorem, introduced *infra* part I.C, is "Independence of Irrelevant Alternatives." *See* Stearns, *supra* note 4, at 1249-50 (explaining criterion and collecting authorities). Arrovian Independence simply means that in assessing pairwise contests, participants are expected to disregard any knowledge that they might have about the agenda-setter's planned path. This, of course, is a restatement of the definition of principled voting.

It is worth noting that this definition of principled voting distinguishes the social choice literature from the growing field of literature addressing the dual questions of what values judges should maximize and what values judges actually *do* maximize. Richard Posner has argued, for example, that judges should promote efficiency. *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (positing that judges should attempt to promote efficiency); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (same); Richard A. Posner, *What Do Judges and Judges Maximize? (The Same Thing as Everybody Else Does)*, 3 S. CT. ECON. REV. 1 (1993). In contrast, others have argued that whatever judges should maximize as a normative matter, the incentives that surround litigation promote efficient common-law rule making. *See, e.g.*, Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) (positing that parties interested in precedent for future litigation will tend to force overturning of more inefficient rules than efficient rules, thus moving the common law toward efficiency without regard to judicial preferences); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (positing that without regard to litigant interest in precedent, the differential gains from overturning inefficient, as opposed to efficient, common law rules moves the common law toward efficiency). Still others argue that judicial and attorney incentives may promote the inefficient evolution of legal doctrine. *See, e.g.*, Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994) (positing that asymmetric incentives generated by lawyer interest groups produce inefficiency); Bruce H. Kobayashi & John R. Lott, Jr., Judicial Reputation and the Efficiency of the Common Law (1993) (unpublished manuscript, on file with author) (positing that judicial desire to be cited for novel rulings may promote inefficiency).

In contrast, social choice is not concerned with evaluating the judicial preference structures against any particular normative framework. Instead, in social choice, all preferences, including judicial preferences, whatever form they happen to take, are taken as assumptions. The social choice inquiry then focuses on how participants, or judges, given their assumed preference structures, process their preferences in a manner conducive to the competing objectives of rationality and fairness. This method of analysis is not inconsistent with the distinction set out in Kornhauser & Sager, *supra* note 15, between preference and judgment aggregation. Kornhauser and Sager posit that within widely accepted schools of jurisprudence, rulings are assumed to be based upon governing legal principles rather than upon the personal preferences of the deciding judges. The assertion is easily reconciled with social

economic assumptions. While these assumptions simplify the analysis and ease the presentation of the Condorcet Paradox, relaxing them exacerbates, rather than ameliorates, the difficulties that the paradox is intended to reveal. In fact, the analysis to follow suggests that both the ordinal-ranking and principled-voting assumptions apply, albeit in an imperfect and somewhat stylized form, within the Supreme Court, and that adherence to these assumptions has significant implications for the evolution of standing.

To illustrate, I will first demonstrate what happens when we relax the ordinal-ranking assumption and I will next demonstrate what happens when we relax the principled-voting assumption. I will proceed to demonstrate the Supreme Court's institutional mechanisms that ameliorate some of the difficulties that are exposed. These mechanisms ensure adherence, albeit in imperfect form, to these assumptions. The analysis reveals that in appellate courts, including the Supreme Court, a version of the ordinal-ranking assumption holds in the form of opinion writing and that reputational costs associated with failing to vote in accordance with published opinions encourage a version of principled-voting. I will also demonstrate that appellate courts, including the Supreme Court, and legislatures, including Congress, employ some decisional rules that ensure path-dependent outcomes subject to manipulation by an agenda setter.[114]

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choice. We need only posit that the deciding judges' ordinal rankings prioritize options based upon governing legal principles, even if those principles are at odds with the judges' normative world views. At this point, the preference/judgment distinction might seem to collapse. The point remains, however, that multiple judges might have different, and perhaps multipeaked, preferences concerning where judgment, so defined, leads them in particular cases. The hypothetical in the text is illustrative. Thus, whether one accepts a preference-driven or judgment-driven adjudicatory model, the social choice aggregation problems set out in this Article to explain standing remain. In short, this Article is concerned with the issue of how the Supreme Court, given whatever individual preference structures the various justices possess and regardless of the origins of those preference structures, employs standing to rationally further its objectives.

114. An important clarification is necessary here. In Stearns, *supra* note 4, I argued that the Supreme Court, because it must decide cases, employs non-Condorcet-producing rules and that Congress, because it has the power of inertia, employs Condorcet-producing rules. I also acknowledged that in Congress, rules limiting the number of motions to amend a particular bill can prevent the requisite number of votes to reveal a cycle if the number of permitted amendments is less than the number of available amendments. *See id.* at 1264-65 n.171 (citing Riker, *supra* note 30). Even though appellate courts, including the Supreme Court, employ non-Condorcet producing rules to avoid cycles in deciding individual cases, such decisional rules are incapable of preventing cycles that occur over time. *See* Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication,* 61 U. CHI. L. REV. 41, 83-106 (1994) (demonstrating intertemporal cycling in English tort cases); *see also infra* part I.B (presenting hypothetical intertemporal cycle). This Article demonstrates that the doctrine of stare decisis has evolved, in large part, to prevent the requisite number of votes to reveal the presence of cycles that occur over time, which is critical to the evolution of standing. *See id*; *cf.* O'Hara, *supra* note 8 (describing evolution of stare decisis in game theoretic terms). This Article also demonstrates that certain informal practices in Congress can have the effect of ameliorating apparent deficiencies in formal non-Condorcet-producing rules, including limits on the number of motions to amend. *See infra* notes 213-217 and accompanying text. The analysis in the text that follows will further demonstrate that informal practices such as logrolls and vote trades, if employed in appellate courts, would undermine formal decisional rules designed to avoid identifying cyclical preferences.

Assume that the participants do *not* ordinally rank their options, but that a rule is in place preventing reconsideration of defeated alternatives. While the group's preferences might still lack a Condorcet winner, the no-reconsideration rule prevents the requisite number of pairwise votes to identify a potential cycle. As a result, the group may be unaware that it has adopted an option preferred by only a minority of the whole. For that very reason, we may also infer that it will be relatively more difficult, having relaxed the ordinal-ranking assumption, for the group effectively to challenge the agenda setter's authority.[115] Because we have assumed that the participants have not taken the time to assess one-on-one comparisons of all available alternatives, it follows that they will be unaware that any particular outcome, which inevitably resulted from the agenda setter's path, thwarted the will of a present majority. This, in turn, decreases, rather than increases, the likelihood that equally weighted voting will produce a rational collective outcome.

The following variation on the taxpayer-standing hypothetical illustrates how relaxing the ordinal-ranking assumption exacerbates irrationality. Assume that while *Frothingham* has been decided, the issues presented in *Flast* and in *Valley Forge* have not yet been decided, and that the Court has simultaneously granted certiorari in both the *Flast* and *Valley Forge* cases. Based upon the assumptions set out above, there are again three camps, this time with the following preferences:[116]

(A) *Scalia*: not-*Flast, Valley Forge*
(B) *Blackmun*: *Flast,* not-*Valley Forge*
(C) *O'Connor*: *Flast, Valley Forge*

Assume that while Justice Scalia opposes the grant of taxpayer standing on both the *Flast* and *Valley Forge* case facts, he also believes that the two cases are indistinguishable. As a result, if the Court rules against his listed preferences in either case, he would prefer that it rule against his listed preferences in both cases. This will avoid his least favored result, in which the *Flast* plaintiffs are granted standing but the *Valley Forge* plaintiffs are denied standing. Justice Scalia's resulting ordinal ranking, based upon the above discussion, is A, B, C. Assume that Justice Blackmun's first choice is to grant taxpayer standing in both cases. He then prefers the O'Connor position, which creates a partial exception to *Frothingham,* to the Scalia position, which allows for no exception to *Frothingham.* Justice Blackmun's resulting preferences are B, C, A. Finally, assume that Justice O'Connor believes that *Flast* and *Valley Forge* are distinguishable such that

115. This further assumes that the participating judges do not reveal their ordinal preferences to their colleagues through informal means.

116. Where a case name stands alone, the justice whose name precedes it favors the actual case result. Where a case name is preceded by the word "not," the justice whose name precedes it disfavors the actual case result. A fourth option (not-*Flast,* not-*Valley Forge*) is not listed because it is not favored by any of the three groups. This option will be introduced in a later variation. *See infra* at notes 119-120.

standing should be granted in *Flast* and denied in *Valley Forge.* O'Connor believes that the taxpayer nexus is stronger when the government, in violation of the Establishment Clause, actually spends money rather than grants land. If, however, the Court will either grant standing in both cases or deny it in both cases, Justice O'Connor would prefer to deny standing than to grant it. Justice O'Connor's resulting preferences are C, A, B.

A brief comparison to the law review managing board hypothetical illustrates that, given these preferences, there is no Condorcet winner. Similarly, a comparison with Table 1[117] reveals that these preferences are multipeaked. Stated differently, the preferences reveal three separate, and irreconcilable, majorities. Justices Blackmun and O'Connor form a majority in favor of the *Flast* result. Justices Scalia and O'Connor form a majority in favor of the *Valley Forge* result. Finally, Justices Scalia and Blackmun form a majority in favor of a consistent grant or denial of standing in *Flast* and *Valley Forge,* whatever the result. The Court then faces the following dilemma. If it were to employ a Condorcet-producing rule to resolve the two cases, it would cycle. Alternatively, if it were to employ a non-Condorcet-producing rule, it would resolve the two cases in a way that undermines the will of a present majority of the Court's members. In addition, if the Court adopts a non-Condorcet producing rule, it will provide the agenda setter with complete authority to set the path that will lead inevitably to his or her favored non-majoritarian outcome.

To illustrate, consider the motion-and-amendment procedure rule with a limit on reconsideration. If Justice Scalia controlled the agenda, he would first move that the cases be decided the same way, which both he and Justice Blackmun would approve. He would then move that standing be denied in *Valley Forge,* which both he and Justice O'Connor would approve. All other motions are barred by the rule against reconsideration.[118] The result would then be (not-*Flast, Valley Forge*). If, instead, Justice Blackmun controlled the agenda, he too would first move that the cases be decided the same way, which, both he and Justice Scalia would approve. He would then move that standing be granted in *Flast,* which both he and Justice O'Connor would approve. All other motions are barred and the result is (*Flast,* not-*Valley Forge*). Finally, if Justice O'Connor controlled the agenda, she would first move that standing be granted in *Flast,* which both she and Justice Blackmun would approve. She would then move that standing be denied in *Valley Forge,* which both she and Scalia would approve. All other motions would be barred and the end result would be (*Flast, Valley Forge*). As before, each outcome is favored by

117. *See supra* part II.A.

118. A motion to grant standing in *Flast* is precluded by the proscription on reconsideration because it has already been defeated by the Court's approval of the combined motions to deny standing in *Valley Forge* and to decide the cases the same way. *See also supra* notes 110-111 and accompanying text.

only a minority of the Court's members, and, more importantly, the evolution of legal doctrine will be controlled, under this regime, by whomever is given the authority to determine the order, or path, in which issues are presented to the Court for consideration.

As with the ordinal-ranking assumption, relaxing the principled-voting assumption only serves to exacerbate the difficulties associated with the Condorcet Paradox. To illustrate, reconsider the most recent variation on the taxpayer standing hypothetical, again using the motion-and-amendment with no reconsideration procedure. This time, however, assume that the justices are free to disregard their preannounced ordinally ranked preferences.[119] As before, because the Court is only allowed to take two votes on three alternatives, someone must be given the authority to set the agenda. Assume that Justice Scalia sets the agenda and again moves that the standing issue be decided the same way in both *Valley Forge* and *Flast.* While Justice Blackmun agrees that the cases should be decided the same way, he anticipates the voting path. In other words, he realizes that if he votes for Justice Scalia's motion, Justice Scalia will then move to deny standing in *Valley Forge,* leading to Justice Blackmun's least favored outcome in which standing is denied in both cases. Justice Blackmun has two alternative options. First, he can disregard his ordinally ranked preferences and vote against Justice Scalia's motion for sameness. While he disagrees with this vote on the merits, by voting in this strategic manner, he will prevent Justice Scalia from continuing the decisional path to (not-*Flast, Valley Forge*), representing Scalia's first choice and Blackmun's third choice, and will instead ensure that the path leads to (*Flast, Valley Forge*), representing Scalia's third choice and Blackmun's second choice.

To understand how this result comes about, consider Justice Scalia's remaining alternatives after Justice Blackmun's strategic vote. While there had been majority support for consistent application of standing in the two cases, the first vote, coupled with the proscription on reconsideration, prevents that outcome. As a result, standing must be granted in one case and denied in the other. The only case for which a majority would vote to deny standing is *Valley Forge.* As a result, Justice Scalia is forced to move to deny standing in *Valley Forge,* which he and Justice O'Connor approve. The outcome (*Flast, Valley Forge*) is favored only by members of the O'Connor camp, a minority of the Court.

To prevent this seemingly undesirable outcome, Justice Blackmun can instead propose to Justice Scalia a form of cooperation known as a logroll. By cooperating, the two justices produce an outcome that each prefers to the one resulting from the non-cooperation strategy, although, in this case, they do so at Justice O'Connor's expense. If Justices Scalia and Blackmun

119. To isolate the effect of relaxing the principled-voting assumption, I have assumed that ordinal ranking holds. If both assumptions are simultaneously relaxed, the result not only will be more chaotic, but also more difficult to analyze.

cooperate, they can ensure that the resulting outcome will be (*Flast,* not-*Valley Forge*), which is Justice Blackmun's first choice and Justice Scalia's second choice, rather than (*Flast, Valley Forge*), which is Justice Blackmun's second choice and Justice Scalia's third choice. The strategy works as follows. Justice Blackmun proposes that if Justice Scalia agrees to alter the decisional path to: (1) motion to grant standing in *Flast,* which Justices Blackmun and O'Connor would approve; (2) motion to decide the cases consistently, which Justice Blackmun and Scalia would approve, he will agree to vote strictly in accordance with his ordinally ranked preferences. But, while the logroll leads to (*Flast,* not-*Valley Forge*), that result is also unstable. Justice O'Connor can derail Justice Blackmun's plans by strategically voting against her actual preference in the first vote, creating the result (not-*Flast*). If Justice Blackmun then honors his agreement to vote for consistency in the second vote, his last choice (not-*Flast, Valley Forge*) will result. If instead, however, he changes his second vote after Justice O'Connor votes strategically in the first, the result (not-*Flast,* not-*Valley Forge*) emerges, even though it is no one's first choice. Even if we assume that Justice Blackmun prefers this outcome, which creates a partial, although less favored, exception to *Frothingham,* to (not-*Flast, Valley Forge*), which results in complete adherence to *Frothingham,* it turns out not to matter because the result is not stable. If Justice Scalia is able to anticipate these maneuvers, he will withdraw from the logroll and restore his original voting path, thus starting the cycles all over again.[120]

Relaxing the principled-voting assumption thus reintroduces the cycling that the no-reconsideration rule was designed to prevent. This seeming anomaly is easily explained. While a prohibition on reconsideration artificially prevents the requisite number of votes to reveal a cycle, all bets are off when strategic voting is permitted. With strategic voting, there

120. As demonstrated below, cyclical indeterminacy is not always a bad thing. In legislative bodies, for example, prolonged indeterminacy might be preferable to enacting a non-Condorcet winner, at least in some situations. But if we assume that courts are obligated to resolve cases that are properly before them, institutional cycling must be viewed with disfavor because it is at odds with that obligation.

It is worth noting that cycling would also arise if the justices were permitted to choose the agenda-setter by majority rule. Assume, for example, Justice Blackmun agrees with Justice O'Connor to wrest agenda power from Justice Scalia and to vest it in Justice O'Connor in exchange for Justice O'Connor's agreeing to the path (1) grant standing in *Flast*, (2) deny standing in *Valley Forge.* The resulting (*Flast, Valley Forge*) will improve each justice's outcome by one ordinal ranking relative to Justice Scalia's planned path. But like the prior results, this too is unstable. Justice Scalia, for example, can then propose wresting agenda-setting power from Justice O'Connor, and giving it to Justice Blackmun, if both Justices Scalia and Blackmun vote in a principled manner with the path (1) *Valley Forge* does not overrule *Flast,* (2) decide cases consistently. The resulting (*Flast,* not-*Valley Forge*) improves the result for each participant by one ordinal ranking. This too is unstable. Justice O'Connor can propose wresting agenda-setting power from Justice Blackmun and giving it to Justice Scalia if both O'Connor and Scalia vote in a principled manner with the path (1) *Valley Forge* does not overrule *Flast,* (2) deny standing in *Valley Forge.* The resulting (*Flast, Valley Forge*) again improves each participants' position by one ordinal ranking. While the Court has come full circle, the most recent result is no more stable now than when it was superseded in an earlier round. In fact, none of the possible outcomes is stable.

is no effective limit on the permissible number of coalitions that can form, breach, and reform outside the formal voting process, regardless of any formal limitation on reconsideration. With or without a proscription on reconsideration, therefore, a sufficient number of iterations can occur to reveal a cycle. And assuming that the Court does manage to achieve some result, it will inevitably be a result favored by only a minority of the Court.

To summarize, when we relax the principled voting assumption, we see that the Supreme Court, even if it employed a motion-and-amendment with no reconsideration rule, would not be capable of ensuring a resolution in each case. While the principled voting assumption causes the hypothetical Court to spin off in different directions, it does not prevent this spinning altogether. In fact, the analysis demonstrates yet another common evolutionary feature of appellate court decisionmaking, including decisionmaking in the Supreme Court. The only method of ensuring a decision, even when the collective preferences fail to produce a Condorcet winner, is to limit motions for reconsideration, thus preventing the requisite number of formal votes to reveal a cycle, *and* to ensure principled decisionmaking, thus preventing the requisite number of iterations outside the formal voting process to reveal what otherwise would be a masked cycle.

Appellate court decisionmaking rules, including those in the Supreme Court, have evolved in a manner that incorporates both of these necessary features. The doctrine of stare decisis prevents the number of formal votes that can reveal cycles over time.[121] While life tenure, a feature of Article III judging that arguably promotes principled voting, is not provided to all state judges, another feature has evolved in appellate courts generally, including the Supreme Court, that provides a substantial check against judges who are unwilling to rule in accordance with their own principles. The practice of writing and publishing opinions commits the writing judge and her colleagues who sign on to a statement of principles, or ordinal rankings, rather than merely to a vote. The publication of written opinions provides judges with an opportunity to criticize colleagues, and allows members of the bar and academia to criticize sitting judges when the authors of published opinions fail to abide by their own stated principles in future cases.[122] In that sense, written opinions discourage informal itera-

121. Within single cases, case-by-case voting prevents the requisite number of votes relative to issues to identify potential cycles that would be revealed if appellate courts were to employ issue-by-issue voting. *See* Stearns, *supra* note 4, at 1258-71. Across groups of cases, stare decisis prevents the requisite number of votes to reveal cycles over time. This Article is concerned with the manner in which standing ameliorates the path dependency that inevitably arises as a consequence of adherence to stare decisis. Of course, no rule provides particular justices with agenda-setting authority over Supreme Court cases. But as we shall see below, litigants do exercise a substantial degree of agenda control, limited in significant part by standing.

122. For an example illustrating the important distinction between the binding force of judicial dictum and the non-binding force of statements on the floor of the legislature, see Stearns, *supra* note 4, at 1259 n.153.

tions, or vote trades, that could reveal cycles outside the formal voting processes.[123]

In short, whether we dispense with the ordinal-ranking assumption or the principled-voting assumption, the result is the same. Absent a Condorcet winner, the Court either produces an outcome that fails to satisfy the will of a present majority, or it cycles. Either way, Condorcet-producing rules, because they lead to arbitrary or irrational outcomes in the absence of a Condorcet winner, are inadequate to the task of appellate-court lawmaking.[124]

B. Standing in the Path of Agenda Manipulation

While the taxpayer standing hypothetical aptly illustrates the difficulty that path dependency poses for the substantive evolution of legal doctrine, including the standing doctrine, the more important point, explored below, is the manner in which modern standing doctrine itself operates to amelio-

123. I do not intend to suggest that vote trading or accommodation cannot take place in appellate courts, including the Supreme Court; instead, I intend to suggest that in contrast with legislative vote trading, judicial vote trading is more costly and thus less likely. It is also less prominent. In H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991), the author observes that Supreme Court justices often act strategically in deciding whether to grant or deny petitions for certiorari. *See id.* at 140-216. In fact, Professor Perry's observation is, at least to that extent, not inconsistent with my assertion that the justices are generally assumed not to trade votes or logroll, at least relative to members of Congress, in deciding particular cases. While justices are constrained to a large extent by prior published opinions, which set out a piecemeal and stylized form of ordinal rankings, justices rarely publish their reasons for granting or denying certiorari petitions. As a result, we should not expect that justices would feel bound by prior votes on certiorari petitions in making future decisions on such petitions. In that sense, the certiorari process is, not surprisingly, more political than is the process of deciding the merits of particular cases. In the language of social choice, we would expect the Arrovian independence criterion to have greater application in casting case votes than in casting votes on certiorari petitions. For an analysis demonstrating that particular Supreme Court justices do not apply the criteria for considering petitions for writ of certiorari in a consistent manner, see Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court,* 136 U. PA. L. REV. 1067 (1988).

124. As demonstrated below, rules that are unable to ensure an outcome when a collective decisionmaking body is faced with non-Condorcet-producing preferences are perfectly adequate to the task of legislatures, which in the absence of such a winner, are free to do nothing, defaulting to the status quo.

One might object that with the exception of opinion assignments, which are made by the Chief Justice when he votes with the majority, or the senior justice voting with the majority when the Chief Justice votes with the dissent, the Supreme Court does not vest agenda-setting power in any member of the Court. *See* Jon O. Newman, *Foreword: In banc Practice in the Second Circuit: The Virtues of Restraint,* 50 BROOK. L. REV. 365, 378 n.85 (1984) ("In the Supreme Court, when the Chief Justice is in the minority, the opinion writing assignment is made by the senior judge in the majority."). In fact, the Court does vest agenda-setting power in a minority of the Court's members through the rule of four for the grant of petitions for writ of certiorari. For an analysis of the rule of four, see Revesz & Karlan, *supra* note 123. But, in any event, the foregoing analysis is not intended to suggest that Supreme Court justices operate under such a rule. Instead, the point is to demonstrate that given the Court's non-Condorcet decisional rules, whoever is given agenda-setting authority, including most notably litigants, is vested with tremendous power to shape the substantive evolution of legal doctrine. This Article demonstrates that standing is best understood as a rational judicial response to the incentives of litigants to manipulate the order of federal court precedent.

rate the difficult choice between Condorcet-producing rules that lead to cycling in the absence of a Condorcet winner and non-Condorcet-producing rules that inevitably lead to path-dependent, and therefore arbitrary, outcomes. To be sure, standing does not prevent path dependency. All non-Condorcet-producing rules are subject to some form of path dependency. But what standing does do, as demonstrated in the Sections that follow, is to limit the extent to which litigants can benefit by opportunistically manipulating the order in which issues are presented to federal circuit courts and, ultimately, to the Supreme Court, for consideration. In short, while rules designed to ensure results in all cases necessarily create path dependency, standing imposes a set of ground rules that reduces the extent to which litigants can exert control over the critical path by presenting issues for decision in the most favorable order. Indeed, the Article III Case or Controversy Clause, while not couched in these terms, can be interpreted as a rule that ensures that fortuity, rather than advertent litigant strategy, is the predominant variable controlling the path in which cases are presented for resolution in the federal courts, including most notably the Supreme Court. The result of such a rule is no less arbitrary in terms of sometimes thwarting the preferences of a present majority of the justices, but it is certainly more fair.[125]

The above analysis is subject to two important qualifications. First, the Supreme Court has an apparent mechanism, other than standing, for reducing the irrationality that cycling can produce. At least in theory, the Court could deny certiorari in those cases in which it anticipates cycling. Given that the Court vests the power to grant certiorari in a minority of four, however, the certiorari process is by no means a panacea for the problems that cyclical preferences pose. The power of a minority to govern the path of decisions is a strong weapon in a fractionalized Court. More importantly, perhaps, federal circuit courts lack the power to control their dockets. In the absence of a standing barrier, that critical fact would provide ideological litigants with the power to create favorable paths in the circuits and would further provide the power to create circuit splits, substantially restricting the power of the Supreme Court to decline certiorari.[126]

In fact, this Article's analysis provides a social choice rationale for the Supreme Court's increasing power to determine its own docket[127] and for adherence to precedent within but not among the federal circuit courts. The

125. The term "fairness" is defined, in social choice terms, *infra* notes 152-161 and accompanying text.

126. For a discussion demonstrating that the power of litigants to create circuit splits may have provided the impetus behind the creation of standing in the New Deal Court, see Stearns, *supra* note 5. As shown below, modern standing doctrine rests on a different basis, namely the inability of a multipeaked Court to control its own decisionmaking outcomes. *See infra* notes 289-291 and accompanying text; *see also* Stearns, *supra* note 5, pt. II.A.

