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How is Constitutional Law Made?

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CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISIONMAKING. By *Maxwell L. Stearns*. Ann Arbor: University of Michigan Press. 2000. Pp. ix, 420. $65.

Bismarck famously remarked: "Laws are like sausages. It's better not to see them being made."[1] This witticism applies with peculiar force to constitutional law. Judges and commentators examine the sausage (the Supreme Court's doctrine), but ignore the messy details of its production.

Maxwell Stearns has demonstrated, with brilliant originality, that the Court fashions constitutional law through process-based rules of decision such as outcome voting, stare decisis, and justiciability. Employing "social choice" economic theory, Professor Stearns argues that the Court, like all multimember decisionmaking bodies, strives to formulate rules that promote both rationality and fairness (p. 4).

Viewed through the lens of social choice, the Court's constitutional precedent becomes more coherent. Stearns aims to present an account that is "positive" (i.e., justifies the Court's rules based upon the historical and case evidence) rather than "normative" (i.e., criticizes the substantive content of those rules) (pp. 6, 63-67). In particular, Stearns logically explains the decisions involving "standing" (i.e., whether a plaintiff has the right to sue), which legal scholars have uniformly concluded are irreconcilable and thus reflect either intellectual sloppiness or unstated political motives.

Professor Stearns's thesis is radical, for it compels us to look at constitutional law in an entirely new way. At the same time, however, his approach is conservative because it depends on the pre-Realist premise that constitutional "law" consists of binding legal rules that the justices try to interpret and apply in a principled way. Unlike many academics, Stearns "takes the justices' own statements of doctrine, as

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1. Otto von Bismarck, *quoted in* 1,911 BEST THINGS ANYBODY EVER SAID 232 (Robert Byne ed., 1988).

expressed in their opinions, quite seriously" (p. 5) and attempts to justify them using social choice analysis.[2]

Stearns displays a unique ability to convey extremely complex legal, economic, and political ideas in a clear and precise manner. His work is especially valuable because it is accessible to scholars in a variety of fields, and it will force them to reconsider their analytical frameworks.

Perhaps the greatest strength of Stearns's book is that he presents a grand unified theory of the Court's rules of constitutional process and the resulting development of doctrine. This strength can also be a weakness, however, because he tends to read precedent and the historical evidence to fit his thesis, even when other explanations might be more persuasive.

In this Review, we will explore two such alternatives, grounded in political science and constitutional theory. We hope to show that these disciplines are at least as effective as economics in illuminating constitutional lawmaking.

I. POSITIVE THEORIES OF APPELLATE COURT DECISIONMAKING

Positive models of Supreme Court decisionmaking begin with the rational choice paradigm: that individuals make decisions that they believe are most likely to lead to their preferred outcomes. Political scientists who study appellate courts have debated the relevance of a court's collegial nature to its decisions. Stearns adds to this literature by focusing on a classical economic theory of collective decisionmaking, Arrow's Theorem.[3] He uses Arrow's voting paradox in both its normative sense (as Arrow originally proposed it) and its positive sense, as it has been employed by social scientists ever since.[4]

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2. Stearns recognizes that politics and ideology influence adjudication, but contends that the justices aim to resolve the dispositive case issues in a legally consistent way: "I take doctrine seriously not because I believe that doctrine neutrally drives case results, but rather because I believe doctrine serves as one of several important constraints that influence the manner in which justices achieve desired case outcomes." P. 5.

3. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

4. Stearns attempts to distinguish between normative "legitimacy" (i.e., society's acceptance of an outcome because of the fairness of the procedures followed) and normative "justification" (i.e., the merits of a result as compared to foregone alternatives). Pp. 63-67. This argument fails to persuade within the social choice framework. He uses "normative" in the first instance in a different sense than it is employed in the second — process rules cannot produce normatively acceptable outcomes (under social choice theory) unless they are consistent with the goals of decisionmaking considered by Arrow. It may be true that the public perceives outcomes as legitimate because they were reached by following predetermined rules. This is a positive account, however, not a normative one. Whether the public should have this perception is a question that goes to the normative justification for the outcomes. Stearns's arguments about the rightness of rules that resolve the voting paradox are normative, of course.

Initially, we consider the central aspect of Arrow's theory of social choice upon which Stearns relies to create his process model. We then examine whether existing political science accounts of Court decisions provide a sounder, more tractable model.

A. *Arrow's Insights into Group Decisionmaking*

1. *Introduction*

Scholarship built upon Arrow's Theorem (or its descendants) has traveled under various banners, including public choice or social choice theory,[5] but shares a heritage in the work of Arrow and Duncan Black.[6] Arrow proved that no collective decisionmaking process could both satisfy accepted notions of fairness and produce a consistent or "rational" outcome, that is, one that would meet the requisites for rationality in individual decisionmaking.[7] Most notably, he demonstrated mathematically that aggregating collective preferences according to democratic methods, such as majority rule, will not always yield a single, transitive collective preference.[8] As a result, the decisionmaking process "cycles," moving through a series of options without ever clearly selecting one. The result is the classic "voting paradox," first

5. The economic theory of group decisionmaking has assumed many labels, including social choice, public choice, collective choice, or positive political theory. Saul Levmore, *Preface*, *in* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY xvii, xi (1997). For a discussion of the schizophrenic naming and defining of the school, see Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992) (discussing the academic debate over the precise meaning of the terms "public choice," "social choice," and "positive political theory," which clearly share "familial" connections).

6. For the classic texts by each author, see ARROW, *supra* note 3; and DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958). Daniel Farber, a legal scholar who has written extensively on social choice, observed: "Kenneth Arrow is undoubtedly the paterfamilias of social choice theory . . . . Arrow's Theorem is the foundation for what is now a huge body of literature on mechanisms of social choice." Daniel S. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1573 (1995). For a law review discussion of Black's contribution, see Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971 (1989).

7. Arrow's "General Possibility" or Impossibility Theorem demonstrates that no method of summing individual preferences can satisfy basic notions of justice and fairness as reflected in five maxims: universal admissibility of individual preference scales, positive association of individual and social values, independence from irrelevant alternatives, individual sovereignty, and nondictatorship. For an intriguing account of Arrow's recognition of the voting paradox, see his autobiographical essay in LIVES OF THE LAUREATES: THIRTEEN NOBEL ECONOMISTS 47-49 (William Breit & Roger W. Spencer eds., 3rd ed. 1995) [hereinafter ARROW, LIVES OF THE LAUREATES].

8. ARROW, *supra* note 3, at 2-3; *see also* DONALD P. GREEN & IAN SCHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 7-8 (1994) (noting that Arrow's theory "rendered all democratic rules of collective decision potentially suspect" because they fail to achieve their seeming end: popular choice).

recognized by the Marquis de Condorcet in 1785 but largely forgotten until Arrow revived it.[9]

Cycling is easy to illustrate. Imagine three individuals, A, B, and C, who must make a group decision among three options. A ranks her preferences 1, 2, 3; B ranks his preferences 2, 3, 1; and C ranks her preferences 3, 1, 2. In a pairwise vote between choices 1 and 2, choice 1 prevails. In a vote between choices 2 and 3, choice 2 prevails. If the group's preferences were rational, it would prefer choice 1 to 3, that is, its preferences would be *transitive*. In a vote between 1 and 3, however, choice 3 prevails.[10] If all three individuals vote sincerely in accordance with their preferences, there is no rational means of choosing one option, and thus there is no "Condorcet winner." No minimum-winning majority can withstand a challenge by the losing participant, who can always entice one member of the majority to support a different option. For example, if choice 1 prevails, B can persuade C to form a new majority in favor of choice 3. If choice 3 prevails, A can persuade B to shift to choice 2, and so forth. The majority *cycles*.

