GRAINS OF SAND OR BUTTERFLY EFFECT: STANDING, THE LEGITIMACY OF PRECEDENT, AND REFLECTIONS ON *HOLLINGSWORTH* AND *WINDSOR*

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ABSTRACT

One test of whether a scholarly work has achieved canonical status is to ask respected scholars in the field which works, setting aside their own, are essential reads. William Fletcher's article, The Structure of Standing*, now in its twenty-fifth year, would almost certainly emerge at the top of any such lists among standing scholars. And yet, while many at this conference have built upon Fletcher's insights, there remains notable disagreement concerning standing doctrine's normative foundations. The central dispute concerns whether standing doctrine should be celebrated as furthering a "private-rights" adjudicatory model, or instead, condemned as thwarting a "public-rights," adjudicatory model.*

In a series of works employing social choice theory, I have presented standing doctrine as furthering a private-rights adjudicatory model. In separate high-profile works, Professors Heather Elliott and Jonathan Siegel have criticized this account, claiming it rests on the "great myth" that the judicial lawmaking is inextricably tied to dispute resolution, with precedent creation merely an incidental byproduct. Instead, Elliott and Siegel contend that the federal judiciary, including especially the Supreme Court, has the primary responsibility of announcing constitutional rules, with case resolutions a justificatory vehicle for performing that task. Siegel further maintains that if, as the social choice model suggests, standing raises the cost to ideological litigants of timing the path of case law to influence developing doctrine, it is no more effective than tossing a "few grains of sand" into the gears of the judicial-lawmaking apparatus.

In this Article, I respond to these critiques and defend the social choice analysis of standing and the private-rights model on which it rests. First,

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these and other public-rights scholars fail to appreciate that the private-rights model enhances the normative legitimacy and durability of precedent. If the justification for creating precedent is the present favorable conditions of judicial staffing, then the arguments for respecting the resulting precedent erode when those conditions change, favoring those opposing the precedent. Second, these critiques misread the social choice model of standing to imply that relaxing its limiting conditions undermines the claim that with reasonable assumptions, even if there are no changes in Supreme Court staffing, the disposition of cases below, intervening precedent, and the jurisprudential views of sitting justices, ideological litigants can affect substantive doctrine through favorable case orderings. The opposite is true: relaxing these limiting conditions has the potential to enhance, not diminish, incentives to manipulate case orderings for maximal doctrinal effect. Third, and finally, expanding the social choice analysis to account for (1) delays in lower federal courts or state courts, (2) the results of changed judicial staffing on the Supreme Court, and (3) the bidirectional nature of constitutional and prudential standing rules more likely generates a "butterfly effect," with substantial implications for developing doctrine, than an inconsequential tossing of sand into the works of developing precedent.

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INTRODUCTION

One test of whether a scholarly work has achieved canonical status is to ask those writing in the field which works, setting their own aside, are essential reads.[1] My own casual empiricism, corroborated by this very conference, suggests that William Fletcher's *The Structure of Standing*[2] would almost certainly emerge at the top of any such lists among standing scholars. Indeed, if there is a reason to avoid calling Fletcher's work a classic it is merely that even after twenty-five years, the article continues to be *both* praised *and* read.[3]

Then-Professor William Fletcher was among the first legal scholars to emphasize the necessarily substantive quality of the Supreme Court's nominally procedural standing decisions.[4] Fletcher demonstrated that any standing decision can be recast as a substantive holding, and he recognized the metaphysical quality of denying a claimant standing for want of injury. Fletcher established that the Supreme Court's requirement of an injury in fact is invariably satisfied, save in the trivial case of the hypothetical lying plaintiff.[5] These insights helped support Fletcher's overriding thesis: Standing decisions should rest on whether the underlying source of law—constitutional, statutory, or regulatory—provides the basis for plaintiff's legal claim.[6]

As a corollary, and responding to Antonin Scalia's *Suffolk Law Review* article,[7] the prelude to *Lujan v. Defenders of Wildlife*,[8] Fletcher maintained that Congress should have broad discretion to confer standing as a means of enforcing federal statutory claims, at least provided that the underlying

1. For a theoretical recasting of this test, see *infra* note 37 and accompanying text (defining Condorcet criterion as the dominant outcome in unlimited binary comparisons absent a first-choice majority candidate).

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

3. Mark Twain, FOLLOWING THE EQUATOR 241 (The American Publishing Co. 1897) (defining a "Classic" as "[a] book which people praise and don't read.") (emphasis omitted).

4. Fletcher, *supra* note 2, at 229 ("The essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked.").

5. *Id*. at 231 ("If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations in her complaint.").

6. *Id*. ("There is nothing wrong with a legal system imposing such external standards of injury; indeed, that is what a legal system must do when it decides which causes of action to recognize as valid legal claims. However, in employing such standards, we measure something that is ascertainable only by reference to a normative structure.")

7. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

8. 504 U.S. 555 (1992).

statute is itself constitutional.[9] Then-Judge Scalia, sitting on the United States Court of Appeals for the District of Columbia Circuit, had suggested recasting the separation-of-powers foundations of standing to limit broad congressional conferrals of private attorney general status. Scalia posited that such expansions of standing risk an over-judicialization of the lawmaking process at the expense of the executive branch.[10] By contrast, Fletcher's analysis implies that because Congress has the power to create the substantive source of law within its purview, so too it has the power to determine the methods by which that law should be enforced.[11] At least implicitly, in Fletcher's account, the separation-of-powers underpinnings of standing doctrine protect legislative policymaking, including Congress's decisions about methods of enforcing federal claims, whereas in Scalia's account, the separation-of-powers underpinnings of standing protect executive enforcement discretion.[12] Although *Lujan* itself was decided after Fletcher's article was published, a reasonable implication of Fletcher's analysis would permit the broad statutory conferral of standing that Scalia, writing for the *Lujan* majority, found constitutionally impermissible.[13]

Several scholars at this conference, which celebrates the twenty-fifth anniversary of Fletcher's article, have built upon these foundations. And although my intuition is that those in attendance would likewise place Fletcher's article on the top reading list for standing doctrine, there remains notable disagreement within our ranks concerning the doctrine's normative foundations. In full candor, although Fletcher's analysis is important to the analysis that follows, I will resist claiming that his study of standing somehow corroborates my thesis. My own best reading suggests that Fletcher's prescient article offers some support for each side in the

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9. Fletcher, *supra* note 2, at 253:

> When Congress passes a statute conferring a legal right on a plaintiff to enforce a statutorily created duty, the Court should not require that the plaintiff show "injury in fact" over and above the violation of the statutorily conferred right. The Court has often stated that the power of Congress to grant standing is limited by the Article III requirement that a plaintiff suffer "injury in fact." But when the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself.

Id.

10. Scalia, *supra* note 7, at 896 ("Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely . . . to be enforcing the political prejudices of their own class.").

11. Fletcher, *supra* note 2, at 264 ("In the end, statutory standing cases need not be conceptually difficult. If a suit is founded directly on a statute, one looks to that statute to determine whether the would-be plaintiff has standing.")

12. *Lujan*, 504 U.S. at 577 (1992).

13. In his keynote address at this conference, Judge Fletcher sought to reconcile the *Lujan* holding with his general standing analysis as set out in *The Structure of Standing*. Although this is not the central focus of this Article, my own view is that these two theories of standing rest on irreconcilable premises and that the premises underlying *The Structure of Standing* are more defensible. *See also infra* note 14 and cites therein.

following debate, which is to say that ultimately I do not believe that *The Structure of Standing* resolves what I take as the central normative disagreement among several attendees at this conference. This is not a criticism; good-faith interpretive disputes often arise following the publication of major works, and for that very reason, it is important to acknowledge the historical context within which such works were written.[14] The central dispute that I believe continues to pervade the standing literature, and that I plan to address in this Article, is whether standing is best understood as furthering a "private-rights" or "public-rights" model of judicial decisionmaking.

Those of us who embrace the private-rights model agree with Judge Fletcher that standing determinations are substantive. We further contend that the different nature of the substantive holdings resulting from standing denials, which typically end litigation, versus those arising from standing conferrals, which typically allow litigation to continue and thus invite a substantive ruling on the merits, holds normative significance for the legitimacy and efficacy of the resulting process of constitutional lawmaking. In a series of past works, I have supported this intuition, borrowing from the toolbox of social choice.[15] Social choice analysis is helpful in studying the nature and limits of group decisionmaking, including that in the Supreme Court. In this Article, I will revisit that analysis to defend what I contend are its normative implications for standing doctrine.

In a series of thoughtful works on standing, Professor Robert Pushaw has taken a somewhat longer path, thoughtfully constructing a neo-federalist critique of standing doctrine[16] that ultimately has led him to a similar place. In his most recent article on standing, published prior to this

14. As previously suggested, that context is largely informed by a separate dispute concerning whether the separation-of-powers foundations of standing are primarily designed to protect congressional monitoring of executive enforcement discretion or to provide autonomy for executive discretion itself. *See supra* notes 7–10 and accompanying text. Although this dispute remains, and indeed, although the Court has itself vacillated on this question, *compare* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000), *with* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), it is not the primary focus of this Article.

15. *See, e.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (paperback ed. 2002); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875 (2008); Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321 (2000); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309 (1995); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995).

16. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994); *see also* Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996).

conference,[17] Pushaw argued that private-rights adjudication improves the normative legitimacy of constitutional lawmaking. As a consequence, Pushaw claims, federal courts should apply standing doctrine in a manner that affirmatively ensures, or at least encourages, fortuity—in the sense of factors presumptively beyond the litigants' control—as the dominant driver in the timing of constitutional litigation.[18] Although our approaches share important common features, there are also notable differences.[19] Whereas my approach is positive—explaining standing's doctrinal foundations as furthering the private-rights adjudicatory model and then allowing the applications to fall as they may without regard to actual litigant motivations—Pushaw's approach, which is grounded in the historical meaning of "case" or "controversy,"[20] is normative—advocating that the federal judiciary construe standing doctrine specifically to promote the private-rights adjudicatory model.

These approaches lead to potentially differing normative implications in some cases,[21] but the analytical commonality suffices to combine them, along with some other notable works on standing, [22] under the broad umbrella of a private-rights adjudicatory model. This model rests on an important premise: what legitimates judicial lawmaking—meaning the announcement of presumptively binding precedent in the course of deciding cases—is the fortuity of the timing of judicial decisionmaking on any given legal issue. This premise has a long pedigree,[23] and, I will argue, it also has a strong functional justification.

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17. Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1 (2010).

18. *Id*. at 11 ("[S]tanding should focus on the appropriate plaintiff who can bring an Article III 'Case'—namely, one whose federal legal rights have been violated fortuitously (that is, involuntarily as a result of a happenstance event or action beyond the plaintiff's control) and who can therefore legitimately trigger the court's expository function.").

19. For Professor Pushaw's earlier co-authored critique of the social choice account of standing, one still grounded in the neo-federalist analysis, see Tracey E. George & Robert J. Pushaw, Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265 (2010) (reviewing STEARNS, *supra* note 15).

20. Pushaw, *supra* note 17, at 3, 11 n.45.

21. As possible illustrations, consider *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), which involved litigants who met the Court's articulated standing criteria but also might have been motivated as much, if not more, by the desire to create precedents restricting race-based affirmative action than to secure relief in the form of admission to the University of Michigan as an undergraduate and law student, respectively.

22. Other articles that view standing doctrine within this tradition include Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663 (2007), and Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

23. This is perhaps most notable in the often overlooked "duty" component of the famous formulation in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "It is emphatically the province *and duty* of the judicial department to say what the law is." *Id*. at 177 (emphasis added). The implication, made plain in the case itself, is that it is the obligation to resolve the case (the duty) that gives rise to the power (or province) to announce, as needed, interpretations of the law as required to resolve the case.

In a related work, I have recently argued that a private-rights adjudicatory model enhances the legitimacy, and thus the durability, of precedent.[24] That is because if the primary normative justification for using a case as the vehicle to establish a sought-after precedent is today's presently favorable judicial staffing, then the argument for respecting that precedent erodes when those disfavoring the precedent confront what they regard as preferred judicial staffing some time in the future. While it may be quaint to observe that what's good for the goose is good for the gander, that doesn't make the claim less true. Fortuity as a timing principle largely avoids this difficulty because the normative justification for respecting precedent is then independent of favored or disfavored judicial staffing. Rather, the fortuitous circumstances that create the need for judicial resolution of the case also justify the resulting precedent. In this Article, I will focus on the closely related descriptive claim that standing has become a central judicial vehicle that promotes this private-rights adjudicatory model.

In separate works published in the *Stanford Law Review* and *Texas Law Review*, Professors Heather Elliott and Jonathan Siegel have argued that the social choice account of standing, along with other accounts that are consistent with the private-rights model, rests on the "great myth" that the judicial lawmaking function is inextricably tied to dispute resolution, with the creation of precedent as an incidental byproduct.[25] Instead, they contend, the federal judiciary, including especially the Supreme Court, should be understood first and foremost as an institution whose primary purpose and responsibility is to announce legal rules, with specific case resolutions ultimately a subsidiary concern, or perhaps a mere justificatory vehicle allowing this important judicial function to occur.[26]

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24. Maxwell L. Stearns, *Private Rights Litigation and the Normative Foundations of Durable Constitutional Precedent*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT (C.J. Peters, ed., forthcoming 2013).

25. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007). This debate was implicated in the two recently decided cases related to same-sex marriage, *Windsor v. United States*, 133 S. Ct. 2675 (2013) and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). For a discussion and analysis, see *infra* Part III.F.

26. Other notable standing scholars have expressed similar views. For example, in critiquing doctrine, Professor Steven Winter has said:

> The stripped-down definition of "case or controversy" that I have just described 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.

Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1512 (1988) (footnote omitted). The works of Siegel and Elliott are particularly notable here

Throughout this Article, I will refer to this view of standing as resting on the "public-rights" model of adjudicatory decisionmaking. In this model, standing doctrine, at worst, disrupts the federal judiciary's central lawmaking function, and at best, constitutes an ineffective yet troublesome barrier to such lawmaking efforts. As Siegel explains, if the function of standing is to deter litigant efforts to optimize case timing as a means of influencing substantive doctrine, it is roughly akin to throwing a "few grains of sand" into the gears of the judicial lawmaking apparatus.[27]

This Article will respond to these claims with three main points. First, it will show that this argument creates an internal tension to the extent that minor inconveniences—of the grains-of-sand variety—are unlikely to systematically thwart whatever lawmaking function the federal judiciary is empowered to undertake. Thus, if there are notable benefits to standing doctrine, as I contend there are, these small costs are likely insufficient to overcome them. Conversely, if the interference *is* great, then the grains-of-sand metaphor proves inapt. Standing doctrine is then doing real work in affecting the timing of the judicial lawmaking function. We might or might not much like standing doctrine's timing consequences, but that merely demonstrates that standing doctrine is nontrivial. At that point, the question becomes which normative account of standing doctrine is more compelling—an inquiry that returns us to the issue of the public-versus private-rights model of adjudicatory decisionmaking.