127. For a discussion of the narrowing of direct appellate jurisdiction in the Supreme Court after 1988, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 28-29 (4th ed. 1991).

social choice analysis reveals that these phenomena are closely related. Given that circuit courts, in adhering to their own precedents, are subject to path dependency and given that parties therefore have an incentive to try to manipulate the order of case presentation within and among the circuits, the Supreme Court has a dual incentive. First, to ensure multiple paths from which to choose the best analyses and outcomes—the social choice definition of issue percolation—we would predict that the Court would desire intra- but not inter-circuit stare decisis. This avoids the irrationality that would result from cyclical preferences *within* particular circuits, while, at the same time, reducing the likelihood that legal doctrine that results from path manipulation in a *given* circuit will be replicated *across* the circuits. Second, to ensure the availability of a sufficient number of paths and an optimal range of analyses from which to choose, and further to reduce path manipulation on the Supreme Court itself, the Court would seek to control its own docket through certiorari jurisdiction.[128]

In this analysis, neither standing nor certiorari are alone sufficient to minimize the effects of path manipulation. With only certiorari, lower federal courts would be subject to path manipulation. In turn, as more frequent circuit splits are created, the price of declining certiorari over disputed issues would rise substantially. Because standing is not an airtight barrier to litigant path manipulation, it alone would not sufficiently reduce the possibility of path manipulation on the Supreme Court. Instead, the Supreme Court uses standing to reduce path manipulation in the federal judiciary generally and, knowing that some path dependency will remain, it then employs internal docket control to ensure that it has provided adequate time for an optimal number of paths to develop among the circuits.[129] Standing, coupled with intra- but not inter-circuit stare decisis, reduces the likelihood that the same path-dependent iterations will occur in every circuit, thus further enhancing a number of different path-dependent iterations from which the Supreme Court can choose the best legal outcomes and analyses. Even with the Supreme Court's power of docket control, therefore, standing proves an essential vehicle for reducing path manipulation in the circuit courts and the Supreme Court.

Second, I have previously demonstrated that the Supreme Court decides cases on a case-by-case, rather than issue-by-issue, basis to avoid the cycling problems that could otherwise arise within a single case when

128. If, instead, the Supreme Court adopted a bright line rule, for example, any time there is a circuit split on a question of federal law the Court must resolve that issue in the first case that presents it, that would reopen the very path manipulation on the Supreme Court that standing operates to reduce. By presenting cases in the most favorable order within two different circuits, interest groups could virtually guarantee having the Court resolve their favored issues through the cases of their choosing.

129. Moreover, the rule of four hinders the Supreme Court's ability to prevent path manipulation through denial of petitions for certiorari. In effect, a minority of four is afforded the power to govern the Court's docket.

the Court lacks a Condorcet-winning preference.[130] While case-by-case voting can lead to outcomes favored by only a minority of the Court, it has the benefit of preventing the cycles that would arise if the Court tried to resolve all cases on an issue-by-issue basis. As this Article demonstrates, however, case-by-case voting cannot prevent cycles that occur over time.[131] The Court has further developed rules that prevent the requisite number of iterations to reveal intertemporal cycles. One might argue that the Supreme Court has never suggested a rule that prevents justices from taking the requisite number of votes to reveal the presence of cycles. In fact, however, it has. Case-by-case decisionmaking prevents the requisite number of votes to reveal a cycle in any given case, even absent a previously established precedent. Once the Court issues an opinion, the doctrine of stare decisis, as the following discussion demonstrates, prevents the requisite number of iterations to reveal cycles that would otherwise be revealed over time.

The following hypothetical, based upon two Supreme Court equal protection decisions issued on the same day, *Washington v. Seattle School District No. 1,*[132] and *Crawford v. Board of Education,*[133] illustrates the point. In *Seattle,* the Supreme Court held that a Washington statewide initiative used to prevent a school board from continuing mandatory integrative busing, absent a court order that the state or federal constitution so requires, violates the Fourteenth Amendment's Equal Protection Clause. In *Crawford,* the same Court upheld a California constitutional amendment that prevented state courts from interpreting the California constitution to require school integration by busing, unless a federal court would so order to remedy a violation of the Fourteenth Amendment's Equal Protection Clause. Four justices who dissented in *Seattle* voted to uphold the *Crawford* amendment and the one justice who dissented alone in *Crawford* voted to uphold the *Seattle* amendment. This brief summary reveals three majorities: (1) a majority in favor of the *Crawford* holding; (2) a majority in favor of the *Seattle* holding; and (3) a majority comprised of the four justices who dissented in *Seattle* and the one justice who alone dissented in *Crawford,* who would have held the two cases indistinguishable, such that both state laws should be upheld or struck down.[134]

To demonstrate the standing issue, it is necessary to slightly modify the case facts. Assume that while both state laws have passed, no local school board in either Washington or California has brought suit to challenge the constitutionality of those laws and that no court has ordered a

130. *See* Stearns, *supra* note 4, at 1256-71 (illustrating proposition with discussion of Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), and other cases).

131. Bruce Chapman has demonstrated, based upon social choice theory, that appellate courts can and do cycle over time. *See generally* Chapman, *supra* note 114 (demonstrating intertemporal cycle).

132. 458 U.S. 457 (1982).

133. 458 U.S. 527 (1982).

134. For a more detailed presentation of these cases and their social choice implications, see Stearns, *supra* note 4, at 1262-71.

revised desegregation plan consistent with the change in state law.[135] Further assume that no California or Washington court has yet been called upon to determine the constitutionality of the relevant state law. Finally, assume that Washington and California each have local branches of two national public interest organizations, which have taken a strong interest in the two state laws.

Members of the first group, *Citizens Against Busing* ("CAB"), are strongly committed to neighborhood education and thus would like the Supreme Court to uphold both state laws. They also believe that while both laws should withstand an equal protection challenge, the California law presents a more attractive case to litigate because, unlike Washington, California did not attempt to alter local school board conduct directly. Instead, it simply tried to cabin the power of state courts to order busing, with federal constitutional requirements as the outer limit. CAB is concerned that some members of the Supreme Court might view the Washington law as an improper attempt to wrest public education from local school board control.

Members of the second group, *Bettering Underprivileged Students* ("BUS"), are strongly committed to busing as a means of achieving the benefits associated with integrated schooling and of equalizing the disparate educational resources across wealthy and poor neighborhoods. Agreeing with CAB, BUS believes that the Washington initiative presents *it* with a better litigation opportunity because in challenging that initiative, BUS can appeal to those justices who favor using the Equal Protection Clause to integrate public schools, as well as to those justices who might be disturbed by Washington's apparent intrusion into local policymaking regarding public education.

Assume that public interest organizations representing affected parents can freely obtain standing to challenge state laws that restrict integrative busing. Given the preferences of the Supreme Court justices set out above, the substantive outcome in *both* cases depends entirely upon the order in which those cases are presented to the Supreme Court.[136] Whichever of the

135. In *Seattle School Board,* the Seattle School Board brought suit in United States District Court to challenge the Washington initiative. *Seattle School Board,* 458 U.S. at 464. The district court held Initiative 350 unconstitutional, and a divided panel of the Ninth Circuit affirmed. *Id.* at 465-66. The State and various officers appealed to the Supreme Court, which noted probable jurisdiction. *Id.* at 467. In *Crawford,* the superior court found the constitutional amendment inapplicable to the revised plan that it had previously ordered, a ruling that was reversed on appeal. *Crawford,* 458 U.S. at 533. After the California Supreme Court denied hearing, the Supreme Court granted the petition for writ of certiorari filed on behalf of the minority schoolchildren. *Id.* at 534.

136. *Cf.* Easterbrook, *supra* note 33, at 818-19 (positing that strict adherence to stare decisis will render Supreme Court decisionmaking path dependent). One might argue that CAB and BUS are unlikely to be aware of the relevant judicial preferences, and thus are unable to use that knowledge to benefit from path manipulation. The opinion-writing function, however, while operating to promote principled voting among judges, also has the consequence of providing, albeit in piecemeal fashion, a form of judicial ordinally ranked preferences. *See supra* notes 122-123 and accompanying text. As a

two citizen groups can get its preferred case to the Supreme Court first will control not only the timing and substantive outcome in that case, but also the substantive outcome in the second case.

Assume that CAB succeeds first in getting its declaratory judgment action seeking to sustain the California constitutional amendment to the Supreme Court. The Court sustains the statute as it actually did in *Crawford.* When *Seattle* reaches the Supreme Court, assuming that the Court adheres to the doctrine of *stare decisis,* the majority that believes the two cases should be decided in the same manner would be obligated to vote to uphold the Washington initiative, with the result (*Crawford,* not-*Seattle*).[137] Alternatively, if BUS succeeded in getting its declaratory judgment action seeking to strike the Washington referendum to the Supreme Court first, the Court would reach the exact opposite result in both cases. This time, the Court would first strike the referendum as it did in *Seattle.* When CAB gets its case to the Supreme Court, under the same stare decisis assumption, the majority that believes the cases are indistinguishable would be obligated to vote to strike the California amendment, with the result (not-*Crawford, Seattle*). In fact, the two cases reached the Court at the same time. Despite the majority favoring like treatment in both cases, the Court adopted yet a third option, upholding the *Crawford* initiative and striking the *Seattle* amendment, with the result (*Crawford, Seattle*). None of these three results, given the preferences of the Court's members, can be said to be any more or less rational than any other. Because the path in which these cases are presented fully controls both substantive outcomes, all three of the potential combinations, including the actual case decisions, can be viewed as equally arbitrary or irrational.[138]

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result, opinion writing provides valuable, albeit imperfect, information about the preferences of Supreme Court justices.

137. *See supra* note 116 (explaining the convention employed in the text).

138. Judge Easterbrook has made a related argument, stating that "[t]he order of decisions has nothing to do with the intent of the framers or any of the other things that might inform constitutional interpretation." Easterbrook, *supra* note 33, at 820. In contrast with Easterbrook, I provide an evolutionary justification for stare decisis, linking the doctrine to the irrationality that would arise without presumptive adherence to precedent as a result of intertemporal cycling on the Supreme Court. I then provide an evolutionary justification for standing, demonstrating that in a regime in which deciding justices presumptively adhere to stare decisis, standing substantially ameliorates the problems associated with path-dependency that stare decisis would otherwise create. Standing does so by rendering the evolution of legal doctrine more fair, meaning more in accordance with the majoritarian norm. Judge Easterbrook is undoubtedly correct that nothing in the substantive corpus of constitutional law links case outcomes to the order in which cases are presented or decided. It is my position, however, that the Supreme Court's decisional rules, including stare decisis, which creates opportunities for path manipulation, and standing, which presumptively grounds the relevant path of case decisions in factors largely beyond the litigants' control, are well grounded in *constitutional process,* as distinguished from the substantive corpus of constitutional law. These decisional rules accord with process-based constitutional norms because they increase the rationality of Supreme Court decisionmaking in a manner that better accords with the majoritarian norm. In short, as this Article demonstrates, the fact that path dependency may render different outcomes equally arbitrary and

In fact, had the cases reached the Court at different times, rather than at the same time, the doctrine of stare decisis would have operated as a prohibition on a motion for reconsideration, thus precluding the requisite number of votes to reveal a cycle. With the *Crawford* rule in place first, stare decisis compels the Court to determine whether *Seattle* is governed by the *Crawford* rule. As shown above, the Court is composed of three relevant majorities. The first continues to believe the *Crawford* result was correct. The second believes the *Seattle* initiative should be struck down. The third believes that applying stare decisis, the *Seattle* initiative must be upheld because the *Crawford* amendment was upheld. Because some of the members of the second majority are also members of the third majority, they are prevented from reaching the question of whether, with no relevant precedent, the *Seattle* initiative should be struck down.[139] They are also prevented by the doctrine of stare decisis from going back to reconsider *Crawford* in an effort to ascertain whether, if enough pairwise votes were taken, the Court would cycle. In short, because one motion, to uphold the *Crawford* amendment, has been approved, and a second motion, to treat the two cases in like manner has majority support, stare decisis, if adhered to, operates as a rule limiting reconsideration of rejected motions. In this case, the justices who believe that the cases are indistinguishable are constrained by stare decisis from voting to strike or to uphold the Washington initiative on the merits. Without stare decisis, all justices are free to vote on the constitutionality of the Washington initiative without regard to precedent, and on whether the two cases should be governed by the same rule. By broadening the number of issues in this manner, however, the Court would reveal a cycle that may prevent it from issuing a decision in the second case.

The above analysis is critical to understanding the function that the modern standing doctrine serves. First, the analysis explains the problems with and the reasons for the doctrine of stare decisis. Because appellate courts can cycle over time, stare decisis operates as a limitation on the permissible number of votes relative to the number of options before such courts.[140] While stare decisis thus prevents the requisite number of itera-

irrational does not mean that all paths are equally the product of fair constitutional process. *See also infra* note 194.

139. In Arrovian terms, stare decisis operates as a range restriction. Range, which is one of the fairness conditions in Arrow's Theorem, holds that members of a collective decisionmaking body must be permitted to choose from all available options in their ordinal rankings in pairwise votes. This criterion is described in greater detail, *infra* part I.C. While three issues appear before the Court, stare decisis has removed one from consideration for those justices who believe the two cases are constitutionally indistinguishable. Those justices are precluded from registering their preference that notwithstanding the outcome in the first case, they would have chosen to decide the second case differently.

140. Stare decisis, of course, is not an absolute rule. It has been variously characterized as an obligation that is "weak," Kornhauser, *supra* note 8, at 73; "optional," Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis,* 65 CHI.-KENT L. REV. 93, 110 (1989); or "imperfect,"

tions to reveal a cycle, it also renders the evolution of legal doctrine path dependent. In short, stare decisis, which is the jurisprudential equivalent of a prohibition on the reconsideration of a rejected motion, can best be understood in social choice terminology as a cycle-prevention vehicle.[141]

Second, the analysis begins to explain the function served by the modern standing doctrine. If the benefit of stare decisis is in reducing intertemporal cycling, thus increasing the value of precedents and the certainty of law, the cost is increased path dependency of legal doctrine relative to a regime without stare decisis. Without stare decisis, the Court would face all issues presented in each case anew. The order in which cases arose would have, at least in theory, little or no impact upon the substantive evolution of legal doctrine.[142]

While such a regime might seem difficult, impossible, or unimaginable, at least for Anglo-American lawyers, it is, of course, the regime of choice in many parts of Europe and, in modified form, in Louisiana.[143] Civil Code jurisdictions are premised upon the ideal that legislatures bear the entire burden of codifying positive law. Civil courts of law, in theory, engage in the entirely deductive process of applying the general principles set out in the Code to the facts before them.[144] In a system that eschews the judicial creation of positive law, the doctrine of stare decisis has a less prominent, and certainly a less formal, role.[145] While the civilian tradition

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O'Hara, *supra* note 8, at 742 n.26. I prefer to view stare decisis as a "presumptive" obligation to adhere to prior decisions, which although not necessarily inconsistent with any of these three characterizations, better captures the intuition that a judge needs a reason beyond the mere desire to reach an alternative result in choosing not to adhere to an otherwise controlling precedent. By "controlling" I mean simply the absence of a material distinction between the facts or procedural posture of the precedent in question and the facts or procedural posture of the case at hand.

141. The Court obviously does revisit past precedents from time to time and sometimes overrules prior cases. *See supra* note 140 (describing stare decisis as imposing presumptive obligation to adhere to precedent). That said, intertemporal stare decisis doctrine is best understood as a prudential doctrine. For one of the Court's more detailed, albeit criticized, discussions of the doctrine, see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-16 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

142. In the absence of a Condorcet winner, the Court, if it employed such a regime, could not ensure an outcome.

143. Louisiana's form of stare decisis, which is something of a hybrid between the jurisprudence prevalent in the common law United States system and the purer civilian counterparts in Europe, is termed *jurisprudence constante.* For introductions to the role of stare decisis in civil law, see FRANCESCO PARISI, LIABILITY FOR NEGLIGENCE AND JUDICIAL DISCRETION 381-95 (2d ed. 1992); 1 KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 108-09 (Tony Weir trans., 1977) (describing Louisiana law as combination of civil and common law).

144. *See generally* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (1969).

145. That is not to suggest, however, that stare decisis has no place as a matter of informal practice. Thus, Professor Merryman explains,

> Although there is no formal rule of *stare decisis,* the practice is for judges to be influenced by prior decisions. . . . The judge may refer to a precedent because he is impressed by the authority of the prior court, because he is persuaded by its reasoning, because he is too lazy to think the problem through himself, because he does not want to risk reversal on appeal, or for a variety of other reasons. These are the principal reasons for the use of authority in the

does not rest upon the romantic ideal that for every question of law, there exists a single correct answer accessible to all judges who engage in the appropriate deductive inquiry, it *does* rest upon a far more stringent vision of separation of powers, one more fearful of judicial tyranny, than is prevalent in our system.[146]

The Anglo-American tradition, which in significant part departs from the stricter separation of powers principles associated, for example, with Montesquieu,[147] rests upon a substantially different normative premise. We do not view legislatures as the sole, or even principal, legitimate source of positive law.[148] Nor do we hold our legislators to the republican ideal of subordinating their self-interest (and that of their constituents) to the well-being of society as a whole. We also generally do not view courts as interchangeable conduits, which, even at the level of theory, all lead to the same place when judges apply the appropriate deductive inquiry based upon generalized statutory or constitutional language to a previously unknown set of facts. Indeed, *Erie Railroad v. Tompkins,*[149] which requires federal courts

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common law tradition, and the absence of any formal rule of *stare decisis* is relatively unimportant.

Merryman, supra note 144, at 48. Professor Parisi also posits that

> any analysis that goes beyond the formal statements of the doctrinal [civilian] tradition and queries the consistency of theoretical statements with the practical dynamic of the judicial system would reach the conclusion that the differences emphasized by some comparative literature [concerning the role of stare decisis] are much smaller in practice than they are in theory.

PARISI, *supra* note 143, at 382; *see also* Caminker, *supra* note 8, at 821 n.14 ("The hierarchical judicial regimes of numerous civil law systems refuse to acknowledge formally rules of either hierarchical precedent or stare decisis, although courts frequently rely on precedent as a matter of informal practice.") (citation omitted).

146. It is perhaps not surprising that the Marquis de Condorcet, who was among the earliest to write about the paradox given his name, was strongly influenced by the writings of Jean-Jacques Rousseau. *See* Stearns, *supra* note 4, at 1250 n.108 and authorities cited therein. In Rousseau's republican political philosophy, legislatures were charged with the task of locating, among available options, that option that was best for society, even if, in doing so, legislators subordinated their own personal preferences. While our political system, despite its admitted republican influence, falls far short of that ideal, that very fact might explain why courts, unlike legislatures, have developed practices consistent with principled decisionmaking. Because legislators are presumed in republican theory to engage in principled decisionmaking, we might expect the need for courts to replicate that function to be reduced relative to a regime, like our own, in which legislators are generally presumed to vote more generally in accordance with a preference-driven model.

147. *See, e.g.,* James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power,* 56 U. CHI. L. REV. 235, 241 (1989) (explaining that "[a]lthough Montesquieu in reality espoused a fairly pragmatic concept of the separation of powers, he was widely interpreted in America as standing for the theory of completely separate governmental branches.") (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 152-54, 449-53 (1964) (describing "enhanced definition" framers imposed upon Montesquieu's concept of separation of powers)).

148. I have argued here and elsewhere that a major difference between the decisional rules of courts and legislatures, which social choice theory reveals, is that legislatures have the power of institutional inertia, that is, they can decline to decide proposed issues, and that courts do not, that is, they cannot generally decline to decide cases properly before them. *See* Stearns, *supra* note 4, at 1258-71 (applying Arrovian range criterion to Supreme Court and to Congress).

149. 304 U.S. 64 (1938). For a more detailed discussion of *Erie* as it relates to this Article's standing analysis, see Stearns, *supra* note 5, part II.B.1.

to predict how a state court would decide a given diversity case,[150] rests more nearly on the opposite premise. The choice of court *does* have a substantial effect on legal outcomes. Social choice theory takes us one step beyond this intuition and reveals that not only does the choice of court substantively affect legal doctrine, but also the timing in which cases are presented to the *same court* substantively affects legal doctrine.

Standing does not cure the anomaly, created by path dependency, that a group of cases presented to the same court in different order can produce opposite legal doctrine. But the same analysis begins to explain the purpose that the modern standing doctrine serves. Standing has evolved in large part as a set of ground rules that informs litigants as to when they can enter the judicial arena in an effort to force the creation of positive law with respect to the legal issues necessary to resolve cases.[151] Because stare decisis ensures that the order in which legal questions are presented for decision will have an arbitrary, and largely unintended, effect upon the substantive evolution of legal doctrine, standing serves the critical function of encouraging the order in which cases are presented to be based upon fortuity rather than litigant path manipulation. By limiting the power of litigants to control the order, or "path," in which cases are presented for decision, standing makes the inevitable path dependency that results from stare decisis substantially more tolerable. Standing does so by rendering the procedures employed to create the critical path of case presentation more fair, as that term is understood in social choice.

At this point, it is critical to define our terminology. Academics, especially those influenced by the law and economics movement, are often suspicious of abstract claims to "fairness," especially when that term, however loosely understood, is deployed to counter an analytic argument grounded in concerns for efficiency.[152] Social choice reveals that the concept of fairness, properly defined, no less than the concept of efficiency, can claim a legitimate foundation in economic theory. To be clear, Arrow's Theorem does not directly (or even necessarily) pit concepts of efficiency against concepts of fairness, although it can in particular instances.[153] Rather, Arrow's Theorem pits *any* normative analytic framework that cannot be successfully imposed through majority rule, including, for example, a pure

150. *Erie,* 304 U.S. at 65.

151. As demonstrated *infra* Part III, the standing ground rules, which can be summarized as positive statements of substantive law, rather than as procedural standing determinations, *accord* Fletcher, *supra* note 3 (positing that standing determinations are inevitably substantive rulings), serve the function of increasing the likelihood that fortuity, rather than litigant path manipulation, governs the order of case presentation. *See also* Stearns, *supra* note 5. The principal ground rules are: (1) no right to enforce the rights of others, (2) no right to prevent diffuse harms, and (3) no right to an undistorted market.

152. On the other side, critics of law and economics often argue that the movement is immoral or amoral in that it subordinates all concerns to efficiency.