2. *Arrow's Theorem in Legal Scholarship*

While many social scientists immediately began to utilize Arrow's work on collective decisionmaking,[11] law professors were not as quick to appreciate its relevance to their studies. Beginning in the mid-1970s and picking up speed in the last decade,[12] legal scholars have sought to evaluate law and legal structures by considering how institutional characteristics influence collective choice.[13] Since 1986, more than 100

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9. *See* ARROW, LIVES OF THE LAUREATES, *supra* note 7, at 50 (describing his surprise at learning, after circulating his own work, that "[t]he paradox of majority voting had indeed been discovered before — in fact, by the French author the Marquis du Condorcet in *1785!*"); H.P. Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231 (1988). In the original book, Arrow credits E.J. Nanson with first recognizing the paradox in 1882. ARROW, *supra* note 3, at 3 n.3.

10. The group members' preferences are "multipeaked". STEVEN J. BRAMS, PARADOXES IN POLITICS: AN INTRODUCTION TO THE NONOBVIOUS IN POLITICAL SCIENCE 37-41 (1976) (discussing single-peakedness and multi-peakedness as discovered by Duncan Black).

11. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES i (2d ed. 1963) (observing in the preface to the second edition that *Social Choice and Individual Values* "has to some extent acquired a life of its own" and thus choosing in the second edition to append material responding to commentary on the book, rather than rewrite the main text); ARROW, LIVES OF THE LAUREATES, *supra* note 7, at 51 (describing the voluminous work built on social choice theory).

12. David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 659-60 (1997) (book review) ("It was not until the mid-1970s that legal scholars first explored the implications of public choice, even though many of the seminal insights of both interest group theory and social choice had been in place for over a decade. Since then, public choice has taken the legal literature by storm.").

13. For example, legal scholars have invoked social choice principles to argue that the legislative process is inherently flawed, thereby justifying greater Supreme Court interven-

law review articles have included "social choice" or "public choice" in their titles, and more than 400 articles have cited Arrow's classic text, *Social Choice and Individual Values*.[14] Within the past decade, law journals have devoted entire issues to articles on the application of choice theory to the study of law.[15]

Frank Easterbrook was the first legal commentator to view the decisionmaking of collegial courts from a social choice perspective.[16] Since then various legal scholars have recognized that multijudge appellate courts may be subject to decisionmaking flaws predicted by social choice theory and have considered the resulting implications for normative adjudication theories.[17] Lewis Kornhauser and Lawrence Sager, for example, have drawn on Arrow's Theorem to examine whether the features of collegial courts satisfy the normative goals of adjudication.[18] David Post and Steven Salop have argued that such courts should adopt a system of "issue voting" as opposed to "outcome voting" to overcome the voting paradox.[19] Stearns contributes to this important body of work.

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tion. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (drawing in part on public choice ideas to support wide-ranging judicial activism under the Takings Clause); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (using interest group analysis to justify more intrusive judicial review of legislation for rationality). Scholars have also taken the contrary position — that legislatures are as well or better suited than appellate courts to reach rational decisions. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

14. These findings are based on a search of WESTLAW JLR database.

15. *See, e.g.*, *Public Choice Theme Issue*, 6 GEO. MASON L. REV. 709 (1998); *Symposium: Positive Political Theory and Public Law*, 80 GEO. L.J. 1787 (1992); *Symposium on Public Choice and the Judiciary*, 1990 BYU L. REV. 729; *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988); *see also* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997) (an edited reader supplemented with a discussion of economic concepts relevant to legal decisionmaking).

16. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813-32 (1982).

17. *See, e.g.*, Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441 (1992).

18. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

19. David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992). For a thoughtful critique, see John M. Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 VAND. L. REV. 997 (1996) and David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminancy: A Reply to Professor Rogers and Others*, 49 VAND. L. REV. 1069 (1996).

3. *Stearns's Adaptation of Arrow's Theorem*

In previous articles, Stearns demonstrated that he is particularly adept at articulating and applying the precepts of social choice theory.[20] His delineation of the voting paradox in the current book is outstanding and will be a great resource for anyone seeking to understand Condorcet's and Arrow's ideas (pp. 42-52, 81-94). Stearns creatively elucidates a number of complicated social choice concepts, making them both accessible and interesting. Perhaps his best effort is his modern revision of Shakespeare's tale of King Lear to illustrate the "empty core" problem.[21]

The driving force of Stearns's book is his argument that appellate courts, as collective decisionmaking bodies, are governed by Arrow's Theorem and therefore are prone to cycling. He presents a group of Supreme Court procedural doctrines that he maintains can be explained *and* justified as responses to cycling and related social choice conundrums. For example, outcome voting, rather than issue voting, ensures that the Court will reach a decision even when no stable majority of justices can agree both on the means (issue) and the ends (outcome) in a particular case (pp. 97-111). In instances where only outcome voting would lead to a decision, the narrowest grounds doctrine offers a fair interpretation of the Court's holding in the case because it limits the ruling to the position that was at least the second-best choice of a majority of justices (pp. 124-29).

Stearns scrutinizes a handful of cases in order to prove that this social choice account of outcome voting and the narrowest grounds doctrine is an accurate *positive* theory. His reasoning, however, is primarily normative, not explanatory. Most significantly, he does not prove that outcome voting developed to respond to cycling problems; in fact, he does not offer a historical account for its emergence (although it seems an obvious default rule). Rather, Stearns provides a justification for keeping the outcome voting rule. The narrowest grounds doctrine also appears to have been adopted for largely pragmatic reasons: judges do not know ex ante their relative position in future cases, and therefore they select a rule that is least likely to be completely contrary to their future decisions. Rational choice theory offers the best

20. *See, e.g.*, Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994).

21. Pp. 54-58. Cycling can be seen as one instance of the "empty core" phenomenon. A bargaining situation requiring a majority agreement contains an empty core when a participant may be persuaded to defect from an agreement by the offer of a bigger share and such defection changes the majority agreement.

explanation for this selection.[22] Again, Stearns sets forth a compelling rationalization for the narrowest grounds doctrine, but not an explanation for it.

Stearns correctly argues that the most important rules of constitutional decisionmaking concern "justiciability" — the fitness of a matter for judicial disposition (pp. 35-38, 157-211). The key doctrine is standing, which denies federal court access to any plaintiff who cannot show an "injury in fact" caused by the defendant that is judicially redressable (pp. 37-38, 160-70). Stearns's most original contribution is to apply his social choice approach to standing (Chapters Five and Six). He argues that standing is a necessary corollary to the doctrine of stare decisis. He contends that the rule of stare decisis is similar to the rule of outcome voting in that both respond to the problem of cycling: outcome voting addresses cycling *within* cases, while stare decisis responds to cycling *across* cases (pp. 158, 170-77).