Second, the Article will evaluate the trade-offs in the value, and specifically the durability, of precedent as between these two models. The analysis reveals that the fortuitous timing associated with a private-rights model makes case law development less predictable yet more durable, whereas the non-fortuitous timing associated with a public-interest model makes development of case law more predictable yet less durable.[28] As is generally the case with positive models, the analysis thus far does no more than expose the inevitability of this trade-off; the ultimate decision as to which of these options is superior rests on premises that the model itself can neither prove nor disprove. My own normative view is that the former regime is not only more attractive, but also more legitimate. Even if public-rights standing scholars reject that position, as I believe they must, they should at least recognize the inevitability of the trade-off and, thus, the cost of their preferred alternative, the public-rights model.

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inasmuch as they have articulated similar views in direct response to the social choice model of standing. *See infra* Part II.

27. Siegel, *supra* note 25, at 75 ("They [standing and related justiciability doctrines] throw a few grains of sand into the workings of the judicial branch but do not prevent it from grinding out a judgment.").

28. Stearns, *supra* note 24.

Finally, the Article will demonstrate that these critiques rest on a misreading of the social choice model of standing. Specifically, the critiques mistakenly imply that relaxing the model's limiting conditions undermines the claim that with reasonable assumptions—even with no changes in Supreme Court staffing, the disposition of cases below, intervening precedent, or the jurisprudential views of sitting Justices—standing and other timing-based justiciability barriers limit the power of ideological litigants to effect substantive doctrine through favorable case orderings. The opposite is true: Relaxing these limiting conditions has the potential to enhance, not diminish, incentives to manipulate case orderings for maximal doctrinal effect. Thus, expanding the social choice analysis to account for (1) delays in lower federal courts or state courts, (2) the results of changed judicial staffing on the Supreme Court, and (3) the bidirectional nature of constitutional and prudential standing rules more likely generates a "butterfly effect," with substantial, and generally unforeseeable, implications for developing doctrine, rather than an inconsequential tossing of sand into the works of developing precedent. Individually or in combination, these factors show standing doctrine's considerable importance and effectiveness in infusing fortuity as the driver in sequencing doctrinally significant constitutional claims.

This Article proceeds as follows. Part I summarizes the social choice analysis of standing and relates it to the debate over the public-versus private-rights adjudicatory models. Part II presents the major criticisms that Professors Siegel and Elliott level against the social choice model. Part III defends against these criticisms both on methodological and normative grounds, thus demonstrating the power of the social choice account of standing and the private-rights model on which it rests.

I. SOCIAL CHOICE, STANDING, AND PRIVATE-VERSUS-PUBLIC-LAWMAKING MODELS

In this part, I will provide a brief summary of the social choice account of standing doctrine. Because those attending this conference are familiar with the standing case law, I will not include a detailed doctrinal survey. Instead, I will refer to specific cases as needed to elucidate particular analytical points.

Most commentators claim that standing doctrine is incoherent, politically or ideologically driven, ineffective, or some combination.[29] The social choice account of standing was, in the first instance, motivated by my desire to explain the doctrine to constitutional law students so that they would have a means of placing the many cases within a coherent analytical

29. Stearns, *Standing Back from the Forest*, *supra* note 15, at 1326–27 n.66.

framework. When I began this project, I primarily anticipated resistance to my claim that the social choice analysis of standing was robust, meaning that it offered a better means of reconciling this large and heavily criticized body of case law than competing theories. To my surprise, I have received virtually no criticism of this particular claim.[30] Instead, I have received pushback on normative grounds primarily related to the model's underlying assumption of a private-rights adjudicatory model.[31] In this Article, I will not provide a sufficiently detailed application of the doctrine to separately support the claim of robustness. Elsewhere I have made the case that the social choice account of standing lines up more cases, including the most contentious cases, as compared with other doctrinal accounts.[32]

I begin with a brief overview of the social choice model of standing, and then take up the previously identified critiques. The analysis demonstrates that standing doctrine raises the cost to litigants of ordering cases favorably to substantively affect developing constitutional doctrine. It does so by creating barriers to path manipulation, meaning efforts to place decisions in a preferred order of resolution. Path manipulation involves timing, meaning relative ordering, of cases for decision in a manner that increases the likelihood that those determining the order—called agenda setters—will obtain the eventual doctrinal outcome, or outcomes, that they prefer.

A. Sequencing, Dimensionality, and Cycling[33]

The basic elements of the social choice account of standing can be expressed simply. As a consequence of stare decisis, or the presumptive adherence to precedent, holding all else constant, different case orderings have the potential under specified conditions to generate different doctrinal results. Sophisticated litigators and judges intuitively understand this, and they are therefore motivated to present cases in what they anticipate will be a preferred sequence. For largely historical reasons that relate to a combination of unstable coalitions in the Supreme Court itself and its complex relationship with lower federal courts,[34] the Court has in recent decades constructed defenses against obvious mechanisms through which ideological litigants can favorably sequence cases to exert an impact on

30. Indeed, one attendee at this conference once told me that although mine was the most robust account of the standing cases of which that scholar was aware, that person would deny it if I so identified her or him. Rest assured that your identity remains safe with me!

31. *See, e.g.*, Siegel, *supra* note 25; Elliott, *supra* note 25.

32. *See generally supra* note 15 and cites therein.

33. For sources that set out this model in greater detail, see *supra* note 15 and cites therein.

34. *See* Stearns, *Standing in the Roberts Court*, *supra* note 15 (presenting data on both the Court's internal coalition stability and its ideological relationship with the federal circuit courts of appeal).

developing constitutional doctrine. Most notably, the Supreme Court has employed its standing doctrine to accomplish this task.[35] Standing doctrine helps to accomplish this by presumptively grounding the order of cases in fortuitous events as opposed to advertent litigant strategy. While the resulting doctrine continues to be affected by the relative ordering of cases, or, in the language of social choice, remains path dependent, the doctrine is less prone to path manipulation. This means the primary determinants of the path are fortuitous historical events generating cases in need of resolution, rather than advertent litigant strategy. As a normative matter, I argue, this process enhances the legitimacy of constitutional case law.

The tools of social choice help to unpack this brief summary. While the social choice tools do not change the essential features of the preceding account, they allow for a more precise methodological exposition about the nature and limits of the relationship between case orderings, on the one hand, and substantive doctrinal outcomes, on the other. Social choice analysis is unfamiliar to many readers and is potentially daunting for the uninitiated. Although I will only provide a brief summary, I will do so without mathematics, and I will introduce familiar case illustrations where appropriate.

The analysis begins with three individuals, *P1*, *P2*, and *P3*, choosing among three options, *A*, *B*, and *C*. Assume that no option has majority support as a first choice and that as a result, the participants must select a means of decision other than simple majority rule. They decide to each rank all options from most to least preferred and then to take a series of pairwise comparisons, with each member voting sincerely based on his or her expressed preferences until a stable winner emerges. Social choice reveals that with particular combinations of individual preferences—*P1*: *ABC*, *P2*: *BCA*, *P3*: *CAB* or *P3*: *CBA*, *P2*: *BAC*, *P1*: *ACB*—this voting protocol will not succeed in selecting a stable or dominant outcome. Instead, the members will discover a "cycle" in which separate majorities prefer *A* to *B*, *B* to *C*, and *C* to *A*, for the first listed preferences, or *C* to *B*, and *B* to *A*, but *A* to *C*, for the second.[36]

The absence of a first-choice majority winner does not always produce a cycle. By changing the first set of preferences for *P3* from *CAB* to *CBA*,

35. To be sure, I do not claim that the Supreme Court justices consciously embrace this rationale in their actual standing decisions; rather, as with economic analysis of law more generally, my positive thesis is that the standing rules endure inasmuch as they solve a problem that alternative doctrines would not solve, even if the conscious motivation for their creation lies elsewhere.

36. It is possible to impose a rule that cuts off the cycle at some point, and in various institutional settings, such rules are commonplace. While the outcomes of decisionmaking in regimes characterized by structure-induced equilibriums are stable, they are also arbitrary in the sense that an alternative protocol would have justified an alternative outcome in a binary comparison against the chosen outcome. For a discussion of structure-induced equilibrium, see Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 514 (1981).

and following the same decisionmaking protocol, the group will discover that *B* is preferred to both *A* and *C* in direct binary comparisons. *B* is known as the Condorcet winner, named for the Marquis de Condorcet, who proposed that absent a first-choice majority candidate, the option that defeats all others in direct comparisons should be regarded as best.[37]

The Condorcet criterion is a helpful decisionmaking benchmark that reflects a commitment to majoritarianism, an important democratic norm.[38] When a group decisionmaking process selects a non-Condorcet winner even though a Condorcet winner is available, in a very real sense the process has thwarted majority rule. Assume for example that the decisionmaking rule generated outcome *A* or *C* in the prior round. Had the decision makers been given the option to take a pairwise vote between the prevailing option and the Condorcet winning alternative, *B*, the latter would have prevailed by simple majority rule.

Based on this intuition, the ability of institutions to ensure that available Condorcet winners are selected, known as the Condorcet criterion, is often considered a critical normative benchmark of institutional quality. And yet, as a result of two notable limitations, some institutions have evolved in a manner that thwarts the Condorcet criterion.[39] First, as shown in the cycling illustration, not all non-majority preference configurations include a Condorcet winner. Applying rules that ensure that available Condorcet winners prevail when no Condorcet option is present will result in a cycle. Introducing a decisionmaking rule that breaks the cycle will produce an outcome, but that outcome will be in some sense arbitrary as compared with the merits of forgone alternatives.[40] Second, even when preference configurations include a Condorcet winner, that option is not always an optimal social choice. That is because the Condorcet criterion considers only ordinal preference rankings, and thus does not account for the intensities with which individuals hold their preferences. Even though *B* is a Condorcet winner in the last example, it is possible that the issue under consideration is most important to *P3*, who ranks *B* last, and that *P1* and *P2*, although generally content with any of the

37. Attentive readers might notice that my adaptation of Twain's test of canonical status, *see supra* note 3 and accompanying text, satisfies the Condorcet criterion inasmuch as we might assume that by excluding authors' own works, it identifies a dominant second choice—that option that defeats all others in binary comparisons—in the absence of a first choice candidate, as the test for a canonical work on standing.

38. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 100 (1982) ("[W]hen 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.").

39. STEARNS, *supra* note 15, at 46**.**

40. *See* Shepsle & Weingast, *supra* note 36.

three choices, have only slight preferences reflected in their expressed ordinal rankings.

Another consideration that might justify bypassing an available Condorcet winner involves the legitimacy of the decisionmaking rule itself. It is possible that although a given array of preferences contains a Condorcet winner, that circumstance is not typical for the decisionmaking body. It is also possible that the decision makers prefer including the issue over which a Condorcet winner exists along with several others even if the effect is to thwart the Condorcet winner to allow a broader coalition-based agreement over multiple issues.[41] If participants have long recognized the chosen non-Condorcet regime as legitimate, then the occasional forgone Condorcet winner might be an acceptable price for an institution justified on other grounds. This is especially likely if the rule is well known in advance, thus providing notice as to how interested persons may meaningfully participate.

Appellate courts are among the notable institutions employing rules that thwart the Condorcet criterion. Because appellate courts are generally obligated to resolve properly docketed cases, employing rules meeting the Condorcet criterion would conflict with that obligation when there is no Condorcet winner. Elections similarly thwart the Condorcet criterion, a result that follows from the combined need to ensure outcomes, on the one hand, and the desire to present the winner as a legitimate victor (one who would not obviously be defeated by a forgone candidate if contests were set up with ongoing binary comparisons), on the other. More generally, when institutions have an obligation to ensure outcomes—regardless of whether a Condorcet winner is likely to be present—they are going to adopt a rule that does not meet the Condorcet criterion. And, as a result, they will miss occasional Condorcet winners.

The Supreme Court applies non-Condorcet rules when deciding both individual cases and groups of cases over time.[42] In individual cases, outcome voting over the binary choice to affirm or reverse the judgment below ensures an outcome even though in a small set of non-majority cases, it is possible to identify the ingredients of a cycle over the outcome (which we can think of as a macro-issue) and controlling issues (or over issues and subissues). In groups of cases over time, stare decisis, meaning the presumptive obligation to adhere to precedent, breaks cycles by limiting the permissible questions that a later court, presumptively bound by precedent, may consider in its formal decisionmaking process in resolving the case before it.

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41. For a general discussion as this relates to plebiscites, see Stearns, *supra* note 24.

42. Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87 (1999); Stearns, *Standing Back from the Forest, supra* note 15.

Standing doctrine is closely linked to the cycle-breaking function of stare decisis. Social choice reveals that a common means of breaking cycles and of ensuring an outcome is to limit the number of votes relative to the number of options.[43] Stare decisis accomplishes this by formally preventing decision makers from reconsidering an option that was defeated in the past. This decision protocol—no reconsideration of defeated alternatives—prevents the final binary comparison, one pitting the previously defeated option against the eventual claimed victor, which would risk disclosing a cycle.

Consider once again the following cycling preferences: *ABC*, *BCA*, *CAB*. Recall that these preferences imply *ApBpCpA* where *p* means preferred by simple majority vote in a binary comparison. If the decisionmaking rule permits only two votes over the three options, the members will select an outcome. Assuming the members vote sincerely, then whoever sets the order of votes, referred to as the agenda setter, can obtain the outcome she prefers. By setting up as the first vote a choice between that option that defeats the agenda setter's preferred option and whichever option would defeat it in a direct comparison, the agenda setter will create a voting path leading to her preferred outcome. If, for example, the agenda setter wants outcome *C*, then she need only have an initial vote between *B*, the option that defeats *C*, and *A*, the option that defeats *B*. After *A* defeats *B*, *C* defeats *A*. Even though *B* would have beaten *C*, *B* cannot be reconsidered. The same technique would allow the agenda setter to set a path producing *A* or *B*.