153. *See also infra* notes 195-207 and accompanying text.

state of laissez-faire or a pure state of communism, against the Arrovian definition of fairness.[154]

Arrow's Theorem demonstrates an inevitable tension between rationality and fairness in collective decisionmaking rules. Kenneth Arrow proved that no collective decisionmaking body can simultaneously satisfy the Arrovian definition of rationality, namely, the ability to ensure that individually transitive preferences, when aggregated, will yield a collectively transitive outcome, and five reasonable assumptions commonly associated with fair collective decisionmaking, each of which is grounded in a majoritarian norm.[155] The Condorcet Paradox reveals that when presented with individually transitive preferences, a collective decisionmaking body, in aggregating those preferences, cannot guarantee a collectively rational outcome if it employs a pure majoritarian voting rule. Such a rule requires enough votes to ensure that the preferences of a minority are not controlling for the group. Arrow's Theorem, which is best thought of as a generalization of the paradox,[156] reveals that to ensure collective rationality, a collective decisionmaking body must sacrifice at least one of five fairness conditions, and alternatively, that to satisfy all five fairness conditions, that body must sacrifice collective rationality.

The Condorcet Paradox and Arrow's Theorem are best understood for their positive, or evolutionary, implications for collective decisionmaking. In short, social choice, which reveals a fundamental tension between rationality and fairness, demonstrates the impossibility of devising a perfect collective decisionmaking process, namely one that satisfies the majoritarian norm and that guarantees rational outcomes. At the same time, the theory itself is uninformative as to whether any particular institution will be more concerned with fairness or rationality, or which features of fairness or rationality that institution must sacrifice to satisfy its objectives. Instead, Arrow's Theorem demonstrates that to prevent the cycling anomaly associated with the Condorcet Paradox, and to ensure a rational collective outcome, the collective decisionmaking body must sacrifice at least one fairness condition. In other words, to achieve collective rationality, the body must supplant a decisional rule, grounded in the majoritarian norm and capable of revealing cyclical preferences, with a decisional rule not grounded in the majoritarian norm that masks cyclical preferences. Arrow's Theorem reveals that in doing so, the body will inevitably vest disproportionate power in a minority, thus undermining the majoritarian norm and compromising fairness.

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154. In other words, if hybrid regimes emerge from a baseline of either sort, laissez-faire or communism—for example, an essentially capitalist welfare state or a socialist state that infuses capitalist features—as a result of majoritarian electoral processes, social choice reveals that the result, notwithstanding its seemingly theoretic imperfections, can claim a legitimate economic foundation.

155. *See infra* part I.C (defining Arrovian fairness conditions).

156. *See* RIKER, *supra* note 82, at 116.

As stated above, social choice is best understood for its evolutionary implications. While, in theory, institutions can choose either to be entirely rational or entirely fair, most institutions, not surprisingly, achieve a middle ground that incorporates (and sacrifices) features of each. Social choice is most helpful in providing a framework with which to assess the evolution of a given institution's decisional rules because it enables us to consider, in light of the institution's functions, why it has subordinated (or emphasized) particular features of rationality and fairness. Moreover, for a complex decisionmaking body, like the Supreme Court, social choice enables us to consider the extent to which multiple decisional rules, for example, stare decisis and standing, complement each other by enhancing the Court's overall fairness and rationality. In other words, as this Article demonstrates, within a given institution, social choice reveals that some decisional rules cannot be evaluated in isolation.[157] The doctrine of stare decisis mitigates one form of collective irrationality in Supreme Court voting. If the Court decided each case it faced in a manner entirely consistent with the majoritarian norm, it would reveal cyclical preferences that arise over time and, as a result, it could no longer ensure stable legal doctrine. But to enhance its rationality, and to provide a greater degree of doctrinal stability (relative to a regime without stare decisis), the Supreme Court is forced to compromise a critical element of fairness. Specifically, with stare decisis in place, which is the social choice equivalent of a proscription on reconsideration of rejected motions,[158] non-Condorcet minority interests could, in theory, exert a disproportionate influence on the substantive evolution of legal doctrine by seizing control of the critical path of case presentations. But, as suggested above, stare decisis cannot be evaluated in isolation.

The modern standing doctrine, which is also best understood in evolutionary terms, is grounded in "fairness" as that term is defined in social choice. Standing, as explained in greater detail below,[159] operates as a set of presumptive ground rules. As a precondition to the Court's deciding a case in which it may be required to make law, the ground rules essentially require that the rights or liabilities implicated arise from a set of facts that is

157. In Stearns, *supra* note 4, I demonstrated the related proposition that in evaluating the implications of cycling for particular institutions, for example, the Supreme Court and Congress, those institutions cannot be viewed in isolation. Instead, many, if not most, collective decisionmaking institutions operate in conjunction with other such institutions to ameliorate the effects of cycling in a manner that each institution could not if it operated alone. *See id.* at 1230 (explaining that through isolation fallacy, "scholars fail to consider that the collective decisionmaking bodies they are studying have never operated, and were never intended to operate, in isolation, but rather were intended to operate in an inherently complementary fashion with other collective decisionmaking institutions"); *id.* at 1233-47 (illustrating the manner in which complementary institutions can improve rationality and reduce cycling).

158. *See supra* notes 100-121 and accompanying text.

159. *See infra* part III.

largely beyond the litigants' control.[160] A presumptive rule that fortuitous factual or historical events, rather than advertent path manipulation, will control the critical path of case presentation, does not prevent path dependency. But the rule does reduce "unfair" path manipulation in a system that observes stare decisis.

The standing rules promote fairness by rendering the evolution of legal doctrine more consistent, in several respects, with a majoritarian norm, than the evolution of legal doctrine would be in the absence of a standing doctrine. Standing promotes adherence to the majoritarian norm by preventing, at least presumptively, a non-Condorcet minority from forcing its preferences into law through the judiciary, that is, unless particular factual circumstances have arisen that render judicial creation of positive law largely unavoidable and that were likely beyond the non-Condorcet minority's control. In the event that such circumstances arise, for example, when a convicted criminal claims that his conviction or sentence violates the Constitution, the judiciary cannot avoid creating positive law based upon case-specific applications of broadly worded constitutional provisions. In such cases, the Supreme Court, in the event it grants certiorari, or federal and state appellate courts in the event the Supreme Court declines certiorari, must make law whether or not the members of the deciding court possess a Condorcet winner.[161] But absent the need to create positive law to resolve such cases, the standing doctrine, as presently formulated, generally prevents non-Condorcet minorities from manipulating case presentation in an unbridled effort to force the Supreme Court, or lower federal courts, to make law on issues of their choosing. In other words, standing prevents, as a presumptive matter, ideological litigants from controlling the critical path of case presentations in an effort to control the substantive evolution of legal doctrine. In turn, standing forces such non-Condorcet minorities to seek codification of their preferences into law in the legislature.

Social choice, as shown below, further reveals that legislatures are better suited than are multimember appellate courts (which will inevitably pass on a lower court's creation of positive law) at resolving—or not resolving—cyclical preferences in a manner consistent with the above-defined sense of fairness. The legislature's decisional processes are generally more fair because they are better grounded in the majoritarian norm. Specifically, legislative decisional rules are relatively superior—as com-

160. A clarification is in order. Certainly a criminal controls the facts that give rise to her conviction and sentence by committing a crime. But the criminal is not likely to engage in criminal conduct with the hope of getting arrested and convicted in a manner that arguably violates the Constitution so that she will eventually have an opportunity to present a claim that makes new law.

161. And while the Court could decline to grant certiorari in such cases, that would only place the burden of resolving such cases on lower federal courts or on state appellate courts, which lack the power of docket control and which may still possess cyclical preferences. Moreover, as explained *supra* notes 127-129 and accompanying text, the social choice analysis of stare decisis further provides an evolutionary justification for the Supreme Court's power of docket control.

pared with those of appellate courts—at identifying preferences that cycle,[162] and thus at identifying attempts by non-Condorcet minorities to control the legislature's decisional processes.

Faced with non-Condorcet preferences, the legislature, unlike an appellate court, has two available options with which to resolve institutionally those preferences in a manner that generally satisfies the majoritarian norm. First, the legislature can remain inert, thus preserving the status quo, which was likely the product of prior majority or, at least, prior Condorcet minority, preferences. And second, the legislature can require the non-Condorcet minority in question to join a larger, successful coalition, thus trading support across bills, as a precondition to codifying their preferences into law. In this manner, the legislature can enact a larger bill or package of bills, which, although possessing items that independently would only garner non-Condorcet minority support, acquire the support of a majority or at least a Condorcet minority when those items are included within a larger package.[163] The end result—legislative inertia *or* a legislative package that is the product of coalition-building across bills, including trades with non-Condorcet minorities—is more likely to satisfy the majoritarian norm than forced judicial lawmaking almost as a matter of definition. Either way, the resulting legislative action, inertia or the complex product of vote trades, will only succeed if it has at least Condorcet-minority support. Otherwise, we can generally assume that some other legislative option will supersede it. And in the absence of any option that has such support, the legislature will cycle, thus defaulting to the status quo.

In contrast, when a non-Condorcet minority seeks to force its preferences into law through the judiciary, it can only succeed when it thwarts the

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162. *See infra* notes 213-217 and accompanying text (describing effect of informal practices such as logrolling and vote trading as identifying cycles even when formal decisional rules defy Condorcet criterion).

163. I have made a similar argument in response to those who advocate the federal adoption of the item veto. *See* Maxwell L. Stearns, *The Public Choice Case Against the Item Veto,* 49 WASH. & LEE L. REV. 385, 397, 422 (1992). In response to Senator Dixon, who argued that "the fact that a bill passes Congress is supposed to mean that there is majority support for that bill, including every item in it," Alan J. Dixon, *The Case for the Line-Item Veto,* 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 223 (1985), I observed:

> Just because Congress alone determines the package of items that form a bill, there is no reason to assume that a majority of either or both houses supports each provision contained in every bill. Rather . . . supporters of a bill, even a bill that is a matter of general interest but that does not yet have majority support in each house, will engage in compromises in the course of legislative bargaining. Those compromises will include agreeing to attach items which as independent bills would not garner majority support, in exchange for votes.

Stearns, *supra* at 397. Two observations are noteworthy. First, while the quoted excerpt involved efforts to procure special interest legislation, which is at issue in the item veto debate, legislative coalitions also form around interests that have, in recent years, attempted to expand the reach of the Fourteenth Amendment's Equal Protection Clause. *See* Stearns, *supra* note 4, at 1274 n.206 (describing coalition-building aspects of statutes at issue in Fullilove v. Klutznick, 448 U.S. 448 (1980), and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)). Second, while the quoted passages speak in terms of gaining majority support for given proposals, a more accurate statement, as this Article demonstrates, would substitute the term Condorcet-winning minority for the term "majority."

majoritarian norm. Indeed, that is the only reason for a non-Condorcet minority to seek codification of its preferences through the courts in the first place. Absent a standing barrier, non-Condorcet minorities could take their shots in the judiciary at will. With standing, they are presumptively limited, unless their interests happen to coincide with a set of facts that they can credibly claim affect them in a reasonably direct manner and over which their control is rather limited. Assuming that the majoritarian norm, on which our system of government is largely rested, has inherent value, then standing promotes a greater degree of fairness, as defined above, in both judicial and legislative creation of positive law.[164]

I have said that standing reduces, but does not eliminate, opportunities for litigant path manipulation. This qualification is important. While examples abound, I will review briefly one of the most well-noted instances of deliberate path manipulation by litigants within constitutional law. For a period of decades the NAACP carried on a brilliant and successful campaign ultimately intended to overrule *Plessy v. Ferguson.*[165] As counsel for

164. One additional clarification is important. This analysis is in no way intended to suggest that judicial decisions are only legitimate when they protect the majority or a Condorcet minority in the population at large. Many substantive legal rules, including several constitutional provisions, specifically provide protections to non-Condorcet minorities. These include, but are not limited to, the various civil rights statutes, the Fourteenth Amendment's Equal Protection and Due Process Clauses, the Eighth Amendment prohibition of cruel and unusual punishment, and the Fifth Amendment protection against compelled self-incrimination. In deciding cases that require the application of broadly worded statutes or constitutional provisions, a majority of the Court's members often (indeed usually) coalesces around a single interpretation as applied to the case facts. In doing so, they lend majority judicial support for an interpretation that often protects a non-Condorcet minority. The argument in the text demonstrates that while such cases provide necessary vehicles for the judicial creation of positive law, that fact should not make the federal judiciary a free-for-all for dissatisfied non-Condorcet minorities who correctly assume that, given the difference in decisional rules, there is a greater likelihood of success at codification of their preferences into law in the federal courts than in Congress. Stated differently, the Arrovian sense of fairness goes to the manner through which substantive rules are made, rather than to the content of those substantive rules.

165. 163 U.S. 537 (1896). For an outstanding history of the NAACP effort to achieve equal treatment for blacks under the law and to have the separate-but-equal doctrine ultimately overturned, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1977).

Kluger explains that in 1929, the NAACP received a grant of $100,000 from the Garland Fund. The money was intended to finance "a large-scale, widespread, dramatic campaign to give the Southern Negro his constitutional rights, his political and civil equality, and therewith a self-consciousness and self-respect which would inevitably tend to effect a revolution in the economic life of the country." *Id.* at 132 (quoting committee memorandum to Garland Fund administrators). The committee also suggested a legal strategy, urging that the NAACP file taxpayers' suits in the seven states with the worst discrimination records: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, and South Carolina. *Id.*

Dr. Charles Houston, dean of Howard Law School, and Felix Frankfurter, then a member of the NAACP, nominated and endorsed Nathan Ross Margold to lead the NAACP legal campaign. *Id.* at 133. Margold, however, felt that the suggested strategy was unrealistic. As Kluger writes, "[t]o go after the problem as proposed in the fund's original memo—by launching one suit in each of the seven most discriminatory states in an effort to force officials to provide equalized school facilities—would be like trying to empty a swimming pool with an eye-dropper." *Id.* Margold devised a different plan. "His plan, he said, was not 'trying to deprive Southern states of their acknowledged privilege of providing

the NAACP, Justice Thurgood Marshall was well aware that a direct attack on *Plessy* would not succeed, as it had not succeeded in the past.[166] He had reason to believe, however, that the Court might be willing to distinguish from *Plessy* a series of cases presenting substantially more narrow challenges to the separate-but-equal doctrine. The NAACP achieved a series of successive victories, each chipping away at *Plessy.* In *Missouri ex rel. Gaines v. Canada,*[167] and again in *Sipuel v. Board of Regents,*[168] the Court held that a state, having created a state law school for whites, must provide a comparable in-state educational opportunity for black students who are qualified but for their race.[169] After rejecting a similar claim in *Fisher v. Hurst,*[170] the Court held in *Sweatt v. Painter,*[171] that the State of Texas

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separate accommodations for the two races.' His target was segregation 'as *now provided and administered.*' " *Id.* at 134 (quoting Margold).

Margold's ideas formed the basis of the NAACP strategy. However, Houston revised that plan in formulating the actual campaign:

> [Houston] had evolved a variation on [Margold's] strategy that seemed to have all of its advantages and few of its problems. The black attack ought to begin in the area where the whites were most vulnerable and least likely to respond with anger. That segregation had produced blatantly discriminatory and unequal school systems, Houston calculated, was most obvious at the level of graduate and professional schools: aside from Howard itself and Meharry Medical College in Nashville, there were *no* graduate or professional schools at any black college in the South. A Negro in Georgia or South Carolina who wanted to become a lawyer or doctor or architect or engineer or biochemist would have to travel hundreds or thousands of miles from home and undergo heavy financial privation to obtain a training available to whites within their home state. Here was an area where the educational facilities for blacks were neither separate nor equal but non-existent. The Supreme Court, unyielding as it had been on the education question, would have trouble turning its back on so plain a discrimination and denial of equal protection. . . . The point now was to establish a real beachhead. If graduate schools were peaceably desegregated, then the NAACP could turn to undergraduate colleges. And then secondary schools. And grade schools. Each new gain would help the advance to the next stage.

Id. at 136-37.

166. Kluger explains, for example, that Thurgood Marshall, a former student of Houston's, did the groundwork and drafted the pleadings for the first case in the campaign, Maryland v. Murray, 182 A. 590 (1936). Kluger, *supra* note 165, at 189. In this case, "an ideal [plaintiff]—Donald Gaines Murray, a twenty-year-old Baltimore resident who had graduated from Amherst," "[a] well-qualified, nice-looking fellow from a prominent black family," challenged his rejection from the University of Maryland Law School. *Id.* at 187.

167. 305 U.S. 337 (1938).

168. 332 U.S. 631 (1948). In *Sipuel,* the Court held that the State of Oklahoma must provide an equal legal education to a black woman denied admission to the only state law school due to her race. *Id.* at 632-33. The Court denied relief in Sipuel's subsequent constitutional challenge to the adequacy of Oklahoma's hastily created black-only law school. Fisher v. Hurst, 333 U.S. 147, 150-51 (1948); *see* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958,* 68 GEO. L.J. 1, 6-9 (1979).

169. *Gaines,* 305 U.S. at 352; *Sipuel,* 332 U.S. at 632-33. The *Gaines* court rejected the State of Missouri's argument that it had met its equal protection obligation by offering Mr. Gaines scholarship assistance to attend an out-of-state law school that admitted black students. *Gaines,* 305 U.S. at 348-50. After the victory in *Gaines,* Missouri appropriated the necessary funds to create a black law school. While the NAACP thought the law school inferior in many respects and hoped to challenge its constitutionality in a successive suit, the prospective law student—Mr. Gaines—disappeared without a trace. *See* Lucile H. Bluford, *The Lloyd Gaines Story,* 32 J. EDUC. SOC. 242, 245-46 (1959).

170. 333 U.S. 147 (1948).

171. 339 U.S. 629 (1950).

could not meet its constitutional obligation under *Gaines* and *Sipuel* by creating a separate law school for qualified black students that lacked the resources and prestige associated with the University of Texas Law School.[172] Finally, in *McLaurin v. Oklahoma State Regents,*[173] the Court held that the University of Oklahoma Department of Education, which following a District Court decision had admitted a black man, had nonetheless violated his equal protection rights in physically separating him within the relevant classroom, library, and cafeteria.[174] With these precedents in place, each arguably distinguishable from *Plessy* but with the effect of chipping away at the margins of *Plessy,* the NAACP had successfully set the stage for a frontal attack on the *Plessy* separate but equal doctrine, in *Brown v. Board of Education.*[175] Without having eroded *Plessy* in this manner, a direct frontal assault upon *Plessy* would almost certainly have failed.

While this story is perhaps the most well-known instance of deliberate litigant path manipulation, it is by no means unique. It should not be surprising, for example, that womens' rights advocates, including Justice Ruth Bader Ginsburg, adopted a nearly identical strategy in their ultimately successful efforts to afford women a version of heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. They, too, chose to chip away at a series of cases denying Fourteenth Amendment equal protection rights to women, resulting in what is now known as intermediate scrutiny for gender classifications.[176] Most recently, *Gregory v. Ashcroft,*[177]

172. *Id.* at 633-35.

173. 339 U.S. 637 (1950).

174. *Id.* at 640-42.

175. 347 U.S. 483 (1954).

176. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976) (Ginsburg on brief for ACLU as amicus curiae); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Ginsburg argued for appellee); Frontiero v. Richardson, 411 U.S. 677 (1973) (Ginsburg argued for ACLU as amicus curiae); Reed v. Reed, 404 U.S. 71 (1971) (Ginsburg on brief for appellant). During an earlier period, New Deal Democrats appointed to the Supreme Court employed a similar process to chip away from the inside at a series of cases that substantially restricted federal Commerce Clause power. Ultimately, in Wickard v. Filburn, 317 U.S. 111 (1942), the Supreme Court adopted precisely the same argument to sustain a federal statute on Commerce Clause grounds against a Tenth Amendment challenge that it had expressly rejected in Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936) (positing that indirect effect on interstate commerce "does not become direct by multiplying the tonnage"). The Court chipped away at the margins of *Carter* in such cases as NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 27 (1937) (allowing Congress to regulate manufacturing in context in which regulated works could "be likened to the heart of a self-contained, highly integrated body" that stretched limbs, arteries, and veins across multiple states), and United States v. Darby, 312 U.S. 100, 124 (1941) (extrapolating from various cases that Tenth Amendment states "but a truism," and thus imposed no independent limits on Congress's Commerce Clause powers). Only by chipping away at *Carter* in this way did the Court lay the groundwork for *Wickard,* a case that adopted the precise multiplier analysis to reach an effect on interstate commerce that the *Carter* Court had expressly rejected. *See Wickard,* 317 U.S. at 127-28: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

177. 501 U.S. 452 (1991).

New York v. United States,[178] and *United States v. Lopez*[179] appear to represent efforts by conservative interest groups and sympathetic Supreme Court justices to chip away at the margins of *Garcia v. San Antonio Metropolitan Transit Authority,*[180] with the ultimate objective of restoring *National League of Cities v. Usery,*[181] where previous frontal attacks would likely have failed.

An obvious question remains: If the process of manipulating the order, or path, in which cases are presented in an effort to shape the substantive evolution of legal doctrine is not new, and if standing operates to ameliorate such manipulation, why did the standing doctrine begin to take its present form only in the 1970s? After providing a more formal introduction to social choice theory, including Arrow's Theorem, the remainder of this Article will answer this question.[182]

C. *Arrow's Theorem, Unipeaked Preferences, and the Power of Inertia*

The modern theory of social choice largely began with Kenneth Arrow's path-breaking book, *Social Choice and Individual Values,*[183] for which he received the Nobel Prize in economics. Arrow had initially set out to devise a social welfare function to be used for central planning and, instead, proved the task impossible. While Arrow was initially unfamiliar with the Marquis de Condorcet's writings in social choice, what Arrow proved can be best understood as a generalization of the Condorcet Paradox.[184] Arrow's Theorem proves that in the absence of a Condorcet winner, any decisional rule that ensures rationality will undermine at least one of the five critical assumptions commonly associated with the notion of majority rule. While I have already introduced several of the Arrow's Theorem assumptions and the tension that the theorem reveals,[185] the following formal introduction to the Arrow's Theorem fairness criteria will summarize much of the previous discussion and lay the foundation for the remaining standing analysis.

Arrow's Theorem proves that no collective decisionmaking body required to aggregate three or more ordinally ranked sets of individual preferences, each of which satisfies the transitivity criterion, can ensure that the resulting collective ordering will be transitive and will comply with five modest assumptions associated with fair collective decisionmaking

178. 505 U.S. 144 (1992).

179. 115 S. Ct. 1624 (1995).

180. 469 U.S. 528 (1985).

181. 426 U.S. 833 (1976).

182. The companion article, Stearns, *supra* note 5, will then provide a detailed empirical study of the history of standing and the modern standing case law to demonstrate that the evolutionary theory parallels the historical evolution of standing.

183. ARROW, *supra* note 75.

184. *See* RIKER, *supra* note 82, at 116.

185. *See supra* notes 152-161 and accompanying text.

processes.[186] The Condorcet Paradox demonstrates the impossibility of ensuring that individually transitive preferences, when aggregated, will produce a transitive collective ordering. Arrow's Theorem proves that any mechanism designed to ensure collective transitivity, which social choice scholars refer to as rationality, will undermine some other equally basic assumption associated with majority rule. The Arrovian definition of rationality, as suggested above, is quite simple: For any set of individual preferences that satisfy the transitivity condition, the body must, in aggregating those preferences, ensure that the collective outcome also satisfies the transitivity criterion. While not stated as a formal assumption, individual rationality, or transitivity, is also assumed. The five assumptions, at least one of which must be violated to guarantee Arrovian rationality, range, universal domain, unanimity, independence of irrelevant alternatives, and nondictatorship, are defined and tied into the preceding analysis below.[187]

1. Range

Range requires that each participant in a collective decisionmaking body be permitted to choose from all available options. Range is closely related to majority rule because when range is restricted, someone must decide which options are off limits; the person given that authority will inevitably possess disproportionate power. We have already seen one important mechanism for limiting range. A prohibition on reconsideration of rejected motions, because it ensures that one less pairwise vote will be taken than the number of available options, denies participants full range. In the Supreme Court, for example, the stare decisis doctrine, which presumptively operates as a prohibition on rejected motions, has the effect of excluding from the justices' permissible range those options that were rejected in prior binding precedents. The following example, based upon the taxpayer hypothetical, will illustrate.