Stare decisis, however, poses its own social choice dilemma, "path dependency": parties, particularly organized interests, can manipulate the development of substantive legal doctrine by presenting cases in a predetermined order and thereby restrain the Court, which is bound by its precedent.[23] One of Arrow's prerequisites for fair group decisionmaking is that the decision should be independent of the order of presentation of alternatives. Stare decisis, coupled with sophisticated litigation strategies, violates this requirement. This conclusion undergirds Stearns's central thesis: that standing doctrine allows the Court to impede parties' attempts at path manipulation by making it more difficult to present cases on their merits (p. 159). Specifically, standing helps ensure that the order in which cases are presented is primarily determined not by litigant strategy, but by chance events directly injuring plaintiff and beyond her control (pp. 23-24, 157, 159, 162, 177-80, 198, 204, 208).

As with outcome voting and the narrowest grounds doctrine, Stearns provides a compelling normative justification for stare decisis and standing, but his case studies do not persuasively explain the development or utilization of these doctrines. A more appealing, direct account as to why courts respect precedent is the desire for fairness: similarly situated parties should be treated alike. Moreover, consistent decisionmaking is a hallmark of rationality and contributes to a court's legitimacy. Again, the simple "rational actor" model explains judicial

22. These two doctrines seem to be instances of the strategic theory of judicial behavior as developed in political science, which we will discuss in the next section. We do not, however, offer a detailed account of its ability to explain outcome voting or the narrowest grounds rule because that would exceed the scope of this Review.

23. Pp. 177-80. Thurgood Marshall and the NAACP Legal Defense Fund developed this test case litigation strategy with great success. *See generally* CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959).

behavior. Indeed, the standing doctrine can be explained by a particular rational choice theory developed in political science, as described below.

In our view, Stearns's approach does not function well as a positive theory because it is not a true model of Supreme Court decisionmaking, in the sense that it is not falsifiable. His theory fails to provide ex ante for any potential conditions that, if observed, would refute the model.

4. *Some Conclusions About the Social Choice Theory*

Stearns's work on the Supreme Court has been anticipated by social science studies of majority rule institutions, which focus primarily on legislatures. Social scientists have demonstrated that strict majority rule in a setting where individuals hold some diversity of viewpoints generally does *not* produce a Condorcet winner.[24] Thus, cycling is inevitable on a theoretical level when groups make even the simplest decision among multidimensional options. Nevertheless, cycling does not appear frequently in practice because most majority rule institutions adopt anticycling procedures or include strategic members who act in such a way as to offset the cycling problem.[25] Or, as may be the case with the Supreme Court, the members hold a limited number of positions[26] and/or are selecting among a smaller or limited range of options.[27]

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24. *See* Linda Cohen, *Cyclic Sets in Multidimensional Voting Models*, 20 J. ECON. THEORY 1 (1979); Richard D. McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 ECONOMETRICA 1085 (1979); Norman Schofield, *Instability of Simple Dynamic Games*, 45 REV. ECON. STUDIES 575 (1978).

25. Kenneth A. Shepsle & Barry R. Weingast, *Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions*, 28 AM. J. POL. SCI. 49, 49, 69 (1984). Shepsle and Weingast's study provides an important insight to majority rule with open agenda setting (i.e., any justice may introduce any alternative at any point in the decisionmaking process): If two options are placed on the agenda where one option encompasses the other, then the more encompassing option is the sophisticated outcome. *Id.* at 68-69. A sophisticated voter would propose that alternative in order to capture additional votes.

26. Heterogenity of preferences is a prerequisite to cycling. *See, e.g.*, BRAMS, *supra* note 10, at 41; Frank DeMeyer & Charles R. Plott, *The Probability of a Cyclical Majority*, 38 ECONOMETRICA 345, 345 (1970).

27. It is common to imagine judges selecting along a unidimensional decisional space, as one of us has done in her work. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999). In such a setting, cycling does not occur because the judges' relative positions are defined in such a way that the majority's preferences are transitive. The literature on majority rule cycles is set in the context of multidimensional voting space. Kenneth A. Shepsle & Barry R. Weingast, *Institutionalizing Majority Rule: A Social Choice Theory with Policy Implications*, 72 AM. ECON. REV. 367 (1982). Judicial process scholars have considered the influence of case complexity on the likelihood of justices circulating separate opinions and noted how their finding — a high positive relationship — is consistent with Arrow's Theorem regarding the instability of majorities in multidimensional issue areas. FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 90-91 (2000).

Stearns obviously has given much thought and energy to the subtleties of social choice theory and the possibilities that arise by applying this theory to Supreme Court decisionmaking. The resulting ideas are keenly original and innovative.

The social choice approach, however, does less than Stearns claims for it. He presents his account as a metatheory that both provides a model of process doctrines and outperforms other models of these doctrines. Although Stearns comprehensively analyzes all the pertinent decisions, we believe that his theory best explains a group of unusual cases rather than the standard doctrines. Political science provides a stronger, more tractable model of process doctrine generally. Stearns's theory may supplement that model, but fails to supplant it.

B. *The Insights of Political Science About Collegial Courts*

1. *Attitudinal and Strategic Theories of Judicial Behavior*

To answer the question of how judges make decisions, political scientists have developed two competing models: attitudinal and strategic. Both models begin with the recognition that judges are at core *human* decisionmakers, and rational choice theory tells us that judges, like human beings generally, will seek to achieve their goals or preferences. Thus, both political science models build on the same base as the social choice one: the rational actor.

The attitudinal model posits that a judge seeks to maximize her *sincere* policy preferences, termed "attitudes".[28] This model has been the dominant positive theory of court behavior because empirical studies demonstrate that it has substantial explanatory power.[29] Most adherents of the model will concede that it does not account for all factors in judicial decisionmaking[30] and acknowledge that legal rules and doctrines have been shown to restrain, and in some instances to guide, adjudication.[31] But they point out that the attitudinal model is a valuable tool for explaining and predicting judicial behavior.

Strategic theorists argue that the attitudinal model can be improved without unnecessarily complicating it or detracting from its

28. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (offering a detailed delineation and defense of the attitudinal model).

29. *See* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1646-55 (1998) (detailing the evolution and status of the attitudinal model); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325-26 (1992) (considering the relevance of legal factors to the attitudinal account). *See generally* SEGAL & SPAETH, *supra* note 28.

30. In fact, models are inherently incomplete, a simplified and useful construct of reality. A "model" that included every characteristic of the object of study would not be a model but would rather be the thing itself.

31. *See, e.g.*, George & Epstein, *supra* note 29.

predictive ability.[32] Strategic theories of judicial behavior adopt the attitudinalist position that justices seek to achieve policy goals but claim that justices, in order to accomplish this end, must and do consider the preferences and likely conduct of other relevant actors. Hence, strategic theorists emphasize the influence of strategic factors, such as interactions with colleagues on the court (internal dynamics) or reactions of other institutional actors, most notably Congress and the President (exogenous constraints).[33] Such strategic considerations are absent from Arrow's Theorem. Arrow assumed that preferences were not affected by the decisionmaking process, and he therefore ignored strategic (or game) aspects of the process that would prevent someone from voting his or her true, or sincere, preference.[34] Relaxing either or both assumptions — as the strategic theory of judicial process does — will prevent cycling.

2. *An Attitudinal Account of Standing Doctrine*

A major aspect of Stearns's work is his positive explanation for the development of the standing doctrine, which assertedly harmonizes most of the relevant cases and thereby improves on existing theories (Chapter Six). In our view, however, the attitudinal model provides a simpler, more intuitive explanation for standing decisions. It can account for the Supreme Court justices' votes on standing by reference to their preference to favor or disfavor sociopolitical underdogs. Liberal justices are far more likely than their conservative counterparts to grant standing to those who are of disadvantaged social or economic status, such as the poor, ethnic minorities, employees, and criminals. Conversely, conservative justices are more likely than their liberal colleagues to confer standing on the powerful.