Not surprisingly, participants can, and sometimes will, try to derail this voting path by voting strategically, meaning in a manner that is not based on their sincere preferences over options, when faced with a binary choice. If in the *A* versus *B* vote, *P1* fears his last choice, *C*, will prevail, he might vote strategically for *B* instead of *A* even though doing so is inconsistent with his ordinal ranking. Assuming the remaining votes are sincere, *B* will defeat *A* (with *P1* and *P3* prevailing), and in the final vote, *B* will defeat *C* (with *P1* and *P2* prevailing). Alternatively two players might join forces by trading votes to achieve a preferred outcome, albeit at the expense of the excluded party.

This brief introduction to social choice has revealed not only the possibility of cycling preferences and of rules that undermine majoritarianism, but also it has introduced other normative considerations that inform group decisionmaking. These combined principles include majoritarianism, ensuring outcomes, principled voting, agenda manipulation, rules permitting (or discouraging) vote trading (also known as *Pareto* exchange). In one of the most famous contributions to social

43. Stearns, *Standing Back from the Forest, supra* note 15, at 1315 n.11.

choice, Nobel Laureate Kenneth Arrow proved that no single institution can satisfy a host of concerns that he considered fundamental to fair group decisionmaking.[44] Although it is unnecessary to survey Arrow's Theorem here, it is worth mentioning what Arrow ultimately proved. Arrow proved the impossibility of designing any single institution that satisfies a set of normative considerations very closely tied to those just listed. Specifically, he proved that no institution can simultaneously satisfy voting requirements—defined as range, independence of irrelevant alternatives, nondictatorship, and unanimity—while also ensuring transitive outcomes without regard to preference structure (meaning not succumbing to cycles).[45]

A corollary to Arrow's proof is that any institution that transforms group preferences into collective outputs necessarily violates at least one of his identified conditions. As mentioned above, institutions that are obligated to issue outputs even when preferences risk cycling avoid rules that satisfy the Condorcet criterion. Within the framework of Arrow's proof, this means that they relax range. Range permits all participants to rank their choices over the three options in any manner they choose and requires that the institution generate an outcome in a manner that honors those preferences. An implication of range is that if member preferences are *ABC*, *BCA*, *CAB or CBA*, *BAC*, *ACB*, then group preferences will cycle with *ApBpCpA* for the first set or *CpBpApC* for the second set. The cycle would threaten to undermine the obligation to reach a collective resolution. To avoid that problem, institutions with the obligation to ensure outcomes impose limits on the available set of member choices. Rules like outcome voting and stare decisis serve that function in appellate courts, including in the Supreme Court.

One notable consequence of range-limiting rules is that they invite opportunities for agenda manipulation. Because such rules disallow the requisite number of pairwise comparisons to reveal a cycle, they generate outcomes that are not always socially significant in the sense of being preferred to others in binary comparisons. We can illustrate how stare decisis grounds outcomes in case orderings with two actual Supreme Court cases decided on the same day.

44. KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1st ed. 1951); KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

45. For a more detailed introduction of Arrow's Theorem and of its relationship to the simplified presentation above, see STEARNS, *supra* note 15, at 81–94.

B. The Tale of Two Cases:[46] Seattle *and* Crawford

In *Washington v. Seattle School District No. 1*,[47] and *Crawford v. Board of Education*,[48] the Supreme Court faced the question whether two state laws with many similar features, a voter referendum in Seattle, Washington, and a legislative referendum in California, were permissible under the Fourteenth Amendment Equal Protection Clause. Despite the similarities, separate majorities struck down the Washington initiative yet sustained the California referendum.[49] Each law sought to reverse a more local set of decisions that had ordered busing as a means of integrating public schools. In *Seattle*, this was accomplished at the level of the school board, and in *Crawford*, it was accomplished through a set of California state court decisions. In each case, the state amended its constitution to disallow busing as a means of integration unless doing so was constitutionally required to remedy an equal protection violation. In *Crawford*, where the Court sustained the referendum, the law permitted busing only as necessary to remedy a violation of federal equal protection requirements, and in *Seattle*, where the law was struck down, the law permitted busing only as necessary to remedy a violation of either federal or state equal protection requirements. Arguably, the *Seattle* initiative, which was struck, was more liberal than the *Crawford* referendum, which was sustained, inasmuch as the former provided a broader set of permissible bases for busing. Either way, however, these combined cases reveal a set of preferences that embed a potential cycle. Although a majority favored each result, a crossover majority found the cases indistinguishable.

As a result, we can identify three separate majorities over these two cases, only two of which can logically prevail at one time: (1) to strike down the *Seattle* initiative; (2) to sustain the *Crawford* referendum; and (3) to treat the two cases the same way. Given these three overlapping majorities, if the Court employs a stare decisis rule and if the justices vote consistently with their sincere preferences, both case outcomes will turn on the order of case presentation. Thus, if *Seattle* is presented first—with the challenged law struck down—when *Crawford* is later presented, those jurists who think that the two cases are indistinguishable will also vote to strike that challenged law down. Conversely, if *Crawford* is presented first—with the challenged law sustained—when *Seattle* is later presented, those jurists who think that the two cases are indistinguishable will also

46. With apologies to Charles Dickens. *See* CHARLES DICKENS, A TALE OF TWO CITIES (1859).

47. 458 U.S. 457 (1982).

48. 458 U.S. 527 (1982).

49. For a more detailed discussion of these cases from a social choice perspective, see STEARNS, *supra* note 15, at 170–77.

vote to sustain that challenged law. In fact, the two cases were presented simultaneously, and decided on the same day, such that stare decisis did not attach from one case to the next. Instead, one law was sustained and the other struck down, with the thwarted majority comprising those who thought the cases indistinguishable.

This hypothetical, because it involves two cases decided on the same day, provides an extreme illustration of the potential for path dependence on developing case law. With no changes in Court personnel, or any other changes beside the order in which two cases are presented, the result in both cases, and the doctrine they produce, is opposite. There are, of course, various responses to this hypothetical, including the possibility that one or more Justices who expressed the view that the cases are indistinguishable when stare decisis is not in play might treat the cases differently, thus voting insincerely, when stare decisis is in play. It is also possible that the Court itself could avoid the threat of path dependence by using its certiorari power in a manner that lowers the risk of path manipulation.[50]

Voting strategically does not eliminate path dependence, but rather, it affects how path dependence is channeled. Rather than having the path manifest itself in the case orders, the path is reflected in the resulting doctrinal changes required to accommodate a desired result within a set of doctrines that would not otherwise permit that result.[51] In addition, the Supreme Court's power to control its docket is only a partial response to the threat of path manipulation. There are certain types of questions that the Supreme Court is less able to avoid answering, including most notably federal circuit splits. With only docket control, ideologically motivated litigants could time splits to raise the cost to the Supreme Court of declining certiorari, thus rendering the power of docket control illusory.[52]

C. Path Manipulation and Standing

The primary defense that the Supreme Court has used to limit path manipulation is its timing-based justiciability doctrines. These rest along a spectrum that includes ripeness, mootness, and standing, and within standing, the presumptive barrier against third-party standing, diffuse harm standing, and claims seeking to correct allegedly unconstitutional rules that distort markets to the claimant's detriment. While these justiciability doctrines can be cast along a timing-based spectrum from early to late—

50. As discussed more fully below, it is also possible that there might be intervening personnel changes on the Court; that the differential filings in the lower courts might affect the timing (or even the possibility of review) in the Supreme Court; or that any number of other considerations might affect the ultimate dispositions. *See infra* Part III.

51. STEARNS, *supra* note 15, at 192–94.

52. *Id*. at 194–97.

ripeness, standing, mootness—a more helpful grouping focuses on the susceptibility of the claims targeted by each rule to path manipulation. In this view, ripeness and mootness are the most obvious barriers to path manipulation. Without them, ideologically motivated litigants could reconstruct past facts or hypothesize new ones when seeking resolution of important constitutional questions and when facing preferred judicial staffing.

Within standing doctrine, which affects the justiciability of presently live claims, as opposed to extinct or premature claims, there are also gradations of difficulty in constructing claims for judicial consideration. Absent traditional standing rules, it would be relatively easy to identify third persons, say in prisons or in other relevant communities of interest, who are sitting on their claims, and present those claims in a preferred ordering. The presumption against permitting diffuse claims is also fairly easy to justify. Returning to William Fletcher's observation about the lying plaintiff,[53] anyone can reconfigure what appears to be a third-party claim as a first-person claim simply by asserting that he or she cares about the other person's injury; unless the claimant is lying, she has suffered an injury in fact. The Supreme Court has made this maneuver more costly by creating a presumption against diffuse claims.[54]

At the opposite end of the spectrum are cases where despite often-dubious merits, the Court invariably resolves the underlying legal question. Criminal appeals are almost never treated as standing cases, even when it appears that they should be, for the simple reason that, in general, those presenting such claims are motivated by the desire for relief rather than to create law.[55] Of course this is not always true, and in fact, the Court has engaged in a sort of pretzel logic,[56] thus facilitating claims in the criminal procedure context that are analytically vacuous insofar as the defendant is relying upon a claim that clearly belongs to someone else in a contorted effort to secure a form of relief. This is most notable in those rare jury cases where the Court has gone so far as to allow a white criminal

53. *See* Fletcher, *supra* note 2, at 231.

54. STEARNS, *supra* note 15, at 269–70.

55. This might further distinguish Professor Pushaw's standing thesis from my own inasmuch as I have criticized those rare cases in which although the person raising the claim is a convicted criminal, the underlying claim actually belongs to someone else. In Pushaw's analysis, because the circumstances for raising the claim are fortuitous, at least in the sense that the motivation is relief, not precedent creation, those case results might better justify the Supreme Court's willingness to confer standing. *See infra* Part III.D.

56. Apologies to Steely Dan. *See* STEELY DAN, *Pretzel Logic*, *on* PRETZEL LOGIC (ABC Records 1974).

defendant to raise a *Batson* challenge, meaning a challenge to the prosecutor's decision to strike an African-American juror.[57]

D. The Tale of Two Other Cases[58]*:* Allen *and* Bakke

Between the more intuitive standing cases (third-party and diffuse claims) and the cases in which standing is overwhelmingly presumed (criminal procedure) rests the most difficult body of standing case law. This involves what I have previously referred to as "no right to an undistorted market."[59] In these cases, the claimant alleges that there is an unconstitutional rule adversely distorting a market in which he or she wishes to engage that if struck down might result in more favorable market conditions. The two paradigmatic illustrations—illustrations yielding opposite results on standing—are *Allen v. Wright* and *Regents of the University of California v. Bakke*.[60]

These cases are particularly important in illustrating the descriptive power of the social choice model of standing and in underscoring the importance of fortuity in driving case sequencing. The *Allen* case involved a challenge by parents of African-American children attending public schools to an Internal Revenue Service (IRS) tax policy that conferred automatic tax-exempt status to schools under the umbrella of already-tax-exempt organizations.[61] The parents claimed that an unspecified number of institutions benefitting under this tax scheme had engaged, or were engaging, in racially discriminatory hiring and promotion practices. Notably, these parents did not claim that their children had applied to these discriminatory schools and were denied admission due to their race; rather, they claimed that schools with policies that should have barred them from obtaining tax-exempt status nonetheless received it, thus lowering the cost of attending such schools. In effect, the parents claimed that the allegedly unconstitutional IRS policy—affording tax-exempt status to unworthy schools—violated the equal protection rights of their children to attend integrated public schools in a manner unencumbered by unconstitutionally subsidized white flight. Writing for the *Allen* majority, Justice O'Connor denied standing, and in doing so, she identified a set of four links in the causal chain between the claimed injury and the eventual integration of

57. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 409–10 (1991) (allowing white criminal defendant to raise challenge under *Batson v. Kentucky*, 476 U.S. 79, 87 (1986), for exclusion by state of African-American jurors); *see also* Campbell v. Louisiana, 523 U.S. 392, 397 (1998) (allowing white criminal defendant to challenge exclusion of African-American as jury foreman).

58. Second apology to Charles Dickens. *See supra* note 46.

59. STEARNS, *supra* note 15, at 274.

60. 438 U.S. 265 (1978).

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

such schools: (1) the extent of the subsidy, (2) the number of schools receiving it, (3) whether denying such schools tax-exempt status would affect the schools' racial policies, and (4) whether any such school policy changes would affect parental decisions concerning school choice.[62] Whether framed in terms of injury or causation, this attenuated chain proved fatal to claimants' standing.

In *Bakke*, a twice-rejected applicant to the University of California at Davis School of Medicine challenged the constitutionality of the medical school's affirmative action program, which set aside sixteen of one-hundred seats for specified racial minorities of which he was not a member.[63] The procedural history of *Bakke* is complex. The California Supreme Court analogized the case to a claim under Title VII, and it shifted the burden to the Regents to prove it would not have denied Bakke's admission without the challenged program in place, a burden the Regents conceded they could not meet, resulting in his admission.[64] The analytical difficulty, however, is that the reverse is also true: just as the Regents could not prove Bakke would be rejected without the program in place, Bakke could not prove he would have been admitted without it in place. Even without the program, there was no guarantee that Bakke would have been among the students admitted.[65]

In fact, we can easily replicate the *Allen* causal-chain analysis to show at least the same number of causal links potentially stand between the admissions practice alleged to violate equal protection and Bakke's ultimate admission assuming that the policy is struck down: (1) the number of medical schools with similar policies; (2) the decision of these schools, including Davis, as to how to respond to the ruling, including alternative, potentially permissible, race-based preference programs; (3) the impact of these changes on other applicants' decisions to apply to Davis; and (4) the combined effect of the changed applicant pool on Bakke's prospects.[66] But rather than focus on such an attenuated causal chain, the *Bakke* Court justified standing by claiming that Bakke was injured in his inability to compete for all one hundred seats.[67]

There is nothing illogical, or necessarily insincere,[68] about claiming an opportunity-style injury. The problem is that one could just as well recast the *Allen* claim in opportunity/injury terms, thus justifying conferring standing there on the logic of *Bakke*. In *Allen*, the claimants could say that

62. *Id*. at 759.
63. *Bakke*, 438 U.S. at 265.
64. Bakke v. Regents of Univ. of Cal., 553 P.2d 1152, 1172 (Cal. 1976).
65. *Bakke*, 438 U.S. at 280 & n.14.
66. STEARNS, *supra* note 15, at 30–35.
67. *Bakke*, 438 U.S. at 280 n.14, 289.
68. *See* Fletcher, *supra* note 2, at 231.

they did not seek any particular ratio of majority-to-minority students in any given school, just as Bakke did not insist upon admission to Davis. Rather, like Bakke, they sought only the opportunity for a desired result—a shot at a more integrated racial composition at these schools—unencumbered by the illegal IRS policy, again, just as Bakke wanted the opportunity for a shot at admission unencumbered by the illegal affirmative action policy.