Assume that *Frothingham, Flast,* and *Valley Forge* have each been decided and that the Supreme Court has granted certiorari in our hypothetical case presenting the two standing sub-issues: (1) did *Valley Forge* overrule *Flast;* and (2) if not, does plaintiff, challenging the exemption of the capital gains tax benefitting a church, satisfy the *Flast* nexus test. This time, however, assume that the Supreme Court votes only on the question whether to reverse and does not vote separately on each sub-issue. Assume also that the Court holds that plaintiff lacks standing. Now consider a future federal court faced with a case presenting the question whether a plaintiff challenging the tax deduction taken by a church for a capital loss

186. For a definition of Arrovian fairness, see *id.*

187. I have previously offered more generalized definitions of these terms than I will offer here. *See* Stearns, *supra* note 4, at 1247-52. The definitions that follow will be more specifically drawn toward the subject matter of stare decisis, standing, and other legal doctrines necessary for the analysis to follow.

resulting after the sale of a building violates *Flast.* The lower federal court, based upon the most recent Supreme Court taxpayer standing case, has full range to construe that decision as either (1) holding that *Valley Forge* overruled *Flast,* in which case plaintiff lacks standing; or (2) holding that *Flast* remains good law but that a similarly situated plaintiff fails to satisfy the *Flast* taxpayer nexus test, in which case it must decide whether the present case is distinguishable.

If we slightly alter the hypothetical, we see the effect of stare decisis on range. Assume this time that after the Supreme Court denies the taxpayer plaintiff standing without resolving either of the two standing subissues, it grants certiorari in a new taxpayer standing case that presents another opportunity to decide whether *Valley Forge* overruled *Flast.* This time the Court holds that *Flast* remains good law. Assume that the lower federal court is presented with the capital loss case after this second Supreme Court decision. This time, the lower federal court's range is restricted. Based upon the second Supreme Court ruling, it no longer has authority to construe the first case as a rejection of *Flast.* But, because plaintiff in the first case was denied standing, the court must construe that case as relying upon the only remaining basis, namely that plaintiff failed to satisfy the *Flast* taxpayer nexus test.[188] As a result, it must confront directly the issue whether the present case is distinguishable from the first recent Supreme Court taxpayer standing case.

When faced with non-Condorcet-producing preferences, unlimited range prevents the collective decisionmaking body from ensuring an outcome. Rules restricting range, like stare decisis, enable the collective decisionmaking body to ensure that in any given instance, it can achieve a collective outcome, but, at the same time, such rules prevent it from ensuring that any given outcome will satisfy the Arrovian rationality condition. That is because in the absence of a Condorcet winner, for any given outcome, there is always a present alternative favored by a majority of the Court.

Limitations on reconsideration also require that some participant be vested with the authority to control the decisionmaking path. The person who controls the path has full power to control the outcome, which again defies our common understanding of majority rule. In appellate courts, including the Supreme Court, such devices as the rule of four, governing the grant or denial of petitions for writ of certiorari, and opinion assignments provide some form of agenda-setting authority in a minority of the Court's justices. More importantly, litigants have substantial control over the path with which issues are presented to appellate courts, including the

188. The analysis further demonstrates that appellate courts are charged not only with the power to decide substantive rules of law, presented in appropriate cases, which are binding on lower courts, but also with the power to determine the stare decisis effect, or limitation on range, of their prior substantive holdings.

Supreme Court, for resolution. Standing significantly reduces, but does not eliminate, the extent to which litigants can shape legal doctrine by controlling the path of issue presentation. The Article III case or controversy requirement, as construed in standing cases, reduces the unfairness that would result if litigants were provided unfettered power to determine the path with which issues were presented and decided.

2. *Universal Domain*

Universal Domain requires that, regardless of individual rankings, a collective decisionmaking body not hold any aggregate ranking off limits.[189] This assumption is critical to majority rule because without it, the person empowered to determine which aggregations are off limits would have disproportionate power. One obvious way to ensure that individual preferences, when aggregated, satisfy the rationality criterion is to hold off limits that option that would render the group's collective preferences intransitive. Thus, if the group prefers A to B to C but C to A, a restriction on universal domain permitting only outcomes A or B but not C will prevent the intransitivity from being revealed. As between A and B, A wins. But because we have held C off limits to the group as a whole, we have achieved that outcome at the cost of preventing the group from selecting an outcome that it prefers to A.

In the Supreme Court, universal domain holds in the following sense: No collective outcome is held off limits simply because a present majority would prefer an available alternative. This can occur within a single case, as demonstrated by the shifting-majority cases.[190] It can also occur with multiple cases. Thus, in the *Seattle* and *Crawford* cases, we saw that the Court selected the outcome (*Seattle, Crawford*)[191] even though a present majority of the Court's members preferred that the cases be decided consistently, resulting in either (not-*Crawford, Seattle*) or (*Crawford,* not-*Seattle*). Either of the latter outcomes might have resulted had the cases been presented at different times. None of the three potential outcomes, including the actual outcome, is off limits simply because it is irrational in that a present majority of the Court would prefer a different outcome.[192] In short,

189. It is important to distinguish range from universal domain. The former holds that no particular options can be held off-limits to participants; the latter holds that no aggregations can be held off-limits to the group as a whole. As demonstrated below, stare decisis imposes a range restriction, by preventing individual judges who determine that a case under review is governed by an existing precedent from considering whether, in the absence of the precedent, the present case should be decided differently. Universal domain, on the other hand, generally applies in appellate courts, including the Supreme Court. *See infra* notes 190-193 and accompanying text.

190. *See, e.g.,* Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); *see also supra* note 97 and sources cited therein.

191. *See supra* note 102 (describing convention employed in text).

192. This form of irrationality is likely to be even more pronounced in federal circuit courts than in the Supreme Court because those courts, which are generally composed of more than three members, create binding precedents in panels of three judges. As a result, an opinion that is non-Condorcet even

while relaxing universal domain ensures rationality, in the Supreme Court, rationality is subordinated to universal domain. One of the benefits of standing is that it renders more palatable the irrationality that results from the Court's adherence to universal domain.[193] While the individual outcomes might defy rationality, limiting the extent to which any particular litigant can control the Court's decisional path renders the admittedly irrational outcomes seemingly more fair.[194]

3. *Unanimity and Independence of Irrelevant Alternatives*[195]

While unanimity is synonymous with the *Pareto* optimality criterion in welfare economics, this equation of terms can be deceiving. Most of us associate the *Pareto* criterion, which holds that all trades must be made that make at least one person better off and no one worse off, with wealth maximization. In the social choice context, depending upon how we define the relevant group of affected participants, satisfying the unanimity criterion can have a detrimental effect upon wealth maximization.

The *Pareto* criterion is best understood as a definition: When a change from the status quo to an alternate state will benefit at least one person without harming others, the move is said to be *Pareto* superior.[196] While

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for the panel, and with which the remainder of the circuit judges disagree, can still bind an entire circuit. This may explain, in part, why all circuits allow petitions for rehearing en banc. Not surprisingly, such petitions tend to be granted in unusually divisive and politicized cases. En banc reconsideration is of limited value, however, in preventing this form of irrationality because the entire court en banc, no less than any particular three-judge panel, might lack a Condorcet-winning preference. In any event, the percentage of cases in which en banc reconsideration is granted is quite small. Moreover, as suggested above, path dependency within circuits explains why we do not have stare decisis across circuits. Instead, the Court seeks to promote multiple paths—generally referred to as issue percolation—from which to choose. The analysis further explains the Supreme Court's power of docket control. *See supra* notes 127-129 and accompanying text.

193. Stated differently, if universal domain were subordinated to rationality in the Supreme Court, the Court could not ensure a collective outcome in those cases in which it lacked a Condorcet-winning preference because it would cycle.

194. This analysis stands in contrast with that of Easterbrook, *supra* note 33: "The upshot of stare decisis is that . . . everything depends on the fortuitous order of decision. Yet this is plainly unsatisfactory; no sensible theory of constitutional adjudication, interpretive or noninterpretive, allows such happenstance to determine the course of the law." *Id.* at 819-20 (footnote omitted). With respect, while Judge Easterbrook is undoubtedly correct that no substantive constitutional law principles turn outcomes on the order of case presentations, as this Article demonstrates, accepted principles of constitutional process—by which I mean mechanisms for the creation of positive law both in federal courts and in Congress, as distinguished from substantive constitutional law—*do* allow outcomes to turn on the order of case presentation, when necessary, provided that manipulation of the critically important path is minimized. Standing serves to minimize—but not to eliminate—this form of path manipulation. This Article has shown that this result follows in a system of governance grounded in the majoritarian norm. *See also supra* note 138.

195. I am treating these two Arrovian conditions together because they can be viewed in large part as flipsides of the same coin. Revisiting the concept of multipeaked preferences and introducing a variation, unipeaked preferences, will illustrate the significance of these Arrovian criteria for the evolution of standing.

196. A move is said to be *Pareto* optimal when no moves are available that lack distributive effects, meaning that any future move would leave at least one person worse off. For readers familiar with the

the definition contains an almost irrefutable logic[197]—one would be hard pressed to justify preventing moves that satisfy the definition—applications of the criterion, even of the most modest sort associated with welfare economics, turn out to be more difficult. A proper analysis of such applications reveals that the *Pareto* criterion cannot be neutrally applied, meaning that it cannot be applied absent some independent normative framework.

Advocates of free-market orderings, for example, argue that because private transactions are entered into voluntarily, such transactions uniquely benefit at least one participant without harming anyone else, thus creating wealth. This is the most common understanding of the *Pareto* criterion. Of course, voluntary exchange is not unique to private markets. Legislatures, for example, condone and even encourage such practices as logrolling and payoffs, transforming the legislative arena into a form of marketplace.[198] No public choice sophistication is required to recognize the obvious difficulty with labeling the resulting exchanges *Pareto* optimal. While these voluntary exchanges, which notoriously produce pork-barrel benefits to legislative districts at a cost borne by society as a whole, can be said to benefit the participating legislators by increasing their re-election prospects, and their immediate constitutents who receive the pork, those benefitting impose a cost, or negative externality, on the rest of society. In many such cases, the resulting negative externality well exceeds the benefit to constituents. Nonetheless, the logroll is likely to proceed. The loud cries of the few drown the quiet whispers of the many and the deal, along with countless others, proceeds unabated. This now-common insight, which lies at the core of public choice theory, at the very least explains why such proposals as term limits, the item veto, and germaneness rules have continued to gain support in recent decades.[199] Like so-called solutions to the Condorcet Paradox, these solutions are likely to create problems potentially as serious as

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Edgeworth box, the contract curve represents the full set of *Pareto* optimal points. See Stearns, supra note 4, at 1248 n.102 (describing Edgeworth box analysis).

197. The logic is especially irrefutable when the *Pareto* efficiency criterion is contrasted with the Kaldor-Hicks efficiency criterion. Kaldor-Hicks holds a move efficient if the winners gain more than the losers lose, such that aggregate gain is possible if the losers are appropriately compensated. This formulation is often used as a theoretic justification for government regulation, which invariably harms someone. The difficulty with Kaldor-Hicks is that compensation from winner to loser is not required. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13-16 (4th ed. 1992).

198. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 132-33 (1962) (explaining conditions under which legislatures can, through encouraging vote trades, increase payoffs to some participants without harming others, thus satisfying *Pareto* criterion).

199. For example, term limits and the item veto were included as part of the Republican Party's "Contract With America." *See* CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 7-12 (Ed Gillespie & Bob Schellhas eds., 1994).

the ones they purport to solve.[200] In any event, given the inefficiencies that result when legislators roll logs, the question remains how such transactions can be labeled *Pareto* superior.

Legislative trades produce *Pareto* superior outcomes *if* we assume that the relevant universe of persons to consider are legislators. No doubt that sounds like a pure exercise in semantics. And so it is. But, upon closer inspection, we can see that the same semantic exercise underlies the common practice of attaching the label of *Pareto* superior to the outcomes of private market transactions.[201] Consider, for example, the era of economic substantive due process, typified by *Lochner v. New York.*[202] Setting aside the constitutional merits, or lack thereof, of this regime, the economic arguments in favor of the *Lochner* era are quite simple. Because private transactions are, for the most part, alone capable of meeting the *Pareto* criterion, they alone ensure wealth creation.[203] Thus, when the Constitution is construed to protect private orderings from governmental regulation, society benefits overall. But do private orderings ensure *Pareto* superior outcomes?

To preserve such private orderings, the *Lochner* Court *prevented* mutually beneficial exchanges within Congress and state legislatures. The prohibited exchanges, which would have created minimum-wage laws, maximum-hour laws, and the like, would have benefitted each legislative participant by providing benefits, or at least the appearance of benefits, to their constituents,[204] thus enhancing their re-election prospects. From the perspective of participating legislators, the *Lochner* era prevented *Pareto* superior legislative exchanges. Flipping the analysis around, *West Coast Hotel Co. v. Parrish,*[205] which formally ended the *Lochner* era, enabled

200. *See, e.g.,* Stearns, *supra* note 163 (demonstrating that item veto is less likely to reduce the most egregious pork-barrel legislation than it is to provide President with substantial control over direction of legislative policy).

201. The following discussion is based upon my remarks at the Law and Economics Center at George Mason University Law School Conference on RICHARD EPSTEIN, BARGAINING WITH THE STATE (1994) (comments on file with author).

202. 198 U.S. 45 (1905).

203. While welfare economists will agree that some public goods create wealth, those are not the goods with which the argument in the text is concerned. The government must provide those goods, if they are to be provided at all, that individuals will not provide privately because noncontributors cannot be excluded from receiving the benefits. *Cf.* OLSON, *supra* note 46 (describing "free rider" phenomenon). Generally speaking, those seeking to force non-Condorcet preferences into law through the courts are not trying to force the government to provide classic public goods.

204. Economists would argue, with considerable force, that minimum-wage laws prevent individuals whose marginal product is lower than the statutory minimum wage from securing employment, at least through lawful means, thus harming the very individuals the law is intended to benefit, namely, those at the bottom of the pay scale. The prevalence of such laws demonstrates nonetheless that, whether or not ill-conceived, they have majority, or at least substantial minority, support in Congress. By delivering these laws to constituents who favor them, members of Congress increase their re-election prospects among those who do not share the foregoing economic intuition, who may well be a majority.

205. 300 U.S. 379 (1937).

legislatures to enact minimum-wage laws for women, thus preventing certain private market transactions which, because they are voluntarily undertaken, are assumed to create wealth. Because the *West Coast Hotel* regime prevented wealth-creating private transactions, one might be inclined to label it *Pareto* inferior. But, we need to remember that in allowing legislatures to prevent some mutually beneficial private transactions, *West Coast Hotel allowed* some mutually beneficial legislative transactions, thus allowing legislators, and their constituents, to maximize their utility in the legislative process.

If we view the legislature and the private marketplace as two competing markets, it is immediately apparent that when *Pareto* optimality is guaranteed in one of those markets, it is inevitably prevented in the other. This works in both directions. Economic regulation prohibits seemingly *Pareto* superior private transactions and laissez-faire prohibits seemingly *Pareto* superior legislative transactions.[206] Although I am personally sympathetic to those who favor private orderings, my point is not to defend either regime against the other. Instead, I am simply demonstrating that any application of the *Pareto* criterion, even of the traditional sort used in welfare economics, is inevitably premised upon a normative baseline that is independent of the *Pareto* criterion itself.[207]

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206. Some critics of the law and economics movement have argued that by subordinating all concerns, including fairness, to efficiency, the movement has generated scholarship that is either immoral or, at best, amoral. *See supra* notes 152-160 and accompanying text; *accord* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets The Real World,* 24 GA. L. REV. 583, 583 (1990) ("'Law and economics' has been hailed by its supporters as the only intellectually valid means for analyzing legal issues. Its critics have dismissed law and economics as amoral and biased against the poor.") (footnote omitted); J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law,* 87 COLUM. L. REV. 1447, 1449 (1987) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987)) (observing that "[m]any commentators have attacked the authors' wealth maximization criterion as immoral, inconsistent with sound economic practice, and the product of a reactionary sensibility," and listing sources).

In fact, however, social choice reveals the critical role that fairness, even at the expense of efficiency, plays in a proper economic analysis of governmental collective decisionmaking bodies. Thus, for example, a libertarian regime imposed by dictatorial fiat, rather than by majority rule, would defy fundamental notions of fairness, by violating such Arrovian criteria as nondictatorship, range, and universal domain, no less than would a communist regime imposed in the same manner. A hybrid economic system, while falling short of a pure libertarian ideal, nonetheless can claim a legitimate foundation in economic theory. A free-market economic system infused with a limited redistribution of wealth, for example, while arguably impure, may well be the least bad alternative that emerges from many a "fair" electoral process. Social choice thus reveals that if a purer notion of laissez-faire capitalism associated with welfare economics does not emerge from a system of government founded upon democratic or republican ideals, the only two available options are, first, to subordinate the ideal of meaningful electoral participation; and, second, to subordinate the ideal of economic efficiency. The critical point is that nothing within positive economic theory itself edifies that choice. Notwithstanding my own sympathies for private orderings, I would suggest that the lessons of history demonstrate that modest limitations on efficiency are a reasonable price to pay for a fairer system of government.

207. Einer Elhauge has made a similar argument in evaluating the claims of those who argue that public choice theory counsels against undue interest group involvement in the political process. *See generally* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?,* 101

I have previously argued that legislatures, including Congress, are relatively superior to appellate courts, including the Supreme Court, at achieving Arrovian unanimity, because unlike legislators, who engage in vote trading, judges are assumed to vote in a principled manner.[208] The preceding analysis provides substantial support for this fundamental difference between courts and legislatures. Condorcet-producing rules are incapable of ensuring a collective outcome in all cases, namely those in which there is

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YALE L.J. 31 (1991) (positing that any arguments against undue interest group influence in legislative processes based upon public choice theory are inevitably premised upon an independent normative baseline concerning the appropriate extent of interest group involvement). In fact, the critical insight that underlies both the argument in the text and Professor Elhauge's argument is rather old. In his famous 1931 paper, "On Formally Undecidable Propositions in *Principia Mathematica* and Related Systems I," Kurt Gödel proved that no system of logic sufficiently complex to be capable of self-description can be both internally consistent and complete. For a highly acclaimed introduction to Gödel's Theorem and its implications, see DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 17-19 (1979); *see also* John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics,* 90 MICH. L. REV. 992 (1992) (exploring implications of Gödel's Theorem for legal reasoning); Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics,* 43 HASTINGS L.J. 1439 (1992) (same).

While Gödel intended his theorem to apply only to mathematical systems of logic, Allonzo Church and Alfred Tarski demonstrated that the theorem can be generalized to all systems of logic. *See* J. BRONOWSKI, THE IDENTITY OF MAN 122, 124 (rev. ed. 1971). Stated differently, any system that achieves internal consistency assumes at least one unprovable proposition or axiom. In this context, any system that purports to demonstrate the manner in which utility or wealth maximization is best achieved, based upon the *Pareto* criterion, rests upon an unproven proposition about the relevant universe of affected individuals. Those who favor the *West Coast Hotel* regime assert, without proof, that the relevant universe of affected individuals are participants in the legislative marketplace and their respective constituents, whose utilities are diminished with a constitutionally protected right to contract and own property free of prospective governmental interference; those who favor the *Lochner* regime, in contrast, assert, without proof, that the relevant universe of affected individuals are participants in the private marketplace, whose abilities to create wealth are diminished with prospective governmental regulation of contract and property. That insight does not mean that all normative assertions are of equal merit. Instead, it simply means that the justifications for those normative assertions must be derived from outside the formal logical system in which they operate as assumptions.

One anomaly associated with Gödel's Theorem is the impossibility of proving or disproving certain self-referential statements, for example, Epimenides' statement that "all Cretans are liars." Since Epimenides was a Cretan, the statement, if true, is false. *Accord* Rogers & Molzon, *supra* at 994. The assertion by Justice Douglas that "[g]eneralizations about standing to sue are largely worthless as such" falls into this category. *See* Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 151 (1970). The anomaly is removed by distinguishing language from meta-language. The statement works well as a straightforward sentence. The problem is that the sentence itself, if viewed as a generalization about standing, is then self-contradictory, much like the Epimenides paradox. If the statement is true, then it is no longer true that generalizations about standing are worthless as such, but, on the other hand, if the statement is false and generalizations about standing are valuable, then presumably this generalization should be true. This anomaly, which results from conflating language and meta-language, renders the statement ironic. The statement is not self-contradictory *if* it is viewed not as a generalization about standing, but rather as a generalization *about generalizations* about standing. Such generalizations may be valuable at the same time that generalizations about standing are valueless.

208. Recall that the principled voting criterion is not a normative assessment of the bases upon which judges cast their votes. By principled voting, I do not mean to cast any value judgment about one set of operating principles or another. Instead, principled voting simply requires adherence to the judge's previously ranked ordinal preferences in relevant pairwise votes. *See supra* note 113 and accompanying text.

no Condorcet winner. As a result, courts employ decisional rules that mask the existence of a cycle. The doctrine of stare decisis serves that function by ensuring that for *n* issues, the court will take at most *n minus 1* votes, one vote short of the number needed to reveal a cycle. But that formal voting rule, as we have seen, is alone insufficient to prevent the decisional indeterminacy that can result when preferences cycle. Thus, if we relax the principled-voting assumption, which in formal Arrovian terms is labeled Independence of Irrelevant Alternatives, and permit judges to vote strategically or to trade votes, stare decisis is no longer adequate to the task of preventing the requisite number of iterations to reveal cyclical preferences. By operating outside the formal voting process, strategic voting and logrolling will allow more than *n minus 1* iterations for *n* options. Thus, even with stare decisis in place, a regime that condones strategic voting and vote trading is insufficient to ensure the absence of a decisional impasse in appellate courts.

We can infer, then, that the stare decisis limitation on the requisite number of votes to reveal a cycle can only succeed if judges engage in principled voting, meaning that they generally adhere to their stated ordinal rankings. We can also infer that certain practices evolved in appellate courts to facilitate this process. The most obvious of such processes is opinion writing and publication. Social choice reveals that published opinions serve several important functions. First, requiring judges to state the reasons, or to sign onto reasons stated by a colleague, for casting a vote in a particular case, whether in the majority, concurrence, or dissent, commits judges to a form of codified ordinal rankings, albeit in piecemeal fashion.[209] Opinion writing thus makes it more difficult for judges to hide their ordinal preferences in an effort to vote strategically in the future.[210]

Second, while judges are not formally prohibited from abandoning their previously stated ordinally-ranked preferences, published opinions greatly increase the cost of doing so. Published opinions provide a ready means for colleagues on the bench, practitioners, and academics to impose reputational costs upon those judges who fail to vote in accordance with their own stated principles.[211]

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209. As demonstrated below, this satisfies Arrovian Independence, *see infra* notes 210-212 and accompanying text, by ensuring that judges choose the best alternative from the actual options based upon a set of principles, rather than based upon agenda considerations.

210. This may also explain why many legal opinions, especially those associated with constitutional law, tend to be written in an attenuated, nonintuitive, and cryptic manner. The strained—or pretzel—logic that underlies many written Supreme Court opinions may represent the justice's attempt to avoid revealing all of his or her ordinally ranked preferences, which actually led to the vote in question, in an effort to preserve some leeway to depart from true ordinally ranked preferences in future cases. The more candid the opinion, the more restrictive it may be for future decisionmaking. Of course, twisted reasoning in one period can create unintended constraints in future periods.

211. Not surprisingly, opinion writing also imposes a cost. Specifically, it provides substantial information about the ordinal rankings of particular judges to those non-Condorcet minorities who are seeking to affect the substantive evolution of legal doctrine through path manipulation.