Consider, for example, the New Deal and Burger Court decisions that adopted very strict standing requirements. Stearns deems these cases surprising because of the two Courts' contrasting policy preferences.[35] As we will detail in Part II, the Court created standing in the

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32. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Forrest Maltzman & Paul Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996).

33. *See* Forrest Maltzman, James F. Spriggs II, & Paul J. Wahlbeck, *Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making* (providing an articulate primer on, and argument for, strategic theory) *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

34. ARROW, *supra* note 3, at 6-8.

35. Pp. 35-38. One of the problems with Stearns's explanation of the standing decisions is that the rules he vaunts are merely what the Court allows us to see of its decisionmaking processes, the great majority of which are entirely secret. It is hard to conceive of these rules, then, as meaningful constraints on judicial behavior when most of that behavior is veiled and

1930s and 1940s primarily to deny federal judicial access to businesses challenging progressive legislation.[36] By contrast, the Burger Court used standing mainly to foreclose litigation by disadvantaged groups attacking conservative statutes.[37] Nonetheless, the New Deal and Burger Courts did share an important feature: both wanted to protect other governmental actors. Access doctrines like standing allow the Court to deny relief to those seeking to challenge existing political power arrangements. Thus, the Court's treatment of standing is irretrievably linked to its position on those with access to power in the first instance.

Moreover, Stearns's process theory is unnecessarily complex. The attitudinal model explains both the New Deal and the Burger/Rehnquist Courts' reliance on standing to protect liberal and conservative legislation, respectively. The attitudinal approach does so with less complexity than a social choice model. Stearns does not achieve greater overall success in predicting Court behavior. If a simple paradigm explains the observed events as accurately as a more complicated and less obvious approach, then the former should be preferred.[38] While it is true that human behavior is complex, it need not be made more so.

Admittedly, Stearns's process model *improves* upon existing models of judicial behavior by *adding* to them and creating a more complete theory. Therefore, social choice is not "the" explanation, but rather is part of several complementary theories (including the attitudinal one) that can account for the observed outcomes. Hence, when combined, these approaches result in a multidimensional, fully real-

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the part we see is carefully choreographed to ensure the appearance of principled decision-making.

36. *See infra* Section II.B.1.

37. For example, the Burger Court held that plaintiffs must establish a direct relationship between the challenged action and a personal injury and must show that the requested remedy will redress that injury. This requirement prevented blacks from challenging allegedly discriminatory police practices, *see, e.g.*, O'Shea v. Littleton, 414 U.S. 488 (1974), and restrictive zoning ordinances in white neighborhoods, *see, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975), as well as the poor from contesting government welfare procedures, *see, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).

38. Clearly, this is the principle of Occam's Razor. Isaac Newton stated as his first rule of philosophizing: "That there ought not be admitted any more causes of natural things than those which are both true and sufficient to explain their phenomena." ISAAC NEWTON, PRINCIPIA: THE SYSTEM OF THE WORLD, *reprinted in* DANA DENSMORE, NEWTON'S PRINCIPIA: THE CENTRAL ARGUMENT: TRANSLATION, NOTES, AND EXPANDED PROOFS 241 (1995) (translations and diagrams by William H. Donohue). As Stephen Hawking explains: "It seems better to employ the principle of economy known as Occam's razor and cut out all the features of the theory which cannot be observed." STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 55 (1988).

ized model of judicial behavior that no model alone can capture.[39] We will now explore other theories that further enrich our understanding.

II. CONSTITUTIONAL THEORY AND HISTORY

A. *The Social Choice Approach to Standing*

1. *Professor Stearns's Conception of Standing*

Stearns presents a novel theoretical and historical account of standing. He begins with Steven Winter's definitive history of this doctrine, which posits that the liberal Supreme Court developed standing to prevent attacks on progressive legislation that began with the New Deal and continued with the Great Society.[40] Professor Stearns asks a penetrating question: Why did the conservative Burger and Rehnquist Courts, which distrust government regulation, retain and strengthen standing doctrine instead of abandoning or limiting it (pp. 35-38, 167-68)?

He finds the answer in social choice theory: through standing, the Court has consistently rejected attempts to conduct litigation on an ideological basis, whether liberal or conservative (pp. 159, 162-64, 168-70, 198, 204-11). Stearns sees standing as operating on two levels.

First, as noted above, standing improves fairness by reducing the ability of interest groups to manipulate the evolution of legal doctrine by controlling the order of case decisions — a "path dependency" that results from stare decisis (pp. 157-62, 177-80, 190-91, 198, 204, 208-11). The accidental occurrence of an individualized injury, not lawyerly calculation, largely determines when a federal court grants access.[41]

Second, standing promotes separation of powers by minimizing attempts to force judicial creation of positive law where Congress has remained silent, thereby protecting its power to leave legal issues undecided until a legislative consensus has formed (pp. 158-59, 164-66, 198, 201, 209). Standing thus helps to preserve the fundamental constitutional structural distinction between legislative and judicial lawmaking processes (pp. 159-60, 198-211). Congress has power to create (or decline to create) law as it sees fit, to aggregate preferences, and to control the timing and scope of its legislation (pp. 159, 201-02). By contrast, courts fashion law only on an ad hoc basis when necessary to decide an actual case, and they are limited to applying legal principles rather than personal preferences (pp. 201-03).

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39. Social scientists have observed that some law and economics scholars mistakenly believe that they must present a theory that beats other theories and exists *instead* of those theories. Such an approach is both unscientific and incomplete.

40. Pp. 35-37, 167. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

41. *See supra* Section I.A.3.

Stearns characterizes "injury" as a metaphor to describe when fortuitous circumstances have harmed a plaintiff seriously enough to justify shifting the burden of legislative inertia and allowing a court to formulate positive law (pp. 204-11, 257-59, 262-65, 268-69). Accordingly, standing enables doctrine to evolve more fairly and consistently with the "majoritarian norm" of democratic lawmaking (p. 300).

Stearns applies this social choice theory to the three main categories of standing cases. First, he endorses the precedent prohibiting third party standing as promoting fairness and reducing manipulation (pp. 162-64, 249-50, 259-69). One illustration is the Court's denial to the Sierra Club of the right to claim that a construction project had violated federal environmental laws because the Club failed to allege that its members actually had used the national park that would be negatively affected by the building.[42] Stearns concludes that the Court correctly held that a park patron, rather than a special interest group, would be the appropriate plaintiff (pp. 263-66, 277-78). He therefore rejects the scholarly consensus that *Sierra Club* invented a pleading technicality to express the majority's political antipathy towards environmentalists.[43]

Second, Stearns contends that the Court's ban on "generalized grievances" ensures fairness by forcing the most majoritarian department to deal with illegal government conduct that produces diffuse harms, rather than allowing ideological litigants to commandeer the least representative branch to make positive law (pp. 250, 269-71). He asserts, for example, that the Court properly denied standing to "taxpayers" and "citizens" who claimed that (1) a statute authorizing secret CIA spending violated the Constitution's requirement that Congress provide a public accounting;[44] (2) Representatives' simultaneous membership in the military reserves ignored a constitutional prohibition on such dual service;[45] and (3) the government's grant of property to a religious institution ran afoul of the Establishment

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

43. Pp. 263-66. Stearns emphasizes that the Sierra Club did not invoke any specific federal statute whose violation had harmed them in a way that conferred standing, but rather merely claimed to be "adversely affected" by agency action under the catch-all standing provision of the Administrative Procedures Act. Pp. 259, 263-66, 268-69. He contrasts *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), in which the plaintiffs relied upon the National Environmental Policy Act, which broadly granted standing. Pp. 264-66. A denial of standing may have left the statute unenforceable by anyone, whereas in *Sierra Club*, park users could still have brought suit. Pp. 265-66.