The parallelism of these claims—and hence the ability to phrase *Allen* in *Bakke* terms or *Bakke* in *Allen* terms—is not intended to suggest that the cases are beyond distinction. Rather, it is to suggest that the distinction is one of degree not kind. Whereas the *Allen* claimants appeared to be pressing a claim with national policy significance that might or might not affect their children in a concrete manner and thus appeared primarily motivated to effect legal change, Bakke instead appeared a more traditional—*A* hit *B*, *B* sued *A*—litigant. With ripeness and mootness occupying one end of the spectrum and criminal procedure occupying the other, the market-distortion cases occupy the hard middle. They share a common analytical box, but with features pulling *Allen* more in the direction of a presumption favoring efforts at path manipulation and with features pulling *Bakke* more in the direction of a presumption favoring efforts to secure relief, in spite of, rather than because of, the resulting effect on developing case law. Most notably, this assessment has nothing to do with the respective merits of the legal claim or with the degrees to which one might find either claim more or less compelling on normative grounds.

For whatever it is worth, my personal view is that the *Allen* plaintiffs are in significant respects more compelling litigants than Bakke. For that matter, many claimants who are denied standing are compelling litigants, including the Sierra Club, the NAACP legal defense fund, and the ACLU. The issue is not the strength of the claim or the zealousness with which the litigant will press it; rather it is whether the suit, as presented, possesses the characteristic features that the Court has come to associate with efforts to win suits even if the result is to make law (consistent with the private-rights model), as opposed to efforts to make law even if doing so requires devising a suit (consistent with the public-rights model).

E. Standing Elements and Path Manipulation Revisited

The social choice model of standing demonstrates that the Supreme Court's constitutional prerequisites to standing—injury in fact, causation, and redressability—combined with the presumptive barriers to standing—presuming against third party and diffuse harm injuries—further the goal of making advertent path manipulation more costly and thus more difficult.

These combined rules promote fortuity as the dominant driver in determining the path of constitutional litigation. In the traditional *A* hit *B*, *B* sued *A* lawsuit, all of these elements are invariably met. So too, they are overwhelmingly met in nearly all criminal procedure cases. They are far less likely to be met in cases where the case is unripe, is moot, rests on a claim belonging to another party, or is diffuse. This characterization can go in either direction in the undistorted market cases, thus explaining why the seemingly problematic results are not distinguishable in kind, but are in degree. More generally, these overall conditions are less likely to be met if the purpose of the litigation is to create law rather than to provide the claimant relief.

And yet, as Fletcher rightly observes, this is not because the claimant in such public interest lawsuits has not been injured. If a claimant is upset that a potential violation of law has previously occurred, has occurred to someone else, or has affected her along with countless others in some way, unless she is lying, she is, in fact, injured. But if the purpose of standing is to limit advertent path manipulation, the question is not if the claimant suffers some metaphysical injury. Rather, it is whether the justification for the suit is satisfied, namely as a means of securing relief for the claimants as opposed to using, or even constructing, the claim to generate favored doctrine. This certainly relates to the protected rights embedded within the relevant source of substantive federal law, as Fletcher claims, but also it relates to the nature of the underlying litigation and whether the features of the suit correlate with traditional features of litigation or with efforts to use the courts to secure doctrinal victories.

II. STANDING ATOP GRAINS OF SAND: OBJECTIONS TO THE SOCIAL CHOICE MODEL

Let us now consider the primary objections that have been leveled against this standing model. Because the objections are important to the analysis to follow, and to represent the criticisms fairly and on their own terms, I quote the critics at some length. Some of the language not only targets my social choice account, but also a related standing account by Professor Lea Brilmayer. Her analysis also rests on a private-rights model, and her primary focus, as explained below, is ensuring that the litigants who press the claims are actually harmed by the injuries for which they seek redress. This implicates Professor Fletcher's analysis of injury, but for now, we focus on the criticism of these combined private-rights analyses:

> Professor Brilmayer's theory . . . exposes what might be called the Great Myth that lies behind the private-rights view of justiciability. It is commonplace for courts and scholars to remark

> that courts do not exist to enforce the laws and the Constitution, and to make sure the government behaves lawfully; courts do these things but only as a mere incident of their proper function of deciding cases. In the mythical world posited by this private-rights view of litigation, constitutional adjudication is something that just happens sometimes, almost against the will of courts. Plaintiffs are fortuitously injured by circumstances beyond their control, they go to court seeking simple redress for their injuries, and constitutional adjudication occurs only because the courts are sometimes compelled to resolve constitutional issues in order to decide the resulting cases as they happen to come along.
>
> In the real world, however, . . . cases do not just come along. Individuals and interest groups create cases for the specific purpose of getting courts to resolve legal issues and to compel the government to obey the laws. A single plaintiff's contrived case can create law (good or bad) that affects the rights of everyone in society. Plaintiffs, even working within a system ostensibly confined by the private-rights view, can make courts perform the public-rights function of enforcing the Constitution and making the other branches of government behave lawfully.
>
> So if the purpose of justiciability doctrines is to protect the rights of absent, interested parties from the effect of stare decisis, they do a poor job. Exposure to bad law created by prior litigants is part of the common law system. Even enforced to the hilt, justiciability doctrines leave highly interested parties exposed to bad law created by strangers who may be only trivially interested, or who may be no more than busybodies who deliberately got themselves injured for the purposes of litigation. A strict insistence on maintaining the myth of the private-rights view, while structuring the system so as to permit the public-rights view to flourish in fact, serves no useful purpose.[69]

While these comments were specifically addressed to Professor Brilmayer, Professor Siegel then explained that they apply with equal force to the social choice account of standing, summarized above.

> Professor Maxwell Stearns provides a "social choice" explanation for justiciability constraints, particularly standing doctrine, that [rests on similar foundations to] the Brilmayer "representational" theory. According to Stearns, the critical purpose behind standing doctrine is related to the "path

69. Siegel, *supra* note 25, at 93–94 (emphasis omitted) (footnotes omitted).

dependency" of constitutional law—the (alleged) fact that because of the principle of stare decisis, the outcomes of the Supreme Court's constitutional cases depend on the order in which the cases come to the Court. This path dependency, Stearns argues, gives ideological litigants an opportunity to manipulate constitutional doctrine by controlling the order in which they bring cases. Therefore, Stearns concludes, modern standing doctrine is best understood as a device that "presumptively prevents ideological litigants from strategically timing cases in federal court solely to manipulate the substantive evolution of constitutional doctrine." It does so by limiting the ability of ideological litigants to create cases that suit their path-manipulative strategies.

Like Professor Brilmayer's argument, this argument focuses on the restraint that standing doctrine imposes on the ability of litigants to create law that affects others through the mechanism of stare decisis. Unlike Brilmayer, however, who is primarily concerned with protecting the ability of the persons "most affected" by government policies to represent their own interests, Stearns is concerned with protecting the courts themselves from ideological litigants who desire to exploit the law's path dependency.

Still, to the extent that Stearns's argument focuses on the stare decisis effect of cases brought by ideological litigants, it suffers from a defect similar to that of Brilmayer's argument. It greatly overstates the restraint that standing doctrine imposes on the ability of ideological litigants to create cases that could be used to exploit the law's path dependency. Stearns asserts that "[t]he principal standing ground rules require that claimants be injured by fortuitous historical circumstances beyond their control as a pre-condition to litigating in federal court." That is certainly not true; Stearns is simply restating the Great Myth that courts just decide cases as they come along randomly. In reality, standing doctrine, even at its most stringent, does not require potential litigants to wait for "fortuitous historical circumstances" before suing. Ideologically interested parties are permitted to place themselves in harm's way in order to suffer an injury that can serve as the basis for standing. As a result, ideological litigants have considerable, if not unlimited, freedom to create justiciable cases that they can use to pursue their alleged schemes of path manipulation, and interest groups exploit this freedom by seeking out ideal plaintiffs for test cases. Once again, therefore, it seems that standing doctrine does such a poor job of serving the asserted purpose that the purpose

> cannot justify regarding the doctrine as a constitutional requirement.[70]

In a footnote to this paragraph, Siegel analogizes the social choice account to throwing grains of sand into the gears of judicial lawmaking. He explains:

> Like a good economist, Stearns falls back on the assertion that standing rules can sufficiently have their desired effect even if they do not prevent ideological path manipulation, provided they make it more costly. But there is a vast difference between saying that standing rules limit litigation to those who are injured "fortuitous[ly]," and saying that standing rules allow ideological litigants to manipulate the judicial process but throw a little sand in the gears when they do so. It seems much harder to believe that the latter is really a constitutional purpose.[71]

To further demonstrate the inefficacy of standing to meet the goals set out in the social choice account, Siegel explains:

> Even where there is a justiciability issue in a controversial case, it often seems like a mere detail that is unrelated to the reason the case is controversial. *Roe v. Wade*—the case most prominently associated with charges of judicial activism—was arguably moot when the Supreme Court decided it, and in *Griswold v. Connecticut* there was a question as to the standing of those charged with distributing contraceptives to rely on the rights of the third parties to whom they distributed them. But critics of these cases are not furious about the Court's assertion of power in inappropriate procedural circumstances; they are furious about the substantive outcomes of the cases. If the Court had dismissed these cases, in all likelihood it could have found other, unquestionably justiciable cases raising the same issues and reached the same results. Indeed, just four years prior to *Griswold*, the Court used justiciability grounds to dismiss a challenge (*Poe v. Ullman*) to the same statute brought by the same activists. It is hard to see what was gained—in terms of limiting judicial power—by forcing those whose test case was dismissed to contrive another test case presenting the same challenge but with all the i's dotted and t's crossed. In the end, the same judges, at the urging of the same activists, struck down the same statute that was challenged in the

70. *Id*. at 113–16 (emphasis omitted) (footnotes omitted).

71. *Id*. at 115 n.246 (internal citations omitted).

first case. It is hard to see why judicial invalidation of the Connecticut statute in *Poe* would have been a dangerous affront to the separation of powers, whereas the same action taken in the only slightly different case of *Griswold* was not.[72]

Siegel continues:

> Furthermore, even where justiciability allows a court to avoid an issue because it is not pressed in a proper "case," the issue can recur and sometimes does so quite soon. The Court's questionable standing ruling in *Warth v. Seldin* allowed it to sidestep the constitutionality of zoning restrictions, but the issue came back just two years later in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* The Court ducked the constitutionality of affirmative action in university admissions in *DeFunis* but reached the issue four years later in *Bakke*. It was admittedly convenient that the Supreme Court avoided ruling on the Pledge of Allegiance in *Newdow*, but that hardly ends the matter. Other plaintiffs, with properly justiciable cases, have challenged the Pledge of Allegiance on the same grounds, and Newdow, after his defeat, did exactly what one would expect: he found like-minded parents and children in the California school system and enlisted them as plaintiffs in a new, justiciable lawsuit. Thus, the courts will have to rule on the merits of the Pledge question.[73]

Siegel concludes:

> The analysis . . . shows two fundamental problems with justiciability doctrines: first, they often accomplish little or nothing other than to make judicial review needlessly cumbersome, and second, even where they appear to do something, the restraints that they impose are not well aligned with any purpose that they are said to serve. Courts could improve justiciability doctrines by focusing on their purposes. Where justiciability constraints are

72. *Id*. at 97 (footnotes omitted). In fact, constitutional challenges to the Connecticut statute persisted far longer than four years. An original challenge was dismissed for want of standing grounds twenty-two years before *Griswold*, in *Tileston v. Ullman*, 318 U.S. 44 (1943). Moreover, the participating justices on the Supreme Court did change even between the shorter four-year period from *Poe* to *Griswold*, and those changes had a perceptible impact on the eventual case outcome. *See infra* note 81, and accompanying text.

73. Siegel, *supra* note 25, at 110 (footnotes omitted).

> purposeless, they should be discarded. Where they serve a purpose, there is at least the possibility that they should be retained.[74]

In a related discussion, Professor Heather Elliott offers a similar critique of the social choice model of standing. Elliott explains:

> [The] Court's standing jurisprudence reinforces this distorted pursuit of democratic goals by making it easiest for economic entities to get standing. Such interests are usually suing as regulated entities, opposing the exercise of government regulation. The Court has emphasized that the standing of a regulated entity is typically self-evident: when "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." But such entities are often the least deserving of democratic solicitude from the courts, for they arguably have the most access to the corridors of power. The Court has repeatedly applied this asymmetric view of standing—making it easy for regulated entities to get standing, and hard for everyone else—and that approach, again, actually has the effect of exacerbating existing inequalities in the democratic system.[75]

In a footnote appended to this passage, Elliott further explains:

> For this reason, Professor Stearns's meticulous argument on social choice and standing also has troubling implications. Professor Stearns notes that, because of stare decisis, the development of doctrine at the Supreme Court is at least in part dependent on the order in which issues are taken up by the Court. Moreover, because of paradoxes inherent in collective decisionmaking (technically, the intransitivity in preferences known as the Condorcet Paradox), the Court may reach different results in sequential cases depending solely on the order in which the cases are decided. Interest groups thus have incentives to try to affect the sequence in which cases arise at the Court. Standing has thus emerged as a means for the Court to limit the ability of interest groups to manipulate the timing of cases. Because the tripartite test demands that litigants make a factual showing "that is largely beyond the litigants' control," it limits the ability of litigants to control the timing of cases. Thus "standing serves the critical

74. *Id*. at 122.

75. Elliott, *supra* note 25, at 491–92 (footnotes omitted).

> function of encouraging the order in which cases are presented to be based upon fortuity rather than litigant path manipulation."
>
> Of course, as Professor Siegel has discussed, the factual bases of standing are more within the litigants' control than Professor Stearns acknowledges. My concern is more with the biases that Stearns's position necessarily embraces: because the courts grant standing much more readily to regulated entities, especially when a strict version of standing doctrine is applied, those entities benefit from stare decisis at the expense of regulatory beneficiaries. As discussed above, that result may exacerbate existing inequalities.[76]

The preceding arguments against the social choice account of standing can be summarized as follows: The social choice account rests on the "great myth" that federal courts serve primarily a dispute resolution rather than lawmaking function. Given that lawmaking function, any path dependence associated with stare decisis to justify standing is only pertinent if the rules actually work. The major cases about which controversy ensues would, absent standing, result in a two-to-four year delay, which seems pointless as a constitutional justification for standing. With or without standing, interest groups and individual litigants can put themselves in harm's way or locate others who have done so, to order cases favorably, and they regularly do just that. The controversial aspects of constitutional litigation primarily involve the substantive outcomes obtained, not the procedural nuances of standing. And finally, the fortuity principle on which the social choice account of standing rests is systematically biased in favor of business interests, rather than individual interests, a result that is undemocratically skewed given the relative disparity between these groups in terms of access to the corridors of power.