In short, appellate court decisional rules have evolved in a manner that is consistent with both principled voting and a no-reconsideration rule. This combination substantially diminishes the ability of judges to engage in the requisite number of iterations to reveal cycles both *within* the formal voting process *and outside* the formal voting process. Both limitations are essential to preventing hidden cycles from being revealed that could lead the Supreme Court to a decisional impasse in a given case or over a series of cases. At the same time, however, this combination promotes path dependency and provides substantial information contributing to opportunities for litigant path manipulation. While no rule can prevent the resulting path dependency, a rule that reduces the opportunities for strategic path manipulation by litigants renders any resulting irrationality more fair.[212] Standing serves that function.

In contrast with judicial voting practices, legislative voting practices have not evolved in a manner that requires legislators either to state their ordinal preferences or to adhere to any such preferences that they have stated.[213] Simply put, principled voting is not part of a legislator's job description. Instead, legislatures condone both vote trading and strategic voting. Both practices can result in the requisite number of iterations to reveal cycles, whatever the formal voting rules happen to be. William Riker has argued that congressional voting rules limiting the number of votes relative to the number of pending motions may prevent the requisite number of iterations to reveal a cycle.[214] Resulting outcomes, Riker maintains, might therefore be preferred by only a minority of participants.[215] The foregoing analysis reveals the flaw in Professor Riker's argument. While it is true that a formal voting process with a no-reconsideration rule prevents the necessary number of votes relative to the number of options to reveal the presence of a cycle, even with such a rule in place members of Congress can engage in the sufficient number of iterations to reveal cycles outside the formal voting process.[216] The question remains, however, whether the legislature's ability to circumvent its own internal operating rules in this manner, thus perpetuating institutional inertia in the face of a

212. *See supra* notes 152-160 and accompanying text (defining fairness).

213. For an example that illustrates the difference between the restraining use of dictum in judicial opinions and the nonrestraining use of statements made on the floor of Congress, see Stearns, *supra* note 4, at 1259 n.153 (describing exchange between Senators Hatch and Biden during confirmation hearings on Justice Ruth Bader Ginsburg).

214. Riker, *supra* note 30, at 355-56.

215. *Id.* at 355-56. Riker further observes that if the rule were amended to permit the requisite number of votes to reveal a cycle, no voting mechanism is available to resolve the resulting intransitivity. *Id.* at 364.

216. In a sense, this creates a quasi-market solution to the problem posed by a regulatory no-reconsideration rule. In contrast, judicial opinion writing largely prevents such a quasi-market solution to a judicial no-reconsideration rule, which would be damaging because it might prevent collective outcomes. In that sense, Congress enhances its collective rationality by employing strategic voting while the Supreme Court subordinates its collective rationality to its obligation to decide cases under review.

rule apparently designed to overcome institutional inertia, is a good thing. I would suggest that it is.[217]

To illustrate, we need to reintroduce the social choice concept of multipeaked preferences and introduce a third variation, collective preferences that are unipeaked.[218] Table 3 illustrates the discussion to follow. Consider a three-person legislature trying to allocate a sum of money for a beach reclamation project. Assume that the state has three bids. The lowest bid is $100,000; the next bid is $200,000; and the highest bid is $300,000. The legislators agree that all three bids are fair, the differences in price representing differences in the quality of restoration. The legislators also agree that the state should fund the project, but disagree as to the amount of funding, and thus as to which bidder should perform the job. Allen would like to allocate the most, $300,000. Carla would like to allocate the least, $100,000. Finally, Bart would like to split the difference, allocating $200,000. Each legislator is represented on the vertical axis and each allocation is represented on the horizontal axis of Table 3.

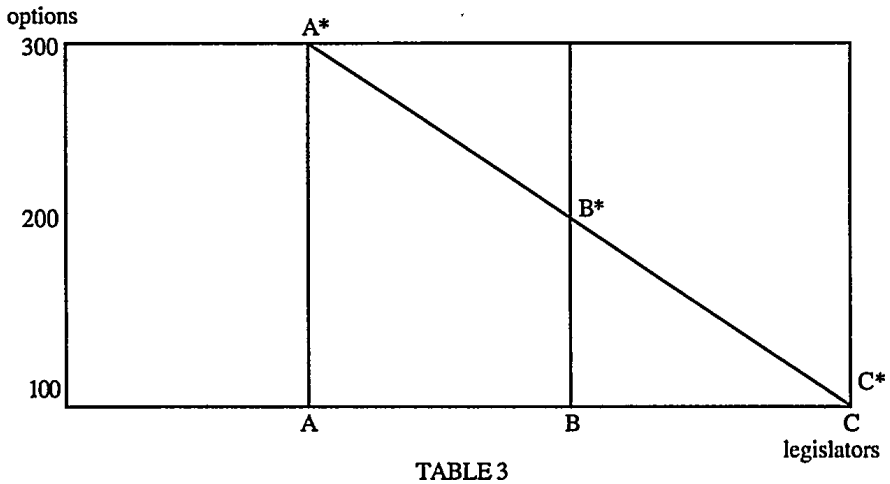

TABLE 3

Now assume that the legislature permits only two votes for three options. Because of this limitation, someone must be given agenda-setting power. In fact, voting on incremental allocations is not uncommon in par-

217. Because standing is intended to preserve Congress' power to choose Condorcet winners in the future and to remain inert in the absence of Condorcet winners, this analysis, which demonstrates the power of Congress to remain inert absent a Condorcet winner, even in the face of a seemingly contrary formal voting rule, is crucial in analyzing the standing doctrine.

218. Recall that we saw two variations of multipeaked preferences, those leading to a cycle in the absence of a Condorcet winner, *see* Table 1, *supra* part I.A; and those leading to a stable equilibrium in the presence of a Condorcet winner, *see* Table 2, *supra* part I.A. Unipeaked preferences can exist with a single curve, as in Table 3, *infra,* or with two curves, if for example a shorter curve descended from the peak, A*, downward to the left, until it intersected with the left wall. But either way, the collective decisionmaking body whose preferences have a single peak, can achieve a stable and rational outcome.

liamentary bodies.[219] Assume, therefore, that the legislature has adopted the following convention: When faced with discrete incremental voting, the agenda setter must either start at the lowest allocation and proceed up or at the highest allocation and proceed down. Thus, if Carla is the agenda setter, she can choose to begin by proposing $100,000 and then proposing $200,000. If Allen is the agenda setter, he can do the opposite, beginning with $300,000, and then proposing $200,000. In fact, with the off-the-rack rule in place, agenda-setting power is of no value. That is because the legislative preferences are unipeaked. When collective preferences are unipeaked, the choice of top-down or bottom-up voting turns out not to matter.[220] Each additional increment adds one more vote until a majority is formed at $200,000. Thus, in Table 2, as the group moves toward position B*, from either A* or C*, a stable majority is formed.

But what if the off-the-rack rule requiring top-down or bottom-up voting were not in place? Agenda-setting power would then appear to matter a lot. For example, if Allen, who wanted to allocate the most, began by proposing $100,000, which would secure only Carla's vote, and then proposed $300,000, Bart would be forced to choose between voting against funding altogether or voting for a larger appropriation than he intended. The result might be $300,000, even though only Allen prefers that result. Similarly, Carla could create the opposite result by proposing $300,000, which gains only Allen's vote, then $100,000, forcing Bart to choose between no funding or minimal funding. Neither of these outcomes is rational compared with the $200,000 outcome, with the bottom-up or top-down voting rule in place. Professor Riker's analysis suggests that such an irrational result could occur if the legislature employs a no-reconsideration rule. In fact, however, that result might not follow.

If strategic voting and vote trading are permitted, the stable result with unipeaked preferences is $200,000 even with the maximum two-vote rule. Reconsider what happens if Allen, who prefers the maximum allocation, were the agenda setter. Bart can inform Allen that if he creates the decisional path (1) $100,000, (2) $300,000, Bart will derail Allen's plans by voting with Carla for $100,000, representing Allen's last choice. Alternatively, Bart will propose that both can be made better off if Allen creates either the decisional path (1) $100,000, (2) $200,000 *or* (1) $300,000, (2) $200,000, in which case he will wait until the second option to cast his ballot, creating a stable outcome at $200,000. The same result holds if Carla is given agenda control. Bart can inform Carla that if she creates the decisional path (1) $300,000, (2) $100,000, he will derail her plans by voting for $300,000, representing her last choice. Again, both can be made better off if Carla creates either of the two decisional paths, each

219. *See* Levmore, *Parliamentary Law*, *supra* note 30, at 973-1004 (describing evolution of voting rules to resolve unipeaked allocations).

220. *See id.* at 985-87 & n.47, 1001-03 (describing operation of top-down or bottom-up voting).

leading to the same outcome, $200,000, that Bart proposed to Allen. Thus, even with a potentially irrational decisional rule, strategic voting, which operates as a quasi-market solution to the problems that the rule poses, allows the legislators to achieve a stable and rational outcome.

Unipeaked preferences imply that the participants, even if they do not agree on the specific allocations, do agree on the relevant issue: How much money should be allocated for this project? As William Riker explains: "This kind of agreement is precisely what is lacking in a cycle, where voters disagree not only about the merits of alternatives but even about where alternatives are on the political dimension."[221] Thus, whether through formal or informal means, Allen, Bart, and Carla can achieve a rational consensus. If Allen, who wants to allocate $300,000, approaches Bart, who wants to allocate $200,000, the two will agree to form a coalition to allocate $200,000. Similarly, if Carla, who wants to allocate $100,000, approaches Bart, the two will reach the same result. The result is stable either way because there is no alternative coalition that can improve its lot by defecting from the resulting $200,000 outcome.

The above analysis suggests that the choice of formal decisional rule does not matter when preferences are unipeaked, provided that vote trading is permitted. On the other hand, as illustrated in the discussion of vote trading on the Supreme Court in the absence of a Condorcet-winning preference, allowing vote trading can prevent an outcome when preferences are multipeaked, even if a formal no-reconsideration rule is in place. If vote trading is permitted, the relevant group's members will discover that their collective preferences cycle, either through formal or informal means.

But when the legislature reaches an impasse, through whatever means, that body, unlike an appellate court, has the authority to do nothing and thus to default to the status quo. Indeed, because legislatures, unlike courts, are not subject to the constraint of having to resolve all issues presented in the form of a bill, their ability to identify cycles enhances their collective rationality. By trading votes and voting strategically, legislators can identify cyclical preferences. And once those preferences are revealed, by whatever means, legislators, unlike judges, have an institutional means with which to prevent a collective institutional outcome. Inertia, of course, simply preserves the status quo. But because the status quo may represent a previously successful Condorcet winner, which only a legislative minority now seeks to supplant, that result may be entirely rational and appropriate.

Perhaps the most critical distinction between courts and legislatures lies in the fact that legislatures, unlike courts, are capable of achieving a form of collective rationality even when faced with multiple sets of multipeaked preferences. That is because legislatures condone the vote trades that enable legislators to cardinalize, rather than merely to rank ordinally,

221. RIKER, *supra* note 82, at 128.

the preferences that produce multipeakedness.[222] For that reason, when evaluating legislative preferences, one cannot look at a single bill, or issue, in isolation.[223] Once we recognize that not all legislators care equally about each ordinal ranking, we can infer that some vote trades can achieve or at least approach unanimity even while thwarting the Condorcet criterion. Thus, by voting across bills, legislators can rationally trade support for each other's most important bills, thus creating the necessary majorities for bills that, based upon ordinal rankings alone, would not pass.[224]

The above distinctions between courts and legislatures are critical to the evolution of the modern standing doctrine. Because courts, unlike legislatures, lack the institutional structures with which to identify non-Condorcet preferences and to default to the status quo when faced with a cycle, litigants who are displeased with legislative inertia have a strong incentive to attempt to force a non-Condorcet preference into law through the courts.[225] Stated differently, the inability of courts to default to the status quo when faced with preferences that cycle provides litigants with an opportunity, through litigation, to shift the burden of legislative inertia. But as we have seen, for some sets of legislative preferences, inertia may well be the most rational, or least bad, alternative. Moreover, allowing non-Condorcet minorities to force creation of positive law in the federal courts thwarts the Arrovian sense of fairness, which is premised upon a majoritarian norm. As demonstrated above, two unique features of judicial decisionmaking serve to exacerbate litigants' incentive to upset legislative inertia. First, albeit in stylized and piecemeal fashion, judges precommit to a form of ordinally ranked preferences through their written opinions. Second, the doctrine of stare decisis, which limits the number of votes relative to the number of options, creates substantial opportunities for even a minority to force its preferences into law. These two features provide litigants with substantial information about the preferences of sitting appeals court judges, including Supreme Court justices, and further provide an opportunity—although by no means a guarantee—that their preferred judicial minority will prevail. As illustrated in the taxpayer standing and *Seattle/Crawford* hypotheticals, the likelihood of minority success is enhanced when cases are presented in the most favorable order.[226] Unbridled litigant

222. Until now, we have assumed that only ordinal rankings, rather than intensity of preference, control vote trades.

223. *Cf.* Stearns, *supra* note 163, at 422 ("It is through [a] continuous and complex process [of trading votes across numerous bills] that the large number of bills of varying content and length, passed in each session of Congress, take their form.").

224. For two simplified vote trading illustrations, see Stearns, *supra* note 4, at 1278-79, n.223.

225. As demonstrated in Stearns, *supra* note 5 (discussing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)), legislatures themselves, faced with multipeaked preferences on the merits of a given issue, might also have an incentive, revealed by public choice, to force issue resolution in the courts, by creating statutes with broad-based standing provisions.

226. For an example illustrating this proposition, consider the response of unnamed civil rights advocates to the Supreme Court's recent remand of a Louisiana districting case, Louisiana v. Hays, 114

control to force issues for judicial resolution would create opportunities to affect the substantive evolution of legal doctrine on a first-come, first-served basis.[227]

While justices whose preferences are being subordinated to those of a successful minority of the Court cannot prevent path dependency, they can, by limiting the opportunities for litigant path manipulation, minimize its most damaging effects both in the Supreme Court and in the federal circuits, which lack docket control.[228] By ensuring that fortuitous historical events, rather than litigant path manipulation, determine when issues are presented in federal courts, the justices composing a frustrated majority, or even a frustrated minority, can substantially level the playing field for themselves and for society as a whole. At the same time, they preserve for as long as possible, that is, until someone's rights will actually be infringed without a judicial resolution of their asserted rights, the power of the legislature *not* to make law.

The difficulty with even this modest standing formulation is that in declining to make law on the ground that the claimant's rights have not been infringed by the asserted illegal conduct, the Court has effectively ruled that plaintiff has no legal right to prevent that allegedly illegal conduct. Despite the technical nature of the standing determination, that ruling is inevitably substantive, rather than procedural.[229] Recognizing that standing decisions are virtually always substantive rulings, however, begins, rather than ends, the process of analyzing particular rulings on the question of standing. The difficulty is that in all standing cases, the court is not faced with a binary choice whether to make, or not to make, positive law. Instead, in cases that present the question of standing, the Court faces two

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S. Ct. 2731 (1994), which followed the Supreme Court's remand in a similar North Carolina districting case, Shaw v. Reno, 113 S. Ct. 2816 (1993). The *Washington Post* reported that "[c]ivil rights advocates have described the case in North Carolina as stronger and said they prefer it to be the first to reach the Supreme Court." Kenneth J. Cooper, *High Court Sends Back Redistricting: Panel to Review New Louisiana Map,* WASH. POST, June 28, 1994, at A10.

227. For a discussion of why the Supreme Court's power of certiorari is consistent with this thesis, see *supra* notes 127-129 and accompanying text.

228. *See supra* notes 127-129 and accompanying text.

229. As Professor Fletcher has demonstrated, all standing rules can be translated into substantive, rather than procedural, legal rulings. *See* Fletcher, *supra* note 3, at 234-39. But, as demonstrated more fully below, that insight does not necessarily render such substantive rulings unjustified. Thus, for example, while the denial of third-party standing can be translated into a presumptive substantive legal rule that individuals lack the right to enforce the rights of others, crafting that substantive rule might be preferable to a contrary rule that permits ideological litigants, simply by locating affected individuals who are sitting on their rights, to manipulate the path of legal decisions. In fact, all three general standing categories, each of which is a substantive legal rule—(1) no right to enforce the rights of others, (2) no right to prevent diffuse harms, and (3) no right to an undistorted market—serve the essential purpose explained in the text, of preventing litigant path manipulation. *See also* Stearns, *supra* note 5. They do so by ensuring that a substantial fortuitous event, with serious consequences for an affected individual absent a judicial determination on the merits of the underlying claim, is a precondition to supplanting legislative inertia with a judicially crafted, and potentially non-Condorcet, rule.

options. The Court can grant standing and make positive law with respect to the underlying legal issue, thus shifting the burden of legislative inertia on that legal question with the attendant risk of codifying a non-Condorcet preference into law. Or it can deny standing and, instead, hold, again as a matter of substantive law, that the claimant has no legal right to prevent the allegedly illegal conduct in question, thereby failing to shift the burden of inertia on the underlying issue. To determine whether a particular standing conferral or denial was warranted, we need to compare these two options to determine which is least bad.[230] That comparison requires, in part, an analysis of which of these alternative substantive rulings is least likely to be the irrational product of codifying cyclical preferences on a multipeaked Court. That, in turn, requires an analysis of whether the case at hand is likely the product of a litigant attempt at path manipulation.

This insight might explain why, notwithstanding that standing denials are substantive rulings, the Court has nonetheless been willing, and sometimes eager, to employ standing. While legislatures can freely supplant precedents that are not dictated by the Constitution, including, for example, many criminal procedure precedents, the mere presence of a Court-crafted legal rule on the underlying substantive issue has three potentially damaging consequences. First, the ruling might thwart a majority's preferences unless and until the legislature acts. Second, by shifting the burden of legislative inertia and codifying a non-Condorcet-winning preference, the ruling might make more difficult, and more costly, the process of bringing about an actual legislative response.[231] Finally, if a particular Court's preferences are multipeaked, majorities and minorities who have been frustrated by congressional silence might increasingly seek to supplant that silence with federal court rulings. Thus, while it is certainly true that standing denials create positive law, it is also true that by preserving Congress's power to act in the future, such rulings might have less serious consequences in the long term than openly reaching underlying issues forced upon the federal judiciary by litigants attempting to manipulate the path, and thus the substance, of legal doctrine. In short, the judicial doctrine of standing preserves the legislative power of sitting.

This insight largely explains why standing assumed its present form—and prominence—beginning in the 1970s.[232] While the Supreme Court

230. For actual case examples illustrating this proposition, see *infra* part III (describing standing cases).

231. Thus, while most of the criminal procedure cases cited in this Article resulted from actual cases requiring judicial resolution, almost none have been supplanted by actual legislation. This result holds even though in Miranda v. Arizona, 384 U.S. 436, 467 (1966), and other cases, the Supreme Court has repeatedly stated that its rulings are consistent with, but not dictated by, the Constitution. Once a gap in the law has been filled, by whatever means, legislators and their constituents rationally move onto the next topic. The result is to leave the status quo, but this time a status quo that was probably never a Condorcet winner to begin with.

232. *See* Stearns, *supra* note 5 (providing detailed historical support for this Article's evolutionary theory of standing).

throughout its history has shifted in its dominant vision of constitutional interpretation, beginning in the 1970s, the Court, for perhaps the first time, has become not only fractionalized, but also multipeaked.[233] This historical fact not only provided litigants with increased incentives to force resolution of divisive policy questions onto the federal courts, but also provided sitting justices, who could no longer ensure that Supreme Court rulings would meaningfully reflect majority, or even Condorcet minority, preferences, with a strong incentive to move the once peripheral doctrine of standing front and center.

4. Nondictatorship

The final Arrovian criterion, nondictatorship, holds that no one participant's preferences can control for the group. One obvious way to guarantee rational outcomes even when faced with non-Condorcet preferences is to impose one person's transitive preferences onto the group as a whole. That rather unfortunate insight may explain the millennia of regimes throughout the world that, although brutal, were undoubtedly rational. But while such regimes might achieve rationality, it is critical to bear in mind just how modest an objective rationality is for governments to achieve. Regimes under the control of even the most eccentric and ruthless dictators in history satisfy the rationality criterion once it is recognized that rationality is not a value judgment about the ruler's preferences. Provided the dictator adheres to his own set of ordinal preferences, however bizarre or cruel and whatever the consequences, a dictatorship will satisfy the Arrovian rationality criterion. While not a social choice scholar, Winston Churchill provided the most poignant response to those advocating limiting electoral participation to solve the inherent problems that democracies pose:

> Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.[234]

Neither Arrow's Theorem, nor the theory of social choice, proves democracy unworkable.[235] Instead, social choice, grounded in Arrow's

233. For a detailed explanation of the Court's historical evolution in this period that resulted from multipeakedness, see Stearns, *supra* note 5, part II.A.

234. Winston Churchill, Speech Before the House of Commons (Nov. 11, 1947), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 150 (3d ed. 1979).

235. *But cf.* Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications,* 80 GEO. L.J. 1787, 1822 (1992) ("Some of those who argue against substantive judicial review of legislative judgments believe democratic rule is inherently desirable. Arrow's Theorem cautions otherwise.") (footnote omitted); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,* 74 VA. L. REV. 275, 283-85 (1988) (arguing that Arrow's Theorem demonstrates that "results achieved under 'democratic' voting rules are arbitrary" in that they may reflect no more than the product of path manipulation and agenda-setting power); Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and*

Theorem, proves that no single institution can function rationally if all of its features are fully democratic and that no single institution can operate fairly if all concerns are subordinated to rationality. Stated differently, social choice demonstrates that rationality cannot be the sole objective of any system of government. Otherwise, it would be quite difficult to explain why people tend to flee dictatorships rather than democracies. If, at some level, social choice trashes both democracy and dictatorship, one might be inclined to ask, "What, then, is the point?" The point is that in analyzing any governmental institution (or for that matter any collective decisionmaking body), one needs to undertake a critical two-step inquiry. First, one needs to analyze critically that institution's democratic and nondemocratic features to determine the institution's functions and limitations. The appropriate gauges, which social choice theory reveals are at odds with one another, are fairness and rationality. Second, one needs to critically analyze the manner in which the institution under review works with other institutions, after analyzing the latter institutions in the same manner, to enhance their collective fairness and rationality.[236]

By employing this methodology, this Article has explained the theoretic evolution of and bases for stare decisis and standing, and the role that those doctrines play in facilitating fair *and* rational cooperation between our most and least majoritarian branches of government, namely Congress and the federal judiciary. While stare decisis, by preventing the requisite number of votes to reveal cycles, renders Supreme Court decisionmaking more rational, standing, by reducing litigant path manipulation, renders the Supreme Court decisionmaking more fair. At the same time, as the next Part demonstrates, by reducing judicial creation of positive law except on an ad hoc and as-needed basis, standing preserves the power of Congress to create, *and not to create,* law as it sees fit. With a job description like that, we ought not to be too surprised that the standing doctrine occasionally becomes confused.

Republican Government, 75 IOWA L. REV. 949, 972 (1990) ("Arrow's theorem is not a constraint on 'distributive' legislation as opposed to 'efficiency' legislation. . . . Arrow's theorem suggests that *all* legislative solutions, whether efficient or otherwise, are inherently unstable and cannot yield determinative social welfare functions."). For a detailed analysis of normative claims by legal scholars based upon social choice theory, not focused on the question of standing, see generally Stearns, *supra* note 4.

236. This summarizes the methodology employed in *The Misguided Renaissance of Social Choice,* in which I used the Arrovian criteria to analyze, then compare, the Supreme Court and Congress in the context of evaluating proposals, based upon social choice, to expand the reach of judicial review. *See* Stearns, *supra* note 4.

