MODELING STANDING

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Standing doctrine serves the important function of ensuring that plaintiffs are the proper parties to bring suits in federal courts, but it has long been the subject of criticism. Scholars have labeled it an incoherent and unstable area of the law and declared that standing decisions are primarily influenced by the political ideologies of judges. Several existing empirical studies have analyzed standing in the federal courts and supported the claim that standing decisions are rooted primarily in individual politics and not legal doctrine. Spurred by this widespread criticism as well as the empirical support, several well-known scholars have proposed reforms of the standing doctrine in an effort to hinder political decisionmaking or at least to bring more candor to the decisionmaking process.

In this Article, Professor Nancy Staudt undertakes rigorous empirical analyses to test the underlying claim that all standing decisions are politically motivated. Improving upon the prior standing studies that have a range of limitations and possible flaws, Professor Staudt's study focuses on standing decisions in one area of the law—taxpayer challenges to government spending—and analyzes the results up and down the federal judicial hierarchy. Using statistical models, she finds that judges render law-abiding and predictable decisions where clear precedent and effective judicial oversight exist; where these variables are absent, however, standing decisions are more likely to be based on judges' personal ideologies. Professor Staudt then applies her findings to the proposed standing reforms and determines that they address some of the problems in the standing doctrine but ignore the importance of the judicial hierarchy. The reform proposals, she argues, are destined to fail unless they consider institutional factors such as the level of oversight and monitoring in the judicial hierarchy.

INTRODUCTION

Standing is a threshold requirement. Without standing, plaintiffs are barred from court; with it, they quite possibly will get a hearing on

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the merits.[1] Determining who has standing, therefore, has major legal significance, and for this reason the black-letter doctrine and its policy underpinnings are numbingly familiar to lawyers and legal theorists: Plaintiffs must demonstrate that they suffered an "injury-in-fact," that the defendant caused the injury, and that the injury is redressable by the remedy sought.[2] These rules, in turn, assure adversity and effective litigation,[3] guarantee that the court decides a concrete case and understands the consequences of its decision,[4] and prevent the judiciary from usurping the policymaking function of the elected branches.[5]

Most scholars agree that when stated in abstract terms, the standing doctrine and its underlying policies are eminently reasonable. When applied to individual cases, however, legal academics become vigorously critical. Indeed, virtually every published article on the

[1] To get a hearing on the merits, plaintiffs must satisfy various other threshold requirements in addition to standing. Other judicially created doctrines that may bar a hearing on the merits include mootness, *see, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 315–20 (1974) (dismissing race discrimination suit as moot), ripeness, *see, e.g.*, Laird v. Tatum, 408 U.S. 1, 13–16 (1972) (dismissing challenge to Army surveillance of civilian activity for lack of ripeness), and the political question doctrine, *see, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1002–06 (1979) (Rehnquist, J., concurring) (dismissing Congresspersons' challenge to president's authority as political question).

[2] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (setting out standing requirements for plaintiffs in federal court). The Court also considers standing in the context of certain prudential considerations. For a discussion of Article III requirements and prudential considerations, see *infra* Part II.

[3] *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (characterizing standing as assurance of adversity, "which sharpens the presentation of issues" for court); *see also* Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (noting importance of plaintiffs having personal stakes in their claims).

[4] *See* Raines v. Byrd, 521 U.S. 811, 819, 830 (1997) (noting that plaintiffs must allege "a sufficiently concrete injury" and that "the dispute is 'traditionally thought to be capable of resolution through the judicial process'") (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 & n.8 (1988) (noting that black-letter standing doctrine ensures that "a concrete case informs the court of the consequences of its decisions"); *cf.* Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924) (warning against advisory opinions because they "move in an unreal atmosphere"). For a criticism of the federal courts' focus on adversity rather than injury, see generally Thomas McCoy & Neil Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441 (1984).

[5] *See* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers."); *Warth*, 422 U.S. at 499–500 (discussing role of standing in precluding courts from deciding policy questions better suited for "other governmental institutions"); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("[S]tanding roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.").

topic seems to argue that the law of standing is at best confusing and at worst a serious impediment to fair and just outcomes. The doctrine, it is charged, is "permeated with sophistry,"[6] a "tool[ ] to further [judges'] ideological agendas,"[7] "wildly vacillating,"[8] and "a large-scale conceptual mistake."[9] Even the Justices themselves admit that problems exist: In Justice Harlan's words, standing law is a "word game played by secret rules,"[10] and according to Justice Douglas, "[g]eneralizations about standing to sue are largely worthless as such."[11]

These condemnations, along with the perceived importance of standing for the administration of justice, have led countless scholars and commentators to seek an improved intellectual framework for determining who has the right to be in court. Some proposals entail complicated multi-pronged tests;[12] others suggest the elimination of the standing doctrine altogether.[13] Underlying much of this criticism is a common belief: Federal judges make standing decisions according to their own political and personal preferences, with little concern for existing legal precedent. This belief is not based on mere intuition—critics point to a range of qualitative and quantitative studies that confirm the correlation between judicial ideology and standing outcomes.[14]

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[6] 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983).

[7] Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758 (1999).

[8] Fletcher, *supra* note 4, at 223.

[9] Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992).

[10] Flast v. Cohen, 392 U.S. 83, 129 (1967) (Harlan, J., dissenting).

[11] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

[12] *See* Pierce, *supra* note 7, at 1777–84 (advocating case-specific analysis of injury and causation and proposing complex method for investigating party's zone of interest).

[13] *See, e.g.*, Fletcher, *supra* note 4 (proposing that federal courts determine right of plaintiff to be in court based on merits of case); Sunstein, *supra* note 9, at 191 (proposing that federal courts base standing on underlying substantive law); *see also* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304–05, 338–40 (2002) (advocating that federal courts exercise less discretion and assume standing unless strong reasons exist for denying it); Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 79 n.240 (1999) (advocating presumption in favor of standing).

[14] *See, e.g.*, Gregory J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969–1976*, in STUDIES IN U.S. SUPREME COURT BEHAVIOR 24 (Harold J. Spaeth & Saul Brenner eds., 1990) (using quantitative methods to show Burger Court Justices motivated by ideological preferences in standing decisions); Fletcher, *supra* note 4, at 224–50 (using qualitative approach to bolster argument that standing decisions should be based on merits of claims); Nichol, *supra* note 13, at 305–30 (using qualitative approach to argue that judges grant standing according to personal predilections and systematically favor plaintiffs whose situa-

Scholars, of course, long ha ve argued that politics play an important role in judicial decisionmaking more generally,[15] but the most recent and sophisticated studies suggest that a lower court judge's position in the judicial chain of command tames her inclination to pursue raw politics in legal settings.[16] This emerging new literature investigates decisionmaking in the context of a judicial hierarchy and notes that while federal judges may want to implement their policy preferences in case outcomes, their proclivity to do so is limited by factors that include resource scarcity, norms of deference, and reputational concerns associated with reversal by a higher court. In short, deviation from precedent in favor of one's own politics is not always a simple and costless enterprise. In the standing context, however, the extant empirical studies indicate that politics govern at every level of the judicial hierarchy.[17]

Why have politics taken over standing decisions?

One common explanation for the strong findings is that the standing doctrine is so completely incoherent that judges have no choice but to resort to their own viewpoints when determining who has the right to be in court. Alternatively, and as this Article argues, the studies themselves may be flawed. The existing literature explores only those court decisions that *explicitly* discuss standing and ignores the cases in which courts *assume* standing and move straight to the

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tions are similar to their own); Pierce, *supra* note 7, at 1758–63 (using quantitative and qualitative methods to show that circuit court judges appointed by Republican presidents denied standing to environmental petitioners more often than did Democrat-appointed judges); C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175, 178–83 (1991) (using quantitative methods to show judicial appointees of Republican presidents more likely to deny standing to "underdog" claimants); Sunstein, *supra* note 9, at 168–97 (using qualitative methods to argue that standing determinations are heavily dependent on judicial assessment of substantive law).

[15] *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (arguing that Justices' own views motivate virtually all Supreme Court decisions).

[16] *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (critiquing scholars for ignoring judicial hierarchy when investigating importance of precedent); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) (investigating judicial politics in hierarchical setting); Richard L. Pacelle, Jr. & Lawrence Baum, *Supreme Court Authority in the Judiciary: A Study of Remands*, 20 AM. POL. Q. 169 (1992) (concluding that lower courts tend to recognize higher courts' authority); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. S CI. 673 (1994) (reaching mixed conclusions regarding effect of Supreme Court doctrine on circuit court outcomes).

[17] *E.g.*, Rathjen & Spaeth, *supra* note 14, at 29–40 (finding that politics explains Supreme Court standing decisions); Pierce, *supra* note 7, at 1758–63 (finding that politics explains appellate court standing decisions); Rowland & Todd, *supra* note 14, at 178–83 (finding that politics explains district court standing decisions).

merits.[18] This approach leads to analyses that incorporate far fewer standing decisions than judges actually make, far more standing denials than exist in the population as a whole, and far more controversial standing disputes than ju dges actually consider.[19] In addition to these serious selection biases, the existing studies cluster a wide range of plaintiffs and lawsuits into a single study and at the same time search for homogenous standing rules applicable to all individuals in court. Judges, however, take an entirely different approach when considering whether to grant or deny standing; they contemplate the issue in fact-specific contexts and appear to defer to the legal rules that directly address the case at hand.[20] Put differently, all plaintiffs must prove that they suffered an "injury-in-fact," but the definition of injury is not uniform across plaintiffs with diverse causes of action.[21] By mixing and matching plaintiffs, scholars are likely to find that courts engage in erratic and unpredictable decisionmaking, whereas a study li mited to a particular category of plaintiffs might lead to a different conclusion. These limitations and biases do not make the empirical findings inaccurate, but they do suggest that further investigation is necessary before concluding that standing decisions are devoid of law.

This Article undertakes that exploration and overcomes the problems found in the legal and social science literatures by including in the analysis the entire population of published judicial opinions in an area of law where a single line of precedent governs the plaintiffs' right to be in court. I select an area of the law that scholars long have considered rife with politics: taxpayer challenges to government spending projects.[22] These plaintiffs do not question their own tax bills but instead challenge a legislature's approach to spending public revenue: Expenditures on war efforts,[23] religious institutions,[24] and

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[18] *E.g.*, Pierce, *supra* note 7, at 1759 & n.112 (collecting appellate court opinions issued in thirty-three cases deciding standing for environmental plaintiffs); Gregory J. Rathjen & Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360, 368 (1979) (collecting judicial decisions that addressed access issues in opinion); Rowland & Todd, *supra* note 14, at 178 (conducting Westlaw search for term "standing" in cases authored by Nixon, Ford, Carter, and Reagan district court appointees).

[19] *See infra* notes 27–31 and accompanying text.

[20] *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (discussing standing for environmental plaintiffs), *with* Flast v. Cohen, 392 U.S. 83, 99–101 (1968) (examining general rules of standing and devising specific rules for taxpayer lawsuits).

[21] See the discussion of constitutional and prudential requirements associated with "injury-in-fact," *infra* Part II.A.

[22] *See infra* note 37.

[23] *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974) (seeking accounting of federal funds expended on CIA activities).

welfare programs[25] have been frequent targets. If political viewpoints play a leading role in judicial decisionmaking, they should surface here.

While this study focuses on one subset of plaintiffs in federal court, it nevertheless offers insight into standing decisions generally—it identifies when politics govern outcomes and in what circumstances legal doctrine cabins a court's propensity to generate political decisions masquerading as law-abiding outcomes.[26] The limitations of my research design, therefore, are purposeful and in the service of a broader goal. Using this approach, I uncover findings that seriously undermine the conventional wisdom on standing. My analysis indicates that judges will render law-abiding and predictable decisions in circumstances where clear precedent *and* effective judicial oversight exists. If either variable is absent, federal judges are more likely to decide standing issues based on their own ideological preferences than on applicable precedent.

My discussion of standing is organized as follows. In Part I, I describe my data collection procedures and, in particular, the sampling decisions that I made in compiling a database of nearly 700 taxpayer lawsuits. In Part II, I briefly outline the general doctrine of standing and then explain how this doctrine applies to taxpayers seeking to challenge government expenditures and how this doctrine has evolved over time. In Part III, I discuss two theories of judicial decisionmaking that have recently gained prominence in the legal and social science literatures. Specifically, Part III.A outlines the team

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[24] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (challenging state funds transferred through voucher program to religious schools); Mitchell v. Helms, 530 U.S. 793 (2000) (challenging direct funding of religious schools); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (challenging creation of religious school district); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464 (1982) (challenging transfer of federal property to Christian educational institution).

[25] *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923) (challenging congressional act providing funds to poor women); Kong v. Min De Parle, No. C00-4285, 2001 U.S. Dist. LEXIS 18772 (N.D. Cal. Nov. 14, 2001) (challenging Medicare and Medicaid exemptions for religious, non-healthcare institutions); Jensen v. United States, No. 99-5652, 2000 U.S. Dist. LEXIS 4459 (W.D. Wash. Mar. 10, 2000) (challenging federal funding for contraceptive health services abroad).