III. STANDING ON A MORE CONCRETE FOUNDATION[77]

In the discussion that follows, I will address each of these objections, and in doing so I will demonstrate once more the power of the social choice account. I will begin with the arguments that go to the claimed inefficacy of standing doctrine. Only by showing its efficacy can I restore the doctrine's normative foundations. The central argument against the stare decisis account of standing is that the effect of any delays in case resolutions is trivial.

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76. *Id*. at 492 n.156 (internal citations omitted).

77. Or, to borrow once more from Mark Twain, *see supra* note 3, "[T]he report of my death was an exaggeration." Frank Marshall White, *Mark Twain Amused*, N.Y. J., June 2, 1897 (quoting Mark Twain).

A. Two-to-Four Year Supreme Court Delays Are Non-Trivial

In the examples that Siegel provides, the delays resulting from standing generally lasted between two and four years, with the result that after the time had lapsed, the Supreme Court had resolved the underlying issue, and had done so in the same manner as sought by the original, standing-denied claimants. The delay, however, came with the cost of uncertainty respecting how those issues would be resolved. This included uncertainty, for example, concerning whether couples have a fundamental right to contraceptive access; whether a state-sponsored racial preference in higher education violates equal protection; and whether neutral zoning restrictions with a disproportionate racial impact violate equal protection. If the purpose of standing is to ground cases in fortuitous circumstances, rather than advertent-litigant strategy, then delays of two, three, or four years in generating a resolution to the same problem later resolved in the Supreme Court are arguably a fairly inconsequential means of accomplishing it.

In fact, however, a delay of two-to-four years in the Supreme Court is potentially quite consequential in terms of a potential effect on the substantive outcome obtained. The contrary impression arises from an erroneous inference drawn from the social choice model. This misimpression arises in part from the nature of economic modeling. Specifically, as is often the case with such models, the social choice model of standing is tightly drawn to demonstrate the minimum set of conditions required to produce a given effect. In this case, it reveals the minimum conditions for a regime lacking timing-based justiciability doctrines—mootness, ripeness, and, most notably, standing—to encourage ideologically motivated litigants to benefit from preferred case sequencing as a means of affecting substantive doctrinal outcomes. Thus, the model demonstrates the theoretical possibility that *without* any changes in the composition of the Court, *without* any changes in precedent beyond those affected by reordering the immediate cases under review, and *without* any changes in the actual cases themselves, a simple reordering of two cases—*A followed by B* versus *B followed by A*—can entirely change the substantive holdings of both cases.

The mistake is misconstruing this statement of minimal conditions as an empirical claim that no other conditions can influence, or even exacerbate, such a doctrinal effect.[78] I do not claim, for example, that

78. This is a pervasive interpretive dilemma that confronts those who seek to construe economic models especially as applied to law and who are not generally accustomed to the style of such modeling. Two important examples come to mind. Many legal scholars have misinterpreted the Coase Theorem, which holds that in a world with zero transactions costs and perfect information, resources flow to their most highly valued uses without regard to liability rules, Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), to imply that in fact we live in a world satisfying those

nothing but intransitive appellate court preferences have the potential to affect litigant incentives to favorably order cases to affect substantive doctrine. The hypothetical involving *Seattle* and *Crawford* merely illustrates how the bare-bones version of the model works, leading to the surprising implication that *even if* there are no other changes, mere changes in case orderings can have profound effects. With two cases that are issued on the same day, with outcomes in tension, and with overlapping majorities whose opinions suggest that the cases should be resolved in the same way, case orderings have the potential to affect the substantive holdings in both cases. It is most unlikely, in fact, that had these cases arisen one year apart—with *Seattle* followed by *Crawford* or the reverse—all else would have remained constant. The critical point, however, is that introducing more realistic elements makes the model more, not less, powerful.

Assume that nothing else changes but the timing of review in the Supreme Court itself. In other words, there is no change as a result in lower court delays. Unlike the *Crawford–Seattle* hypothetical, however, this time we will introduce the possibility of intervening personnel changes to the Court, meaning that the delayed presentation to the Supreme Court might result in having the case reviewed before a different natural Court,[79] meaning a Court that comprises different membership than that which would have resolved the case had the original case, for which standing was denied, instead been resolved on the merits.

The likely impact of this possible change is significantly enhanced such that delays of two to four years, or even delays of less than one year, could have profound doctrinal effects. Consider the possibility of one intervening Supreme Court appointment. The most dramatic impact of a single-Justice change would arise in a case expected to be close, meaning decided by a 5–4 margin, a prediction often associated with high profile constitutional rulings. In such a case, there is a 5/9 chance that changing a single Justice will change the case outcome. If the case would be decided 5–4, then

conditions, and thus we should assume welfare-maximizing resource flows. *See* Ronald H. Coase, *Notes on the Problem of Social Cost*, *in* RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 157, 170–74 (1988). Instead, Coase was trying to demonstrate the danger of legal rules that have the opposite effect of raising transactions costs and of inhibiting the flow of information, two adverse conditions that combine to undermine allocative efficiency. *See id*. Similarly, William Riker's theory of minimum winning coalitions posits that in a world with complete information and in which side payments are permitted, the most stable coalitions will approach minimum winning size, meaning simple majorities. WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962). Here too, although commentators mistakenly criticized the theory because observed coalitions, including notably in Congress, typically comprised supermajorities, Riker's thesis was not designed to demonstrate that his conditions were met, but rather to provide a basis for studying rules within legislative bodies that raise the size of governing coalitions. For a general discussion, see MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 72–75 (2009).

79. *Online Code Book: Natural Court*, THE SUPREME COURT DATABASE (Harold J. Spaeth et al. eds.), http://scdb.wustl.edu/documentation.php?var=naturalCourt (last visited Feb. 7, 2013) (defining "natural court").

replacing one of the four minority Justices with either a like-or different-minded jurist would at most affect the ruling's composition from 5–4 to 6–3, but would not change the outcome. If, instead, a member of the expected narrow majority of five is replaced between when the case was prevented from going forward due to a timing-based justiciability barrier, and when it ultimately proceeded, as Professor Siegel has aptly phrased it, "with all the *s*'s dotted and *t*'s crossed,"[80] then this would flip the outcome to 5–4 favoring the side originally pressing for Supreme Court review to 5–4 favoring the other side. This implies that five out of nine possible Supreme Court replacements could possibly affect outcomes in a high profile case expected to be resolved narrowly. Although the actual voting margins in the cited cases varied,[81] each case that Professor Siegel has relied upon to demonstrate the inefficacy of standing qualifies as high profile.

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80. Siegel, *supra* note 25, at 98.

81. As previously noted, Siegel's reliance on *Poe* and *Griswold* is at least potentially misplaced, and the timeline might better support the account offered here. In 1961, *Poe* was dismissed for want of standing in a decision with a 4–1–4 vote. Poe v. Ullman, 367 U.S. 497 (1961). Justice Frankfurter wrote a plurality opinion joined by Chief Justice Warren and by Justices Clark and Whitaker; Justice Brennan concurred in the judgment; and Justices Douglas, Harlan, Stewart, and Black dissented. In the four years between *Poe* and *Griswold*, Justice Goldberg replaced Justice Frankfurter, and Justice White replaced Justice Whitaker. Justice Douglas wrote for the *Griswold* majority, joined by Justice Clark, and also by Justice Goldberg, who wrote a simple concurrence joined by the Chief Justice and Justice Brennan. Griswold v. Connecticut, 381 U.S. 491 (1965). Justices Harlan and White concurred in the judgment. And Justices Stewart and Black dissented. Although it appears that Stewart and Black switched positions between the two cases, that is unlikely. More likely the four *Poe* dissenters were split evenly on the merits, with Douglas and Harlan favoring striking the Connecticut statute down and Justices Stewart and Black rejecting the constitutional claim. Because Justice Frankfurter expressed no view on the merits, it is not possible to ascertain with certainty his views or the views of those who joined him. It appears plausible, however, that the replacements of Justices Frankfurter and Whitaker with Goldberg and White respectively, both of whom supported the judgment striking down the Connecticut law, albeit on different grounds, might have flipped a potential contrary outcome that the *Poe* Court would have reached had it conferred standing and resolved the case on the merits.

Although the different timelines did not actually generate results from substantially different natural Supreme Courts, when assessed according to the median duration of natural Courts, each pairing certainly had the potential to do so. Although the start date is not specified in the appellate record, the district court decisions that gave rise to the eventual Supreme Court decisions in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), appear to have been separated by two years, with the district court decision in *Warth* issued in 1972, and the district court decision in *Village of Arlington Heights* issued in 1974. Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208 (N.D. Ill. 1974). The district court decisions in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), were separated by three years with DeFunis initiating his suit the fall of 1971, 416 U.S. at 314, and with Bakke commencing his lawsuit following his rejection from the medical school in 1974. Brief for Respondent at 15, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811). Throughout this entire period, from 1972 through 1978, the Court remained remarkably stable with the exception of Justice Stevens, appointed by Republican President Gerald Ford in 1974, replacing Justice Douglas, appointed by Democratic President Franklin Delano Roosevelt in 1937. Despite this, most constitutional commentators would place Justice Stevens, like Justice Douglas, on the liberal side of the Court for most of his career. And also despite this relative continuity, based on probabilities, this same time period would have predictably produced three replacements, and using the harmonic mean, upwards of seven natural Courts.

Now consider historically how often such replacements take place. Since 1790, or over a span of 222 years, there have been 117 Supreme Court Justices. There is considerable variance in the number of appointments in a given historical period,[82] with President George Washington appointing an entire Court and President Franklin Delano Roosevelt appointing nine justices over eight seats, with one seat filled twice and one seat (filled by Owen Roberts) surviving his administration. Conversely, President Jimmy Carter had no appointments in his single-term presidency. Setting aside the variance, there has been an average of one appointment every 1.89 years. This simple statistic suggests that on average, a delay of two years has historically produced a 55% chance of replacing a member of a 5–4 majority coalition, although obviously not all such replacements will change the ideological direction of the Court.

There are different methods of calculating frequency of changes on the Supreme Court. One useful measure is the harmonic mean, which is the mean after removing the extremes at either end. The harmonic mean for natural Supreme Courts is a mere nine months,[83] implying that delays of one to two years are at least potentially more significant than Siegel's thesis suggests. It is important to acknowledge that there is considerable variance around that mean. The shortest natural Court arose in the Warren Court in 1969 for a period of a single month, and the longest natural Court, during the Rehnquist period, lasted 133 months from 1994 through 2005.[84] Indeed, that relatively recent period of natural Court stability might lead some observers to imagine that relatively modest delays in timing have a lesser consequence in affecting high profile constitutional litigation than is suggested by the broader implications of the Court's appointments history.

The fact that appointments sometimes occur in waves rather than in smooth periods of successive increments makes the effects of such appointments less predicable, but it does not change the fundamental analysis. Major shifts on the Court, as seen for example from the conservative Court at the start of the Progressive era to the New Deal Court, from the New Deal Court to the Warren Court, and from the Warren Court to the Burger/Rehnquist/Roberts Courts have generated fundamental shifts in once-accepted jurisprudential framings. Whereas, for example, New Deal liberalism tended to equate to progressivism, and a corresponding desire to avoid judicial interference in state or federal regulatory policies, Warren Court liberalism relied instead on a far more

82. *Supreme Court Nominations, 1789–Present*, U.S. SENATE STATS. & LISTS, http://www.senate.gov/pagelayout/reference/nominations/reverseNominations.htm (last visited Oct. 18, 2013).

83. *See infra* Appendix A.

84. Appendix A has tables presenting the number of months of each natural Court from 1946 through 2010.

active level of judicial involvement in advancing a rights-driven agenda, even though doing so intruded upon once-protected legislative prerogatives. In the modern era, there has been a substantial debate over the meaning of conservatism, with some taking the view that judicial restraint is more important than particular outcomes, and others taking the view that it is important to counterbalance a once-liberal, rights-driven jurisprudence with a conservative equivalent, one for example, that emphasizes property rights and the Second Amendment.[85]

The possibility of intervening Supreme Court appointments and their effect on doctrinal direction thus arises in two distinct ways. In its more modest form, it risks flipping a particular case outcome, when for example, a single appointment changes the Court's view on a specific doctrinal issue. The replacement of Justice O'Connor with Justice Alito, for example, might have affected holdings in such cases as *Gonzales v. Carhart*,[86] which sustained a federal ban on partial birth abortion that did not include protection for the health of the mother; *Citizens United v. Federal Election Commission*,[87] which by treating corporations as protected persons for purposes of the First Amendment, condoned a regime of unlimited corporate political contributions; and *Fisher v. University of Texas at Austin*,[88] which curtailed judicial deference to state university rationales supporting race-based preferences for diversity as compared with the *Gratz–Grutter* regime. In its stronger form, it risks recasting once-accepted framings of constitutional jurisprudence, thus inviting even stronger incentives for interest-group efforts to forge desired paths of case law either to lock in changes, thus making future incremental changes more difficult, or to capture change quickly after a favorable jurisprudential shift. When this occurs, the effects of path dependence correspondingly have the potential to affect, or cut into, doctrine more deeply. Certainly this was the case in the period post "switch in time," where Franklin Delano Roosevelt made a total of nine appointments over eight seats, with only Justice Owen Roberts—the one who is alleged to have switched votes—remaining throughout FDR's entire tenure as president. The result was a fundamental change in once-dominant understandings across vast fields, including due process, non-delegation, the contracts clause, and even justiciability itself.

85. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005, at 42.
86. 550 U.S. 124 (2007).
87. 558 U.S. 310 (2010).
88. 133 S. Ct. 2411 (2013).

B. The Lower Court "Butterfly Effect"[89]

Although intervening changes in the Supreme Court can have profound effects in shaping doctrine, in some respects timing delays are likely to be all the more pronounced in lower federal and state courts. For expositional reasons, the social choice analysis of standing is modeled on institutional practices in the Supreme Court. The benefit of this approach was that it demonstrated an effect through case orderings *even when* nothing changes elsewhere in the system. When we introduce the possibility of such changes in state courts and lower federal courts, however, the effect on Supreme Court doctrine becomes all the more pronounced.