II
CONGRESS, THE POWER OF INERTIA, AND CRIMINAL PROCEDURE

A. *Mistretta, Casey,* and the Elusive Distinction Between Adjudication and Legislation

The prior Part explored three phenomena: first, the different evolutionary paths in the formal voting processes of appellate courts and legislatures; second, the different evolutionary paths of informal practices in appellate courts and legislatures that further the objectives of the formal voting rules of those institutions; and, third, the functions that both stare decisis and standing serve in furthering the objectives of those formal and informal processes. The evolutionary analysis offered thus far has assumed, rather than asserted, a normative framework against which to assess the propriety of the exercise of judicial and legislative lawmaking powers. Establishing a normative distinction that demarcates the lawmaking roles of appellate courts, including the Supreme Court, and legislatures, including Congress, is critical to evaluating the function that standing serves. If the Supreme Court and Congress are coterminous in their lawmaking powers, then standing serves no function, since each has full authority to decide any issues of policy, limited only by express constitutional constraint, that it deems fit. In such a regime, justiciability doctrines in general, and standing in particular, which serve as constraints on the judiciary's lawmaking function, would have no place.

The difficulty, as demonstrated below, however, is that positing any normative distinction between Supreme Court and congressional lawmaking functions, proves exceedingly difficult. But, as before, the social choice framework helps in defining, and ultimately in resolving, this task. Relying upon comments that appeared in dictum in two recent Supreme Court decisions that relate to the Supreme Court's lawmaking role, the first by retired Associate Justice Harry Blackmun and the second by Chief Justice William Rehnquist, this Section will define this critical distinction, explain why the Supreme Court itself has become confused in attempting to comprehend and articulate this distinction, and demonstrate the unique function that standing serves in preserving this distinction.

In *Mistretta v. United States,*[237] the Supreme Court rejected a separation-of-powers challenge to the United States Sentencing Commission. Mistretta, who pleaded guilty to conspiracy to distribute cocaine, challenged his sentence imposed under the guidelines. He argued that the statute creating the seven-member independent commission, which is located within the federal judiciary and which includes three Article III judges, violates the separation of powers. Specifically, Mistretta argued that the

237. 488 U.S. 361 (1989).

Sentencing Reform Act of 1984 ("the Act")[238] improperly vests exessive power in the judicial branch, thereby undermining that branch's "independence and integrity,"[239] and improperly provides legislative powers to federal judges.[240] Under the Act, the Commission is vested with authority to implement uniform federal sentencing guidelines, binding upon all federal courts.[241] When teaching this case, I ask my students to comment upon the following excerpt from Justice Blackmun's opinion for the Court:

> Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations.[242]

My students quickly grasp that, as Justice Blackmun has described it, there is something quite legislative about the Sentencing Commission's function. I then ask my students to explain the difference between legislation and adjudication. The exercise leads the students to a fascinating discovery. Before studying constitutional law, and certainly before entering law school, most students, relying upon their general understanding of government, would have had little difficulty in answering that seemingly basic question. In the middle of a course on constitutional law, however, the question suddenly becomes difficult, perhaps impossible, to answer.

With a year and a half of legal training, my students find it much easier to reject distinguishing characterizations than to devise them. First, they reject as simplistic the assumption that legislatures make law and that courts

238. 18 U.S.C. § 3551 et. seq. (1982, Supp. IV); 28 U.S.C. §§ 991-998 (1982 ed. Supp. IV).

239. *Mistretta*, 488 U.S. at 383.

240. *Id.* at 383-84. Mistretta also alleged that the statute creating the Commission violated the nondelegation doctrine, a challenge the Court easily rejected in light of the effective abandonment of that doctrine and the statute's level of specificity. *Id.* at 371-379.

241. *Id.* at 367 (noting exceptions where "the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines"). The Commission was required to submit both the initial guidelines to Congress and to wait six months before they went into effect, *see* Section 235 of Pub. L. 98-473, and to review periodically its established guidelines and to report any amendments or modifications to Congress subject to the same delay period before implementation. 28 U.S.C. § 994(p) (providing that such amendments shall take effect "no earlier than 180 days after being submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted"). *See also Mistretta*, 488 U.S. at 36 (describing the process for amendments to guidelines). The statutory delay requirements in no way undermine the argument below, *infra* text accompanying notes 243-248, that the Commission's powers are essentially legislative in nature. Congress could always change the guidelines or the amendments and modifications to those guidelines through ordinary legislation. The sixth-month delay provisions simply provide Congress an opportunity to do so *before* the guidelines and amendments or modifications go into effect.

242. *Mistretta*, 488 U.S. at 395.

apply law. That is not surprising; after all, constitutional law is essentially a study in judicially created positive law. Second, students quickly dispense with the notion that legislative rules apply generally and prospectively while judicial rules apply retrospectively to the parties before the court. The prevalence of declaratory judgment actions coupled with the widespread use of injunctive relief aptly illustrates that both courts and legislatures not only make law, but they often do so with prospective effect. Finally, students reject the idea that statutes necessarily affect larger numbers of people than do cases. After all, class actions have greatly increased the size of affected plaintiff populations, and the prevalence of broad-based injunctive relief has had the same effect on defendant populations.[243] Moreover, in modern constitutional litigation, more people's conduct may be on the margin with respect to, and thus affected by, Supreme Court cases dealing with such matters as public school desegregation, the right to use contraceptives, abortion, and affirmative action, than with respect to many federal statutory schemes. One would be hard-pressed, for example, to argue that *Brown v. Board of Education*[244] and its progeny affected fewer people than did many, if not most, federal statutes adopted during the same period.

After debunking each of the above distinctions between legislation and adjudication, many students are still struck with the notion that Blackmun's description of the Sentencing Commission sounds more legislative than judicial in character. In my opinion, these students are rightly disturbed, even if they have difficulty articulating why. In fact, however, I believe that it is possible to articulate two critical distinctions between legislation and adjudication, each of which is undermined by Justice Blackmun's analysis. More importantly, these distinctions are critical to understanding the modern standing doctrine.

Courts, like legislatures, undoubtedly create positive law with prospective application that affects large numbers of people. But unlike legislatures, courts, in our system of government, do so on an ad hoc and as needed basis.[245] While the Supreme Court, for example, makes law, it does so only in the context of cases presented to it by litigants after a grant of

243. *Cf.* Monaghan, *supra* note 69, at 1382 ("The explosion of class actions in constitutional cases further illustrates . . . [that these cases] in fact serve as 'public' actions vindicating broad public interests not protected under the traditional private rights model.").

244. 347 U.S. 483 (1954).

245. Professor Monaghan, relying on the prior work of Herbert Wechsler, has advanced an argument consistent with my thesis that the Court's function in creating positive law in appropriate cases does not place it on par with Congress,

> [T]he Court, while quick to protect private rights from "arbitrary" social legislation [in its early justiciability cases], repeatedly disclaimed any general commission to expound on the meaning of the Constitution. Professor Wechsler reflected this tradition when, writing in 1966 [sic: 1961], he denied that the Court had any "special function" of "policing or advising Legislatures or Executives," and yet reasoned that where individual rights were at issue, the Court had the inescapable duty "to decide the litigated case and to decide it in accordance with the [Constitution]."

certiorari or a proper appeal.[246] And while Congress has free rein to legislate on any issue it seeks, provided it has properly delegated authority under Article I and that it does not violate any independent constitutional clause, the Supreme Court is limited by the Article III Case or Controversy Clause in the exercise of its lawmaking power. Not only are courts limited to and by actual cases in their lawmaking capacity, but in deciding cases, they are generally expected to abstain from creating positive law unless necessary to resolve the case before them. This is especially true in the context of constitutional adjudication. In contrast, legislatures, in deciding whether to make law, are not subject either to an ad hoc or as needed constraint.[247] Legislatures have full authority to make law as they see fit and in doing so they are limited only by constitutional constraint.[248]

Monaghan, *supra* note 69, at 1366-67 (footnote omitted) (alteration in original) (quoting HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 9 (1961)).

246. *See* NOWAK & ROTUNDA, *supra* note 127, at 28-29.

247. The Supreme Court has repeatedly emphasized that legislatures, including Congress, are the masters of their own timing in enacting legislation. Thus, the Court has rejected challenges to economic regulation premised upon the argument that the legislature improperly chose to deal with the underlying policy issue in only an incremental fashion. *See, e.g.*, Bowen v. Owens, 476 U.S. 340, 348 (1986) ("Congress' adjustments of this complex system of [Social Security] entitlements necessarily create distinctions among categories of beneficiaries, a result that could be avoided only by making sweeping changes in the Act instead of incremental ones. A constitutional rule that would invalidate Congress' attempts to proceed cautiously in awarding increased benefits might deter Congress from making any increases at all."); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."). The Court has also rejected challenges to regulation premised upon the opposite argument, namely that the regulatory scheme neglects to create a mechanism for case-by-case determinations, rather than creating categorical determinations for the regulated group. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303 (1964) (rejecting challenge to public accommodations provisions of the Civil Rights Act of 1964, premised upon "omission of a provision for a case-by-case determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce").

248. Perhaps not surprisingly, in light of his standing analysis, Professor Winter rejects this distinction:

> The stripped-down definition of "case or controversy" that [eschews the distinction furthered by standing between a private and public rights adjudicatory model] is only the common denominator of the political question and standing doctrines. It would account for virtually all of the classic decisions in cases mounting generalized challenges to constitutional amendments or congressional statutes. If the definition doesn't say very much, it is because there isn't much to say. Once we recognize that legislation and adjudication are not dichotomous, but are merely different points on a single normative spectrum, then we are free to assume responsibility.

Winter, *supra* note 66, at 1512 (footnote omitted). In a critical respect, the thesis advanced in this Article is nearly opposite that advanced by Professor Winter. Professor Winter asserts that the distinction between legislative and adjudicatory lawmaking is not one of kind, but rather one of degree. In contrast, I argue that the distinction is precisely one of kind and not (necessarily) one of degree. Thus, while particular bodies of case law may make "as much" law as certain statutes, the process of making that corpus of positive law, through cases, is different in kind than is the process of making a body of statutory positive law because the former is done on an *ad hoc* and as-needed basis, based upon the need to resolve particular cases, while the latter is done according to the will of the legislature, limited only by delegation and independent constitutional constraint. Stated differently, the timing of judicial decisionmaking is governed by events beyond the court's (and to a large extent the affected parties') control, while Congress, in contrast, is essentially the master of its own timing.

In *Mistretta,* the Court substantially compromised both of these critical distinctions. Certainly it is true that courts, in the aggregate, sentence large numbers of convicted criminals. Is is also true that courts, in the aggregate, interpret, and sometimes invalidate, large numbers of statutes, fill in statutory interstitial gaps, and create law by interpreting substantive constitutional provisions. In each of these functions, courts, no less than legislatures, make positive law. None of that, however, places courts on a par with the legislature in their lawmaking functions. The constitutional question in *Mistretta* was not whether, in totaling the individualized sentencing determinations, each of which is a proper judicial function, the federal judiciary affects as many people as does a legislative body. The issue, instead, was whether the Sentencing Commission, which included three Article III judges, unconstitutionally exercised legislative powers by creating positive law in the form of uniform sentencing guidelines *other than* on an ad hoc and as needed basis. The answer to that question was almost surely yes.

Now juxtapose the Justice Blackmun excerpt from *Mistretta* with a brief excerpt from Chief Justice Rehnquist's dissenting opinion in *Planned Parenthood v. Casey.*[249] In criticizing the joint opinion's newly announced undue burden test, which the Court had used to strike several provisions of Pennsylvania's restrictive abortion statute, the Chief Justice stated: "Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code."[250] Although coming at the issue from quite a different perspective than Justice Blackmun, one far less trusting of the judicial creation of positive law, Chief Justice Rehnquist's assertion no less fails to capture the essential distinction between legislation and adjudication than does Justice Blackmun's *Mistretta* excerpt. Comparing these two statements is edifying in exploring the function that the modern standing doctrine serves. The Chief Justice suggested that the Supreme Court improperly exercises a quasi-legislative function when, in the name of constitutional adjudication, it devises a sufficiently detailed set of commands that the emerging body of law resembles a complex statute in level of specificity. If that were true, however, we would need to dispense with huge bodies of constitutional case law developed throughout our two-hundred-year history, most of which carry nowhere near the political baggage associated with the abortion case law.

The Supreme Court, throughout its history, has devised bodies of positive law, based upon the Constitution, that bear a striking resemblance in level of specificity to complex federal statutes. While detailing any particular substantive area is unnecessary, listing a few well-noted bodies of code-like case law will suffice to make the point. Prior to abandoning all pretense of imposing Tenth-Amendment limits on the commerce power, the

249. 112 S. Ct. 2791 (1992).

250. *Id.* at 2866 (Rehnquist, C.J., concurring in part and dissenting in part).

Supreme Court developed a code-like body of case law attempting to distinguish activities affecting commerce from activities that were deemed inherently local in nature. While abandoning this effort greatly simplified the affirmative side of the Commerce Clause, it did not remove the complexity from the code-like dormant Commerce Clause cases.

During the New Deal, the Court developed a code-like body of case law concerning which substantive provisions of the Bill of Rights were incorporated against the states under the Fourteenth Amendment's Due Process Clause. After incorporating all but four provisions of the Bill of Rights,[251] the Warren and Burger Courts began the continuing process of creating an even more code-like set of interpretations governing the Fourth Amendment prohibition against unreasonable searches and seizures, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to counsel and a fair trial, to name only a few. During the Warren, Burger, and Rehnquist eras, beginning with *Brown v. Board of Education,*[252] the Court developed an exceptionally detailed and code-like body of case law concerning the obligations of previously segregated school systems to desegregate their schools. In the 1970s, the Court went further, rejecting Justice Powell's plea for uniform national standards on desegregating public schools,[253] and began to create yet another complex body of code-like case law on the obligation of the northern states, which had never segregated their public schools by law, to integrate their de facto segregated schools. The Court also has created code-like bodies of case law related to the First Amendment's Establishment and Free Exercise Clauses and the Fifth Amendment's Takings Clause. While this list is by no means exhaustive, it is sufficient to demonstrate that the level of judicially-imposed detail in any particular body of case law, if used to challenge its legitimacy, would undermine the legitimacy of vast and important bodies of constitutional law, some dating to the earliest days of the republic.

While criminal procedure cases, as demonstrated above, are by no means unique in their code-like complexity, they are particularly relevant to the evolution and function of the modern standing doctrine. The Supreme Court has not only ruled on which substantive provisions of the Bill of Rights apply against the states, but also has provided detailed instructions in numerous cases to state and local police officers on the timing and method of securing a search warrant, when a search warrant is and is not necessary, what constitutes exigent circumstances, what may and may not be searched in exigent circumstances, how to secure an arrest warrant, what constitutes

251. The only provisions not incorporated are the Second Amendment, the Third Amendment, the Fifth Amendment's requirement of grand jury indictment, and the Seventh Amendment. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 784 (2d ed. 1991).

252. 347 U.S. 483 (1954).

253. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 219 (1973) (Powell, J., concurring in part and dissenting in part) ("In my view we should . . . formulate constitutional principles of national rather than merely regional application.").

probable cause to search and to arrest, when suspects may be apprehended short of probable cause, when police officers must inform suspects of their constitutional rights, what specific constitutional rights police officers must identify, what to say and do when a suspect seeks to exercise each of those rights, and when the state is and is not obligated to provide counsel. As before, this list is not exhaustive. Certainly this body of case law is at least as code-like, and is probably more code-like, than the abortion case law. Its legitimacy, however, is not determined, or undermined, by its code-like detail. Instead, it is determined by the Court's need to interpret specific constitutional clauses, thus creating positive law, in determining the substantive rights of convicted criminals when those criminals present appeals[254] and collateral challenges properly to the Court. Stated differently, to determine the legitimacy of any area of constitutional case law, one cannot look at the aggregate level of detail. Instead, one must look, at the level of each individual case, to determine whether judicial creation of positive law was required to resolve the rights and obligations of the parties before the Court. If, in deciding several—or several dozen—cases for which the answer to that question is yes, the Court creates a code-like body of case law, one can only conclude that creating that body of detailed positive law was a necessary part of the Court's job.

And yet, we have seen that precisely because the Court needs to resolve cases properly before it, it has developed decisional rules, including the doctrine of stare decisis, which render the substantive evolution of positive law largely subject to the control of those dictating the order of case presentation. This doctrine, adhered to within but not among the circuits, when coupled with the power of docket control, enables the Court to wait until a sufficient selection of path-dependent iterations among the circuits have emerged from which to choose.[255] The Court has also increasingly relied upon its standing doctrine, which tends to mitigate the most damaging effects of path dependency not only in the Supreme Court, which can control its docket, but also among the circuits, which cannot control their dockets. Standing performs this function by ensuring that fortuity rather than advertent litigant path manipulation ultimately shapes legal doctrine. In the criminal procedure cases, outlined above, the substantive evolution of perhaps the Supreme Court's most code-like body of case law was largely dictated, curiously, by convicted criminals. The question then arises: If we know that the order in which cases are presented for decision affects the substantive evolution of legal doctrine, and not just the timing, does it make any sense at all to provide convicted criminals with complete agenda-set-

254. I am not using the term "appeals" in its technical sense here. *See* NOWAK & ROTUNDA, *supra* note 127, at 28-29 (discussing narrowing of appeals in Supreme Court practice since 1988). Instead, the phrase is intended to distinguish direct appeals, which may include petitions for writ of certiorari, from collateral challenges, which may also include such petitions.

255. *See supra* notes 127-129 and accompanying text.

ting power over such an important area of case law as constitutional criminal procedure? Indeed, it does.

B. True Penumbras and the Bill of Rights: The Independence of Standing from Cause of Action, Ripeness, and Mootness

The Supreme Court has protected many of our most intimate associations with a generalized right of privacy, based upon penumbras drawn from the Bill of Rights. I do not doubt the presence of penumbras, or shadows, associated with the substantive provisions of the Bill of Rights.[256] The penumbras that I have in mind, however, neither emanate from the constitutional clauses themselves nor relate, necessarily, to intimate sexual conduct. The boldest shadows, of course, are cast by individuals who are standing—or, as we shall see, who are denied standing—in broad daylight.

The need to employ a shadow case analysis, rather than to compare directly the results of standing cases themselves, is most easily illustrated by considering two actual standing cases.[257] In *City of Los Angeles v. Lyons,*[258] a released chokehold victim had obtained a preliminary injunction on behalf of himself and the class he represented, based upon a holding that the Los Angeles Police Department's practice of restraining suspected criminals with chokeholds violated several constitutional guarantees, including the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition on cruel and unusual punishment. Lyons argued that as a prior chokehold victim, he had a substantial chance of being so held a second time. The Court rejected the claim, holding that Lyons had not alleged a sufficient injury to warrant a judicial determination of the constitutionality of the police chokehold practice, except as applied to him in the past in an action for damages.

In *Gilmore v. Utah,*[259] Gary Gilmore's mother sought to challenge the constitutionality of her son's capital murder conviction and pending execution. Mrs. Gilmore alleged that because her son had not filed his own collateral attack on his conviction and sentence, he was certain to be executed,

256. WEBSTER'S NEW WORLD DICTIONARY 1053 (2d college ed. 1976) defines penumbra as: "the partly lighted area surrounding the complete shadow of a body, as the moon, in full eclipse." In Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965), Justice Douglas held for the Court that the right of privacy, which emanates from the penumbras of several provisions in the Bill of Rights, protects the right of married couples, in their homes, to use contraceptives.

257. In the shadow case analysis, as set forth below, we compare the relationships of those cases in which standing was granted or denied with the hypothetical cases in which litigants could present the same underlying issues with no credible standing barrier, rather than comparing directly standing case results based upon abstract inquiries into injury, zealousness, or some other standing metaphor. The shadow case analysis reveals those critical facts that likely enabled the deciding court to intuit the need to shift *or not shift* the burden of legislative inertia. Specifically, the analysis reveals whether the claimant is seeking to influence the critically important path of case decisions or, instead, has been burdened with the consequences of a fortuitous historical event beyond her control, but which inflicted significant legal harm.

258. 461 U.S. 95 (1983).

259. 429 U.S. 1012 (1976).

allegedly in violation of several constitutional guarantees,[260] if she were not permitted to raise the constitutional challenges on his behalf. The Court again rejected the claim, terminating the stay of execution that it had previously entered.[261] In two separate concurring opinions, four of the six deciding justices expressly concluded that Mrs. Gilmore lacked standing to press her son's claims,[262] reasoning that Mrs. Gilmore had not alleged a sufficient injury to qualify for standing.

In criticizing these case results, scholars have compared cases in which the Court, faced with attenuated, and sometimes dubious, causal chains, held that plaintiffs were sufficiently injured for purposes of standing. Thus, for example, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[263] a group of homeowners were granted standing to challenge the constitutionality of the Price-Anderson Act, a federal statute that limited the liability of nuclear power plants, including a proposed plant to be constructed near their home.[264] Plaintiffs did not allege, however, that if they were afforded standing, and then succeeded on the merits, thus striking the liability limitation, the construction would necessarily be abated. Even though plaintiffs' injury may therefore have been independent of the judicial relief they sought, the Court rejected the challenge to plaintiffs' standing. Similarly, in *Regents of the University of California v. Bakke*,[265] plaintiff, a medical school applicant, was granted standing to challenge a state medical school's admissions process that created two pools, the first with eighty-four seats for which all students, minorities and nonminorities could compete; and the second, an affirmative action pool of sixteen seats for which only qualified minority students could compete.[266] Bakke alleged that the medical school had violated his equal protection rights in denying him consideration for all 100 seats.[267] Like the *Duke Power* plaintiffs, Bakke did not allege that if he were granted relief, and considered for all 100 seats, he would necessarily have been admitted into the medical school. While the Court granted standing to both the *Duke Power* plaintiffs and to Bakke, who undeniably presented, at best, contingent claims of injury in fact, it denied standing in *Lyons* and in *Gilmore,* notwithstanding

260. I have used the term "constitutional guarantees" rather than "constitutional rights" deliberately; the issue is whether Mrs. Gilmore has the authority to bring a claim to prevent a violation of a constitutional guarantee, when the violation does not infringe one of *her* constitutional rights.

261. 429 U.S. at 1013.

262. While Chief Justice Burger (joined by Powell), *id.* at 1013, and Justice Stevens (joined by Rehnquist), *id.* at 1017, would have resolved the case on standing principles, Justice Stewart apparently declined to sign onto a decision based upon standing. This lineup is significant because the Article's thesis suggests that standing will often be deployed by at least some conservatives (including, for example, Rehnquist, Burger, and sometimes Powell) and some liberals (including, for example, Stevens and Brennan) against justices in the often-dispositive center, which, in 1976, included Justice Stewart.

263. 438 U.S. 59 (1978).

264. *Id.* at 81.

265. 438 U.S. 265 (1978).

266. *Id.* at 280-81 n.14.

267. *Id.* at 277-78.

actual prior or pending injuries that would inevitably arise in the absence of judicial relief. In contrast with *Duke Power* and *Bakke,* if the Court had reached the merits and granted relief in *Gilmore* and *Lyons,* plaintiffs' claimed injuries would necessarily have been prevented. Gary Gilmore would not have been executed or, at the very least, he would have received a new trial or sentencing phase, and the Los Angeles Police Department would have been enjoined from continuing its chokehold practice.

The problem with the above analysis, however, is that in comparing the cases directly, we lose sight of the critical distinction between adjudication and legislation. In doing so, we also lose sight of the real purpose underlying the standing inquiry. As a result, we miss a critical intermediate step. Injury in fact cannot be assessed in a vacuum.[268] Indeed, the injury-in-fact prong of the standing inquiry, properly understood, is not really about injury at all. Instead, the term "injury" is a metaphor.[269] The relevant inquiry in comparing these cases is whether the facts alleged are sufficient to overcome the burden of congressional inertia. In each case, Congress has full authority to resolve the issues under review. Congress

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268. *Cf.* Fletcher, *supra* note 3, at 232-33 (positing that injury-in-fact prong must be assessed according to the substantive right in question).