[26] The very point of most empirical studies is to make inferences about the world from a subset of the population. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2 (2002) (discussing goals of empirical studies and noting that most studies have "a concern, however implicit, with *empiricism*—basing conclusions on observation or experimentation—and *inference*—using facts we know to learn about facts we do not know"). For a well-known example of this type of analysis, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1484–97 (1987) (drawing conclusions about interplay between Supreme Court decisionmaking and possibility of legislative overrides through investigation of sample of civil rights cases).

theory of decisionmaking, which assumes that judges at every level of the judicial hierarchy seek correct outcomes for reasons that may include resource scarcity or information asymmetries. Part III.B outlines the agency theory of decisionmaking, which assumes judges have diverse preferences and that they seek to implement them in the context of institutional constraints; these constraints include the judicial hierarchy and an appellate process that polices lower courts' pursuit of ideology and politics through a system of monitoring and oversight. In Part IV, I turn to the existing empirical studies on standing and show that their conclusions conform neither to the team model nor the agency model of decisionmaking; the studies, however, suffer from limitations and drawbacks that make their findings suspect.

Accordingly, in Part V, I reconsider the role of law and politics using a more complex model that controls for a range of variables that might explain standing outcomes but that scholars have ignored in their statistical studies. With a more nuanced approach, I confirm that politics play a role in standing outcomes, but only in *certain* contexts. Law can and does play a role when the doctrine is coherent and effective judicial monitoring exists.

Finally, in Part VI, I compare two well-known proposals for standing reform to my empirical findings to determine whether the proposed standing rules would in fact eliminate the role of politics in standing decisions. I argue that while the normative proposals are eminently reasonable and perhaps far superior to the existing standing doctrine from a theoretical perspective, they both fail to account for the importance of narrow rules and judicial oversight. The architects of the proposals, in short, have devised substitutes for the existing standing regime that suffer from its very same pitfalls and drawbacks.

I
DATA COLLECTION

In this Article, I investigate the underlying motives for granting or denying standing. To understand judicial motives, it is essential to go beyond stated rationales. Judges may claim to rely on legal precedent, but the precedent may serve predominantly as a smokescreen for their political preferences or views on the allocation of scarce judicial resources. Moreover, in many cases, courts do not address the standing issue directly; rather, they make assumptions that negate the need for any discussion whatsoever. If standing exists or mootness is

not a perceived problem, the judge will ignore the issue and move immediately to the merits of the case.[27]

The extant literature on standing recognizes the possibility that doctrine might serve to conceal nonlegal rationales for judicial outcomes; consequently, most studies go beyond the language of a given opinion to glean unstated motives by observing patterns of decisionmaking or using statistical models.[28] Most standing scholars, however, ignore the problem of "silent" standing decisions and include in their empirical studies only court opinions that explicitly discuss standing. As we will see, the decision to discuss or assume a plaintiff's right to be in court has important legal and strategic implications—but it is important to recognize that the court makes a standing decision even when it does not discuss it.[29] By systematically excluding one type of standing decision, the authors collect data and reach conclusions that may not accurately reflect the real world of standing outcomes. To understand this, consider the fact that judges cannot *deny* standing unless they actually discuss it. By excluding the decisions in which the courts assume standing, the existing studies include proportionally far more standing denials than actually exist in the population as a whole.[30] Thus while courts grant standing in the vast majority of cases, the selection bias in the literature has led some legal scholars to conclude just the opposite—that federal judges deny standing more often than they grant plaintiffs the right to be in court—and in so doing the judges appear motivated more by politics than by law.[31] This conclusion about politics may well be true but a more systematic study of standing decisions is necessary to confirm the finding.

One approach for undertaking a more comprehensive study of standing would involve sampling court opinions from a variety of legal contexts and then controlling statistically for the variation in facts and circumstances. Controlling for a wide range of variables, however,

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[27] For a discussion of the precedential implications of cases in which courts assume standing, see *infra* note 93 and accompanying text.

[28] *See, e.g.*, Rathjen & Spaeth, *supra* note 14, at 27 (examining correlation between outcome and politics); Pierce, *supra* note 7, at 1758–60 (same); Rowland & Todd, *supra* note 14, at 178–83 (same).

[29] If the court finds a lack of jurisdiction on other grounds, I do not consider the opinion to have any precedential impact on standing questions.

[30] In fact, when I estimated a model of judicial decisionmaking with a dependent variable equal to 1 if the court grants standing and equal to 0 if standing is denied and the explanatory variable is equal to 1 if the court discussed standing in the opinion and equal to 0 if standing is assumed, I found a statistically significant (at the level of .000) relationship. Because federal courts appear most likely to grant standing without discussion, excluding cases that have no discussion excludes a significant number of standing grants and overselects for standing denials.

[31] *See infra* Part IV.

can lead to statistical problems and past attempts to do so have had limited success.[32] Accordingly, I choose a different route—one that eliminates the need for a large number of variables designed to control for doctrine in different contexts: I collect every case in one area of the law—cases in which individuals bring ideological claims challenging government spending projects.[33] Over the course of the last century, claimants have challenged a range of government expenditures, including spending on utilities,[34] parks,[35] and education.[36] In all

[32] *See, e.g.*, Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1230 (2003) (discussing impact of large numbers of interrelated explanatory variables on statistical findings).

[33] In order to identify *every* electronically published taxpayer lawsuit in federal court alleging a violation of the U.S. Constitution or a federal statute, I conducted a broad search in the Lexis database using the search terms "taxpayer w/s (sue or suit or challenge or petitioner or appellant or plaintiff or appellee or respondent or action or complaint or complainant or injury) and tax!". This search produced well over 10,000 cases. I examined every opinion and retained only those 667 cases that involved an alleged misuse of public funds and excluded all other cases (such as those involving IRS deficiency notices). Many of the taxpayer cases that I included in the database solely involved a claim regarding a public expenditure, but some cases involved a number of claims, only one of which was related to the government's use of taxpayer monies. I included both types of cases, even if the relevant claim was buried in a mass of issues unrelated to this project. In short, my goal was to collect every taxpayer claim in federal court regardless of how marginal the claim was to the overall litigation strategy.

The more difficult selection decisions involved cases in which the complainant sought standing based on more than one status (for example, as a voter and a taxpayer) or cases that involved a multitude of complainants representing a variety of different groups (for example, taxpayers, parents, and school officials). Plaintiffs' counsel often take this approach as a litigation strategy; the more grounds for standing exist, the more likely the court will hear the case on its merits—even if some plaintiffs are dismissed. I discuss this feature of the cases *infra* notes 174–77 and accompanying text.

[34] *See, e.g.*, Mo. Pub. Serv. Co. v. City of Concordia, 8 F. Supp. 1 (W.D. Mo. 1934) (challenging city-operated utility as violation of Fourteenth Amendment); Vonberberg v. City of Seattle, 20 F.2d 247, 247 (W.D. Wash. 1927) (challenging "illegal" loans made to Puget Sound Power & Light Company); Kiefer v. City of Idaho Falls, 19 F.2d 538, 539 (D. Idaho 1927) (challenging city contracts with water supply company as contrary to "certain provisions of the Constitution").

[35] *See, e.g.*, Moorhead v. City of Fort Lauderdale, 152 F. Supp. 131 (S.D. Fla. 1957) (challenging city's discriminatory policies at public golf course); Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Cal. 1944) (challenging prohibition on use of park facilities for Latinos); United States v. 8677 Acres of Land in Richland County and Columbia, 42 F. Supp. 91 (E.D.S.C. 1941) (challenging compensated taking of private and city-owned property for purposes of constructing recreational center).

[36] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (challenging direct funding of parochial schools); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (challenging creation of religious school district); Aguilar v. Felton, 473 U.S. 402 (1985) (challenging use of federal funds to finance teacher salaries in religious schools); Sch. Dist. v. Ball, 473 U.S. 373 (1985) (challenging funding of religious schools through "shared time" and community education programs); Mueller v. Allen, 463 U.S. 388 (1983) (challenging award of tax credit to parents whose children attend religious schools); Luetkemeyer v. Kaufmann, 419 U.S. 888, 888–89 (1974) (White, J., dissenting) (discussing Court's affirmance of lower court's denial of public funding of bus transportation for parochial school

the cases, the complainants claimed standing qua taxpayers and alleged that the government misused public funds (their money) in violation of the U.S. Constitution or a federal statute.

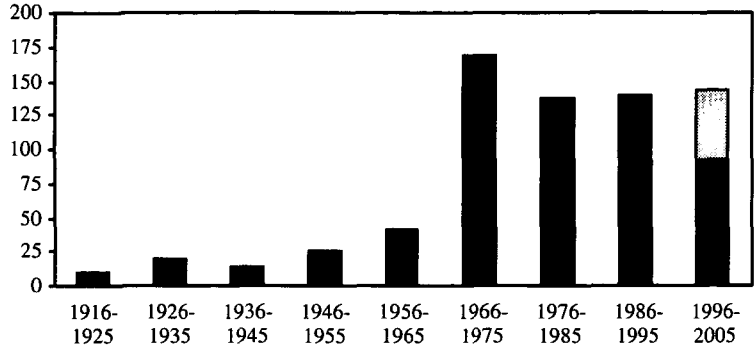
Taxpayer lawsuits may seem an unlikely choice for my analysis given the widespread wisdom among standing theorists that the Supreme Court has narrowed taxpayers' right to be in federal court almost to nonexistence.[37] Scholars base this conclusion, however, on a review of cases in which the courts discuss standing—a data sample subject to the selection bias described above. A more systematic and comprehensive study of taxpayer lawsuits leads to a different conclusion: Federal courts have decided nearly 700 taxpayer lawsuits over the course of the last century.[38] While taxpayers have always been a fairly litigious group, as Figure 1 below demonstrates, they have filed the vast majority of their lawsuits in the last three decades—the time period in which many scholars claim federal courts have closed the door to taxpayers. Between the years 1866 and 2002, the Supreme Court decided 57 taxpayer lawsuits, and lower federal courts decided a total of 610 such cases. Just over 50% of all the opinions explicitly discuss taxpayer standing, but the Supreme Court discussed standing in just 13% of its cases. In all but one of these cases, the Court denied standing. It is this limited pattern of standing denials in the Supreme Court that has led legal scholars and commentators to assume taxpayers standing is virtually dead when, in fact, taxpayers do have the right to be in federal court and do litigate a range of legal controversies.

children); Tilton v. Richardson, 403 U.S. 672 (1971) (challenging funding of religious universities); Lemon v. Kurtzman, 403 U.S. 602 (1971) (challenging reimbursement for services and materials used by religious schools); Flast v. Cohen, 392 U.S. 83 (1968) (challenging funding of parochial school textbooks).

[37] *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 62 (14th ed. 2001) ("The [Supreme] Court has long declined to adjudicate constitutional claims at the behest of a plaintiff who is merely one of millions of taxpayers . . . ."); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-17, at 421 (3d ed. 2000) ("In general, suits premised on federal [and state] taxpayer status are not cognizable in federal court . . . .").

[38] For an in-depth discussion of these cases, see Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771 (2003).

FIGURE 1: TAXPAYER LAWSUITS FILED IN FEDERAL COURT[39]



Taxpayer lawsuits make an interesting case study of standing decisions because the Supreme Court first devised the doctrine of standing (applicable to all plaintiffs in federal court) in *Frothingham v. Mellon*,[40] a taxpayer challenge to federal legislation in 1923. In *Frothingham* the Court held that federal taxpayers could not challenge government expenditures because, as taxpayers, they did not suffer individualized harm but only a grievance in common with all taxpayers.[41] Generalized grievances, the Court noted, were not the type of claims appropriate for federal court jurisdiction.[42] The *Frothingham* rule that federal taxpayers do not have standing remained in place until 1968, when in *Flast v. Cohen*[43] the Court permitted federal taxpayers to sue the government in certain circumstances. After deciding *Flast*, the Court explicitly discussed taxpayer standing in several more cases, including *United States v. Richardson*,[44] *Schlesinger v. Reservists Committee to Stop the War*,[45] and *Valley Forge Christian College v. Americans United for Separation of Church and State*,[46] all well-known and highly publicized cases limiting the scope of *Flast*.[47] Standing scholars cite this line of cases (and

[39] Each bar represents the number of published federal court opinions addressing taxpayer challenges to government spending over the course of a ten-year period ending in the year indicated. The final bar represents actual cases filed between January 1996 and June 2002 and the gray bar represents the expected number of taxpayer cases to be filed between July 2002 and December 2005, if the trend continues.

[40] 262 U.S. 447 (1923).

[41] *Id.* at 486–89.

[42] *Id.*

[43] 392 U.S. 83 (1968).

[44] 418 U.S. 166 (1974).

[45] 418 U.S. 208 (1974).

[46] 454 U.S. 464 (1982).

[47] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.5.5, at 92 (2d ed. 2002) (arguing that Burger Court consistently rejected taxpayer challenges and essentially limited *Flast* to its facts); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1518–26 (9th ed. 2001) (same); WILLIAM COHEN & JONATHAN D. VARAT, CONSTITU-

the flip-flopping on the standing issue) as a blatant example of political decisionmaking in which particular outcomes were unrestrained by any legal doctrine whatsoever.[48] Taxpayer lawsuits, in short, played a key role in the creation of the doctrine of standing and routinely are cited by scholars as examples of its misuse. The question I seek to answer is: Do politics in fact govern taxpayer standing decisions or does legal doctrine have a role to play in the decisionmaking process?