44. *See* United States v. Richardson, 418 U.S. 166 (1974); *see also id.* at 179 (declaring that "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process").

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

Clause.[46] Stearns argues that the alleged constitutional violations in these three cases did not directly harm any particular citizen in a manner substantial enough to warrant a grant of standing and thus an assumption by courts of lawmaking power (pp. 168-69, 269-70). Again, he questions the prevailing wisdom that these cases simply reflected hostility toward antiwar activists and strict separationists (pp. 167-69, 233, 269-70).

Third, Stearns characterizes standing's "causation" and "redressability" prongs as shorthand for denying anyone the right to allege that unlawful government conduct has created a market distortion, the removal of which will benefit the plaintiff (pp. 250, 271-79). For instance, in *Allen v. Wright*,[47] the Court conceded that IRS tax exemptions to discriminatory private schools had constitutionally injured black public school children by diminishing their ability to receive an integrated education.[48] Nonetheless, the majority denied standing because the plaintiffs had not shown that the IRS, as distinguished from the private schools and their parental supporters, had caused their injury.[49] The Court concluded that the plaintiffs were making a general complaint about an executive agency's internal program.[50] Stearns agrees that citizens should ask the political branches, not the courts, to eliminate market distortions such as the one created by the IRS exemption (pp. 32-35, 271-77, 279).

2. *A General Critique of the Social Choice Approach*

Stearns's theory has considerable explanatory power. Nonetheless, it rests upon two debatable premises.

The first is that the Court applies standing in a relatively apolitical manner to repel all ideological litigants. If this is true, however, why did the Warren Court in *Flast v. Cohen*[51] break with ironclad precedent and allow taxpayers to claim that congressional spending for church-run schools violated the Establishment Clause? Was it not for the transparent purpose of furthering the Court's liberal agenda of ending public support for religion? Conversely, didn't the Burger Court serve conservative political ends (and eviscerate *Flast*) by rejecting the standing of taxpayers to question the federal government's

46. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982).

47. 468 U.S. 737 (1984).

48. *Id.* at 756.

49. *Id.* at 757-59.

50. *Id.* at 760-61.

51. 392 U.S. 83 (1968).

grant of property to a Christian college?[52] Similarly, why was the Court in the 1950s and 1960s so solicitous of minorities, whereas by the 1970s and 1980s it was denying standing to blacks and Latinos who alleged unconstitutional discrimination in taxation[53] and housing policies?[54] Finally, why have the Burger and Rehnquist Courts routinely rejected the standing of those who seek to protect the environment,[55] but not those who wish to degrade it?[56]

Although Stearns plausibly answers such questions through complex social choice analysis, most scholars have a simpler explanation — partisan politics.[57] While conceding the force of such political arguments, Stearns astutely points out that they cannot account for several anomalies in the standing cases or explain why this doctrine has persisted despite the Court's shift from predominantly Democratic to Republican appointees (pp. 216, 280-81). For instance, crass politics should have led the "law and order" Burger and Rehnquist Courts to shut the federal courthouse doors to accused and convicted criminals, yet the opposite has occurred. The reason, Stearns says, is that criminals are not ideologues trying to manipulate the evolution of legal doctrine, but rather are alleging the most serious kind of individual injury — that they will be unlawfully imprisoned or executed.[58] In any event,

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52. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982); *see also supra* note 46 and accompanying text (summarizing *Valley Forge*).

53. *See* Allen v. Wright, 468 U.S. 737 (1984); *see also supra* notes 47-50 and accompanying text (examining *Allen*).

54. *See* Warth v. Seldin, 422 U.S. 490 (1975).

55. *See* Sierra Club v. Morton, 405 U.S. 727 (1972), discussed *supra* notes 42-43 and accompanying text; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (invalidating Congress's grant of standing to "any person" to enforce the Endangered Species Act); *infra* notes 70-72 and accompanying text (analyzing *Lujan*).

56. *See, e.g.*, Bennett v. Spear, 520 U.S. 154 (1997) (allowing developers to sue a government agency that prevented them from proceeding in order to safeguard endangered species); Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (conferring standing on homeowners who challenged the constitutionality of a federal statute limiting the liability of nuclear power plants, and upholding this law).

57. *See, e.g.*, Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 659 (1985) ("One could perhaps be forgiven for confusing standing's agenda with that of the New Right."). Instead of accusing federal courts of consciously engaging in raw politics, attitudinal theorists suggest that judges' political backgrounds influence their decisionmaking in empirically demonstrable ways, regardless of whether they are aware of this fact.

58. Pp. 163-64, 203-04, 262-63, 273-74. Stearns distinguishes those few decisions that seem to hold to the contrary. For example, he maintains that in *Gilmore v. Utah*, 429 U.S. 1012 (1976), the Court properly declined to permit Gary Gilmore's mother to allege that his conviction and death penalty were unconstitutional, because the son alone had standing to raise these claims and thereby force the Court to create constitutional law. Pp. 168, 179, 205-07, 209, 250, 256-58, 260, 264. Similarly, in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Court would have allowed Lyons to sue for damages resulting from the police department's application of a dangerous "choke hold" to him, but correctly denied him standing to

he criticizes political explanations as "nonfalsifiable": one cannot prove or disprove hidden motives that are not expressed in opinions (pp. 280-81).

But standing decisions do reflect, if not partisan politics, a broader political theory. Indeed, that theory forms Stearns's second premise: the Constitution imposes strict standing requirements because our democracy requires minimal judicial interference with the political branches. We submit, on the contrary, that standing sabotages the constitutional will of "We the People," who authorized the federal judiciary to check Congress and the President so that they neither exceed their delegated powers nor violate anyone's constitutional rights.[59] Before developing this thesis further, however, we will first attempt to refute Stearns's argument that the historical evidence supports his social choice theory of standing.

B. *The History of Standing*

1. *The New Deal Era*

Stearns's version of events may be summarized as follows. By 1941, President Roosevelt had appointed a majority of the justices, who agreed doctrinally on two critical constitutional issues: the validity of the New Deal and the incorrectness of the substantive due process jurisprudence epitomized in *Lochner v. New York*[60] (pp. 220-22, 228-29). The emerging liberal Court developed standing to foreclose attacks on progressive legislation in the reactionary lower federal courts, which would have sustained such challenges and thereby compelled the Supreme Court to issue substantive constitutional rulings (pp. 36-37, 226-28). These holdings would have differed radically from those of the preceding era, which had sharply limited the power of Congress and the states to address social and economic ills (pp. 226-29). Such wholesale reversals would have exacted a high political cost, exposing the Court as nakedly partisan and damaging its credibility and perceived impartiality (p. 226).

We are skeptical of Stearns's account of New Deal history for two reasons. First, from 1937 to 1942, the justices had no qualms about ex-

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request an injunction (and thereby raise constitutional claims) on behalf of unknown future choke hold victims. Pp. 168, 204-07, 209, 256, 258, 260.