269. For an analysis demonstrating that the Supreme Court erred in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), in taking the injury metaphor literally, see Stearns, *supra* note 5, Part III.D. Professor Winter, relying upon the works of George Lakoff and Mark Johnson, has provided a lengthy and insightful analysis demonstrating that "standing" itself emerged as a metaphor from the equity tradition, intended to capture the circumstances in which particular litigants could invoke the powers of equitable relief. *See* Winter, *supra* note 66. In relying upon the term "standing" in other contexts, beginning most prominently in the New Deal, the Court effectively supplanted two concurrent adjudicatory models, the first premised upon the notion of public rights and the second premised on the notion of private rights, with only the latter. In essence, only individuals "stand," and thus, only individuals can litigate. The problem with the metaphor, as with all metaphors, is that it tends to highlight prominent features that are common to the object of the metaphor, here the right to litigate, and the metaphor itself, here the ability to stand. At the same time, the metaphor tends to mask the distinguishing characteristics between the metaphor and its object. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980).

This Article departs from Winter in, among other respects, the relevance it attaches to the standing metaphor. Although Winter has explained why the Court chose to take the particular metaphor "standing" more literally in the New Deal, he has not explained why, when a later, more conservative Court emerged, it did not reconstruct that metaphor in a manner that invited once disfavored, and now welcome, challenges to increased regulatory conduct. Moreover, if standing emerged as the product of an overly literal use of metaphor, and if, as Professor Winter suggests, all language ultimately is premised upon metaphor, why did the Court misuse the "standing" metaphor instead of any number of other metaphors? And upon recognizing its initial misuse of the standing metaphor, why did the Court not seize upon some better-suited metaphor to remedy the doctrinal damage? Without an independent positive theory designed to explain why a particular Supreme Court employed, and adhered to, a particular metaphor in a particular historical period, one is hard-pressed to argue that an entire body of case law is attributable to the single misuse of a metaphor. This Article, and its companion, provide an economic analysis that begins to answer these important questions. In addition, while the use of standing as a metaphor is interesting to consider, this Article, and its companion, focus instead on the doctrinal elements of standing as metaphors, namely injury in fact, causation, and redressability. As set forth in the text, these elements emerged because they tend to capture the essential elements of those cases in which the Court inevitably must supplant congressional inertia. *See infra* notes 279-280 and accompanying text; *see also* Stearns, *supra* note 5, part III.

could, for example, in legislating under Section 5 of the Fourteenth Amendment, prohibit the Los Angeles Police Department's chokehold practice and prohibit capital punishment, or at least limit the circumstances in which capital punishment may be imposed.[270] Congress could also amend or rescind the liability limitation that was the subject of the *Duke Power* case and prohibit states from considering race in the manner employed by the University of California at Davis Medical School. At the time these cases were decided, however, Congress had remained inert with respect to these issues.

In each of these cases, plaintiff is seeking to shift the burden of congressional inertia, thus reversing the general presumption that when Congress is silent, the status quo governs. The standing question, then, is not which plaintiff has alleged a more serious or acute injury. Instead, it is which plaintiff has alleged the necessary facts to justify forcing a federal court to consider shifting the burden of congressional inertia on the underlying substantive legal question. Stated differently, the critical standing inquiry is whether plaintiff has sufficiently demonstrated the need for an ad hoc judicial creation of positive law on the underlying legal issue or whether the Court is better served by denying standing, even though in doing so it will issue another, albeit less prominent, substantive legal ruling.[271]

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270. One might object that because the Fourteenth Amendment expressly recognizes the power of the state, with due process of law, to take a life, Congress cannot infringe upon that power absent a constitutional amendment. There are two responses. First, to the extent that the objection is valid, it applies with equal force to both Congress and the Supreme Court. *See* Katzenbach v. Morgan, 384 U.S. 641, 646-47 (1966) (holding that Congress may expand substantive reach of Fourteenth Amendment's Equal Protection Clause beyond that provided in Supreme Court decision interpreting that clause). For example, the Court, in interpreting the Fourteenth Amendment, has struckdown state laws that make certain crimes death eligible. *Compare* Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that death penalty statutes that leave juries with untrammeled discretion to impose or withhold death sentence violate Eighth and Fourteenth Amendments), *with* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (concluding that death penalty does not violate Eighth and Fourteenth Amendments when used to punish murder and when carefully drafted statute ensures that sentencer has adequate information and guidance in imposing that penalty); *and* Proffitt v. Florida, 428 U.S. 242, 251-52 (1976) (upholding a death penalty statute that guides and focuses judge's objective consideration of particularized circumstances of individual offense and individual offender before imposing sentence of death). Because the Court apparently has this power, under the logic of *Katzenbach* Congress would also appear to have the same power. Second, while the Constitution does, in fact, by its express wording, provide the state with power to take a life with due process of law, that does not necessarily prevent Congress from prohibiting the exercise of that state power when, in exercising it, states violate an independent clause of the Fourteenth Amendment, most notably the Equal Protection Clause, over which Congress is provided express enforcement authority in Section 5.

271. As Professor Fletcher has demonstrated, all standing determinations, although couched in procedural terms, can readily be transformed into substantive legal determinations. Fletcher, *supra* note 3, at 234-39. Thus, while the *Gilmore* Court effectively held that Mrs. Gilmore lacked standing to challenge her son's conviction and sentence, it also effectively held as a matter of substantive law, that at least as a presumptive matter, Mrs. Gilmore has no right to challenge the constitutionality of her son's conviction and sentence, or more generally, that individuals have no presumptive right to enforce the rights of others. The general categories of standing case law that are presented as substantive legal

This insight explains why the standing and cause-of-action inquiries have become independent.[272] One of the many substantive issues that the Supreme Court resolves in its positive lawmaking is whether to infer a cause of action from relevant statutes and constitutional provisions in a given case. As with any other substantive area of Supreme Court decision-making, the determination whether to infer particular causes of action is subject to path dependency. The standing inquiry is not about whether a particular cause of action is inferable from any particular statutory or constitutional clause. Instead, in cases that involve the issue of whether to infer a cause of action, the standing inquiry is about whether plaintiff has alleged the requisite facts to shift the burden of congressional inertia on that substantive legal question. In other words, the standing issue in such cases is whether *this case* presents the appropriate opportunity for the Court to resolve the substantive issue whether the statutory or constitutional provision under review implies the proffered cause of action. Again, the standing and cause-of-action determinations are necessarily separate as a theoretic and practical matter.

As we have seen in the criminal procedure context, the Court is not shy about providing detailed and code-like rules when needed to resolve actual cases. This includes providing detailed information about the nature and scope of implied causes of action when required to resolve concrete cases that are presented to the Court. And yet, notwithstanding the Court's willingness to create detailed positive law when required, the Court effectively denied Mrs. Gilmore standing, even though in doing so it virtually ensured that her son would be executed. If the Supreme Court, in failing to consider a particular case, has virtually ensured that plaintiff's son will be

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determinations are as follows: (1) no right to enforce the rights of others, represented by Gilmore v. Utah, 429 U.S. 1012 (1976), and City of Los Angeles v. Lyons, 461 U.S. 95 (1983); (2) no right to prevent diffuse harms, represented by United States v. Richardson, 418 U.S. 166 (1974), and Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); and (3) no right to remove illegal market distortions, represented by Allen v. Wright, 468 U.S. 737 (1984), and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). These categories have one critical feature in common. They each presumptively prevent plaintiffs from supplanting the burden of congressional inertia based upon the desire to control the critical path of legal doctrine, rather than based upon fortuitous historical events that give rise to traditional notions of injury and that are largely beyond the control of the litigants themselves. *See also* Stearns, *supra* note 5, part III. And while each category is substantive, we can begin to understand why the Court is willing to issue a relatively modest substantive ruling—albeit in the guise of a standing denial—in an effort to prevent path manipulation from controlling the evolution of legal doctrine with respect to the underlying legal claim. *See generally id.*

272. For articles expressing a contrary opinion—that standing is ultimately a cause-of-action inquiry in another name—see Sunstein, *supra* note 58, at 166 n.15 (observing that while Justice Douglas's *Data Processing* statement is generally correct, "one generalization—that the standing issue depends on the existence of a cause of action—is not [worthless]"); Cass Sunstein, *Standing and the Privatization of Public Law,* 88 COLUM. L. REV. 1432, 1474-75 (1988); *supra* note 58, and *supra* note 64 and accompanying text; *cf.* Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a),* 57 U. CHI. L. REV. 279, 286 n.34 (1990) ("To the extent that Congress can create redressable injuries by creating new legal rights, constitutional standing and the existence of a cause of action are essentially the same.").

executed, and if the Court is willing, in resolving cases, to create positive law on an as-needed basis, an obvious question arises: What, then, could "as needed" possibly mean?

The judicial creation of positive law is "needed" if a judicial decision is required to prevent the infringement of plaintiff's constitutional or statutory rights. Mrs. Gilmore never alleged that the wrongful execution of her son violated *her* constitutional rights. Instead, she alleged that her son's rights were being violated. In denying her standing, therefore, the Court has held that as a matter of substantive law, Mrs. Gilmore does not have the right to enforce the rights of others, even those of her son. It is relatively easy to understand why the Court willingly issued this modest substantive holding, best understood as a denial of standing, rather than reaching the merits of Mrs. Gilmore's underlying legal claim. To litigate the underlying constitutional issues, a ready alternative was available: Gary Gilmore was free to file his own collateral attack.

Similarly, Mr. Lyons had not alleged that absent judicial resolution, *his* constitutional rights would have been violated. Instead, he alleged that without a judicial resolution, someone's rights at some unknown time in the future might be violated. But again, there is an obvious solution. If someone is convicted of a crime following an unconstitutional apprehending chokehold, that person, like Lyons, can file a retroactive damages suit and, unlike Lyons, that person can try to challenge the constitutionality of his detention in a direct appeal from his conviction or sentence.[273] In fact, in virtually all criminal procedure cases, the claimant who received relief did so either in a direct appeal following a criminal conviction and sentence or in a subsequent collateral attack. And in those criminal procedure cases presenting novel legal questions based upon the application of broad-based textual provisions in the Bill of Rights to a previously unknown set of facts, the Court willingly created positive law. Standing is never in issue in such proceedings because a judicial determination is needed to determine whether plaintiff's constitutional rights have been, or are being, violated.

This analysis also explains why the standing inquiry is inevitably separate from such related justiciability inquiries as ripeness and mootness. As with judicially inferred causes of action, the judicial resolution of the substantive rights of convicted criminals based upon broadly worded constitutional provisions is subject to path dependency. There is virtually always the possibility that at some future time, a criminal defendant will be convicted and sentenced based upon an allegedly erroneous interpretation of a constitutional clause, or that a criminal was so convicted in the past. There

273. In fact, in Tennessee v. Gardner, 471 U.S. 1, 11-12 (1985), two years after *Lyons*, the Supreme Court did reach the issue whether a police officer must have probable cause to believe a fleeing suspect is dangerous before employing deadly force. In that case, Gardner raised the claim and obtained a favorable holding on the very issue for which Lyons had sought a holding on, *id.* at 22, but in a context in which there was no credible standing barrier.

may also be some convict, who, if he chose to do so, could force a judicial determination of the limits of a particular constitutional clause in an appropriate direct or collateral challenge to his conviction or sentence. For those convicts who could force the further judicial creation of positive law, timing is not in issue. The claim is ripe, given that a conviction or sentence has already been imposed, and is not moot, given that a contrary constitutional interpretation would result in a meaningful remedy, for example, a reversal or remand for a new trial or sentencing phase.

If public-interest organizations dedicated to furthering the reach of these substantive constitutional provisions could freely test the limits of such constitutional clauses by identifying some convicted criminal, somewhere, for whom a ripe and non-moot constitutional claim exists, we would again be subject to the very same sort of litigant-controlled path manipulation that standing is designed to prevent. As stated above, however, standing does not prevent path dependency. Why, then, given the inevitability of path dependency, do we vest nearly complete agenda-setting power over as important an area as constitutional criminal procedure in, of all people, convicted criminals? The preceding analysis suggests that we do so because convicted criminals are the only people who, in presenting these difficult cases for judicial resolution, do so for one reason and one reason only—to get relief from their convictions and sentences. They do not do so out of any desire to manipulate the order of precedent based upon some ideologically driven desire to benefit society at large.[274] Instead, when we allow convicted criminals to force judicial creation of positive law in proper appeals and collateral challenges, we further the likelihood that fortuity, rather than advertant litigant path manipulation, will control the substantive evolution of inevitably path-dependent legal doctrine.

The above analysis also helps to explain another anomaly in the standing case law. While the Court sometimes speaks in terms of promoting zealous advocacy, the Court, on occasion, appears to deny standing *because of* rather than *in spite of* the zealousness with which the claimant will litigate the case.[275] As with injury-in-fact, the anomaly is removed once we recognize that zealousness is a metaphor. Zealousness is intended to capture the essence of a traditional bipolar legal dispute in which there is no question of standing, namely a case grounded in the rights and obligations of particular parties, rather than one based upon generalized principles. The zealousness metaphor is apt inasmuch as most litigants who can credibly justify shifting the burden of legislative inertia on the ground that without a judicial ruling on the issue they are presenting, their rights will be infringed,

274. In that sense, they are not trying to muddy the distinction between legislative and judicial lawmaking.

275. *Cf.* Monaghan, *supra* note 69, at 1385 ("[T]here is no reason to believe that litigants with a 'personal interest' will present constitutional issues any more sharply or ably than the Sierra Club or the ACLU.").

tend to present their claims zealously. But the correlation between zealousness and the need to shift the burden of legislative inertia is just that. The difficulty is that most contested standing cases involve ideological litigants who, although they might not allege facts that justify forcing the federal courts to create positive law, will zealously represent their side of the disputed issue.[276] Ironically, at least if we were to credit the Court's language in describing the standing criteria, it is because of the zealousness with which ideological litigants seek to thrust a quasi-legislative function onto the federal courts that the Court denies standing in such cases. The anomaly is removed, however, when we realize that zealousness is not an independent objective of justiciability;[277] it is instead a convenient—albeit imperfect—analog that the Court employs to ascertain whether the present case satisfies the traditional criteria justifying it to shift the burden of legislative inertia, thus forcing judicial creation of positive law.

In *Duke Power* it was true that construction would not necessarily be halted if the Court granted the requested relief. But there was no shadow case, as in *Gilmore* and *Lyons,* in which plaintiffs' claims could be presented for resolution with no standing barrier. Once we realize that, the injury-in-fact metaphor is easily translated to secure standing: Absent a judicial determination whether the liability-limiting statute is constitutional, plaintiffs may be subjected to a severe infringement of their right not to have a nuclear power plant with federally-limited liability constructed near their homes, based upon the assumption that a federal statute will limit the plant's potential financial exposure. The financial consequences of the construction in *Duke Power* were imminent and the potential personal consequences were severe. In short, there was no alternative plaintiff or forum in which to protect the plaintiffs' claimed constitutional rights. Plaintiffs therefore alleged facts that more closely resembled those in cases in which the Court has no choice but to consider creating positive law in the face of congressional silence. Moreover, the *Duke Power* plaintiffs could credibly argue that whatever ultimately happened with the construction of the nuclear power plant, they had already suffered a substantial economic hardship in the present decline in property values resulting from the announced intent to proceed with construction, based largely, if not entirely, on the Price-Anderson Act's liability cap.

Similarly, Mr. Bakke appears closer to the traditional litigant whose circumstances are governed by fortuity rather than advertent or ideological

276. In that sense, we might also think of zealousness as a necessary, but not sufficient, condition for judicial lawmaking.

277. The analysis is directly contrary to that offered in Gottlieb, *supra* note 59, at 1071 ("[T]he constitutional justification for standing should be based in the assurance of zealous advocacy. Conversely, the other possible justifications, such as separation of powers, federalism, military deference, and internationalism, should not be rooted in the Article III limitations."), which suggests that the desire to ensure zealous advocacy is the only standing criterion of constitutional, as opposed to prudential, dimension.

path manipulation. While it is true that even if he were considered for all sixteen minority seats, Bakke might still have been rejected, it is also true that no alternative plaintiff, or forum, existed in which Mr. Bakke could meaningfully have vindicated his claimed constitutional right. Moreover, it is also possible that if considered for the additional seats, he would have been admitted.[278] The consequence of denying standing, and thus guaranteeing no admission, for this plaintiff was again potentially serious to a specific individual. Because both cases lack a compelling shadow case, judicial abstinence would have been inappropriate and standing was, therefore, properly granted. That is *not* because plaintiff's injuries were more concrete at some theoretic level than in those cases in which standing was denied. It is instead because, having recognized injury for what it is—a metaphor for when plaintiffs have alleged the necessary facts to justify shifting the burden of legislative inertia—these plaintiffs met the injury test. In that respect, *Duke Power* and *Bakke* are hybrids of traditional bipolar litigation in which standing is not in dispute and those cases in which standing is denied.[279]

III

STANDING CASE CATEGORIZATION: A PRELUDE

While the companion article, *Standing and Social Choice: Historical Evidence,*[280] will provide a more comprehensive overview of the standing case law to demonstrate that standing's doctrinal development closely mirrors this Article's theoretic predictions, a brief prelude is appropriate. Although this section will not trace the full history nor the many rich and subtle nuances of the standing cases,[281] it will briefly illustrate the manner

278. In fact, by the time the case went to the Supreme Court, Mr. Bakke had already been enrolled in the medical school. The California Supreme Court had remanded the case on the ground that the set-aside was not the least restrictive means of effectuating the desired affirmative-action policy. On remand, the burden of proof shifted to the medical school to demonstrate that Mr. Bakke would not have been admitted even without the program in place, a burden that the medical school admitted that it could not carry. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 279-80 (1978).

279. The same analysis explains why the political question doctrine and the standing doctrine are necessarily distinct. Even cases in which judicially manageable standards are not lacking, see Baker v. Carr, 369 U.S. 186 (1962), are subject to the same path dependency that the standing doctrine is designed to ameliorate.

280. *See* Stearns, *supra* note 5.

281. A college roommate used to analogize studying for exams to climbing on the back of a camel, which, of course, has two humps. By studying relatively little, a student could obtain an A, provided that he or she managed to acquire just enough knowledge—no more and no less—than is required to ascend the top of the first hump. To do that one had to acquire just enough of an overview that, most likely, would be tested. The danger with this approach, of course, was that if the student made the mistake of studying just a bit too much, the simplicities that would be exposed would create confusion resulting in a lower grade. The risk-averse strategy, then, which he and I generally pursued, was to study sufficiently to ascend the first hump, topple head first into the valley, and then ascend the second hump only *after* we had clarified the confusion that resulted from thinking too hard about the materials to achieve an easy A. Now that I work in academia, I realize that with virtually any interesting subject matter, there are always many more humps than two. Nonetheless, the analogy is apt. Relying upon the

in which the three principal standing case categories serve to further the Court's objective of ensuring that fortuitous historical events, rather than advertent litigant path manipulation, generally control the critical path of case presentation. Before outlining these standing categories, a few comments about methodology are in order.

As has already been demonstrated, denials of standing, while couched in procedural terms, can invariably be recast as substantive rulings.[282] Thus, while the *Lyons* and *Gilmore* Courts denied plaintiffs third-party standing, suggesting a preliminary determination designed to avoid reaching the merits, they also held as a matter of substantive law that plaintiffs do not have the right—at least as a presumptive matter—to enforce the rights of others. In *Lyons,* plaintiff lacked the right to prevent allegedly unconstitutional chokeholds by the Los Angeles Police Department, even though he had been so held in the past, and in *Gilmore,* plaintiff lacked the right to prevent an allegedly unconstitutional conviction and death sentence, even though absent relief, plaintiff's son was certain to be executed.

While each standing determination can readily be cast in substantive terms, for any substantive standing rule, including the presumptive rule that individuals lack the right to enforce the rights of others, exceptions are fairly easy to locate. As the companion article will demonstrate, however, while commentators have focused upon readily available exceptions to the Court's generalized standing pronouncements, a proper analysis of the standing doctrine dissipates many—although certainly not all—of the apparent anomalies. More importantly, the presence of irreconcilable cases within a given case category by no means refutes the existence or soundness of the general rule. The Court's standing doctrine cannot be meaningfully compared against a hypothetical doctrine with no glitches;[283] instead, we need to inquire whether the lawmaking processes set out in the Constitution are advanced or undermined with the present standing doctrine—with all its faults—in place. These two articles, relying upon a social choice framework, demonstrate that the answer to that question is almost surely yes. Standing furthers the constitutional design with respect to its two established lawmaking institutions, Congress and the federal judiciary, by promoting the objective of ensuring that positive law is presumptively made in a manner that accords with a majoritarian norm. Standing

social choice framework, this brief section will take us to the top of a relatively early hump, to demonstrate that the standing cases can be meaningfully characterized in a positive manner. The companion article, Stearns, *supra* note 5, parts II and III, will demonstrate that even after taking a much closer look at the history of the standing cases, and at the cases themselves, we can regroup—and we can regroup the cases—to tell a more detailed, but still cogent, positive story about standing.

282. *See also* Fletcher, *supra* note 3, at 234-39.

283. *Cf.* Stearns, *supra* note 4, at 1230 n.33 and sources cited therein (describing "nirvana fallacy," through which individuals compare a given institution against the abstract or ideal institution, rather than against real-world alternatives).

thus renders our lawmaking regime more fair, in the social choice sense, than it would be without the doctrine in place.

That said, each standing category is better cast as a presumptive, rather than as an absolute, rule. The rules are presumptive in a two-fold sense. First, within the standing categories, examples can be located in which Congress has created an exception to the Supreme Court's standing denial.[284] The Supreme Court's recent decision in *Lujan v. Defenders of Wildlife,*[285] however, casts some doubt on the extent of Congress's power to reverse the Supreme Court's presumptive standing rules through ordinary legislation.[286] Second, the Court, by resting the doctrine on both "prudential" and constitutional bases,[287] has afforded itself some leeway in applying its general standing rules. The Court's willingness to emphasize different elements of its standing doctrine at different times, rendering its categories substantially less than airtight, ensures that the standing case law will defy easy characterization.

In turn, the doctrine is destined to promote academic skepticism. In fact, as suggested below and as the companion article demonstrates more fully, to reconcile many standing cases within given categories, we need to treat the relevant case facts as lying along a spectrum, with one end representing those cases that involve fortuitous historical events beyond the litigant's control and the other end representing those cases that involve attempts by litigants to manipulate the order of precedent, with an obvious shadow case lurking in the background. Thus viewed, standing cases are often distinguishable in degree, rather than in kind.

While the companion article[288] will explore the historical context surrounding the development of the standing doctrine in greater detail, a brief preview may be helpful. As suggested above, numerous scholars attribute standing to two unrelated and noncomplementary events: the advent of the New Deal and the increased tendency, beginning in the 1960s, of litigants to present ideological disputes for resolution in the federal courts, especially in the context of constitutional adjudication.[289] The obvious question then arises why standing, which emerged to stave off unwelcome New Deal challenges, was not abandoned, or at least greatly curtailed, in a later conservative Court. Presumably, an emerging conservative Court would welcome the opportunity to limit the power of Congress and state legislatures to regulate with the level of ambition a more liberal Supreme Court had

284. *See, e.g.,* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (conferring standing upon testers, who are not themselves interested in securing housing, to challenge violations of Fair Housing Act).

285. 504 U.S. 555 (1992).

286. For a detailed discussion of *Lujan,* see Stearns, *supra* note 5, part III.D.

287. *See, e.g.,* Allen v. Wright, 468 U.S. 737, 750-51 (1984) (explaining that standing is rested upon both prudential and constitutional bases, the latter grounded in Art. III).

288. *See* Stearns, *supra* note 5, part III.D.

289. *See supra* note 69 and authorities cited therein.

allowed during the New Deal and Great Society. The answer to that historical anomaly is also best explained using a social choice framework.