II
THE LAW OF STANDING

In this Part, I provide a brief description of the law of standing both as a general matter and as applied specifically to taxpayers in court. This Part is purposefully succinct given that a more thorough investigation of the topic can be found elsewhere.[49] Nevertheless, the rules that I describe here play an important role later—they serve as variables in the statistical models that I estimate in Part V.

A. General Standing Doctrine

Standing is a metaphor the Supreme Court devised to ensure that federal courts stay within the boundaries of Article III of the Constitution—a provision that extends judicial power only to "Cases" and "Controversies."[50] A dispute rises to the level of a case or controversy when the complainant has a "sufficient stake" in the outcome.[51]

TIONAL LAW 75 (11th ed. 2001) (same); LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 80–95 (5th ed. 2003) (same); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES § 12-3 (7th ed. 2003) (same); SULLIVAN & GUNTHER, *supra* note 37, at 62 (same); TRIBE, *supra* note 37, § 3-17, at 421–24 (same).

[48] A terrific historical investigation of the law and politics of standing can be found in Sunstein, *supra* note 9, at 168–97. The simplified story goes like this: In an attempt to insulate progressive legislation from aggressive Supreme Court review in the 1920s, Justices Brandeis and Frankfurter devised the doctrine of standing in *Frothingham v. Mellon*. *Id.* at 179. Forty-five years later, the Warren Court (comprised mostly of liberals) sought to make the process of litigation match the demands of constitutional accountability, and the Justices opened the federal courthouse doors to progressive litigants seeking to challenge legislative spending on conservative causes (for example, subsidies to religious organizations). The Court accomplished this goal when it decided *Flast v. Cohen*. Nichol, *supra* note 13, at 305–06 & n.9. Soon after the *Flast* decision, the Court took a decidedly different turn with Justice Burger at the helm and began to worry about the flood of litigation and the "overjudicialization of the processes of self-governance." *Id.* at 306–07. Accordingly, the conservative Court decided *Richardson*, *Schlesinger*, and *Valley Forge*, virtually limiting *Flast* to its facts and closing the doors to progressive taxpayer challenges to conservative spending projects. *Id.* at 307–08 & n.20.

[49] For a more thorough exploration of taxpayer standing, see, for example, Staudt, *supra* note 38.

[50] U.S. CONST. art. III, § 2.

[51] Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972).

While the precise elements necessary to prove a sufficient stake are notoriously difficult to pin down,[52] over the last several decades the Supreme Court has set forth three requirements that the plaintiff must satisfy in order to gain access to the federal judiciary: (1) the plaintiff must have suffered a concrete and particularized "injury in fact," rather than an injury that is conjectural or hypothetical;[53] (2) a causal connection must exist between the plaintiff's injury and the allegedly illegal conduct;[54] and (3) a favorable court decision must be likely to redress the plaintiff's alleged injury.[55] These requirements operate as a bar to judges who would exceed constitutional limitations by issuing, for example, opinions that are purely advisory. The standing doctrine also promotes other judicial values, including zealous advocacy and impartial results. Injured parties are likely to pursue their claims vigorously and the adversary process enables courts to uncover all the relevant facts and issues necessary to reach the best and most fair outcomes.[56] These concepts—injury and adverseness—have led federal courts to focus on individualized harms as distinct from generalized grievances. Without suffering a personal injury, litigants merely seek to enforce law on behalf of the public-at-large—the type of dispute that does not entail a sufficient stake in the controversy.[57]

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[52] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency . . . ."); *see also* Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1915 (1986) ("[A]fter almost two hundred years, the judiciary has yet to outline successfully the parameters of a constitutional 'case.'").

[53] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Warth v. Seldin, 422 U.S. 490, 508 (1975); *see also* Sunstein, *supra* note 9, at 186–93 (critiquing concept of "injury in fact").

[54] *Lujan*, 504 U.S. at 560–61; Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976).

[55] *Lujan*, 504 U.S. at 561; *Simon*, 426 U.S. at 38.

[56] *See Warth*, 422 U.S. at 498–99 (noting that important question for standing is whether specific plaintiff has sufficient stake in controversy to ask court for redress); Flast v. Cohen, 392 U.S. 83, 99 (1968) ("The 'gist of . . . standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))); *see also* Fletcher, *supra* note 4, at 222 (arguing that black-letter standing doctrine ensures that "concrete case[s] inform[ ] the court of the consequences of its decisions"); *cf.* Frankfurter, *supra* note 4, at 1006 (noting that advisory opinions are problematic because they "move in an unreal atmosphere").

[57] In addition to the focus on a complainant's injury as a means to ensure proper judicial outcomes, the Court considers the standing doctrine to be key for promoting two other constitutional norms: separation of powers and federalism. *See* Scalia, *supra* note 5, at 881 (arguing that disregard of "standing . . . will inevitably produce . . . an overjudicialization of the process of self-governance"). The standing doctrine, it is argued, not only enables federal courts to do their work well, but also serves to restrain the countermajoritarian judi-

In addition to the Article III case or controversy requirement, the Supreme Court also has developed "prudential" factors that influence the decision to grant or deny standing. Prudential standing doctrine, grounded not in the Constitution, but in common law notions of legal rights, is also important in the decision to grant or deny standing.[58] The Supreme Court's decision in *Warth v. Seldin*[59] demonstrates such prudential considerations. In *Warth*, the Court considered an attack on exclusionary zoning in a suburb of Rochester, New York, and found that none of the named plaintiffs adequately stated a cause of action.[60] The Court discussed two jurisprudential limitations that are not found in the Constitution but nevertheless can lead to a standing denial. First, the Court noted that even if there is an injury in fact, if the asserted harm is a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."[61] Second, the Court noted that plaintiffs alleging injury sufficient to meet the case or controversy requirement will not have standing unless the asserted injury is associated with their own rights and interests and not those of third parties.[62] As *Warth* implies, the prudential standing doctrine parallels Article III, but in certain circumstances it may result in a standing denial even when the plaintiff meets the constitutional case or controversy requirement.

These general constitutional and prudential rules apply to all plaintiffs seeking access to federal court. In practice, however, the rules have very different meanings for different plaintiffs. The Court,

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ciary from usurping the policymaking function of the coordinate branches of the federal government, as well as violating the basic principles of state autonomy found in the structure of the Constitution. Indeed, some commentators, including Justice Scalia, argue that the primary purpose of standing is to keep the judiciary out of affairs better left to the other branches of government. *Cf. id.* at 891 (arguing that Court designed "remarkably" poor doctrine if standing was meant only to assure adverseness and sharpen presentation of issues). The injury and nexus requirements, therefore, help to restrict federal courts to the role of protecting individuals and to avoid engaging in broader policy debates—debates that effect all individuals in society and thus better are left to elected bodies at the federal level and to state governments generally.

58 *See* James T. Blanch, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 710–12 (1993) (arguing that Court acknowledges existence of prudential standing, but that it is often subsumed within Article III standing); Fletcher, *supra* note 4, at 251–52 (outlining prudential standing doctrine); Scalia, *supra* note 5, at 886 (describing prudential standing as "set of presumptions derived from common-law tradition designed to determine whether a legal right exists"; noting that when Congress determines right exists, prudential standing is "displaced").

59 422 U.S. 490 (1975).

60 *Id.* at 506–07.

61 *Id.* at 499.

62 *See id.*

for example, has held that a mother has no right to prevent the execution of her son[63] and that a chokehold victim cannot challenge police department practices[64] because neither suffered the requisite "injury in fact" under Article III. Federal courts, however, routinely grant standing to plaintiffs who object to government activities that harm national forests and endanger wildlife species, perceiving the harm to the environment as closely linked to the complainants' alleged injury.[65] In the taxpayer context, courts allow plaintiffs to challenge government spending under the Establishment Clause but not the Equal Protection or Due Process Clauses due to the peculiar way in which the Supreme Court has defined individual harm in this context.[66] Scholars, of course, have sought to systematize and explain these diverse outcomes,[67] but my point here is simply to note that the term "injury in fact" has different meanings in different contexts and is impossible to understand fully in the abstract.

B. Taxpayer Standing Doctrine

While taxpayers seek standing in federal court to challenge a wide range of government expenditures, all of their claims must allege a violation of either the U.S. Constitution or federal statutory law. Although the textbook literature on taxpayer standing identifies only *federal* taxpayers as litigants, in fact, *state* and *municipal* taxpayers also bring claims in federal court and, indeed, file many more lawsuits against state and local government officials than federal taxpayers file against the U.S. government. The data assembled in this study includes 147 federal taxpayer suits, 206 state taxpayer suits, and 263 municipal taxpayer suits—all alleging that the government violated the Constitution or a federal law and all containing decisions on standing by Article III judges.[68] Figure 2 depicts the frequency of fed-

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63 *See* Gilmore v. Utah, 429 U.S. 1012, 1013, 1016 (1976).

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

65 *E.g.*, Sierra Club v. Thomas, 105 F.3d 248 (6th Cir. 1997).

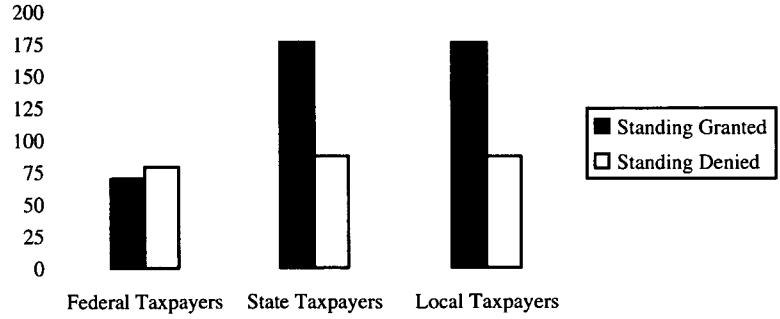
66 *See infra* Part II.B.

67 *See generally* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (investigating history of standing decisions from social choice perspective and suggesting theoretical framework for understanding and rationalizing seemingly contradictory outcomes); *see also* Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) (providing empirical support for theoretical argument).

68 These numbers do not add up to the total number of taxpayer lawsuits because they exclude the fifty lawsuits that involved taxpayers simultaneously claiming standing in two or more of these categories. Some commentators make the assumption that federal taxpayers bring claims in federal court while state and municipal taxpayers bring claims in state courts. The legal landscape and the role of taxpayer lawsuits is not so simple. Of course, state and municipal taxpayers are free to file in their local court system, but many

eral courts' decisions to grant and deny standing to taxpayers in each category.

FIGURE 2: TAXPAYER STANDING GRANTS AND DENIALS



1. *Federal Taxpayers*

The general rule on federal taxpayer standing is found in *Frothingham v. Mellon*,[69] a 1923 Supreme Court case that held that federal taxpayers do not have standing to challenge the constitutionality of federal expenditures. In *Frothingham*, a federal taxpayer argued that Congress violated both the Tenth Amendment and the Due Process Clause when it adopted the Federal Maternity Act of 1921, which provided financial subsidies to states in an effort to reduce maternal and infant mortality. According to the *Frothingham* Court, the taxpayer did not allege a personal injury but only a generalized grievance on behalf of all citizens; standing in these circumstances, the Court held, was not warranted.[70]

In 1968, the Court decided *Flast v. Cohen*[71] and created an exception to the general rule found in *Frothingham*. In *Flast*, a taxpayer challenged the legislative decision to allocate federal money to schools, including those with a religious orientation. The Court held that federal taxpayers would have standing to challenge federal budg-

choose to file in the federal system based upon their federal constitutional claims. *See* Staudt, *supra* note 38, at 774–75, 789–91, 813–34. One article that does not confuse the issues is Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 610–11 (1968) (explicitly noting that state taxpayers may be subject to unique rules governing standing in federal court). For a discussion of state and local taxpayer lawsuits in state courts, see DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 931–42 (5th ed. 2002).

[69] 262 U.S. 447 (1923).

[70] *Id.* at 486–89. Whether the Court grounded its decision in constitutional or prudential considerations is widely debated. *See* Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555, 578–84 (2002) (outlining *Frothingham* and its implications for taxpayers in court).

[71] 392 U.S. 83 (1968).

etary decisions if they satisfied a two-prong test: (1) The plaintiff challenged the expenditure of public resources under Article I, Section 8 of the Constitution (the Taxing and Spending Clause), and (2) the plaintiff alleged that the expenditure was in violation of a constitutional provision intended to limit Article I powers.[72] In *Flast*, the plaintiff objected to a federal expenditure on religious schools and alleged a violation of the Establishment Clause. The Court found that these facts satisfied the two-prong test and granted standing.[73]

In the years following *Flast*, the Court embarked on a process of limiting the federal taxpayer standing doctrine. In *Schlesinger v. Reservists Committee to Stop the War*,[74] taxpayers sought to enjoin the federal government from spending money on war-related activities, and in *United States v. Richardson*,[75] taxpayers sought an accounting of federal expenditures by the Central Intelligence Agency. The taxpayers in both cases failed to allege congressional spending under Article I, Section 8 or to allege an Establishment Clause violation—two requirements for standing if *Flast* is read in the narrowest terms possible.[76] In *Valley Forge Christian College v. Americans United for Separation of Church and State*,[77] the third case limiting *Flast*, the Court held that taxpayers challenging a property transfer to a religious educational institution as a violation of the Establishment Clause did not have standing because the Property Clause, not the Taxing and Spending Clause, authorized the transfer.[78] The only two Supreme Court cases that allowed federal taxpayers into court after *Flast*—*Tilton v. Richardson*[79] and *Bowen v. Kendrick*[80]—involved taxpayers who challenged Spending Clause projects on Establishment Clause

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[72] *Id.* at 102–03.