Within federal practice, judicial assignments in the district court and for appellate panels are typically random.[90] A one-or two-year delay, or even a one-or two-month delay, will often produce a different district court judge assignment, and through luck of the draw the differential timing of the ultimate case resolution. This, of course, will also affect the panel to which the case is assigned, assuming it is in fact appealed.[91] The appeals

89. The term "butterfly effect" has been ascribed to Edward N. Lorenz, who used it to describe how present conditions are sensitive to seemingly inconsequential changes in the past. Edward N. Lorenz, *Deterministic Nonperiodic Flow*, 20 J. ATMOSPHERIC SCI. 130–41 (1963). The general concept had previously gained popular currency as a result of the famous science fiction story, Raymond Bradbury, *A Sound of Thunder*, published in *Colliers* magazine in 1952, which imagined time travelers visiting the age of dinosaurs seeking to avoid altering history, but profoundly changing it when one traveler accidentally stomped on a butterfly prior to returning. Lorenz coined the term "butterfly effect" in a speech. *See* Edward N. Lorenz, Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?, at the American Association for the Advancement of Science (Dec. 29 1972), *available at* http://eaps4.mit.edu/research/Lorenz/Butterfly_1972.pdf.

90. *Frequently Asked Questions: Federal Judges*, U.S. COURTS, http://www.uscourts.gov/Common/FAQS.aspx (last visited Oct. 18, 2013).

91. Consider the example of federal district courts within the Fourth Circuit. From 2009–2010, the average time from filing to a civil trial in the Eastern District of Virginia was approximately eleven months. *See Federal Court Management Statistics Archive*, U.S. COURTS, http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/FederalCourtManagementStatistics_Archive.aspx (last visited Oct. 18, 2013). By contrast, the average time from filing to a civil trial in the Eastern District of North Carolina was thirty-two months in 2009 and fifty months in 2010. *Id*. During that two-year period, the composition of the Fourth Circuit itself substantially changed. At the beginning of 2009, eleven judges comprised the Fourth Circuit, with seven nominated by Republican presidents and four nominated by Democratic presidents. Over the next two years, one Republican-nominated judge left the bench. Because of additional vacancies on the Fourth Circuit, President Obama filled four seats. And since 2010, Obama has filled two more seats. Now reconsider our two hypothetical litigants filing at the same time in 2009, one in the Eastern District of Virginia and the other in the Eastern District of North Carolina. Whereas the Virginia litigant would likely face a panel drawn from the same natural circuit court as when she initially filed, the North Carolina litigant would face a panel drawn from an enlarged Fourth Circuit, one that began with eleven judges, and that was dominated by Republican appointees, to one that instead had fifteen judges, and that was dominated by Democratic appointees. This not only had the potential to alter the composition of a randomly drawn panel of three but also it has the potential to affect the disposition of any potential en banc review. And in the interim, the composition of the Supreme Court also changed as a result of the replacements of Justice Souter with Justice Sotomayor and Justice Stevens with Justice Kagan, although these appointments did not affect the overall ideological direction of the Court.

court assignment process is particularly notable. Whereas the Supreme Court generally hears all docketed cases *en banc*, meaning that the entire Court hears all cases in full, federal circuits review cases in randomly drawn panels of three. En banc review in the circuit courts of appeal is not only relatively uncommon, but also it is a separate proceeding, and one that entirely negates the precedential impact of the original panel decision. It is also notable that although most circuit courts have full en banc procedures, the United States Court of Appeals for the Ninth Circuit employs a mini en banc procedure, drawing a subset of the larger en banc court. This further randomizes outcomes even at this separate stage.[92]

In a closely divided federal circuit court, there is an increasing likelihood that a majority of the assigned three-judge panel could be either liberal or conservative, as compared with a clearly dominated court for which three-judge panels are likely to mirror the circuit court's overall composition. This introduces another randomizing factor in divided courts respecting the disposition of close questions of constitutional doctrine. Depending on the luck of the draw and its effect on the case resolution, some cases initially intended for eventual Supreme Court resolution might be resolved in a manner that renders them no longer suitable for an appeal to the Supreme Court, thus further enhancing the delayed timing to get to that Court. As one example, if the result is consistent with prior circuit case law, it will not produce the desired circuit split designed to make the grant of certiorari more likely. Alternatively, the panel might view the issue more narrowly, remand for clarification on some arcane issue or a question of fact, or decide it on grounds separate from those for which the parties seek resolution. And this list is certainly not exhaustive.

Although Professor Siegel claims that the randomization effect of delays is overstated,[93] the opposite is more likely the case. As a result of the unpredictable effects on (1) district court judge assignments; (2) differential timing across and even within particular districts; (3) randomly drawn appellate court panels; and (4) the possibility of en banc or mini en banc review, a dismissal for want of standing in one case might have enormous consequences for the substantive outcome and timing of that outcome in a later case in which standing is eventually granted. Rather than proving no more consequential than a few grains of sand tossed into the adjudicatory gears, the delays are more likely to generate a butterfly effect in which the

92. Maxwell L. Stearns, *Appellate Courts Inside and Out*, 101 MICH. L. REV. 1764, 1780–85 (2003) (reviewing JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS (2002)).

93. Siegel, *supra* note 25, 114–16.

eventual impact, although never knowable with certainty, might well be profound.[94]

Part of the analytical difficulty is captured in the adage: "absence of evidence is not evidence of absence."[95] The intuition is that merely because we cannot with certainty identify a direct chain of causation in a given case demonstrating that a delay in case 1, resulting from a standing denial, produced a different holding in case 2, an otherwise identical case in which standing was conferred, does not mean that standing has no consequence or that its consequences were trivial.[96] The butterfly effect does not imply that we can locate stomped-on butterflies or particular wing flaps at key moments that produce identifiable causal chains to major current events.[97] On the contrary, the intuition is that we can never do this, but that this inability does not undermine claims that past randomizing forces have profoundly influenced current events. Going back in time for any major case, and changing the start date by even a few months, can result in any number of unexpected procedural pathways, delay tactics, or random factors affecting timing that result in a very different case trajectory respecting a case that as a consequence of any of these factors might or might not end up in the anticipated natural Supreme Court if it winds up in that Court at all.

Although it is not possible to identify the effect on a single case with precision, it is possible to identify those factors likely to produce such effects. The relationship between lower federal court delays and Supreme Court delays is likely, for example, to enhance path dependence effects. Assume a filing delay resulting from the failure at the preferred time

94. Others have explored the implications of the butterfly effect on constitutional litigation. *See* notably Symposium, *The Sound of Legal Thunder*, 16 CONST. COMMENT. 483 (1999); Peter Dizikes, *The Meaning of the Butterfly: Why Pop Culture Loves the 'Butterfly Effect,' and Gets it Totally Wrong*, BOSTON GLOBE, (June 8, 2008), http://www.boston.com/bostonglobe/ideas/articles/2008/06/08/the_meaning_of_the_butterfly/?page=full ("Such borrowings of Lorenz's idea might seem authoritative to unsuspecting viewers, but they share one major problem: They get his insight precisely backwards. The larger meaning of the butterfly effect is not that we can readily track such connections, but that we can't. To claim a butterfly's wings can cause a storm, after all, is to raise the question: How can we definitively say what caused any storm, if it could be something as slight as a butterfly?"). One of the difficulties with Siegel's criticism of the social choice account is that it assumes that the inability to identify the delay effect in a precisely identified case or set of cases undermines the randomization consequences of any number of factors that include standing. This, however, falls victim to the analytical difficulty that Dizikes correctly identifies respecting the butterfly effect.

95. CARL SAGAN, *The Fine Art of Baloney Detection*, *in* THE DEMON-HAUNTED WORLD 201, 213 (1996).

96. One additional irony: those scholars who are most critical of O'Connor's causation analysis in *Allen, see supra* note 62 and accompanying text, on the ground that O'Connor was unwilling to acknowledge that striking the challenged IRS practice would have benign effects on public schools because those effects could not be precisely foreseen, are committing the same analytical fallacy respecting standing inasmuch as they are unwilling to acknowledge that eliminating standing doctrine will have profound effects on developing case law because those effects cannot be precisely foreseen.

97. *See* Dizikes, *supra* note 94 (describing misreading of the butterfly effect).

period, *T1*, to meet expected standing requirements to a later, and less preferred time period six months later, *T2*. Assigning the case to a speedier judge (one perhaps on a so-called rocket docket) might result in a faster resolution by a year or more as compared with a judge who tracks at an ordinary or even a slow pace.[98] Even a smaller difference in timing can, of course, affect such matters as how the district court responds to any number of issues related to discovery, motions to dismiss or other pretrial motions, jury selection, how the jury resolves the case, and how the district court responds to any post-verdict motions.

One notable issue for petitioning for certiorari is, of course, the ultimate disposition below. If a lower court rules favorably on behalf of a constitutional claimant, then the government might choose to decide to live with the lower court's adverse ruling, rather than to risk having the case become a nationwide ruling. The prospect of petitioning for certiorari is enhanced, of course, if the claimant loses, but this difference in outcome, if not entirely random in the lower courts—litigants are well aware of the overall composition of the various circuits—certainly is not altogether predictable either.[99] And of course, these delays, or different case outcomes, will also affect the nature of the issues appealed, the timing of those appeals, and the panel to which that appeal is assigned. Any one change along the way can affect whether the case ends up appropriately situated for Supreme Court review and the timing of the case in that Court, if it does get there.

Siegel's two-to-four-year delay critique assumes that nothing else changes but the amount of time passed. In the rough-and-tumble world of constitutional litigation, however, even seemingly modest timing delays can quite literally change just about everything. The social choice model shows that *even if* nothing else changes, the prospect of path dependence—in the tightly drawn sense—remains a sufficiently significant concern. But

98. Not only are there timing differences among districts, see *supra* note 91, but also there are notable timing differences among judges within the same district. Consider, for example, the most recent report provided by the ADMIN. OFFICE OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT OF 1990 (2012), *available at* http://www.uscourts.gov/uscourts/statistics/cjra/2012–03/CJRAMarch2012.pdf. The report provides data, broken down by judge, which include how many civil cases have remained pending for more than three years and how many motions have been pending longer than six months. Judge Leonard Stark of the District of Delaware had eighty-one civil cases and forty-nine motions pending in 2012. Judge Sue Robinson, in the same district and for the same period, had only seven civil cases and fourteen motions pending. The judges' chambers provide various reasons for why these cases are unresolved, most commonly multidistrict litigation or complexity of the case. And while these results by no means imply that Judge Stark is consistently slower than Judge Robinson, it does mean the litigant whose case is assigned to Judge Stark is likely to find herself at the back of a long line as compared to the litigant whose case is assigned to Judge Robinson. These timing delays then feed into potential effects on changes in the Fourth Circuit, including the random panel draw, and then for both the prospect of Supreme Court review and any substantive resolution in the event that review is taken.

99. See the earlier comment on relatively random draw of three-judge panels at *supra* pg. 134.

the model should not be read to make an empirical claim that nothing else actually does change,[100] or that if such changes occur elsewhere within the adjudicatory system, those changes have no randomizing effect. Rather, because everything else does change with even modest delays, the effect of fortuity becomes all the more pronounced.

C. The Problem of Legal Counterfactuals

As is generally true with models used to describe actual historical events, it is not possible to test the theory in a lab. There is no method of employing a control group of litigants to see how their incentives, and the developing course of doctrine, might be affected with and without existing standing doctrine. In short, there is no direct evidence one can point to that will demonstrate how relaxing standing would produce a particular delayed case sequence and how that, in turn, would affect an alternative doctrinal path. Once again, the absence of evidence is not evidence of absence. This merely implies a need to devise a more suitable means of testing.

The primary test that I previously offered to defend the social choice model is its robustness in explaining the heavily criticized body of case law. As previously noted,[101] no one has challenged that claim, and interested readers can review earlier works that broadly fit the standing case law against this theory and judge for themselves. There is notable anecdotal evidence that sophisticated litigants perceive that relative timing matters greatly to the development of legal doctrine. And this remains so even if litigants are sometimes prone to getting it wrong.

Consider, for example, that litigants are often encouraged, and sometimes discouraged, to litigate cases that might get to the Supreme Court. In two famous recent illustrations, the NRA sought to dissuade Robert A. Levy from litigating the case that became *District of Columbia v. Heller*,[102] and a group of LGBT activists sought to dissuade the efforts to press the case *Hollingsworth v. Perry*,[103] challenging California's Proposition 8. The critics in both instances were "wrong" in the sense that from their preferred perspective, the *Heller* Court ruled favorably to the NRA's interests, and the California courts created what ultimately appeared to many to be a strong vehicle for appealing to the Supreme Court, even though the end result was to dismiss the case for want of standing. But

100. Any more than the Coase Theorem should be read to suggest a frictionless world. *See supra* note 78 (discussing common misreading of the Coase Theorem among law professors.)

101. *See supra* note 30 and accompanying text.

102. 554 U.S. 570 (2008). *See* Adam Liptak, *Carefully Plotted Course Propels Gun Case to Top*, N.Y. TIMES, Dec. 3, 2007, at A16.

103. Hollingsworth v. Perry, 558 U.S. 183 (2013). *See* Adam Liptak, *In Battle on Marriage, the Timing May Be Key*, N.Y. TIMES, Oct. 27, 2009, at A14.

there is little doubt that the leadership of these interest groups thought the timing of the cases mattered to their ability to secure favorable rulings either in lower federal courts or eventually in the Supreme Court.[104]

I have reviewed other instances of favorable case trajectories elsewhere, including most notably the NAACP decision to chip away at the margins of the doctrine of *Plessy v. Ferguson*,[105] by focusing on the most egregious illustrations of race-based program deprivations in higher education, before challenging public school desegregation head-on, and the decision of Ruth Bader Ginsburg, and others, to challenge sex-based distinctions adversely affecting men in an effort to elevate scrutiny for so-called gender distinctions under equal protection.[106] In addition to these successful efforts to favorably order cases, we can locate within case law illustrations of problematic distinctions that result from efforts to avoid the operation of seemingly adverse precedent.[107] While these are not the equivalent, perhaps, of a smoking gun, one that proves the butterfly whodunit in the past, they are akin to fossils suggesting something profound about the makings of a longstanding evolutionary path, one that social choice theory helps to unpack and explain.

D. Standing's Bidirectional Nature

The critiques by Professor Siegel and Professor Elliott of the social choice account of standing further fail to account for the bidirectional nature of standing rules in affecting case timing. In fairness, I have not focused on this aspect in prior works, and this feature of the model creates the basis for distinguishing my largely positive account of standing doctrine from Professor Pushaw's related normative account. Elliott maintains that because standing rules tend to favor regulated industries, this affords standing to interests with greater access to political power as compared with private individuals who typically lack such access.[108]

Broadly viewed, Elliott anticipates that a firm within a regulated industry will likely have standing to challenge an imposed regulation because the regulation will produce identifiable costs, thus meeting the constitutional prerequisites of injury in fact, causation, and redressability.