59. This argument has been fleshed out in Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) [hereinafter Pushaw, *Justiciability*].

60. 198 U.S. 45 (1905). Stearns acknowledges that the Court eventually became split on whether the Fourteenth Amendment's Due Process Clause should be interpreted as incorporating the entire Bill of Rights against the states (the Black/Douglas position) or only those rights that were fundamental (the Frankfurter view). Pp. 229-30. Nonetheless, he stresses that this division was bipolar, and that therefore the justices could predict the outcome of any particular case. P. 230.

plicitly rejecting the substantive constitutional decisions of even their very recent predecessors.[61] For example, the Court repudiated long-established limits on Congress's power under the Commerce Clause[62] and decades of substantive due process cases that had thwarted state economic legislation.[63] The Court paid little political price for this about-face because the vast majority of Americans (and the political officials they elected) supported this trend. Moreover, any resulting institutional costs to the Court (e.g., being perceived as applying political rather than legal principles) seem to have been far less than the damage to its prestige caused by the intransigence of the conservative justices in the early 1930s.

Second, Stearns argues that, without standing, the reactionary federal district and appellate judges would have cleverly distinguished the Supreme Court's new decisions on substantive constitutional law (pp. 226-28). In particular, they would have struck down progressive legislation that the Court had not yet specifically considered, thereby forcing its hand. But we think the justices would have been unwise to choose standing as the principal tool to discipline lower federal courts. If these sly Neanderthal judges could distinguish the Court's seemingly unequivocal substantive holdings, why could they not also manipulate the Court's new standing doctrine — which was largely discretionary and very malleable — to grant plaintiffs access and rule on the merits?[64] Stearns leaves this question unanswered.[65]

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61. Stearns recognizes this phenomenon, pp. 218, 221-26, but not its tendency to undermine his thesis.

62. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (allowing Congress to regulate a farmer's growth of wheat for personal consumption, despite previous cases holding that "commerce" did not include production and that Congress could not reach activity that occurred entirely within a state); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (sustaining the National Labor Relations Act by overruling an unbroken line of precedent which had established that labor was not a matter of interstate commerce). For a detailed analysis of the New Deal Court's overhaul of Commerce Clause jurisprudence, see Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 79-83 (1999); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 715-16 (2002).

63. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding a state minimum wage law even though the Court had struck down a virtually identical statute the year before as a violation of employers' substantive due process right to freedom of contract).

64. Again, Stearns acknowledges the prudential and flexible nature of standing, pp. 4, 30, 161-62, but not its negative implications for his argument.

65. A complete explanation would require an intensive study of lower federal court cases from that era. Thus, Stearns's claims are not supported by adequate empirical evidence.

2. *The Warren Court*

Almost everyone agrees that the Warren Court relaxed standing to facilitate implementation of its liberal agenda.[66] First, its activist creation of new constitutional rights would have been hollow without plaintiffs to enforce them, especially those who had no real remedy in the political branches (such as minorities and criminal defendants). Second, the Court sought to effectuate Great Society legislation, allowing Congress to authorize statutory enforcement by plaintiffs who had suffered generalized harms with no common law antecedent (e.g., the right to a clean environment or to live in an integrated community).

Stearns accepts this account, but uses social choice theory to complement it (pp. 231-34). He contends that, because a solid majority on the Warren Court shared a liberal ideology (with at most bipolar divisions on a few issues), the justices could accurately predict how critical legal questions would be defined and resolved (p. 232). Again, although social choice provides a fresh perspective, the obvious political explanation seems to us to be the better one.

3. *The Burger and Rehnquist Courts*

Stearns demonstrates that the Burger and Rehnquist Courts split into three camps: (1) liberal holdovers like Brennan and Marshall, later joined by Blackmun, Stevens, Ginsburg, and Breyer; (2) conservatives such as Burger, Rehnquist, Scalia, and Thomas who would overrule precedent they deemed incorrect; and (3) pragmatic moderates who were generally committed to precedent (e.g., White, Stewart, Powell, O'Connor, and Kennedy) (pp. 219-20, 234-38). The justices could not be sure that, in codifying their preferred legal outcomes in case decisions, the will of the present majority would be reflected (pp. 239-44). For instance, in *Planned Parenthood v. Casey*,[67] Justices O'Connor and Kennedy voted to uphold *Roe v. Wade*[68] on stare decisis grounds, even though their previously expressed position was that *Roe* had been wrongly decided (pp. 16-23, 129-30).

According to Stearns, the justices often concluded that because they could not predict the result, it was better not to risk deciding the merits (p. 244). Furthermore, as always, the Court could use standing to foster democratic lawmaking by thwarting ideological litigants who wanted to create positive law that lacked current legislative support (pp. 239, 244).

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66. The following summary draws on Pushaw, *Justiciability*, *supra* note 59, at 464.

67. 505 U.S. 833 (1992).

68. 410 U.S. 113 (1973).

Stearns's analysis ingeniously reveals why the Burger and Rehnquist Courts not only reaffirmed, but actually expanded, the standing doctrine developed by their liberal forebears.[69] Unfortunately, however, he cannot explain perhaps the most significant standing case of the past half century, *Lujan v. Defenders of Wildlife*.[70] There the Court struck down a provision of the Endangered Species Act authorizing "any person" to sue to enjoin federal agencies from violating that statute.[71] Justice Scalia maintained that Article III banned such "generalized grievances" that the government had failed to comply with the law, and instead limited federal courts to vindicating the rights of individuals.[72]

Under Stearns's model, however, the Court should have deferred to Congress's exercise of its legislative power to affirmatively create law (to protect endangered species) and to determine who best could enforce that law (private citizens).[73] For the same reason, Stearns cannot justify *Bennett v. Spear*,[74] which granted standing under the same Endangered Species Act "citizen suit" provision to developers who claimed economic harm when the government invoked that Act to halt their project.[75] The Court thus has flouted an express statutory directive by denying standing to those attempting to preserve endangered species, yet welcoming entrepreneurs who want to harm such creatures.

Stearns concedes that *Lujan* and *Bennett* undercut his thesis that the Court takes an apolitical, nonideological approach to standing in order to preserve Congress's ability to make laws reflecting majoritarian preferences (pp. 271, 281-93). Despite these and a few other unruly cases, however, he contends that his social choice

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69. *See* Pushaw, *Justiciability*, *supra* note 59, at 467, 475-76 (describing the Burger Court's addition of two Article III requirements, causation and redressability). Social choice theory also clarifies certain seeming anomalies in the standing cases, such as the conservative Court's liberal grant of access to criminal defendants. *See supra* notes 57-58 and accompanying text. Social choice analysis here is superior to an attitudinalist or political model, which would likely predict that conservative justices would restrict the standing of criminals.

Alternatively, however, this jurisprudence might reflect the conservative abhorrence to government overreaching, which has the most devastating individual consequences in the criminal area. Thus, the Court may be willing to confer standing generously for the purpose of monitoring law enforcement officials to guarantee core liberties, although it will give those officials considerable latitude. Concededly, sensitivity to criminal procedural rights has not been a hallmark of the Burger and Rehnquist Courts.

70. 504 U.S. 555 (1992).

71. *Id.* at 558-59, 571-73 (discussing 16 U.S.C. § 1536).

72. *Id.* at 573-78.

73. The plaintiffs in *Lujan* were not trying to persuade the Court to make positive law in an area where Congress had chosen not to act; rather, they were simply asking the Court to apply a law that Congress had passed. *Id.* at 559.