[73] *Id.* at 103–04.

[74] 418 U.S. 208 (1974).

[75] 418 U.S. 166 (1974).

[76] *Id.* at 175 (holding that litigants failed standards for taxpayer standing set forth in *Flast*); *Schlesinger*, 418 U.S. at 227–28 (same). In denying standing in *Richardson*, the Court noted separation-of-powers concerns and cautioned against granting taxpayers the right to be in federal court. *Richardson*, 418 U.S. at 179–80. The Court noted that to recognize injury (and therefore to grant standing) would lead to a "government by injunction," *Schlesinger*, 418 U.S. at 222, or to a transformation of our governmental structure into "an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts," *Richardson*, 418 U.S. at 179.

[77] 454 U.S. 464 (1982).

[78] *Id.* at 480. The Court also noted that a federal *agency* and not Congress sanctioned the spending and, according to the Court, that taxpayers could only challenge *congressional* spending. *Id.* at 479.

[79] 403 U.S. 672 (1971).

[80] 487 U.S. 589 (1985).

grounds, thereby confirming the viability of the *Flast* doctrine but apparently limiting it to its facts.[81]

2. State Taxpayers

The Supreme Court has decided twenty-four state taxpayer lawsuits since 1866—many of which are discussed by scholars and commentators for reasons other than their standing holdings.[82] One explanation for the lack of scholarly attention to state taxpayer standing may be that the Court itself has largely ignored the issue—of the twenty-four state taxpayer cases considered, the Court addressed standing explicitly in only two.[83]

The first of these cases was *Doremus v. Board of Education*,[84] in which a state taxpayer challenged a New Jersey statute requiring Bible readings in public schools as a violation of the Establishment Clause; the Court never reached the merits, holding that the taxpayers did not have standing.[85] Quoting *Frothingham*, the Court held that a party who seeks to have a claim heard by a federal court "must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement, and not merely that he suffers in some indefinite way in common with people generally."[86] A state taxpayer's action could meet this test, "but only when it is a good-faith pocketbook action."[87] The plaintiff, the Court noted, did not allege any appropriation or disbursement of public funds for the activities complained of and thus did not have standing.[88]

The Supreme Court also addressed state taxpayer standing in a 1989 case, *ASARCO v. Kadish*.[89] The taxpayers in *ASARCO* challenged an Arizona statute permitting the state to lease certain prop-

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[81] *See Bowen*, 487 U.S. at 593–600 (challenging federal health subsidies under Establishment Clause); *Tilton*, 403 U.S. at 674–78 (challenging certain federal education spending under Establishment Clause). The *Bowen* Court, however, suggested that *Valley Forge* should not be read as having the limiting effect that some scholars and commentators have contended. *See Bowen*, 487 U.S. at 618–20 (indicating that *agency* funding decisions could be challenged); *see also* TRIBE, *supra* note 37, § 3-17, at 423–24 & n.50 (discussing limited effect of *Valley Forge*'s bar on taxpayer standing to challenge agency actions).

[82] *See* Staudt, *supra* note 38, at 791–92.

[83] *See id.* at 815.

[84] 342 U.S. 429 (1952).

[85] *Id.* at 434–35.

[86] *Id.* at 434 (quoting Frothingham v. Mellon, 262 U.S. 447, 488 (1923)).

[87] *Id.* A "pocketbook" action is one in which the plaintiff alleges a constitutional or statutory violation that involves an expenditure of public funds and not merely a challenge to a symbolic action, such as prayer in public schools.

[88] *Id.* at 434–35.

[89] 490 U.S. 605 (1989).

erty as a violation of federal statutory law.[90] Justice Kennedy wrote the majority opinion. In a portion of his opinion joined by just three other Justices, Justice Kennedy elaborated his perceived understanding of state taxpayer standing. He suggested that "we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise. No such showing has been made in the case."[91] *ASARCO*, in short, confirmed the importance of a "pocketbook" action for state taxpayers who seek standing in federal court, but did not explicitly require an Establishment Clause allegation. Indeed, despite numerous opportunities to do so, the Court never has imposed, or even suggested, any limitations on state taxpayers that mirror the *Flast* doctrine for federal taxpayers or that go beyond *Doremus*. The only unambiguous requirement is that state taxpayers must challenge actual expenditures.[92]

A thoughtful consideration of the standing rules, however, requires an examination not only of what the Court has *said* on the topic of standing, but also what the Court has *actually done*. If the Court assumes that the plaintiff passes the threshold standing requirement, the fact that the Court fails to discuss the issue of standing does not imply the standing outcome has any less precedential value than an explicit judicial holding that standing exists. Indeed, because standing is an Article III jurisdictional requirement, the Supreme Court has stated unambiguously that federal judges must determine that standing exists and cannot disregard the issue even if the parties

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[90] *Id.* at 610.

[91] *Id.* at 613–14 (quoting *Doremus*, 342 U.S. at 434). In the Court's words,

> [the plaintiffs] have simply asserted that the Arizona statute . . . has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." Even if the first part of that assertion were correct, however, it is pure speculation whether the lawsuit would result in any actual tax relief for respondents. . . . The possibility that the taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain" . . . .

Id. at 614 (quoting Frothingham v. Mellon, 262 U.S. 447, 487 (1923)). *ASARCO* suggests that state taxpayers must allege that the expenditure produces increased taxes. *See id.* Notwithstanding this language and the plaintiffs' failure to meet the stated test, the Court nevertheless heard the case because the state courts had granted standing to the plaintiffs, and the defendants had lost below and had petitioned the Court to hear the case. *Id.* at 617–18; *see also id.* at 633–34 (Brennan, J., concurring) (disagreeing with Justice Kennedy's discussion of state taxpayer standing and arguing that it was unnecessary because Court agreed to hear case on other grounds).

[92] *Doremus*, 342 U.S. at 434–35.

concede standing or if the judge is certain the plaintiff should lose on the merits.[93]

In the *federal* taxpayer context, the Court explicitly has addressed standing in every case, thereby creating unambiguous doctrine. By contrast, in the *state* taxpayer context, the Court has assumed far more often that taxpayer-complainants satisfy Article III's case or controversy requirement. State taxpayer cases have alleged a broad range of constitutional violations, including claims under the Equal Protection, Due Process, Establishment, and Free Exercise Clauses, and violations of federal law. This list of claims suggests that the Court has imposed no limitations on the types of claims state taxpayers may file in federal court. Most recently, however, the Court has appeared more responsive to Establishment Clause claims than to any other type of claim. Indeed, with just one exception, since 1950 the Court only has considered cases in which state taxpayers have alleged an Establishment Clause violation.[94] This trend, of course, does not necessarily mean that the Court intends to impose an additional requirement on state taxpayers seeking standing in federal court, but it does suggest that certain claims are unambiguously suitable for federal court judges to decide on the merits.

3. *Municipal Taxpayers*

The only case in which the Supreme Court has addressed municipal taxpayer standing directly was *Frothingham v. Mellon*.[95] In *Frothingham*, as noted above, a federal taxpayer brought suit challenging the Federal Maternity Act of 1921. In denying standing to the federal taxpayer, the Court noted that federal taxpayers were not in the same position as municipal taxpayers who brought lawsuits in federal court prior to *Frothingham* and apparently satisfied the direct injury test for standing. The Court stated that municipal taxpayers' interest in the use of their monies is "direct and immediate" and "not without some resemblance to that subsisting between stockholder and private corporation."[96] In short, the Court suggested that municipal taxpayers always have standing to challenge perceived unconstitutional government expenditures irrespective of the particular constitutional claim involved. In recent years, however, just as in the state

[93] *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). For a discussion of the problem of "assumed standing," see generally Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855 (2001).

[94] For an in-depth discussion of the state taxpayer cases in the Supreme Court, see Staudt, *supra* note 38, at 800–04.

[95] 262 U.S. 447 (1923).

[96] *Id.* at 486–87.

taxpayer context, the Court has granted standing primarily to taxpayers alleging an Establishment Clause violation. Unlike the law set out for federal taxpayers, however, the Court never has explicitly *required* municipal taxpayers to allege an Establishment Clause violation.

In summary, the Supreme Court has established three separate standing doctrines for taxpayer cases and the rules diverge depending on which government entity is being sued. When municipal taxpayers seek to challenge local government spending, the Supreme Court has provided a low level of scrutiny: Federal courts are to presume that standing exists for this category of plaintiffs and should reach the merits of the controversy. State taxpayers appear to be subject to something like "intermediate scrutiny;" the Court does not presume standing but requires that state taxpayer plaintiffs challenge spending as opposed to mere symbolic governmental activities. Recently, the Court has tightened this review and has "likened state taxpayers to federal taxpayers,"[97] suggesting that it strongly prefers state taxpayer claims alleging Establishment Clause violations. Finally, federal taxpayers face the highest scrutiny for standing purposes: They are denied access to federal courts unless they challenge legislative spending authorized under Article I, Section 8 of the Constitution and allege an Establishment Clause violation.

III
ADJUDICATING STANDING CONTROVERSIES: TWO THEORETICAL APPROACHES

Judicial decisionmaking in the context of standing has generated much interest in the legal and social science literatures and with good cause: Standing decisions determine who has the right to be in federal court. Legal and social science scholars each explain court decisions using very different models, and these models, in turn, offer conflicting insights into the underlying motives of judicial decisionmaking. Historically, the two models could be stated in simple terms: Lawyers believe that law and doctrine govern legal outcomes, and social scientists believe that politics motivates judicial decisions.[98] This "law"

[97] ASARCO, Inc. v. Kadish, 490 U.S. 605, 613 (1989).

[98] *Compare* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64–65 (1992) (noting legal position that courts make decisions based on precedent and well-reasoned doctrine, not politics), *with* Segal & Spaeth, *supra* note 15, at 89–90 (arguing that politics are primary motive in legal decisions). *See also* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. REV. 251, 251–79 (1997) (discussing and critiquing law-versus-politics models of decisionmaking). While the interplay between law and politics

versus "politics" dichotomy, while once popular among students of the courts, no longer captures the sophistication and nuance found in the current literature on judicial decisionmaking.[99] This is especially so for those who study decisions throughout the judicial hierarchy, a hierarchy that imposes unique constraints on judges at different levels of the chain of command and leads to a mix of law and politics that is not reflected in the undemanding dichotomy of "all law" or "all politics."[100]

Legal scholars who theorize about the logic of judicial decisionmaking in the context of a hierarchy have converged on a theory of teams. This team theory of adjudication derives from a branch of economics that is concerned with the efficient organization of individuals who share a common goal but who control different decisionmaking variables and base decisions on different information.[101] Applied to the courts, legal scholars assume that the judicial system operates as a team, with each member seeking to maximize the number of correct outcomes.[102] As I describe below, correct outcomes in the standing context are assumed to be those that adhere to existing legal precedent.[103]

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has been the primary focus of court studies, some scholars also have investigated the effects of biographical and psychological factors. *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (investigating effects of judicial backgrounds on case outcomes); James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104 (1981) (investigating psychological factors in decisionmaking in sample of California Supreme Court judges).

99 *See infra* Parts III.A & III.B.

100 *Id.* For a terrific, albeit brief, discussion of the modern theories of adjudication, see generally Charles Cameron et al., *Strategic Defiance of the U.S. Supreme Court* (2003), *at* http://artsci.wustl.edu/~polisci/epstein/research/defiance.pdf (grant proposal filed with National Science Foundation to investigate judicial decisions at appellate and Supreme Court levels). Because the data set in this Article encompasses standing decisions from all three levels of the judicial hierarchy, I look to the most advanced and recent theories of adjudication.

101 *See, e.g.*, Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1612–28 (1995) [hereinafter Kornhauser, *Hierarchy and Precedent*] (investigating team theory of adjudication from economic perspective and concluding optimal structure depends on multiple factors); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989) (investigating judicial decisionmaking from economic perspective and concluding that reliance on precedent alone is insufficient explanation for decisions); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) (drawing on economic theory to explain hierarchical structure of courts and concluding that there are reasons for structure other than error correction, including harmonization, error prevention, legitimacy, and centralization of power).

102 *See* Kornhauser, *Hierarchy and Precedent*, *supra* note 101, at 1612.

103 *See infra* Part III.A.