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104. For an interesting study of the settlement, funded by interest groups, see *Piscataway v. Taxman*, 522 U.S. 1010 (1997), to avoid an anticipated adverse precedent, see Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and Its Lessons About Interest Group Path Manipulation*, 9 GEO. MASON U. CIV. RTS. L.J. 207 (1999).

105. 163 U.S. 537 (1896).

106. STEARNS, *supra* note 15, at 190.

107. Morrison v. Olson, 487 U.S. 654, 685–92 (1988) (recasting executive removal cases from expressing a clear rule based on nature of appointment and functions to expressing a balancing test whereby inquiry goes to affect of removal limitation on the executive functioning).

108. Elliott, *supra* note 25, at 491–92.

By contrast, beneficiaries of the same regulation, those who, for example, enjoy cleaner air or water or who benefit from the protection of endangered species or their habitats, are less likely to have standing to ensure that the regulation is enforced to the extent required by law.

There is certainly some historical support for Elliott's concern. During the Progressive Era, Justice Brandeis and then-Professor Frankfurter conceived standing largely with this sort of dynamic in mind.[109] The goal was not necessarily to advantage regulated industries as such, but rather it was to limit the overall class of potential litigants seeking to challenge the increasingly aggressive regulatory state. As Judge Fletcher observed in his article, the earliest standing cases created presumptive rules that mirrored common law understandings of traditional litigation.[110] Industries subject to regulation fit the traditional adjudicatory pattern of suits resembling those that might arise in tort, contract, or property more so than suits claiming that regulated firms were thwarting the terms of regulations designed to protect diffuse interests of the general public. And indeed, one problem with such diffuse harms is that they stand opposed to those of others in the general public who benefit from the ability of businesses foisting the harm to thereby produce goods and services at lower cost. In effect, the interests of regulatory beneficiaries stand opposed to those of consumers who are more focused on price, even when costs are externalized, than on the consequences of those externalities. Today, we would say that the suits presented by affected firms satisfy the characteristic features of injury, causation, and redressability. In the Progressive Era, however, the framing was instead intended to reduce opportunities for litigating challenges to regulatory reform. So viewed, these new standing rules did not create the power of firms to sue; that was preexisting. Rather, they curbed the ability of others more generally—firms lacking cases analogous to those existing at common law, and others lacking a direct connection at all—to sue.

These rules were presumptive, and Fletcher demonstrated that in the early incarnation of standing, Congress had the wherewithal to alter that presumption.[111] Thus, by statute, Congress could generally restrict standing even where in the absence of a statute, an injury analogous to one recognized at common law would have been recognized as cognizable, and conversely, it could confer standing where no such common law analogue existed. This, in part, distinguishes the views of Judge Fletcher and Justice Scalia, who instead construed standing to protect executive enforcement authority, as opposed to protecting congressional policymaking in

109. Stearns, *Standing and Social Choice*, *supra* note 15, at 396–98.

110. Fletcher, *supra* note 2, at 224.

111. *Id*. at 222–23.

monitoring the executive branch.[112] *Allen v. Wright* lends support to Fletcher's view inasmuch as Justice O'Connor claimed that standing's separation of powers foundations imply a judicial policy against stepping on Congress's toes, thus risking undermining its monitoring function concerning the IRS policy.[113]

As a descriptor of the class of persons currently empowered to sue, however, the claim that it uniquely protects those with access to the corridors of power is less obvious. Consider, for example, the famous line of affirmative action cases. In such cases as *Bakke*,[114] *Gratz*,[115] and *Grutter*,[116] for example, individual litigants were afforded standing against major academic institutions. Undoubtedly, the University of California at Davis School of Medicine, the University of Michigan, and the University of Michigan School of Law, respectively, had far greater access to such corridors of power than the individuals who sought to curb their allegedly illegal race-conscious admissions policies. To be sure, as a matter of ideology, these challenges might be viewed as coming from the "right" because they challenge the allegedly benign use of race-based policies. However, Professor Elliott's argument does not appear to be grounded in the particular ideological valence of the underlying constitutional claims. Rather, it is grounded in an inquiry into who, among various potential claimants, intuitively holds the greater levers of political access.

One might dismiss the affirmative action cases as a kind of quirk in the standing system. But that would be mistaken. Even if we set those cases aside, the criminal procedure cases provide an even more profound counterexample to Elliott's access-to-power thesis. As previously shown, in the context of juror exclusions, the Court has contorted its standing rules to confer standing upon white criminal defendants—an even more striking group in terms of lacking access to channels of power—to challenge the exclusion of African-American jurors despite the fact that there appears not to be an injury—members of the defendant's race were not excluded—and if there is an injury, that injury rests with the excluded juror, who is a third party.[117] So if a private-rights view of standing consistently favors empowered interests, the Supreme Court, contrary to Elliott's thesis, appears to have gotten it wrong.

The problem, however, lies in the critique, not the standing rules. The private-rights model does not mean that either empowered groups or

112. Stearns, *Standing Back from the Forest*, *supra* note 15, at 1325.

113. Allen v. Wright, 468 U.S. 737 (1984); Stearns, *Standing Back from the Forest*, *supra* note 15, at 1325.

114. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

115. Gratz v. Bollinger, 539 U.S. 244 (2003).

116. Grutter v. Bollinger, 539 U.S. 306 (2003).

117. *See supra* note 57 and cases therein.

upstart individuals are systematically preferred. Rather, it means that whatever the claim and whoever the claimant, the Court's standing rules are more likely to treat the case as justiciable if it appears that the primary motivation is to gain relief, not to create law. And this holds true for individual as well as corporate litigants. Moreover, the social choice account of standing suggests that the doctrine is designed to push controversies in the direction of Congress, which has the wherewithal not to force a decision.[118] An implication of this—one that is consistent with Fletcher's original thesis and contrary to Scalia's—is that Congress also has the power to broaden standing by statute, including by conferring it on persons who (as Justice Marshall famously observed) would lack a justiciable injury in the absence of the statute.[119]

Given that the social choice account of standing is critical of *Lujan* while it embraces *Allen* and *Friends of the Earth v. Laidlaw*,[120] once again, the model is not siding with any particular type of claimant, and certainly not corporate over individual. Rather, the model demonstrates the benefit of grounding standing rules in particular kinds of legal claims: those that are structured to afford relief, at least as a formal matter, rather than to create law.

This analysis further relates to the recent study of standing by Professor Robert Pushaw. Standing rules are generally expressed in terms of litigant restrictions; absent the constitutional prerequisites to standing—injury in fact, causation, redressability—or in the presence of a prudential constraint (a third party or diffuse claim most notably), litigants lack standing to press their claims in federal courts. This can just as easily be flipped to say that when litigants meet these prerequisites—injury in fact, causation, redressability—and are not subject to the most common prudential constraints—third-party or diffuse harm—they can press their claims in federal court. And most notably, they can do so regardless of whatever subjective motivations they may have.

Consider once more the cases of *Bakke*, *Gratz* and *Grutter*. We might think that Bakke, the litigant, was motivated to attend U.C. Davis Medical School because that was his best opportunity to become a physician. He might have lacked options to travel elsewhere in California, the United States, or the world to fulfill that goal. Or perhaps the standards of admission, and also the tuition, were relatively more congenial at Davis than at other, relatively more competitive, medical schools to which he

118. STEARNS, *supra* note 15; Stearns, *Standing Back from the Forest*, *supra* note 15.

119. *See* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("It is, of course, true that 'Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions[.]' But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.") (citation omitted).

120. *Laidlaw*, 528 U.S. 167 (2000).

might otherwise have applied. For whatever reason or combination of reasons, he wished to be admitted to Davis to become a doctor.

What if, by contrast, Gratz and Grutter, again the litigants, instead chose to apply specifically to the University of Michigan, as an undergraduate and law student respectively, not because it was their preferred choice for academic advancement, but rather for the specific purpose of creating a vehicle through which to defeat Michigan's race-based affirmative action?[121] As Professor Siegel has rightly noted: "Ideologically interested parties are permitted to place themselves in harm's way in order to suffer an injury that can serve as the basis for standing."[122] Professor Pushaw's thesis, which seeks to have the courts construe standing limits to ensure that litigants press claims resulting from fortuitous circumstances beyond their control,[123] implies that these sorts of practices, designed to circumvent standing rules, are potentially problematic on that very ground. If the purpose of standing doctrine is to encourage fortuity, then the ability of litigants to create justiciable factual case predicates, especially if the true motive is the precedent, not the dispute resolution, is disturbing. But in the social choice model, these or other standing rules can affect relative case orderings in both directions, holding some claims off-limits and creating conditions under which some litigants can, by placing themselves in harm's way, create a suitable factual predicate for standing in others.

These affirmative litigant efforts likewise have a profound impact on developing case law, and in fact, there are examples of recently decided cases that interested litigants have tried to stifle. This certainly includes *Hollingsworth v. Perry*. The distaste for cases that satisfy the requirements of standing matters no more to standing than the taste for cases that do not satisfy them. Cases in both directions can affect the ultimate development of substantive constitutional doctrine.

E. Standing and the Value of Precedent

Professor Siegel further maintains that a difficulty with the social choice account is that the timing-based justification for standing fails to appreciate that the true basis for the controversies respecting the delayed resolution of cases he identifies—for example, *Griswold*, *Roe*, *Bakke*—were the merits of the outcomes, as opposed to the peculiarities of their

121. To be clear, I am not making this claim about these particular litigants. Rather, I am making a hypothetical assumption to explore an analytical point about the cases they were afforded standing to press.

122. Siegel, *supra* note 25, at 115.

123. *See* Pushaw, *supra* note 18 and accompanying text.

timing.[124] That is almost certainly true. The problem, however, is that the observation better serves the social choice theory of standing than Siegel's critique.

Consider that the same observation would have applied had each of those cases come out the other way: holding that married couples can legally be barred from contraceptive access; that women have no fundamental right to terminate unwanted pregnancies; and that universities are free to set up racial quotas, all consistently with the requirements of the Fourteenth Amendment Equal Protection Clause. These counter-factual results likewise would be subject to the observation that whenever they were issued, the primary opposition to them would have been the merits, not the timing. Controversial cases, after all, can be defined as those that, regardless of outcome, garner substantial opposition on the other side. The question, however, is not what makes these cases controversial; rather, it is whether relaxed justiciability norms would have undermined their legitimacy. And that, too, is almost certainly true.

If the timing of these cases were governed by nothing more than the desire of the litigants to place them before a seemingly attractive Court, the very fact that they were controversial would have created enormous pent-up opposition not only to the outcomes but also to the legitimacy of the ruling. When Justice O'Connor discussed *Roe* as constructing a compromise that settles a contentious question,[125] the claim is only strong to the extent that the process of decision legitimates the substantive ruling, however controversial that ruling happens to be. If the question "why now?" could not credibly be answered other than with the refrain "because now is when we have a better chance at winning," then this will undermine any claim to ongoing normative legitimacy when those conditions change. If the normative rationale governing the outcome is timing, the rejoinder becomes "yes, until the tables turn such that now is when *we* have a better chance at winning." The social choice account does not suggest that observers are focused on relative timing—quite the opposite. To the extent that standing rules render outcomes more legitimate—because the timing is not manipulated—concerns about timing are *less likely* to be part of the public discourse. In other words, the very fact that pent-up opposition is not about standing merely reflects that standing is doing its job.

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124. Siegel, *supra* note 25, at 122–23.

125. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866–67 (1992) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.").

F. A Final Tale: Windsor *and* Hollingsworth

Since this Article was originally written, the central debate into which it has ventured—whether to view the judiciary's role essentially as announcing legal rules, with cases as justificatory vehicles for the task, or alternatively as resolving cases or controversies, with rule announcement as a byproduct—played itself out in two high-profile Supreme Court cases. The two cases, *United States v. Windsor*,[126] and *Hollingsworth v. Perry*,[127] issued on the same day, each involved same-sex marriage. The primary factor that complicated standing in these cases was that the original governmental defendants in each case had declined to defend the challenged enactments on appeal.

In *Windsor*, the Supreme Court, with Justice Kennedy writing for a 5–4 majority, found standing despite agreement by the nominal opponents in the case that § 3 of the Defense of Marriage Act (DOMA), which restricted marriage for federal law purposes to unions of one man and one woman, was unconstitutional, and proceeded to strike that provision down.[128] In *Hollingsworth*, a procedurally complex case, the Supreme Court, with Chief Justice Roberts writing for a 5–4 majority, held that the sponsors of California's Proposition 8, which disallowed a union between members of the same sex to be formally recognized as a "marriage" under California law, lacked standing to appeal a ruling striking down Proposition 8. It held this despite a certified California Supreme Court ruling affording initiative sponsors the authority "to assert the State's interest in the initiative's validity" in court when the relevant state officials have declined to do so.[129]

Although the *Windsor* opinions followed along somewhat predictable ideological lines, with Justice Kennedy's majority opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, and with Chief Justice Roberts and Justices Scalia, Alito, and Thomas dissenting, the *Hollingsworth* lineup thwarted such ideological conventions, with Chief Roberts's majority opinion joined by Justices Scalia, Ginsburg, Breyer, and Kagan, and with Justice Kennedy's dissent joined by Justices Thomas, Alito, and Sotomayor.

In *Windsor*, the petitioner, who had married a same-sex spouse in Canada who later died, challenged Section 3 of DOMA as applied to an estate tax. Windsor claimed that the obligation to pay the estate tax, from which an otherwise similarly situated widow of an opposite-sex spouse would be exempt, violated her Fifth Amendment Due Process rights. The

126. 133 S. Ct. 2675 (2013).
127. 133 S. Ct. 2652 (2013).
128. *Windsor*, 133 S. Ct. at 2688, 2696.
129. *Hollingsworth*, 133 S. Ct. at 2666–68.

Obama administration agreed with the merits of a district court opinion that struck down Section 3, but nonetheless chose to enforce the statute and to file a notice of appeal, albeit without defending the statute on the merits. Instead, the administration claimed an executive interest in providing interested members of Congress a full and fair opportunity to defend the challenged law, thus paving the way for the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives to intervene and defend DOMA before the Supreme Court.