74. 520 U.S. 154 (1997).

75. *Id.* at 175.

paradigm makes sense of more precedent than any other approach (pp. 281, 301). We, on the other hand, believe that one political theory can explain nearly every standing case.

C. *A Competing Model of Standing*

The Court has always defended its standing decisions as dictated by the Constitution's creation of a democracy with a uniquely limited judiciary.[76] This idea traces to Progressive scholars like Woodrow Wilson, who argued that the American Constitution, with its emphasis on checks and balances, inhibited the effective governance that modern conditions demanded.[77] Instead, these intellectuals championed the English parliamentary system, which featured a unified legislative/executive "sovereign" (i.e., a plenary lawmaking authority) unencumbered by judicial review of statutes.[78]

Depression era politicians largely adopted this approach, as President Roosevelt and Congress worked hand-in-hand to craft the New Deal, but federal judges often invalidated this legislation.[79] Felix Frankfurter solved this problem by creating — and persuading his fellow justices to adopt — a standing doctrine that incorporated the Wilsonian notion that the judiciary should avoid interfering with the sovereign political branches.[80] Justice Frankfurter did not, however, candidly acknowledge that he was responding to the practical reality of a vastly expanded federal government that might generate an unmanageable volume of litigation. Rather, he insisted that his approach implemented the Constitution's text, history, precedent, and political theory.[81]

Justice Frankfurter asserted that Article III reinforced basic separation-of-powers principles by restricting standing in federal court

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76. *See, e.g.*, Fed. Election Comm'n v. Akins, 524 U.S. 11, 19-26 (1998) (supporting this proposition by citing numerous standing cases from the Hughes, Stone, Vinson, Warren, Burger, and Rehnquist Courts).

77. *See, e.g.*, WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885) and CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908).

78. *See* BRUCE ACKERMAN, WE THE PEOPLE 7-11, 34-35, 84-86, 222, 252-61 (1991) (describing this concept of "monistic democracy").

79. Most ominously, the Court struck down the centerpiece of the New Deal, the National Industrial Recovery Act, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

80. His seminal opinion is in *Coleman v. Miller*, 307 U.S. 433, 460-70 (1939) (Frankfurter, J., concurring). The full Court definitively embraced Justice Frankfurter's approach in *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). For a discussion of Frankfurter's singular influence on modern standing doctrine, see Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 452-53 (1994).

81. *See Coleman*, 307 U.S. at 460-64 (Frankfurter, J., concurring); *see also* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 150-60 (1951) (Frankfurter, J., concurring).

to those who could demonstrate an "injury."[82] Determining whether a plaintiff had suffered a cognizable "injury" depended upon the substantive law he invoked.

As to statutes, Justice Frankfurter urged judicial deference to Congress's judgment about who was "injured."[83] Hence, Congress had sole power to define substantive rights (including novel ones with no common law analogue) and to decide which persons could vindicate those rights judicially — government agencies, individuals whose private law rights had been directly invaded by the alleged violation of the statute, citizens acting as private attorneys general, or some combination.[84] Conversely, if Congress had not conferred standing in a particular statute, and the plaintiff instead relied upon the Administrative Procedure Act's general provision allowing suit by those "adversely affected" by an agency's action, the Court would deny standing unless the plaintiff credibly alleged a personal injury of the sort recognized by property, tort, or contract law.[85]

Although the foregoing approach comported with the original constitutional design,[86] Justice Frankfurter went awry when he extended his test for implied statutory standing — individualized, common law injury — to all claims arising under the Constitution.[87] Such a test (and a corresponding prohibition on third party standing) might be defensible as applied to those constitutional clauses guaranteeing individual rights,[88] but certainly not to those that either protect collective rights

82. *See, e.g.*, *Coleman*, 307 U.S. at 460-64, 468-70 (Frankfurter, J., concurring); *see also McGrath*, 341 U.S. at 149-52, 157-60 (Frankfurter, J., concurring).

83. For an insightful analysis of the evolution of this approach to statutory standing, see JOSEPH VINING, LEGAL IDENTITY 36-37 (1978).

84. For example, the Court upheld the Communications Act of 1934, which authorized citizens to sue to vindicate "the public interest in communications," even if they had no "private rights" at stake. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14-15 (1942) (Frankfurter, J., for the Court).

85. *See Coleman*, 307 U.S. at 460-64 (Frankfurter, J., concurring); *see also McGrath*, 341 U.S. at 152 (Frankfurter, J., concurring). This aspect of Justice Frankfurter's analysis incorporated existing precedent. *See, e.g.*, Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939). Stearns nicely summarizes the Court's new approach to standing. Pp. 227-29.

86. Separation of powers demands that federal courts respect Congress's policy determination about how the legal rights it has created can be enforced most effectively. Thus, for example, from the beginning of the Republic, Congress has allowed standing to citizens generally to bring various "public actions" to ensure the government's compliance with the law. *See* Pushaw, *Justiciability*, *supra* note 59, at 481-83.

87. *See McGrath*, 341 U.S. at 150-54 (Frankfurter, J., concurring) (contending that, in the absence of an express congressional grant of standing, the plaintiff had to show an individualized injury to a private legal interest in order to pursue an action under a federal statute or the Constitution); *see also Coleman*, 307 U.S. at 460, 464, 468-70 (Frankfurter, J., concurring) (to similar effect).

88. Such an approach promotes liberty by allowing the person whose constitutional rights have been infringed to decide whether or not to litigate. If at least one potential plaintiff has the ability to enforce a constitutional provision protecting individual rights, that clause remains viable, and the government will be deterred from violating it. Conversely, the

(such as the Establishment Clause) or structure the government (e.g., most of Articles I and II).[89] To say that no one has standing to vindicate these collective or structural provisions, unless perhaps Congress specifically lets them, turns the Constitution on its head.[90]

Indeed, Justice Frankfurter and his current judicial disciples have failed to grasp that the framers and ratifiers of the Constitution shifted sovereignty from the government to "the People," who delegate certain powers to their representatives in all three government departments.[91] Thus, the federal courts' power is coextensive with — not inferior to — that of Congress and the President.[92] Similarly, the Constitution limits all three branches, not just the judiciary.[93] Moreover, federal judges are not unrepresentative because they are unelected. Rather, the People removed judges from the electoral process to ensure their independence in representing the People through the exercise of judicial power, especially by upholding the Constitution against transient majoritarian pressures.[94] Thus, federal

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particularized injury requirement prevents meddlers from asserting the individual constitutional rights of those who choose not to press them. For elaborations of this argument, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306-10 (1979); Pushaw, *Justiciability*, *supra* note 59, at 486.

89. *See* Pushaw, *Justiciability*, *supra* note 59, at 485-87.

90. The claim that Congress alone can authorize standing to enforce the Constitution assumes that the political branches have power to preclude judicial review over their own actions that allegedly violate the Constitution. A central reason that "the People" adopted a written Constitution establishing an independent judiciary, however, was that the political branches cannot be trusted to impartially interpret restrictions on their own authority. *See* Pushaw, *Justiciability*, *supra* note 59, at 485-88.

91. The pathbreaking history on the development and implications of popular sovereignty is GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 259-63, 272-83, 291-343, 362-63, 372-89, 453-63, 530-53, 596-609 (1969). For a discussion of the influence of Wood and other intellectual historians on constitutional law scholars, see Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 495-96 (1998).