Social scientists, by contrast, tend to focus on federal judges' policy preferences and the conflicting nature of those preferences at different levels of the judicial hierarchy.[104] Thus, rather than assuming a collegial team of judicial actors, social scientists posit an agency model of adjudication—a model that assumes that appellate court judges seek to impose their own policy preferences and will police and tame the politically motivated rulings of lower court judges that veer from their own views.[105] Although those who subscribe to this approach emphasize different aspects of the decisionmaking process, all assume a principal-agent problem due to conflicting preferences among judges.[106]

In this Part, I briefly describe the two models of adjudication and explain the possible implications of each. My goal in this Part is not to offer a detailed and nuanced account of the two theories (especially because much work is still to be done in this area[107]), but rather to explain their basic insights and predictions for legal doctrine and precedent.[108]

A. The Team Theory of Adjudication: A Study in Doctrine

The team model of decisionmaking assumes that the goal for judges is to maximize correct answers to existing legal problems.[109] Scholars define "correctness" in a variety of ways. Some argue that correct answers are those which lead to efficient outcomes, while others argue that they are the answers that best implement a certain

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[104] *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158–61 (1998) (discussing theories of compliance and noting plausibility of agency theory of decisionmaking for predicting outcomes); McNollgast, *supra* note 16, at 1643–44 (arguing that lower courts restrain political decisionmaking for fear of reversal by higher court); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 740–50 (1984) (discussing previously neglected approach to study of organizations that focuses on hierarchical control and principal-agency models); Songer et al., *supra* note 16, at 675 (investigating effect of ideologies on court outcomes in context with monitoring and oversight).

[105] *See* Songer et al., *supra* note 16.

[106] *See* Cameron et al., *supra* note 100, at c-5 to c-10 (providing brief discussion of agency theories).

[107] Charles Cameron, Lee Epstein, and Jeff Segal currently are undertaking further study of these questions. *See id.*

[108] For a formalized discussion of various predictions and hypotheses, see *id.*

[109] *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5 & n.20 (1994) (noting overwhelming scholarly and judicial view that "correct" outcomes reflect adherence to superior court rulings); Kornhauser, *Hierarchy and Precedent*, *supra* note 101, at 1612 ("I assume that the team seeks to maximize the expected number of correct decisions.").

conception of corrective justice.[110] In the standing context, however, nearly all legal scholars argue that correct outcomes are those that adhere to existing Supreme Court standing doctrine (or some conception of it) and that courts err when they produce unpredictable decisions.[111]

Importantly, adherence to precedent does not necessarily imply that judicial team members completely agree with the controlling legal doctrine.[112] Judges may view adherence as a means to other equally important ends associated with fairness, efficiency, and respect for the judiciary.[113] Obedience to and compliance with precedent arguably leads to the uniform treatment of litigants, a goal inextricably linked to the perception that the decisionmaking process is fair and just.[114] Precedent is also valuable because it enables individuals to predict outcomes; this, in turn, permits a uniform understanding of social and business interactions, allows reliance on expectations, and creates disincentives to litigate every conflict.[115] Finally, adherence to precedent fosters respect for the judiciary because it demonstrates that judges draw on a body of law that represents collective experience over time, rather than upon their own political and ideological viewpoints. Con-

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110 Kornhauser, *Hierarchy and Precedent*, *supra* note 101, at 1606 (noting different interpretations of "correctness").

111 The normative literature on standing focuses on "correct legal outcomes." *See, e.g.*, Fletcher, *supra* note 4, at 251–90 (proposing new doctrinal framework for assuring better, more predictable results); Nichol, *supra* note 13, at 305–22, 334–40 (arguing that Court has reached absurd standing decisions and should redefine standing doctrine to assure correct legal outcomes); Pierce, *supra* note 7, at 1775–86 (devising doctrine to assure more rational and correct answers to complex standing problems); Richard M. Elias, Note, *Confusion in the Realm of Taxpayer Standing: The State of State Taxpayer Standing in the Eighth Circuit*, 66 MO. L. REV. 413 (2001) (arguing that Eighth Circuit has erred in narrowly construing state taxpayer standing doctrine and investigating possible correct outcome).

112 Caminker, *supra* note 109, at 27 n.99 ("[T]he doctrines of stare decisis and hierarchical precedent are based on the realization that various institutional and substantive values are served if, at least generally, prior interpretations (whether correct or not) are maintained into the present and future.").

113 *See* Staudt, *supra* note 38, at 835–40 (providing brief discussion of values in federal court decisionmaking and in standing context in particular).

114 *See* H.L.A. HART, THE CONCEPT OF LAW 121 (1961) (asserting that strongest rationale for binding precedent is its usefulness in assuring that like cases are treated alike); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 69–72 (1961) (noting link between fairness and binding precedent). *See also* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 654 (2001) (arguing that "stare decisis is an appeal to a general principle of equality, a cousin of the Kantian principle of universalizability and the biblical Golden Rule").

115 *See* WASSERSTROM, *supra* note 114, at 60 (stating that precedent is useful because it enables certainty that would otherwise be impossible); David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 496 (1985) (stating that predictability in judicial decisionmaking is key rationale for adhering to precedent).

sequently, the public is more likely to consider court decisions as fair and uniform, not impulsive and fickle.[116]

The team theory of adjudication assumes that a common goal of conforming to precedent exists and, at least for purposes of this Article, it is unnecessary to ask why this is the case. This study tests whether this assumption is realistic—that is, whether the data support a theory that assumes that judges commonly seek to follow legal precedent. To do this, it is important to understand the empirical implications of the team theory. Assuming that courts seek outcomes grounded in law, one can make several predictions about taxpayer standing outcomes.[117] First, one would expect federal judges at every level to grant standing to federal taxpayers only if the taxpayers challenge Article I spending under the Establishment Clause. Supreme Court doctrine in this context is unambiguous and should lead to predictable and stable outcomes.[118] Second, one would expect judges to grant standing to state taxpayers if they challenge actual spending projects as opposed to symbolic acts that involve no expenditure of state funds. Although the Supreme Court has imposed no further requirements on state taxpayers, it has granted certiorari in recent years only to those claimants alleging Establishment Clause violations.[119] Team players seeking correct outcomes likely would impose federal taxpayer standing requirements—or something close to them—on state litigants. Finally, one would expect federal judges to grant standing to nearly all municipal taxpayers regardless of the constitutional violation alleged, so long as the plaintiff claims that the local government illegally or unconstitutionally expended public funds.[120]

How does the judicial hierarchy impact these legal outcomes? If the team theory explains judicial outcomes, we should expect higher courts to overturn lower courts only when an erroneous decision is issued below. Thus, higher court judges should not substitute their own opinions for those of the lower court judges but reverse only when the lower court erred as a matter of law.[121] The Supreme Court also must adhere to precedent, but the flexibility of stare decisis allows the Court to overrule precedent that it no longer believes was

116 *See* Hathaway, *supra* note 114, at 652.

117 A more formal game-theoretic approach may suggest different hypotheses than those I suggest here, but I leave that formal investigation of standing to future study. *See generally* Cameron et al., *supra* note 100.

118 *See supra* Part II.B.1.

119 *See supra* Part II.B.2.

120 *See supra* notes 95–97 and accompanying text.

121 *See* Kornhauser, *Hierarchy and Precedent*, *supra* note 101, at 1612–13.

decided correctly. The team model of adjudication, therefore, offers an escape hatch that allows the Supreme Court to jettison "bad law."[122]

B. *Agency Theory of Adjudication: A Study of Politics and Institutions*

The agency theory of decisionmaking focuses on the conflicting interests among judges. This theory assumes that judges have policy preferences and seek to implement those preferences through case outcomes.[123] This model does not ignore precedent or law-related factors, but views the development of doctrine as a means for implementing political and ideological viewpoints and for keeping lower court judges in line.[124] Unlike the team theory, the agency theory of adjudication does not assume that legal doctrine reflects inevitable or neutral outcomes that jurists reach after fully considering the legal issues before the court. Instead, doctrine is merely a mechanism to realize politics. Through the creation of law and precedent, appellate judges achieve their political goals and then monitor lower courts to prevent such "agents" from substituting their own preferences in the decisionmaking process.[125] The assumption that judges are political actors does not necessarily mean that individual actors pursue raw politics and accord no weight to the preferences of others for non-strategic reasons, such as altruism or respect for the rule of law.[126] The point of the agency theory is that judges are not solely objective decisionmakers who check their personal opinions on legal controver-

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122 *See* Caminker, *supra* note 109, at 11 & n.40 (noting that "theory of mistakes" allows Supreme Court to jettison body of legal materials that no longer fit).

123 *See* McNollgast, *supra* note 16, at 1636–37 (stating assumption that judges do not check their politics at courtroom door, but rather act to bring policy as close as possible to their own preferred outcomes).

124 *See* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 68 (1994) (asserting that Supreme Court uses legal doctrine as signal to lower courts about range of opinions and outcomes that it will tolerate); McNollgast, *supra* note 16, at 1641–56 (discussing precedent as reflection of political preferences); Moe, *supra* note 104, at 740–48; Songer et al., *supra* note 16, at 675; *see also* Cameron et al., *supra* note 100, at c-5 to c-10 (discussing three different but related branches of agency theory).

125 *See generally* Songer et al., *supra* note 16 (applying principal-agent theory to interaction between Supreme Court and courts of appeals); *see also* Moe, *supra* note 104, at 740–50 (applying hierarchical and principal-agent theories to management of organizations); *cf.* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65–67, 73 (1998) (advocating that higher courts allow difficult issues to "percolate" in lower courts and permit some precedent to be "provisional" so that lower courts can experiment).

126 *See* McNollgast, *supra* note 16, at 1636.

sies at the courtroom door; instead, judges have personal viewpoints *and* give them weight when rendering decisions.[127]

Many scholars criticize judges who have strong beliefs and then act upon them in the decisionmaking process, but this policy-oriented approach is not universally disfavored. Indeed, some argue that if a judge believes that the Constitution requires an interpretation that conflicts with past precedent, the judge *must* ignore the precedent when deciding cases.[128] The agency theory of adjudication does not address the normative considerations associated with political decisionmaking; rather, it simply argues that judges do, in fact, seek to implement their policy viewpoints, but are constrained from doing so by the judicial hierarchy that implements a system of oversight and monitoring.

Accepting for the moment that this theory is descriptively accurate, it is not clear exactly how a judge should decide a standing controversy to ensure that it aligns with her political view—whatever that view entails. The conventional wisdom suggests that liberal judges seek to open the courtroom doors, while conservative judges seek to close them.[129] But this is a rough means for achieving political ends. Because agency theory assumes that judges are rational, it predicts a slightly more nuanced approach to standing: Liberal courts will grant standing to liberal plaintiffs and deny standing to conservative plaintiffs; conservative judges will do just the opposite.[130] This approach for deciding standing also may be a bit more rough than necessary. Judges can adopt a third (and still more) strategic approach: They can grant standing to plaintiffs with opposing political preferences specifi-

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127 *See id.* at 1636–37.

128 *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23–28 (1994) (arguing that if court believes Constitution and precedent are in conflict, it has obligation to ignore precedent); *see also* Caminker, *supra* note 16, at 818–21 (discussing situations in which judges adhered to their own idiosyncratic political or legal views despite clear Supreme Court precedent to the contrary and noting scholars' diverse reactions); *cf.* Ashenfelter, et al., *supra* note 98, at 281 (arguing that judges' political interests may play role in shaping outcomes in small number of "close cases," but that total effect is mitigated because law is determinative in vast majority of cases).

129 *See, e.g.*, Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 320 (1979) (noting that typical liberal approach calls for greater access to federal courts and typical conservative approach calls for limited access). *But see* Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705–07 (1980) (arguing that Brilmayer has misconstrued liberal view of standing and proposing an alternative description).

130 In this study, if a liberal judge followed this approach, she would grant standing to taxpayers challenging public funds spent on religious causes and deny standing to taxpayers challenging minority set-asides. Conservative judges would do just the opposite.

cally to deny the plaintiffs' claim on the merits.[131] Whatever mechanism judges choose to implement their policy preferences, the important point is that they will pursue an agenda that leads to favorable political outcomes while still avoiding reversal by a higher court.

According to the agency theory of adjudication, we can expect different outcomes at the district, appellate, and Supreme Court levels because of the unique institutional constraints faced by judges at each level. The district courts are subject to a high level of oversight given the litigants' right of appeal to the circuit court.[132] In practice, this means that district court judges who seek to avoid reversal will be reluctant to engage in raw political decisionmaking and generally will adhere to circuit court precedent. If the district court claims to follow precedent, but nonetheless reaches a decision that displeases the higher court, the higher court will reverse the decision.[133] The problem that a district court judge faces is that she cannot know in advance which three-judge panel will review her decision on appeal, and thus she will not know how to craft her decision to avoid reversal. Unless circuit court politics are uniform across the whole court—that is, unless circumstances exist that enable the district court judge to know the politics of the reviewing panel—the district court will take the safest route and adhere to the Supreme Court precedent that governs the circuit court, especially when it is clear and unambiguous.[134] Accordingly, agency theory adherents would expect district courts in every circuit to adhere to the *Flast* doctrine when considering federal taxpayer standing cases. Because there is no clear and unambiguous Supreme Court doctrine addressing state and municipal taxpayer standing, the district courts will attempt to predict the circuit court preferences, but this will lead to an erratic, circuit-specific collection of outcomes. The important point is that one would *not* expect dis-

131 One recent Supreme Court case that would fit into this category is *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In *Zelman*, the conservative court granted standing to "liberal" plaintiffs challenging a school voucher plan as a violation of the Establishment Clause and ruled against them on the merits. *See also* Lee Epstein & Olga Shvetsova, *Heresthetical Maneuvering on the U.S. Supreme Court*, 14 J. THEORETICAL POL. 93 (2002) (proposing game-theoretical analysis for why courts undertake this type of strategic behavior); *infra* note 173.

132 *See* FED. R. APP. P. 3, 4.