While admittedly more conservative than their predecessors in the New Deal and Warren Courts, the Burger and Rehnquist Courts were themselves multipeaked, and thus unable to ensure that in codifying their preferences, they would not thwart the will of a present majority. This anomaly stemmed in large part from a conservative divergence that continues to this day, between those judicial conservatives who emphasize adherence to precedent, whether or not the relevant case was rightly decided as an original matter, and those judicial conservatives with a doctrinal agenda to reduce the role of the judiciary in questions of policy (or alternatively to advance a particular conservative policy agenda), even if that requires departing from the liberal precedents of an earlier era.[290] When we add one final group, namely those justices who, even though they are in the minority, continue to adhere to the principles of a prior, more liberal judicial era, the stage is set for a Court possessed of cyclical preferences.[291] One obvious method that a Court can employ to reduce the risk of issuing opinions that codify

290. For a very recent illustration of this point, compare the joint opinion with the Scalia dissent in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), on the role of stare decisis in deciding whether to uphold Roe v. Wade, 410 U.S. 113 (1973).

291. A variation on Bowers v. Hardwick, 478 U.S. 186 (1986), will illustrate the point. In *Bowers*, the Court upheld the conviction of a man charged with violating a Georgia statute prohibiting consensual acts of sodomy. *Id.* at 189. The state maintained that, although the statute would be unconstitutional if applied to heterosexual acts of sodomy, as applied to the defendant, a homosexual, the statute was constitutional. *Id.* at 218 n.10 (Stevens, J., dissenting). Thus, to reverse the conviction, the Court would have had to expand the reach of the privacy cases to include protection of consensual acts of homosexual sodomy. Ruling in defendant's favor would have required departing from a long history in which the constitutionality of such statutes was assumed.

Assume that a group of justices that favors the recent privacy cases, which we will call the Liberal bloc, would most like to reverse and to issue an opinion that expands the reach of these privacy cases. If required to uphold the conviction, however, the Liberal bloc members would prefer doing so on the narrow basis offered by their somewhat more conservative colleagues who exhibit a great respect for precedent. Those justices, whom we will refer to as the Moderate bloc, would prefer to hold that the privacy cases have not extended this far and that the history of such statutes suggests that their constitutionality has long been assumed. The final group of justices, whom we will refer to as the Conservative bloc, would most like to take the case as an opportunity to either reverse earlier privacy cases or to invite cases presenting opportunities to do so in the future. If we refer to the Liberal bloc's position as A, the Moderate bloc's position as B, and the Conservative bloc's position as C, with a few minor assumptions, we can see the problems that the Court may have faced in aggregating its preferences. Based upon the above assumptions, the Liberal bloc's resulting preferences are (A,B,C). Assume that the Moderate bloc would most like to affirm based upon a narrowly drawn ruling that does not call into question the prior privacy cases but that declines to extend their reach. Failing that, Moderate bloc members would prefer to uphold the conviction based upon the Conservative bloc's position, resulting in the preferences (B,C,A). Finally, assume that the Conservative bloc, which would most like to issue a strong ruling, suggesting that the Constitution does not protect a generalized right of privacy, would next prefer reversing based upon the Liberal bloc's rationale, rather than the Moderate bloc's rationale. While that might appear counterintuitive, assume that the Conservative bloc would prefer not to signal that it is disinclined to revisit the expansive privacy cases (or other liberal precedents) in other contexts. The resulting preferences are (C,A,B). The three sets of preferences are non-Condorcet and multipeaked, thus preventing the Court from guaranteeing a rational resolution of the case.

non-Condorcet minority preferences is to expand, rather than to retreat from, the use of standing. While the companion article will set out many more dots and a more detailed historical context than we can lay out here, with the foregoing observations in mind, we are now ready to paint an informative sketch.

A. No Right to Enforce the Rights of Others

The first standing case category, which is commonly referred to as third-party standing, but which is better labelled "no right to enforce the rights of others," is critical to preventing advertent path manipulation. Absent this presumptive rule, ambitious interest groups could, with virtual certainty, locate a nonripe and nonmoot claim based upon facts that affect someone else in an effort to manipulate the order of precedent. This is most obviously true in, although it is not limited to, the criminal procedure context. There is virtually always some convicted criminal for whom a live claim exists that, if presented, could be used to test the outermost limits or reach of a substantive constitutional provision.[292] And yet, many (or perhaps most) such claims are not pursued. As a presumptive matter, the Court requires that we wait until convicted criminals raise their own claims before the federal courts are permitted to engage in the process of creating positive law with respect to the scope and reach of broad-based constitutional provisions that afford protections to criminal defendants.

Forcing the courts to wait for actual cases that implicate the rights of the persons who raise them does not remove the inevitable path dependency that arises in a system of law that adheres to the doctrine of stare decisis. Instead, it renders the evolution of legal doctrine more fair as that term is defined in social choice. The presumptive rule against enforcing the rights of others renders the evolution of legal doctrine more fair because when historical events beyond the control of the litigants, rather than the desire to affect the order of case presentation, govern the order of precedent, the process of creating law on the underlying issue, whether in the courts or by the legislature, is more likely to accord with a majoritarian norm. Interest groups who deploy a set of facts that adversely affected someone else to force judicial creation of positive law do so precisely because, as a group with non-Condorcet minority preferences, their best (and perhaps their only) shot at creating the positive law they seek on their issue of choice is in forcing the courts to decide some case that rests upon that issue. On a Court with multipeaked preferences, which the companion article will

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The fact that the Court reached a result and upheld the conviction does not disprove the thesis set out above. Given the Court's decisional rules, a Court with non-Condorcet preferences will achieve some resolution, but in doing so, it will inevitably thwart the will of a present majority.

292. Moreover, as City of Los Angeles v. Lyons, 461 U.S. 95 (1983), reveals, absent this presumptive rule, litigants could present claims without undertaking the effort to identify a convicted criminal with a live claim; instead, one need only posit that the state of the law is such that absent a judicial corrective, a future person might be subject to criminal penalties in violation of the law.

demonstrate in more detail was especially true of the Burger and Rehnquist Courts,[293] we could anticipate a presumptive rule that litigants presumptively lack the right to enforce the rights of others, which is designed to prevent this form of advertent path manipulation.

B. No Right to Prevent Diffuse Harms

In law, as in life, there is always more than one way to skin a cat. Interest groups could effectively force judicial creation of positive law and manipulate the order of precedent through means other than identifying facts that implicate the rights of third parties. Some illegal government activities can be said to affect us all, even if in an indirect and seemingly inconsequential manner. Thus, as the taxpayer hypothetical[294] demonstrates, when the government spends money or donates land in a manner that violates the First Amendment, each taxpayer or citizen can be said to have suffered an injury, even if most of us view that injury as trivial.[295] Of course, to the extent that we all *have* been injured, we might expect Congress, which represents all of our interests, to act on our behalf. But the very same mechanisms that promote rationality in Congress by permitting inertia or the formation of broad-based coalitions in response to cyclical preferences,[296] can also appear to render Congress a sleepy giant. Frustrated victims of allegedly illegal, or unconstitutional, government actions—or interest groups representing such individuals—could, absent a standing barrier, attempt to affect the evolution of legal doctrine by presenting cases challenging such conduct in the most favorable order.

The Court has, therefore, created a second presumptive rule that prevents litigants from attempting to remedy diffuse harms through the federal courts. As with the rule against enforcing the rights of others, the presumptive rule against allowing individuals to prevent diffuse harms in federal court promotes Arrovian fairness. It does so by requiring that the most majoritarian branch, rather than the least, decide how and when to deal with illegal government conduct that harms us generally. Because all persons are arguably harmed in like manner and degree by the government's failure to require that the CIA publish its budget in violation of the Constitution's

293. *See* Stearns, *supra* note 5, part II.A (demonstrating that Burger and Rehnquist Courts, which primarily developed standing into its present form, were multipeaked and thus prone to cycling).

294. *See supra* notes 87-111 and accompanying text.

295. The injury is trivial if we assume that the financial harm is the primary element of injury. For some individuals, the fact of a constitutional violation, for example, one that implicates the First Amendment, may result in substantially greater nonpecuniary harm, such as psychological injury. The problem is that given the ubiquity of taxpayer status, we can virtually always posit that someone suffers disproportionate psychological harm associated with allegedly illegal government activity. As a result, unless we assume that litigants are lying (or unless we can somehow weed out nonlying litigants), *cf.* Fletcher, *supra* note 3, at 231 (asserting that injury in fact cannot be applied in nonnormative manner to prevent claims of nonlying litigants), allowing sensitive litigants to present such claims would open the doors to the very path manipulation that standing is intended to prevent.

296. *See supra* note 163 and accompanying text.

Statement and Accounts Clause,[297] by the potential conflicts associated with seating members of the military reserves as members of Congress,[298] and by the government's spending or land-granting policies that violate the Establishment Clause or Article I's Property Clause,[299] the presumptive rule against enforcing the rights of others cannot alone prevent the path manipulation that such cases would promote. Again, however, in denying standing in these cases, the Court has in fact created a substantive legal rule, namely that individuals, at least presumptively, cannot sue in federal court to prevent diffuse harms, especially where doing so requires the federal courts to create positive law.

C. No Right to an Undistorted Market

The final general standing category is conceptually the most difficult and, perhaps for that reason, the one category most prone to inconsistent (some might go so far as to say arbitrary) applications. In a series of cases, in the guise of standing denials, the Court has prevented a series of individuals or groups from challenging government activity that allegedly violates an express constitutional provision, for example, an IRS tax policy which allegedly violates the Fourteenth Amendment's Equal Protection Clause,[300] or a statute,[301] on the theory that if the market distortion created by illegal or unconstitutional activity is removed, corrected market forces will inure to their benefit.[302] Thus, for example, in *Allen v. Wright,*[303] the parents of black public school children challenged an IRS tax policy that afforded favorable tax treatment to private schools with discriminatory admissions

297. *See* United States v. Richardson, 418 U.S. 166 (1974).

298. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

299. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982); Flast v. Cohen, 392 U.S. 83 (1968).

300. *See, e.g.,* Allen v. Wright, 468 U.S. 737 (1984).

301. *See, e.g.,* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). For a detailed discussion exploring the difference in substantive content between standing denials based upon statutes and standing denials based upon the Constitution, see Stearns, *supra* note 5, parts II-III.

302. It is important to distinguish this category, which I have labelled "no right to an undistorted market," from economic substantive due process. Under the doctrine most commonly associated with Lochner v. New York, 198 U.S. 45 (1905), the Court protected, under the Fifth and Fourteenth Amendment Due Process Clauses, the right of individuals and corporations to contract and to own property free of prospective government interference. The Court gradually chipped away at, and then abandoned, this policy. *See, e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (rejecting due process challenge to state minimum wage law for women). In cases within this standing category, in contrast, plaintiffs seek to invalidate government practices that they allege violate some independent constitutional guarantee, most commonly the Fourteenth Amendment's Equal Protection Clause, or some independent federal statute, on the theory that if the illegal practice is stopped, the market forces will work to their eventual benefit. The *Lochner* doctrine takes a state of laissez-faire as its normative baseline, while cases within this category can rely variously upon either a laissez-faire or a regulatory baseline. Thus, for example, the *Allen* and *EKWRO* claimants alleged that if the government discontinued its favorable tax treatment for discriminatory institutions, market forces, which would then operate with a *greater* degree of regulation, given that they would be subject to more taxation unless they were willing to alter their conduct, would eventually inure to their benefit.

303. 468 U.S. 737 (1984).

policies, by classifying the tax status of those schools according to the umbrella organizations to which they belonged, rather than according to each school's admissions practices. Plaintiffs alleged that if the market distortion created by the tax policy, rendering attendance at private white schools less costly and, in turn, promoting white flight, were removed, their children would be more likely to receive an integrated public school education. Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization*[304] (*EKWRO*), plaintiffs challenged an IRS tax policy affording favorable tax treatment to hospitals that failed to provide medical services to indigents, allegedly in violation of the Internal Revenue Code. In both cases, the Court denied standing, reasoning that the attenuated line of causation between the alleged harm and the desired remedy, which involved actions of third parties not before the Court, rendered the claimed injury insufficiently concrete for standing purposes.

In denying these and related claims on standing grounds,[305] the Court has focused largely on the number of links in the causal chain between the facts forming the claimed injury and the ultimate desired remedy. In *Allen,* for example, to obtain standing, plaintiffs would have had to allege that if the tax policy were struck, a sufficient number of schools and parents would alter their conduct to discernibly integrate the public schools that the plaintiffs' children attended. These cases are analytically difficult for two reasons. First, plaintiffs are neither raising claims of third parties nor claims that are diffuse, as that term was employed in the prior category. While the class of affected plaintiffs may be large, that is certainly not a basis upon which to deny standing, provided plaintiffs suffer an injury distinct from the population (or taxpayers) generally. Second, in these cases, plaintiffs' injuries result from factual circumstances that are seemingly well beyond their control; in fact, the factual circumstances are seemingly within the primary control of the government. Moreover, because plaintiffs have suffered an injury distinguishable from that of the population at large, we might expect the Court to have less confidence in a political solution.

These cases are best understood as hybrids, lying somewhere in the midpoint of a spectrum. At one extreme, we have those cases that involve facts entirely beyond the litigants' control and for which judicial relief will unquestionably remedy the alleged harm. In the criminal procedure cases, for example, path manipulation is rarely, if ever, a concern; the litigants are pursuing their claims not out of any sense of ideological altruism, but, instead, out of a narrow desire for personal gain. At the other extreme are

304. 426 U.S. 26 (1976).

305. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 504-08 (1975) (denying standing to residents of the City of Rochester who challenged an exclusionary zoning ordinance in neighboring Penfield, on ground that striking the ordinance might not result in increasing desired low and moderate income housing); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (denying standing to unwed mother seeking to enjoin discriminatory application of child-support statute on grounds that application of statute might result in jailing of father rather than in increased child-support payments).

the ideologically driven cases that fit generally within the two prior categories, namely generalized grievances or grievances that, while specific, are specific to someone else. In those cases, legislative processes are presumptively superior precisely because the litigants are trying to codify non-Condorcet minority preferences through the courts. In denying standing, the Court does not forever hold the underlying claim off-limits; instead, it sends a signal that when a proper shadow case arises as a result of factual developments beyond the litigants' control, it will resolve the case. Until then, the litigants are free to participate in legislative processes.

As suggested above,[306] one of the major difficulties with the standing case law is that because the Court has never precisely articulated (and perhaps has not quite understood) the doctrine's purpose, it has employed descriptive labels that capture only part of the relevant image. While the Court has stated, for example, that standing is designed to promote zealous advocacy, it has denied standing to the unquestionably zealous Sierra Club. While the Court has stated that injuries must be concrete and particularized, it denied standing to Mrs. Gilmore whose injury was utterly precise. In each of these cases, the Court was employing a heuristic—or metaphor—that is only loosely correlated with the issues at stake in its standing determinations. The cases in this category are an extension of this principle. The Court has denied standing in these cases because features of these cases more closely resemble those associated with path manipulation than those associated with traditional bipolar litigation.

The point is most aptly illustrated when we revisit the contrasting cases of *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[307] and *Regents of the University of California v. Bakke*.[308] In both cases, the Court granted standing even though, as in *Allen* and *EKWRO,* the ultimate relief that plaintiffs were seeking depended upon the largesse of third parties not before the Court. In both of these cases, had the Court employed the analysis that it used in *Allen* or *EKWRO,* focusing on the attenuated chain of causation between the alleged illegal conduct and the desired relief, it would have—or at least it could have—denied standing. Instead, the *Duke Power* and *Bakke* courts found the claimed injuries sufficiently concrete to confer standing. In *Duke Power,* the Court focused on the proximity of the proposed plant to plaintiffs' homes[309] and in *Bakke,* Justice Powell, whose opinion was controlling, focused on the exclusion from full consideration of all seats, rather than on the claimant's ultimate objective[310]

306. *See supra* part II.B.

307. 438 U.S. 59 (1978).

308. 438 U.S. 265 (1978).

309. *Duke Power Co.,* 438 U.S. at 73-74. Plaintiffs alleged that the construction was proceeding on the assumption that in the event of an accident, liability was capped at $560 million by federal law.

310. *Bakke,* 438 U.S. at 289 (opinion of Powell, J.).

of securing admission to medical school. These four cases cannot be distinguished in kind, but they can be distinguished in degree.

As with its standing rhetoric,[311] the Court's standing determinations are largely based upon rough correlations between characteristics of case facts under review and those that lie at the two extremes. The zealousness and concreteness labels, for example, used to describe the appropriate circumstances for granting standing, have no abstract or independent significance, but they do correlate fairly well with those circumstances in which the federal courts have no choice but to shift the burden of congressional inertia. Thus, the Court has no choice but to shift the burden of inertia in a proper criminal appeal or collateral attack because, otherwise, the claimant might suffer the most serious form of concrete harm in violation of the Constitution. This holds true even if, in doing so, the Court is forced to issue a decision that is the product of non-Condorcet preferences. At the other extreme, the Court is well aware that facts can be variously characterized and case orders can be readily manipulated to force the Courts to create positive law in ways that are likely to thwart the preferences of even a majority of its own members. When case facts appear to fit that description, members of the Court, having occasionally issued opinions that thwart their will, even when that will is shared by a majority, may well prefer a presumptive rule that requires the litigants to go to Congress, which can freely elect to act or not to act, in response to the claimants' grievances.

The cases in this category are hybrids between these two extremes. In *Allen,* the breadth of the claim, affecting large numbers of people, and its nature, requesting an expansive constitutional interpretation of the Fourteenth Amendment with implications for institutions across the nation, may have suggested to the Court that the claim was of a different kind than that generally associated with the traditional context in which the federal courts cannot avoid creating positive law. Similarly, in *EKWRO* the requested potential interpretation of the Internal Revenue Code, with similarly broad potential effects, likely signalled an effort to control the order of precedent, rather than the need to make law to remedy an injury resulting from factors beyond the claimants' control. In other words, even though the *Allen* and *EKWRO* plaintiffs suffered a form of injury distinct from the population at large and that did not belong to another set of individuals, their claim looked and smelled much like those in the first two categories in level of generality. By focusing on the attenuated causal chain between the requested relief and the plaintiffs' ultimate objectives, the Court was able to strengthen its intuition that these cases better fit the general categories in which litigants are attempting to force judicial creation of positive law than those cases in which plaintiffs are requesting relief in spite of, rather than because of, the need to make law.

311. *See supra* note 279 and accompanying text.

In contrast, the facts of *Duke Power* and *Bakke,* while undoubtedly susceptible of a contrary characterization, possessed significant characteristics that correlate with the opposite extreme, namely cases in which individuals are seeking concrete judicial relief and are, at best, indifferent to any ancillary lawmaking that may be required to obtain that relief. In *Duke Power,* for example, it was fairly obvious that plaintiffs did not seize upon the construction of a nuclear facility near their homes to establish a precedent on the due process limits on Congress's power to cap liability. Instead, they looked like a group of individuals who were attempting to preserve the value of their homes and the character of their community. Similarly, in *Bakke,* plaintiff, having twice been denied admission to medical school, did not look like a plaintiff on an ideological mission to thwart affirmative action programs based upon a restrictive interpretation of the Equal Protection Clause. Instead, he looked like a frustrated medical school applicant trying to remove an admissions barrier that he perceived as unfair and possibly illegal.

This analysis is not intended to suggest that these four cases were necessarily decided in the correct manner. As stated at the outset, the purpose of this Article, and its companion, is to provide a positive analysis of the Supreme Court's standing doctrine. To do that, we need to pierce the Court's standing language and, instead, focus on the case facts in light of the Court's standing objectives. When we understand the underlying purpose of the modern standing doctrine, namely to prevent litigants from undermining the majoritarian norm associated with our lawmaking system by seizing upon the different decisional rules in Congress and in the federal judiciary in an effort to force non-Condorcet preferences into law, we can begin to dissipate many, if not most, of the seeming anomalies in the standing case law. Absent a standing barrier, ideological interests, by manipulating the order of case presentations, could alter the substantive evolution—and not merely the timing—of legal doctrine. This is especially true with respect to those controversial issues over which the Court lacks majoritarian or Condorcet-winning preferences. When plaintiffs are not the individuals who suffer the alleged harm, and when harms are sufficiently generalized that we would expect the legislature to protect our collective interests, the Court presumes that the real objective of the case is to make law and not to obtain relief. But when plaintiffs have virtually no control over the facts or timing of their cases and, instead, are simply trying to get relief to which they believe they are entitled, the Court will presume that any lawmaking associated with resolving such cases, even if it results in codifying non-Condorcet preferences, is a necessary part of its judicial responsibility.

These are not easy concepts. Just as standing promotes the objective of ensuring that the judiciary make law only on an ad hoc and as-needed basis, we would expect pronouncements on standing to be made only in piecemeal fashion. Thus viewed, we should not be surprised when the

Court's standing language, which can capture only a small slice of a larger picture, to be filled in over time, turns out to be something of a distortion. But, as this Article and its companion are intended to demonstrate, fuzzy images become increasingly clear when we take enough steps back.

CONCLUSION

In the art museum anecdote, which opened this Article, the lawyer, rather than the judge, is the artist. The judge is not the artist because, in deciding actual cases, she inevitably stands too close. But the effective lawyer, because she is trying to paint a positive picture that captures as many of the judicially created points of reference as are consistent with her desired outcome, is anything but a neutral conduit. Instead, to be effective, she must choose which cases and principles to emphasize and which to subordinate. This combination of tasks may not be surprising; after all, the artist is nothing if not a critic of the world in which she lives. The stroke of paint, no less than the selection of a metaphor, tends to emphasize those features that the artist thinks important and to downplay those features that are not critical in her overall vision.

In deciding its standing cases, the Supreme Court, perhaps more than in any other single area of law, has stood too close to see more than the dots themselves. It is our job, as lawyers, to discern, or to paint, the relevant picture. This Article has begun that task by providing an evolutionary model, grounded in social choice, that explains the development of the modern standing doctrine and the functions that the doctrine serves. To explain standing, the Article has shown that we first need a theory of stare decisis. The Article demonstrates that stare decisis has evolved to prevent the Court from revealing cyclical preferences that would otherwise be revealed over time and across cases. The negative, and unintended, consequence of stare decisis, however, is that in preventing intertemporal cycling, the doctrine inevitably renders the substantive evolution of legal doctrine path dependent. The same cases presented to the same Court, but in different order, can create entirely opposite legal doctrine. As a result, adherence to stare decisis creates a strong incentive for interest groups to try to seize control of the order of case presentation to affect the substantive evolution of law.

If stare decisis enhances the rationality of Supreme Court decisionmaking by preventing the Court from revealing cycles over time, standing enhances the fairness of Supreme Court decisionmaking by preventing, at least presumptively, the most damaging consequences of path dependency. Standing does not prevent path dependency. In a regime in which stare decisis is observed, the evolution of legal doctrine will necessarily be path dependent. Instead, standing, which operates as a set of presumptive ground rules, renders the inevitable path dependency of legal doctrine more fair. It does so by presumptively requiring as a precondition to forcing the

federal courts, including the Supreme Court, to make law in a given case, that the case result from a set of facts that affect the litigants in a direct and meaningful way and that are, for the most part, beyond the litigants' control.

The three principal standing categories have each been stated in the form of a substantive legal ruling. Each has the critical feature, revealed by social choice, of encouraging fortuity, rather than advertent litigant path manipulation, to effectively govern the order in which cases are presented for adjudication. While the Court, in issuing its standing decisions, inevitably makes substantive law, this Article has demonstrated the importance of comparing the Court's options, either to make law on the underlying issue, or to deny standing with the effect of issuing a relatively modest substantive holding, one that discourages path manipulation. Once we recognize that, from the 1970s through the present, the Court has been, perhaps for the first time in history, prone to issuing decisions that were the product of multipeaked preferences, we can understand why the Court during this period made standing an increasingly prominent doctrine.

The test of any model, of course, is the extent to which it explains and predicts. The final section of this Article provided a prelude, or preliminary assessment, of this model's analytic force. The companion article will take us further, providing both a more detailed historical framework and a more thorough review of the standing case law. Together, these articles will help those interested in this enigmatic doctrine to take a few steps back.