92. *See* 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, 895-96 (agreeing with Akhil Amar that this "coextensiveness principle" was an axiom of Federalist political thought); *see also* Pushaw, *Justiciability*, *supra* note 59, at 397-99, 415-19, 427, 451, 469-72, 478 (arguing that the modern Court's approach to justiciability undermines the coordinate role of the judicial branch).

93. *See* Pushaw, *Justiciability*, *supra* note 59, at 397-98, 411, 425-27, 467-69, 478, 485.

94. Hamilton made this precise argument in THE FEDERALIST NO. 78. He crystallized an idea that had been evolving over the previous decade, as documented in WOOD, *supra* note 91, at 259-63, 273-82, 291-343, 383-89, 453-63, 549; *see also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 823, 826-28 (2001) (describing the Federalist precept that independent federal judges represent the People through adjudication, especially by reviewing constitutional claims); Pushaw, *Justiciability*, *supra* note 59, at 398-99, 411, 420-25, 455, 467-69, 478 (contending that standing and similar jurisdictional doctrines ignore this principle).

courts must "interfere" with (i.e., check) the political branches when they exceed the constitutional powers granted to them by the People.[95]

In short, the Frankfurter-inspired standing doctrine frustrates separation of powers by allowing federal courts to abdicate their role of enforcing the Constitution. For present purposes, however, it does not matter whether the political theory underlying standing is right or wrong. The relevant point is that the Court has consistently implemented this theory: that judicial review is presumptively illegitimate because federal courts are peculiarly "limited" in our separation-of-powers scheme compared to the "democratic" political branches, and that this presumption can be rebutted only by a plaintiff who can demonstrate an individualized injury caused by the defendant.

Indeed, the only major standing case that does not fit this model is *Flast v. Cohen*.[96] There, the Warren Court permitted taxpayers to claim that the federal government's support for religious schools violated the Establishment Clause, even though no individual taxpayer could show an injury distinct from that suffered by all citizens.[97] Interestingly, however, the Court did not set forth the new concept of separation of powers that apparently drove its decision: that aggressive checking of the political branches to protect constitutional rights (broadly defined) outweighed the efficiency interest of the political branches in acting without judicial interference.[98] Rather, the Court purported to do nothing more than follow the established "limited judiciary" rationale of standing.[99]

Consequently, it was easy for the Burger Court to revive the Frankfurterian notion of English constitutionalism, both in rhetoric and in reality. Indeed, every Burger Court standing decision reflects this idea, which was nicely encapsulated in *Allen v. Wright*:[100] standing "define[s] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," and thus reflects " 'concern about the proper — and properly limited — role of the courts in a democratic society.' "[101]

As to constitutional claims, the Burger Court emasculated *Flast* in the *Valley Forge* case, which denied taxpayers standing under the Establishment Clause because they had alleged a generalized grievance that the government had violated the Constitution, not a per-

95. *See id.* at 398-99, 432, 469, 478, 485-89.

96. 392 U.S. 83 (1968).

97. *Id.* at 91-106.

98. *See* Pushaw, *Justiciability*, *supra* note 59, at 464.

99. *See Flast*, 392 U.S. at 92-95, 97, 101.

100. 468 U.S. 737 (1984).

101. *Id.* at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

sonal "common law" injury resulting from such unlawful conduct.[102] Similarly, in *Richardson*[103] and *Schlesinger*,[104] the Court ruled that no plaintiff could demonstrate a unique harm flowing from Congress's violation of Article I's provisions requiring a public accounting of all expenditures and prohibiting Congressmen from serving at the same time in the executive branch.[105] By contrast, the Court granted standing to criminal petitioners who alleged that unconstitutional conduct by law enforcement officials had directly injured them, but not to third parties who were unaffected by the government's actions.[106]

Turning to statutory standing, the Burger Court followed Justice Frankfurter's script to the letter. For example, it deferred to Congress's decision to confer broad standing to vindicate the Fair Housing Act, which created a novel "right" — a right to live in an integrated community — that had no common law analogue.[107] Conversely, if Congress had not specifically granted such widespread standing, the justices prudentially declined to infer it.[108]

The Rehnquist Court has continued the restrictive approach to standing to raise constitutional claims.[109] As to statutory standing, the Court has sometimes departed from Justice Frankfurter's precise analysis, but not from his underlying constitutional theory. If, as Frankfurter asserted, the *Constitution* requires an individualized injury, then Congress cannot grant broader standing, any more than it can pass a bill of attainder or an ex post facto law. Under this reasoning, the Court in *Lujan* properly refused to countenance such an unconstitutional statute, even though its predecessors had mistakenly

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102. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982).

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

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

105. Cases like *Valley Forge*, *Richardson*, and *Schlesinger* effectively delete the constitutional clauses at issue. The political branches refuse to obey them, the judiciary declines to enforce them, and the political remedy of voting is useless because the majority of citizens do not care if the government violates these constitutional provisions. *See* Pushaw, *Justiciability*, *supra* note 59, at 487-89.

106. *See supra* notes 57-58 and accompanying text.

107. In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972), the Court permitted "testers" with no interest in obtaining housing to claim that a company had violated the Fair Housing Act by racially discriminating in conveying information about this housing. For similar holdings, see Havens Realty v. Coleman, 455 U.S. 363, 373-74 (1982); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 109-15 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264 (1977).

108. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

109. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 818-20 (1997) (reaffirming the Court's "insist[ence] on strict compliance with this jurisdictional standing requirement [i.e., of a particularized personal injury]," which is applied in an "especially rigorous" manner to constitutional attacks on a coordinate federal branch).

done so out of misguided deference to Congress.[110] Conversely, *Bennett v. Spear*[111] correctly found standing because the developers alleged that they had personally suffered economic loss — the quintessential common law injury.[112]

In short, the Rehnquist Court has taken Justice Frankfurter's premises to their logical extreme. The Court believes that it is faithfully adhering to the Constitution's command that the "inferior" and "limited" federal judiciary must leave the "sovereign" and "democratic" political branches undisturbed, even if they are violating the law, unless they happen to cause someone a traditional kind of injury. This theory undergirds nearly every modern standing decision.

III. CONCLUSION

Maxwell Stearns asks that his book be judged on two levels. First, he declares that his social choice analysis should be deemed a success if it contributes to our understanding of the Supreme Court's decisionmaking process and its implications for the evolution of constitutional doctrine (pp. 216-17). Second, Stearns asserts that his model is better than all the others, in the sense that it explains more data, including anomalies that no other theory can rationalize (pp. 217, 279-81).

We are not quite persuaded by this second, bolder claim. Nonetheless, Stearns has convinced us that any serious constitutional law scholar must consider his social choice theory in formulating critiques based on doctrine, history, politics, or any other discipline. In this respect, he has made an original, important, and enduring contribution to the study of constitutional law.

110. If the judiciary's constitutional role is solely to vindicate individual rights, then Justice Scalia is correct that neither the Constitution nor Congress can force federal courts to hear general claims that the government has not followed the law. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-78 (1992). Again, we are arguing here that the Court has logically applied a single political theory in its standing cases, not that we agree with this theory. Indeed, the *Lujan* Court ignored two centuries of American history authorizing public law actions to ensure the government's compliance with the law, which in turn incorporated ancient English practices. *See* Pushaw, *Justiciability*, *supra* note 59, at 483-85.

111. 520 U.S. 154 (1997).

112. *Id.* at 167-68, 176-77.