133 *See* Cross & Tiller, *supra* note 104, at 2158–59 (listing additional reasons why lower courts may comply with or disobey doctrine).

134 This hypothesis diverges from some that exist in the literature. *See, e.g.*, Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792, 792–803 (1979) (testing hypothesis that district court compliance with Supreme Court decision is determined in part by number of dissents accompanying opinion and failing to find any correlation).

trict court judges to issue opinions that align with their own political preferences given the level of oversight and monitoring that they face in every case they decide.

Circuit court judges, by contrast, face a very different oversight mechanism. The Supreme Court's jurisdiction is for the most part discretionary, and the Justices grant only a tiny fraction of all petitions for certiorari. Consequently, circuit court judges largely are free to act in accordance with their own policy preferences in the decision-making process.[135] The one exception to this general rule involves cases that the appellate court knows the Supreme Court is likely to take, such as cases involving highly visible issues or those in which the Court previously has indicated an interest. With regard to taxpayers challenging government expenditures, the Supreme Court has adopted a clear federal taxpayer doctrine and has indicated that it will overturn any appellate court decision that grants standing to federal taxpayers outside the *Flast* context. Having exhibited little tolerance for diverse views on federal taxpayer standing, appellate courts most likely will adhere to the federal taxpayer doctrine described above. In the state taxpayer context, the Court has implied that it prefers a narrow standing doctrine but has never explicitly held as much—this leaves appellate court judges with more freedom to decide the cases according to their own politics. Finally, the Court has encouraged chaos in municipal taxpayer standing cases by refusing to hear appeals and implicitly establishing a presumption in favor of standing without a specific rule requiring it. This allows appellate court judges to make political decisions in municipal taxpayer cases.

At the Supreme Court level, the Justices are the least constrained by institutional factors, and thus they are the most likely to align their votes with their own political views, tamed only by the political views of the other eight Justices, the remote possibility of a legislative override, and concerns associated with institutional legitimacy.[136] Accordingly, Supreme Court decisions should reflect the Justices' own

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[135] James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565, 568 (2001) (noting that appellate judges appropriately are called "vital center" of federal judicial structure because they have "final word on important matters of public law [and are] largely immune from the Supreme Court's exercise of discretionary jurisdiction"); *see also* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1747–50 (1997) (finding political motivations for appellate court decisions, especially in certain cases not likely to be reviewed by Supreme Court and when decided by panels with three judges who have similar political party affiliations). *But see* Songer et al., *supra* note 16, at 681–88 (finding appellate courts tend to adhere to Supreme Court precedent in search-and-seizure context).

[136] *See* SEGAL & SPAETH, *supra* note 15 (exploring Supreme Court decisions); *cf.* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (arguing that Supreme

political preferences, and we should observe little or no adherence to past precedent. Importantly, this does not mean that the standing decisions blatantly will reflect politics. The Justices may well pursue a strategic agenda that entails granting standing to disfavored petitioners and then deciding against them in the merits phase of the case. In short, the standing decisions may well be political but will not appear to be so.

It is not important that readers agree with my description of court politics—indeed, these are the very hypotheses I intend to test. Moreover, a more formal game-theoretic approach may suggest a different set of hypotheses.[137] For now my point is that agency theory predicts that courts at different levels of the judicial hierarchy are likely to pursue distinct strategies in the decisionmaking process—strategies that are likely to reflect important roles for both law and politics. In contrast to the agency theory, the team theory outlined in Part III.A predicts that politics will have no role because law motivates outcomes in every courtroom setting throughout the hierarchy. Finally, the agency and team theories can be contrasted with the empirical literature discussed in Part IV: a literature that suggests that politics is the *only* explanatory variable in standing outcomes, and neither institutional constraints nor legal precedent have a role to play.

IV
Existing Empirical Studies of Standing

Notwithstanding the theories of adjudication described in the last Part, the legal and social science scholars who have undertaken empirical studies of standing reach a different conclusion: Politics explains standing outcomes at every level of the judicial hierarchy.[138] If one believes the team model approach, this empirical finding suggests that courts are reaching "erroneous" outcomes; under the agency model it suggests that principals have lost control of their agents. The three existing empirical studies also suggest that judges *always* pursue sincere political preferences—conservative judges systematically vote to grant conservative litigants standing and to deny liberal plaintiffs the right to be in court, and liberal judges do just the opposite. The courts apparently do not take a strategic approach to the problem by

Court Justices are strategic decisionmakers who consider a range of institutional constraints when etching personal policy preferences into law).

[137] *See* Cameron et al., *supra* note 100, at c-5 to c-10.

[138] *See* Rathjen & Spaeth, *supra* note 14, at 24 (investigating standing in Supreme Court); Pierce, *supra* note 7, at 1758–63 (investigating standing in federal appellate courts); Rowland & Todd, *supra* note 14 (investigating standing in district courts).

granting standing to disfavored plaintiffs to render a decision against them on the merits of the claim.

That we can observe federal judges at all levels adopting exactly the same mechanism to achieve precisely the same political goal is somewhat of a surprise given that neither theoretical model predicts this finding. The logical question to ask, then, is whether the theories of adjudication are flawed or whether, instead, the three empirical studies suffer limitations that should lead us to reject their generalizations about standing. In this Part and the next, I investigate these questions. I first discuss the three extant standing studies and note their drawbacks and limitations. In Part V, I then describe my own empirical study that overcomes the problems identified here and reaches a different conclusion regarding the interaction of law and politics. My study suggests that some but not all of the findings in the extant literature are problematic and that this, in turn, leads to the conclusion that the theoretical models do have purchase for understanding and predicting court outcomes. Ultimately, I argue that the agency model has the most predictive value for understanding outcomes in a hierarchical judicial setting.

A. Politics in the District and Appellate Courts

In 1991, Professors C.K. Rowland and Bridget Jeffery Todd published a study of district court standing decisions in which the authors collected 265 cases that discussed standing between 1985 and 1987.[139] They found that liberal judges grant standing more often than conservative judges at statistically significant levels.[140] When the authors controlled for the status of the plaintiff as well as the politics of the judge, the role of politics became more pronounced: Conservative judges are highly likely to grant standing to conservative plaintiffs while liberal judges are highly likely to grant standing to plaintiffs with liberal causes.[141]

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139 Rowland & Todd, *supra* note 14.

140 The authors present their data in percentages, which alone do not speak to the question of statistical significance. I, therefore, recoded the aggregate data into individual units for purposes of statistical analysis and confirmed that court politics are correlated with standing outcomes at statistically significant levels. *See infra* notes 151–54 and accompanying text. Andrew Martin confirmed my statistical results through use of the Fisher's Exact Test.

141 Professors Rowland and Todd's findings are somewhat more nuanced. The authors do not code the courts as liberal or conservative but rather according to the party of the appointing president. Three cohorts exist in their study: Nixon/Ford, Carter, and Reagan judges. Rowland & Todd, *supra* note 14, at 177. While Reagan judges granted standing more often to "upperdogs" than to "underdogs," the Nixon/Ford and Carter appointees treated the groups similarly. *Id.* at 180–82. When the authors controlled for underdogs who challenged social regulation versus those who sought personal remuneration, they

Professors Rowland and Todd's study is the first to investigate standing issues at the district court level and for this reason it is a valuable contribution to the literature. The authors correctly argued that their finding is important because it suggests that the appointing president can have a noticeable impact on court decisions not only in the Supreme Court, which is widely viewed as political, but also in the lowest federal courts.[142] In the standing context, plaintiffs favored by the appointing president are more likely to get a hearing on the merits and judges will bar all others from court. Rowland and Todd's conclusions may well be true, but several data problems in their study suggest that further investigation is warranted.

First, the study suffers from the typical selection biases discussed earlier.[143] Rowland and Todd investigated only cases in which the courts explicitly discussed standing.[144] As a result, they included far fewer standing decisions than courts actually make, far more standing denials than exist in the population as a whole, and only the most controversial cases that come into court.[145] Moreover, the authors clustered a wide range of lawsuits in their study, leading to a grouping of diverse plaintiffs alleging very different fact patterns and subject to unique standing requirements under the "injury in fact" rule. These selection biases suggest that the authors' finding may be limited to only a small subset of standing decisions—the most hotly contested lawsuits. But even this conclusion may not hold because the authors

found Carter appointees were highly likely to grant standing to underdogs seeking broad social goals, such as better environmental regulation or prison conditions. *Id.* at 179, 182–83. Recoding the data to run logit regressions, I found that as a general matter, Republican-appointed district court judges tended to deny standing to liberal plaintiffs and Democratic-appointed judges tended to grant standing.

142 *See id.* at 174. *But see* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 39 (6th ed. 2003) (noting that president exerts more influence over Supreme Court appointments than lower court appointments).

143 *See supra* notes 28–31 and accompanying text.

144 *See* Rowland & Todd, *supra* note 14, at 178.

145 Rowland and Todd fail to explain why they chose to study standing cases published between 1985 and 1987. The article indicates that the authors wrote the first draft of the manuscript in 1988, *id.* at 184, but this does not explain why they chose the 1985 cutoff date, one that if set earlier would have provided more data points for analysis. This 1985 cutoff date is particularly odd given that the authors point to both the 1980 and 1984 Republican platforms as expressing explicit support for business and criticism of social regulation—the campaign rhetoric that led the authors to undertake the study in the first place. *Id.* at 176. The parameters of the study are important, because a small change can have huge impacts on statistical findings. My point is not that the cutoff points Rowland and Todd use are necessarily problematic, but that they do require explanation; without clarification one wonders if the findings are simply a matter of chance rather than suggestive of broader trends associated with judicial politics, as the authors claim. For a more in-depth discussion of cutoff points, see Lee Epstein & Andrew D. Martin, *Does Age (Really) Matter? A Response to Manning, Carroll, and Carp*, 85 Soc. Sci. Q. 19 (2004).

fail to control for anything but politics in their model—in short, they claim that politics governs without first investigating the possible roles of law and various other institutional factors that may impact case outcomes.

Professor Richard Pierce's 1999 study of standing precedent is the only existing investigation of standing that controls for the facts and circumstances of the case.[146] Rather than clustering all plaintiffs together for purposes of understanding judicial decisions, Pierce used an area-studies approach limited to environmental claims to test the hypothesis that federal appellate judges manipulate the standing doctrine to achieve politically preferred outcomes. Pierce collected thirty-three federal appellate decisions published between 1993 and 1998,[147] the time period immediately following the Supreme Court's landmark decision in *Lujan v. Defenders of Wildlife*.[148] Pierce's study indicates that judges decide cases according to their own political preferences: Democrats vote to grant standing nearly four times as often as their Republican counterparts, a statistically significant finding.[149] Pierce's finding may be the strongest suggestion that politics governs outcomes, but he too fails to control for a range of other important variables and draws unwarranted conclusions from his study.[150]

Table 1 presents Professors Rowland and Todd's findings as to the district court standing decisions and Professor Pierce's empirical

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146 Pierce, *supra* note 7.

147 *See id.* at 1759.

148 504 U.S. 555 (1992). In *Lujan*, the Supreme Court held unconstitutional the citizen-suit provision of the Endangered Species Act (and consequently similar provisions in various other environmental statutes with similar provisions). *Id.* at 574–78; *see also* Sunstein, *supra* note 9, at 200–01 ("[T]he Court held in effect that this provision [of the Endangered Species Act] was unconstitutional as applied."). The majority held the plaintiffs did not suffer judicially cognizable injury when the government provided financial support to projects that adversely affected endangered species' habitats. *Id.* at 562–64. The plaintiffs testified that they planned to visit the habitats, but the Court held that this did not prove "imminent injury" as required by the constitutional doctrine of standing. *Id.*

149 Pierce, *supra* note 7, at 1760, 1775. For doctrinal analyses reaching similar conclusions, see Emily Longfellow, Friends of the Earth v. Laidlaw Environmental Services: *A New Look at Environmental Standing*, 24 ENVIRONS ENVTL. L. & POL'Y J. 3, 4–11, 16–43 (2000) (summarizing existing Supreme Court approach towards standing for environmental plaintiffs and asserting that judicial appointments by Republican administrations were intended to thwart environmental legislation); Peter Van Tuyn, *"Who Do You Think You Are?": Tales From the Trenches of the Environmental Standing Battle*, 30 ENVTL. L. 41, 43–48 (2000) (noting that changes in standing law, championed by Justice Scalia and followed by district court judges, have led defendants in environmental cases to raise standing claims more frequently).

150 *See infra* notes 155–58 and accompanying text.

findings on appellate court outcomes.[151] In both studies, the dependent variable is the courts' decision on standing and the explanatory variable is the politics of the court.[152] For purposes of measuring judges' politics, the authors used the politics of the appointing president.[153] I fit the authors' data to a logit model and ran regressions that are reflected in the table below. A coefficient ("β") that is positive indicates that a Democratic appointee is more likely to grant standing to a plaintiff than is a Republican appointee. Statistical significance ("Sig.") at the .05 level suggests that politics motivates standing decisions and that the relationship does not exist due to mere chance.[154] As Table 1 shows, Professors Rowland and Todd's study finds a statistically significant correlation between standing outcomes and presidential appointments and Professor Pierce's study suggests a correlation that is very close to statistical significance. Collectively, these studies suggest that we should reject the null hypothesis that no correlation exists. Put most directly: Politics explains standing decisions.