After concluding that adverseness was a prudential, rather than constitutional, standing constraint, Justice Kennedy determined that this unusual case posture did not defeat standing, stating:

> [I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[130]

Writing in dissent, Justice Scalia rejoined:

> The Court is eager—hungry—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the "judicial Power," a power to decide not abstract questions but real, concrete "Cases" and "Controversies." Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?[131]

Scalia continued:

> Windsor won below, and so cured her injury, and the President was glad to see it. True, says the majority, but judicial review must

130. *Windsor*, 133 S. Ct. at 2666–68 (citation omitted).

131. *Id*. at 2698 (emphasis omitted).

> march on regardless, lest we "undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is."
>
> That is jaw-dropping. It is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere "primary" in its role.[132]

In *Hollingsworth*, after the California Supreme Court had found a right to same-sex marriage, the State adopted an initiative limiting marriage to one man and one woman. Two women seeking to be married filed suit in federal district court, seeking to have the proposition struck down, naming various state officials as defendants. As in *Windsor*, the relevant officials, this time of California, declined to defend the challenged law, instead allowing the initiative sponsors to do so. After a federal district court ruling permanently enjoined the operation of Proposition 8, the Ninth Circuit certified to the California Supreme Court the question of whether the initiative sponsors were authorized to assert the state's interest for purposes of defending the initiative in court. The California Supreme Court ruled that they could, and the Ninth Circuit then proceeded to affirm the district court's decision on the merits.

In the Supreme Court, Chief Justice Roberts, writing for a majority, determined the initiative sponsors lacked Article III standing, stating:

> [O]nce Proposition 8 was approved by the voters, the measure became "a duly enacted constitutional amendment or statute." Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. . . . (petitioners do not "possess any official authority . . . to directly enforce the initiative measure in question"). They therefore have no "personal stake" in defending its enforcement that is distinguishable from the general interest of every citizen of California.[133]

This time writing in dissent, Justice Kennedy responded:

> The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass

132. *Id*. (emphasis omitted) (citation omitted).

133. *Hollingsworth*, 133 S. Ct. at 2663 (citations omitted).

> public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied.[134]

My preliminary assessment is that although the standing issue in *Windsor* is somewhat more difficult, the Supreme Court confused foundational standing principles in both cases. And the reasons have much to do with the central focus of this Article and specifically whether we view the judicial function as tied to a private-or public-rights model.

With respect to *Hollingsworth*, if a state has an initiative process, it must be permitted to establish an external means of defending the outcome of that lawmaking process, which, after all, is designed precisely to bypass elected public officials in policymaking, when those officials are unwilling to defend the challenged law. Although I have previously expressed skepticism of voter initiatives, at least in some circumstances,[135] that issue is separate from how successfully adopted initiatives can be defended in the judicial process. There was certainly a clear controversy that needed to be resolved in *Hollingsworth,* and the only question—one that the California Supreme Court answered for state law purposes, albeit not for purposes of Article III standing—was whether, in the absence of a willing state official to undertake the task, some other party could be so designated. The California Supreme Court's affirmative answer to that question should have sufficed to allow a genuine and ongoing dispute between the State of California and a couple seeking access to same-sex marriage to reach a final disposition as to the constitutional status of a law affecting the couple's claimed rights.

And with respect to *Windsor*, it is quite clear that the Obama administration sought to have the wedding cake it was eating. If the administration wanted to concede error and thus claim that the law was unconstitutional, it should have paid the price of not receiving a Supreme Court imprimatur of its policy choice. Conversely, if it wanted the benefit of a Supreme Court ruling one way or the other, it should have defended DOMA as a properly enacted federal statute, setting aside its normative views on the merits. What makes *Windsor* more difficult than *Hollingsworth* is that if the administration continued to enforce the law but remained unwilling to defend it, then that peculiar legal posture risked leaving other same-sex spouses (or widows or widowers) seeking to benefit from relevant federal statutory protections in a sort of Catch-22. Individual litigants could press for case-specific relief challenging the application of Section 3, but given the administration's stance—continuing to enforce DOMA but not defending it—each judicial victory of its own force

134. *Id*. at 2668.

135. *See* Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 GEO. WASH. L. REV. 311 (2012).

prevents the ruling from becoming the predicate to a beneficial precedent. It is perhaps for this very reason that the administration's legal posture in *Windsor* was so problematic.

On one reading, these cases support a political view of standing. One majority wanted to get to the DOMA question, and another sought to duck the Proposition 8 question. This thesis, which is nearly impossible to disprove, might help to explain the peculiar judicial alignment in *Hollingsworth.* Perhaps one or more of the liberal jurists who joined the majority decision denying standing, Justices Breyer, Ginsburg, and Kagan, feared that if standing were granted, a majority would have sustained Proposition 8 on the merits. And yet, assuming that an eventual merits ruling on Proposition 8 followed along more conventional ideological lines, this theory implies that Justice Kennedy, the author of the three most significant cases for same-sex relationships or conduct, *Romer*, *Lawrence*, and now *Windsor*, would have drawn the line just shy of protecting access to the label "marriage." And consider that if Justice Kennedy believed that the law dictated such a ruling, however problematic in light of his larger related jurisprudence, he could have easily delayed making those views known by joining the majority's standing denial, rather than authoring *Hollingsworth*'s standing dissent.

There is another, potentially more generous, if ironic, account that in some sense aligns with the social choice analysis of standing. Perhaps some who joined the *Hollingsworth* majority thought that the case for a constitutional right to same-sex marriage would be strengthened if the precedents related to same-sex relationships or conduct continued to develop incrementally, rather than ending in one swoop. As the precedents line up over a period of years, first *Romer*, then *Lawrence*, then *Windsor*, the legitimacy of an eventual same-sex marriage ruling might appear stronger. The irony, of course, is that this implicit suggestion of judicial modesty, at least in terms of favoring incrementalism, came at the price of two seemingly problematic, and frankly non-modest, standing decisions. And more to the point, it came at the price of having the Supreme Court use standing, a doctrine designed to limit litigant manipulation of case orderings with an eye toward effectuating desired precedent, to manipulate case orderings itself toward the very same goal.

One might write off *Windsor* as an isolated anomaly given the Obama administration's unusual strategy. That is harder to do with *Hollingsworth.* That standing precedent, after all, holds significant implications for states that rely on direct democracy to circumvent legislative lawmaking processes, especially when those processes are used to enact the very policies that elected officials are unwilling to embrace. And if we think of state law as having an existence apart from legislative processes, the very

premise of direct democracy, the *Hollingsworth* precedent seems problematic indeed.

IV. CONCLUSION

While this Article reveals foundational disagreements among a number of standing scholars, it also reveals areas in which standing scholars agree: Each of the scholars whose works I have discussed agree that standing implicates fundamental questions of judicial legitimacy that lie at the core of constitutional judicial review. It also reveals a common appreciation for the contribution of then-Professor, and now Judge, William Fletcher, who himself struggled with these foundational questions as a legal scholar well before he realized he would face the actual task of applying such doctrines as a member of the United States Court of Appeals for the Ninth Circuit.

Holding this conference in Judge Fletcher's honor is fitting. It is also useful. It provides the basis for serious consideration not only of standing—a topic certainly important in its own right—but also of whether we conceive the judicial function as grounded in a private-or public-rights model. Ultimately, this Article makes a singular claim: For those who care most deeply about public law precedent, there is a price to be paid when the foundations upon which those precedents rest are weak. Ironically, the social choice theory of standing reveals that those who embrace the public-rights model might come to realize that their foundation is resting on sand.

APPENDIX A

The following four tables present the overlapping data on Supreme Court duration. The first table provides data for the Supreme Courts based on shortest, longest, and average tenure (expressed in months), in addition to harmonic mean[136] and the most common tenure, from 1953 through 2010. The second graphic provides the duration of each natural Court in succession by months from the Vinson Court in 1946 to the Roberts Court in 2010, and the third and fourth tables provide the same data in bar graph and chart form, respectively.[137]

Typology	*Court*	*Value (in months)*
Shortest Tenure	Warren 1969–1969	1
Longest Tenure	Rehnquist 1994–2005	133
Average Tenure	N/A	25.6
Harmonic Mean (average adjusted for outliers)	N/A	9.0*
Most Common Tenure	Warren 1953–54 Burger 1969–70 Rehnquist 1990–91 Rehnquist 1993–94 Roberts 2009–10	12.0
Total Months Accounted		767

Table 1

136. The harmonic mean represents the mean value after excluding the outliers, which in this instance are the one-month natural Court during the Warren Court era and the 133-month natural Court during the Rehnquist Court era. This harmonic mean is primarily valuable in demonstrating that the longevity of the 133-month Rehnquist Court period substantially extended the harmonic mean of 9 months to an average tenure of 25.6 months.

137. The changes in the Court were collected from the website OYEZ, while filtering out non-material changes to the make-up of the Court, including, most notably, changes that occurred during the summer months when the Court was not in session. This avoids counting as a natural Court the changed composition following a justice's retirement, but before a successor joins the Court. *See Justices*, OYEZ, http://www.oyez.org/courts/robt6. For example, the Rehnquist Court from 1988–90 was calculated as lasting thirty months, beginning when Justice Kennedy joined in February 1988 until Justice Souter joined in August 1990. To err on the side of longevity in calculating the duration of a natural court, it also included the summer months following Justice Brennan's retirement in June 1990. Although the chart uses simplifying calculations, it does provide a listing of natural Courts that coincides with those in the Supreme Court database. *See Analysis Specifications*, THE SUPREME COURT DATABASE, http://scdb.wustl.edu/analysis.php.

Natural Court	*Number of Months*
Vinson 1946–49	36
Vinson 1949–53	48
Warren 1953–54	12
Warren 1954–55	5
Warren 1955–56	19
Warren 1956–57	5
Warren 1957–58	19
Warren 1958–62	42
Warren 1962–62	6
Warren 1962–65	36
Warren 1965–67	24
Warren 1967–69	19
Warren 1969–69	1
Burger 1969–70	12
Burger 1970–71	15
Burger 1971–72	4
Burger 1972–75	36
Burger 1975–75	11
Burger 1975–81	69
Burger 1981–86	60
Rehnquist 1986–87	9
Rehnquist 1987–88	8
Rehnquist 1988–90	30
Rehnquist 1990–91	12
Rehnquist 1991–93	24
Rehnquist 1993–94	12
Rehnquist 1994–2005	133
Roberts 2005–06	4
Roberts 2006–09	44
Roberts 2009–10	12

Table 2

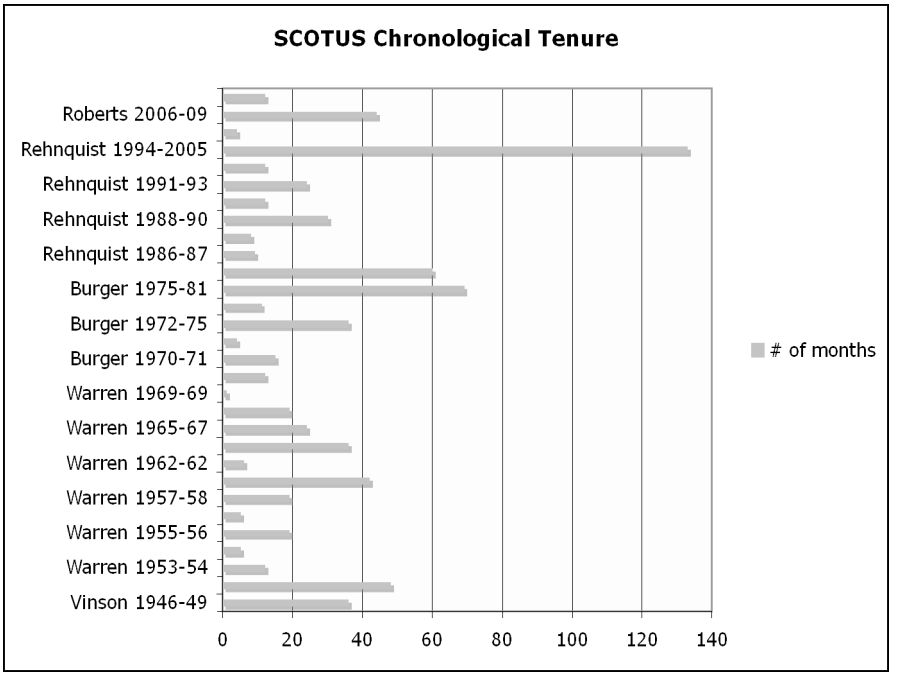

Table 3

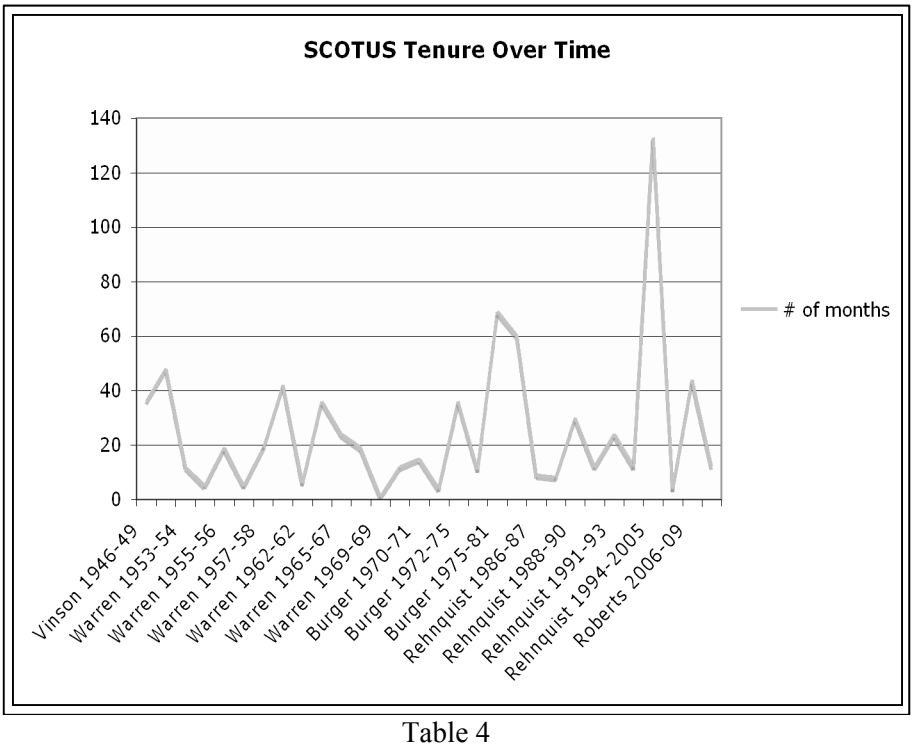

Table 4