TABLE 1: LOGIT ESTIMATES OF SIMPLE STANDING MODEL FOUND IN EXTANT LITERATURE

Dependent Variable = Court's Decision on Standing
(coding protocol: 0 = denied, 1 = granted)

	Professors Rowland & Todd's Standing Study N=265	Professor Pierce's Standing Study N=33
Party of the Appointing President	β=.554 S.E.=.254 Sig.=.029	β=2.911 S.E.=1.646 Sig.=.077
Constant	β=.125 S.E.=.311 Sig.=.577	β=.027 S.E.=.577 Sig.=.962

151 Pierce examined the individual votes of each judge on the panel (i.e., each judge's vote to grant or deny standing), but did not investigate actual court outcomes. Pierce, *supra* note 8, at 1759–60. Because I am interested in the correlation between court politics and court outcomes, I recoded his thirty-three cases using my own coding protocols and confirmed Pierce's finding that the liberal panels in his database were more likely to reach pro-plaintiff outcomes in environmental lawsuits. Although the finding is not statistically significant, it approaches significance and is consistent with my finding that politics plays a strong role in appellate court outcomes in the taxpayer context. *See infra* Part V.C.2.

152 The model is specified in the following way: Standing Decision = $\beta_0 + \beta_1$ Party of Appointing President. The dependent variable is dichotomous and equal to 0 if the court denied standing and equal to 1 if the court granted standing. The explanatory variable is also dichotomous and equal to 0 if a Republican president appointed the judge and equal to 1 if a Democratic president made the appointment.

153 Rowland & Todd, *supra* note 14, at 175–78 (describing politics of judge variable); Pierce, *supra* note 7, at 1759 n.112 (describing author's methodology).

154 *See* ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS OF THE SOCIAL SCIENCES 173–74 (3d ed. 1997).

Unlike Professors Rowland and Todd, Professor Pierce argues that his findings indicate that *Lujan*, along with four other Supreme Court decisions addressing the threshold issue of standing, have created confusion as to the parameters of the legal doctrine. He contends that his study documents appellate judges' propensity to take "advantage of the complicated and malleable standing doctrines to resolve a high proportion of standing disputes in a manner consistent with each judge's own political and ideological preferences."[155] I hesitate to adopt Pierce's interpretation of his own study, despite the significant correlation between politics and outcome. His model fails to control for a range of factors that may impact these findings—statistical controls that may tame the judges' apparent strong motive to decide cases in accord with their own political preferences. To ensure that politics is the leading motivation, it is important to undertake a multivariate analysis that accounts for a range of other factors: the relevant legal precedent, the identity of the defendant, the type of violation alleged, and others. In short, without testing for the role of politics in a complex model, it is unclear how strong the correlation is.

Furthermore, even if politics continues to play an important role in standing decisions in a more complex model, Professor Pierce seems to confuse correlation with causation. If Pierce would like to claim that it is the nature of the law—its complexity and malleability—that leads to political outcomes, he must define complexity, devise a useful measure for capturing it in court decisions, and then control for it in a statistical model. Pierce may well be right that complicated and malleable precedent fails to constrain appellate court politics, but a systematic study of the hypothesis is necessary before a strong claim can be made. This is particularly important because his theory that *Lujan* created major uncertainty in the law is not universally accepted. Scholars agree that the Court introduced some uncertainty, but at least one also argues that *Lujan* added predictability for certain types of environmental plaintiffs. Thus, without further study, Pierce's findings are subject to a behavioral equivalence problem: Pierce observes that politics play a role in standing outcomes and attributes this finding to the nature of the law, but it also could be attributable to institutional factors (such as lack of Supreme Court review)[156] or to social factors (such as diverse preferences within a

155 Pierce, *supra* note 7, at 1775.

156 9*See* Sunstein, *supra* note 9, at 224 (claiming that after *Lujan*, standing is clearly available to plaintiff who actually uses resource at issue).

See Songer et al., *supra* note 16, at 674–75 (proposing that lack of oversight and monitoring may leave "opportunities for discretion").

community for a clean environment).[157] That is to say, even if clear and unambiguous precedent existed, courts still may reach political outcomes, and, if this were true, Pierce's claim regarding complex and malleable law would be false. We cannot know for sure unless the study controls for other possible explanations.

B. Politics in the Supreme Court

In 1990, Professors Gregory Rathjen and Harold Spaeth investigated 177 United States Supreme Court decisions that explicitly address plaintiffs' access to federal court, and found that conservative Justices vote to deny standing to plaintiffs with liberal claims while liberal Justices seek to ensure that these plaintiffs receive a hearing on the merits.[158] Indeed, the authors found a statistically significant relationship between individual politics and legal outcomes in a wide range of decisions that address threshold requirements, including exhaustion of remedies and abstention.[159] Disaggregating the data according to the type of issue raised, Rathjen and Spaeth found that the Justices' political preferences have a high correlation with outcomes in the twenty-four standing cases included in the study.[160]

Like the studies of district and appellate courts discussed above, Professors Rathjen and Spaeth failed to control for any explanatory variable other than politics. On the one hand, the lack of statistical controls, along with a selection bias that led the authors to investigate only the most highly controversial standing cases, suggests that the findings may have limited value.[161] On the other hand, a Court with few institutional constraints addressing mostly novel legal questions that are not subject to clear and controlling precedent is more likely to defer to the background policy preferences of the justices.[162] The important question to ask is: Do Professors Rathjen and Spaeth's findings continue to hold for all standing outcomes, even in cases in

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[157] *See* McNollgast, *supra* note 16, at 1668 ("[O]ver the long run, judicial choice of doctrine reflects the preferences expressed in the electoral arena.").

[158] Rathjen & Spaeth, *supra* note 14, at 29–32, 40. This 1990 study is an update of an article the authors published in 1979 on the same topic. *See* Rathjen & Spaeth, *supra* note 18.

[159] Rathjen & Spaeth, *supra* note 14, at 37 tbl.I.8.

[160] *See id.* at 40.

[161] The authors chose their cases by reading the summary of the case produced either in the U.S. Reports or the Lawyers' Edition of Supreme Court cases. *Id.* at 27. They selected the cases that had lengthy discussions of standing; this selection procedure led the authors to identify only the most controversial standing cases. *Id.* Put differently, when the Court only briefly addressed standing, Professor Rathjen and Spaeth would fail to include the case in their database.

[162] See the discussion of Supreme Court decisionmaking in the team theory and agency theory of decisionmaking, *supra* Part III.

which the Court assumed standing and when the model controls for applicable law?

A more comprehensive study may uncover sophisticated voting patterns that Professors Rathjen and Spaeth did not observe. They found that the Justices routinely vote their sincere preferences and do not act strategically—that is, the Justices do not grant standing to disfavored petitioners only to deny their claims on the merits. Professors Rathjen and Spaeth's finding not only conflicts with formal game-theoretic predictions of Supreme Court behavior, but it also conflicts with at least one other empirical study finding that Supreme Court Justices vote strategically on threshold issues.[163] These studies, along with the limitation and drawbacks discussed above, suggest that further study is necessary before we fully can understand Supreme Court decision-making on standing questions.

V
A New Approach for Understanding Judicial Standing Decisions

In this Part, I examine standing decisions in a single area of the law—taxpayers challenging government expenditures. This approach avoids the two selection biases found in the existing literature, because it does not allow clustering of all types of plaintiffs and lawsuits together, and it includes every court opinion that reaches a standing decision, whether explicitly or implicitly.

My ultimate goal is to uncover the interplay of law and politics in standing outcomes, and in particular, the impact of each as the case moves through the judicial chain of command. I measure my findings against those found in the extant literature as well as against those predicted by the team theory and the agency theory of decision-making. My results support the predictions generated by the agency theory and thus confirm the argument that politics have a role to play in judicial outcomes. This is true, however, only in certain circumstances—when legal rules are vague and when little or no judicial monitoring exists.

A. Basic Results

To assess the role of law in taxpayer lawsuits, I start with a simple logit model and estimate it separately for federal, state, and municipal taxpayers in court. The dependent variable is the courts' standing

[163] *See* Epstein & Shvetsova, *supra* note 131, at 113–18 (employing game-theoretical study to show that Chief Justice Burger voted strategically on procedural issues in order to avoid losing).

decision, and the two independent variables are (1) a challenge to spending and (2) a challenge to spending along with an allegation of an Establishment Clause violation.[164] That is to say, I seek to explain when a federal court grants standing (the dependent variable) by looking to the type of claim involved in the lawsuit (the two independent variables). For purposes of data collection, if the variable obtains, I coded it equal to 1, and if the variable is absent, I coded it equal to 0. In the discussion below, I focus on statistical significance and probabilities. If the finding is statistically significant at the .05 level, it is unlikely that the results are due to chance. Put differently, statistical significance strongly suggests a relationship between the explanatory variable and the standing decision, and I can reject the null hypothesis that there is no correlation between legal doctrine and standing outcomes.[165] For purposes of comparison, I also report the probability ("Prob.") of a court granting standing in the various contexts explored. Table 2 reports my findings in this simple model.

The preliminary results in Table 2 undermine the extant empirical literature on standing and strongly suggest that federal judges are cooperative team players; this is especially true in the state and federal taxpayer context. The correlation between a court's decision to grant standing to a federal taxpayer and the taxpayer's challenge to government expenditures under the Establishment Clause is highly statistically significant (at the .000 level). If the plaintiff fails the *Flast* test, the court is likely to deny standing, and this finding approaches statistical significance (significance is equal to .067). A federal taxpayer who satisfies *Flast* thus has a 90 percent chance of getting into court and otherwise just a 22 percent chance of getting heard. Courts, in short, usually adhere to Supreme Court doctrine when determining a federal taxpayer's right to be in court—a finding that supports the team theory of adjudication.

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[164] I specified the equation as follows: Court's Decision on Standing = β_0 + β_1 Spending + β_2 (Spending x Establishment Clause). The dependent variable—the court's decision on standing—is a dichotomous variable equal to 0 if the court denied standing and equal to 1 if the court granted standing. "Spending" is a dichotomous variable equal to 0 if the plaintiff did not allege spending and equal to 1 if the plaintiff alleged spending. "Establishment Clause" is a dichotomous variable equal to 0 if the plaintiff did not allege an Establishment Clause violation and equal to 1 if such an allegation was made in the complaint. Thus in this model, β_0 is the constant (which includes all cases in which the plaintiff did not allege spending), β_1 Spending is a variable that includes all cases in which the plaintiff alleged spending plus a violation of the U.S. Constitution or a federal statute but not an Establishment Clause violation, and β_2 (Spending x Establishment Clause) is an interaction term that includes all cases in which the plaintiff alleged a spending and an Establishment Clause violation.

[165] Because my dataset does not include *every* taxpayer standing case in federal court (i.e., it excludes unpublished decisions), statistical significance is a useful concept.

TABLE 2: LOGIT MODEL ESTIMATING IMPACT OF LAW ON FEDERAL, STATE, & MUNICIPAL TAXPAYERS IN COURT

Dependent Variable = Court's Decision on Standing
(Coding protocol: 0 = denied, 1 = granted)

	Federal Taxpayer N=148	State Taxpayer N=243	Municipal Taxpayer N=262
Spending	β=.784 S.E.=.428 Sig.=.067 Prob.=22%	β=.091 S.E.=.308 Sig.=.768 Prob.=59%	β=.046 S.E.=.281 Sig.=.870 Prob.=64%
Spending and Establishment Clause	β=1.786 S.E.=.410 Sig.=.000 Prob.=84%	β.944 S.E.=.366 Sig.=.01 Prob.=90%	β=.320 S.E.=.310 Sig.=.302 Prob.=72%
Constant	β=.005 S.E.=.384 Sig.=.989	β=.572 S.E.=.254 Sig.=.000	β=.657 S.E.=.250 Sig.009

At the same time, judges allow state taxpayers into court at statistically significant levels (significance equals .01) when they challenge spending projects under the Establishment Clause—ninety percent of the state taxpayers satisfying *Flast* get into court. While the positive coefficient for spending suggests that courts are likely to grant standing when state taxpayers challenge spending in other circumstances (i.e., a spending challenge but no Establishment Clause claim), this finding does not approach statistical significance and state taxpayers have little better than a 50-50 chance of getting standing. Although the Supreme Court never has explicitly *required* state taxpayers to meet any test beyond that set out in *Doremus*, lower federal courts apparently have taken notice of the *ASARCO* language, as well as various other cases indicating that the Supreme Court "has likened state taxpayers to federal taxpayers" and has largely granted standing only to those state taxpayers who satisfy *Flast*.[166]

Municipal taxpayers increase their chances of getting into court when they satisfy the federal taxpayer standing doctrine set out in *Flast*, but this finding is not statistically significant, and thus we cannot reject the null hypothesis that no relationship between the law and standing outcomes exists. Indeed, municipal taxpayers have roughly the same chance of getting standing regardless of the type of claim alleged (72% if the plaintiff satisfies *Flast* and 65% if the *Flast* requirements are not met). This latter finding does not necessarily mean that the team model of decisionmaking fails to explain out-

166 *See supra* Part II.B.1–2 for a discussion of *Flast* and *ASARCO*.

comes; after all, the Supreme Court never articulated a clear standing doctrine for municipal taxpayers and has not implied that courts deciding such cases should adhere to *Flast*.

The simple model in Table 2 implies that law impacts outcomes, but we cannot be sure that politics—or any other variable—has no role to play in the decisionmaking process, because the model does not account for anything but law. In other words, my simple model controls only for law, and I find that law explains outcomes. This is the approach that the empirical scholars in the extant literature adopted to understand the role of politics: They controlled only for politics and found that politics explains outcomes. Table 2 alone, therefore, cannot defeat the argument that politics explains outcomes. To overcome the finding that standing decisions are devoid of law, the findings presented in Table 2 must obtain not only in a simple model but also in a more complex model that controls for additional explanatory variables, including the politics of the court.

Moreover, the simple model presented in Table 2 does not speak to the agency model of adjudication, because the agency theory requires a separate analysis of district, appellate, and Supreme Court decisions. The model presented in Table 2 clusters all the courts together, making it impossible to discern the differential impact of law on courts throughout the judicial hierarchy. In the next Section, I estimate a more nuanced model and disaggregate the data to account for institutional constraints in order to investigate the robustness of the politics finding and to test the agency model predictions set out above.

B. Robustness as to Individual Case Factors

The basic results presented thus far are early indicators of the primary conclusion of this paper—that legal precedent has a role to play in judicial standing decisions. I now probe the robustness of this finding along various dimensions to ensure the results are not solely a function of the simplicity of the model estimated. This further investigation is necessary to determine whether team or agency models of adjudication have any purchase for explaining judicial outcomes or whether standing decisions are all politics, as the existing empirical studies suggest.

1. Additional Explanatory Variables

a. Judicial Politics

The most obvious variable missing from the basic model of standing is the courts' and plaintiffs' politics. To capture the politics of the courts, I link the political preference of the judge to the appointing

president.[167] Judges appointed by a Democratic president are coded as Democrats and those appointed by a Republican president are coded Republican.[168] Admittedly, this is a rough measure that may not always reflect the political positions of the judges and justices under investigation.[169] Given that this is the measure that Professors Rowland and Todd and Professor Pierce use in their studies, however, it allows for the most accurate comparison of outcomes and motivations across studies.[170] Moreover, the point of my study is to identify trends in the decisionmaking process: I am interested in whether Democratic appointees systematically vote in one direction while Republican appointees vote the opposite way, irrespective of the erratic and unpredictable decisions issued by a few individual judges or justices.

I also account for the politics of the plaintiffs in the more complex model. The type of claim pursued defines the politics of the plaintiff; plaintiffs seeking broad social regulation such as better prison conditions or more protection for the environment are designated as liberal, as are those who object to the expenditure of public

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[167] *See infra* note 170.

[168] I coded Democratic appointees equal to 1 and Republican appointees equal to 0. For multi-judge courts, I coded the court as equal to the number of Democrats on the panel. For example, I coded a three-judge appellate court as 0, .33, .67, or 1 depending on the number of Democratic appointees on the panel.

[169] Scholars have devised a number of different "politics" measures to investigate the impact of a judge's politics on the decisionmaking process. For a meta-analysis of eighty-four studies using different measures, see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999). The measures and surrogates devised to test judges' political preferences do not always work well in every context—thus some commentators argue for caution in selecting a particular measure. *See, e.g.*, Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 261–72 (1996) (undertaking methodological audit for purposes of testing "Segal/Cover" measure and finding that it works best in civil liberties cases but adds "little explanatory power for most non-civil liberties areas"); *see also* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002) (devising politics measure that uses Justices' votes on cases to estimate term-by-term ideological ideal point for each Justice). While one of the simplest surrogates measuring judges' and Justices' politics is the party of the appointing president, I use it here for the purposes identified in the text.

[170] Professors Rathjen and Spaeth create their own measure for capturing the Justices' politics that differs from the one used in Professors Rowland and Todd's study and in Professor Pierce's study. *Compare* Rathjen & Spaeth, *supra* note 14, at 27–29 (using measure that calculates Justices' politics by examining past votes in cases on threshold issues), *and* Rathjen & Spaeth, *supra* note 18, at 368–69, *with* Rowland & Todd, *supra* note 14, at 178–80 (using party of appointing president to measure district court judges' politics), *and* Pierce, *supra* note 7, at 1759 n.112 (using party of appointing president to measure appellate court judges' politics). Rowland and Todd, however, go further and divide the judges not only according to the party of the appointing president, but also examine outcomes under different presidents in the same party. *See* Rowland & Todd, *supra* note 14, at 178–80.

funds on religious institutions.[171] Plaintiffs challenging spending on affirmative action and minority set-asides in government contracting projects are labelled conservative.[172] Like the measure for court politics, this measure may not always capture the political and ideological position of each plaintiff in every lawsuit considered in this study. Nevertheless, it is a useful means for understanding how plaintiffs' claims generally correlate with court decisions.[173]

b. Ambiguous Standing Outcomes

In a fair number of lawsuits, the taxpayers challenge expenditures qua taxpayers, but in some circumstances the complainants simultaneously claim standing on a second ground—for example, as legislators, parents, educators, or voters.[174] Plaintiffs' counsel often take this approach as a litigation strategy; the more grounds for standing, the more likely the court will hear the case on the merits—even if the court dismisses several of the plaintiffs from the lawsuit.[175] Furthermore, in cases with multiple plaintiffs, courts tend to ignore the standing question, presumably believing that at least one plaintiff sat-

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171 I coded a liberal plaintiff equal to 1 and a conservative plaintiff equal to 0. Examples of cases that I coded as liberal include: *Mitchell v. Helms*, 530 U.S. 793 (2000) (challenging direct funding of religiously affiliated schools), *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (challenging creation of religious school district), and *School District v. Ball*, 473 U.S. 373 (1985) (challenging funding of religious schools through "shared time" and community education programs).

172 Examples of cases that I coded as conservative include: *Associated General Contractors of America v. Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996) (challenging minority and women hiring in city construction projects), and *Main Line Paving Co. v. Board of Education*, 725 F. Supp. 1349 (E.D. Pa. 1989) (challenging minority set-asides as violation of equal protection). If the political leaning of the plaintiff was unclear, I coded the case as "missing data." Examples of missing data include cases in which plaintiffs challenge government expenditures on sewers and roads. *E.g.*, Mitchell v. Stephens, 285 F. 756 (S.D. Cal. 1922) (challenging state sale of municipal bonds for construction of state highway as violation of federal statutory law); Kiefer v. City of Idaho Falls, 19 F.2d 538, 540 (D. Idaho 1927) (challenging city contracts with water supply company as contrary to "certain provisions of the Constitution").

173 For example, the recent Supreme Court case of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), involved a challenge to a Cleveland, Ohio voucher program that entitled taxpayers to use the voucher on any school their children attended—including religiously affiliated schools. *Id.* at 645–48. Because this decision also may be seen as supportive of inner-city, low-income children, the Establishment Clause challenge could be viewed as conservative. I coded the case as liberal, however, reflecting the plaintiffs' position on church-state relations, which was the dominant substantive issue in the case.

174 *See, e.g.*, *id.* (involving taxpayer, parent, and school teacher plaintiffs); Marsh v. Chambers, 463 U.S. 783 (1993) (involving taxpayer and legislator plaintiffs); D.C. Common Cause v. Dist. of Columbia, 848 F.2d 1 (D.C. Cir. 1988) (involving taxpayer and voter plaintiffs).

175 Counsel must, of course, have some grounds for claiming the named plaintiffs have standing in order to avoid sanctions against frivolous claims. *See* FED. R. CIV. P. 11.

isfies the relevant standing doctrine. This strategy suggests that at least one participant in the lawsuit (i.e., plaintiffs' counsel) believes the *taxpayer* has Article III standing, but nothing in the case indicates the judge necessarily agrees with this conclusion. I control for the cases in which the only complainant is a taxpayer, as well as for cases in which the taxpayer also claims standing under a second status (or in which there are additional non-taxpayer, named plaintiffs).[176]

Multiple-plaintiff cases are not the only cause for confusion in standing outcomes. A case in which the court believes the taxpayer will lose on both the standing issue and on the merits may also lead to ambiguous outcomes. In these cases, courts could first address standing, hold for the government, then move to the merits and rule for the government again. But able judges might well choose an alternative route to achieve the same outcome: addressing either standing or the merits, but not both. If the standing law is complex, judges will ignore standing and address only the merits for purposes of dismissing the case; when the standing law is more simple, they may address only standing and ignore the merits of the case.[177] When these circumstances lead judges to ignore standing, the courts appear to rule for the taxpayer; indeed, I characterize these cases as taxpayer standing victories, though if the court explicitly had addressed the standing issue it might have ruled for the government.

This discussion may imply that when courts assume standing, they are more likely to deny the taxpayer's claim on the merits, but a regression analysis of the question proves that no such correlation exists. In fact, courts that assume standing are more likely to rule *in favor* of the taxpayer on the merits.[178] Nevertheless, the point is a good one—my coding protocols may have led me to view a case as a taxpayer standing victory when in fact the judge believes the taxpayer did not have standing but for efficiency purposes chose not to comment on the issue. The impact of my coding decision (i.e., viewing the case as a standing victory) should tame the significance of law in the

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[176] I coded this variable, "plaintiff sought standing on more than one status," equal to 0 if plaintiff was only a taxpayer and equal to 1 if plaintiff sought standing on more than taxpayer status.

[177] *See, e.g.*, Warren v. Pataki, No. 01-CV-0004E(Sr), 2002 U.S. Dist. LEXIS 861, at *8–*9 (W.D.N.Y. Jan. 9, 2002) (addressing merits but noting standing problems exist).

[178] In this bivariate model, the dependent variable is the courts' decision on the merits (coded 0 if the government wins and 1 if the taxpayer wins) and the independent variable is the courts' decision to discuss or assume standing (coded 0 if the court assumed standing and 1 if the court discussed standing). The coefficient of the estimate is -.233, the standard error is .198, and statistical significance equals .239—which means that we cannot reject the null hypothesis that there is no relation between courts' rulings on the merits and their standing decisions.

statistical model rather than exaggerate it, because if I view cases that do not conform to precedent as standing victories, then it will appear judges are granting standing on some basis other than law. This ambiguity should work to support rather than undermine the studies claiming that politics explain outcomes. To assure robust results, I add an additional variable to the model to control for cases that assume standing rather than discuss it.[179]

c. Doctrinal Era

The era in which the court decided the case may also play a role in the outcome. The spike depicted in Figure 1 above indicates that *Flast v. Cohen*, the well-known 1968 Supreme Court case granting standing to federal taxpayers, had a noticeable impact on *all* taxpayer-plaintiffs—more individuals filed lawsuits challenging government expenditures after *Flast* than in any era prior to 1968.[180] *Flast* also may have impacted federal judges. After 1968, courts may have granted standing more often to taxpayers (in all contexts) due to the new open-door policy for federal taxpayers enunciated in *Flast*. At the same time, *Flast* could work to reduce the number of standing grants; if courts borrowed the *Flast* doctrine for state and municipal taxpayers, as the basic model depicted in Table 2 suggests, a group that had fewer hurdles for standing purposes prior to the Supreme Court's decision in *Flast* may have faced more extreme requirements post-1968. To assess the role of *Flast* and its impact on outcomes, I control for the era during which the court rendered its decision.[181]

d. The Merits

Finally, some commentators and analysts argue that it is difficult to separate standing decisions from decisions on the merits. They take the position that if courts believe the taxpayer should lose on the merits, then the courts will deny standing, and vice versa.[182] Under this view, the law of standing plays no role in standing outcomes—the judges' views on the merits of the case motivate the standing decision.

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[179] I coded this dichotomous variable, "court discussed standing," equal to 0 if the court assumed standing and equal to 1 if the court discussed the issue.

[180] *See supra* Fig.1.

[181] I coded this dichotomous variable, "case decided after *Flast v. Cohen*," equal to 0 if the judge rendered the decision prior to 1968 and equal to 1 if the decision was post-1968.

[182] *See* Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144–54 (1977) (arguing that "judicial expressions of skepticism about the merits" often explain standing outcomes); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 47 (arguing that two Supreme Court decisions with similar standing claims yet opposite standing holdings were examples of "typical Supreme Court practice").

If federal courts conflate the standing and merits decisions in the manner just described, we might observe taxpayers winning the majority of their claims once they pass the threshold standing requirement. In fact, only forty-two percent of the taxpayers who win standing also prevail on the merits—a finding that suggests courts do not use standing as a means of deciding the merits but instead make two independent decisions.[183] Not only does the low success rate at the merits stage undermine the theory that standing decisions are proxies for the more substantive decisions on the merits, but the theory itself also raises a difficult correlation/causation question. Given that we cannot claim to be in the judge's head, it is problematic to conclude that the merits decision could operate as an explanatory variable in the standing model, even if the taxpayers won the vast majority of their cases. The theory of standing as a proxy would require that we explain an event that occurs in time period t=1 by an event that has not yet occurred but will take place down the road in time period t=2.[184]

Nevertheless, statistical models do exist to assist in the investigation of exactly this question: Are two seemingly independent decisions in fact dependent on one another? I used a model devised by James Heckman to answer this question and found no dependence between federal judges' standing decisions, on the one hand, and their decisions on the merits on the other.[185] Thus, while theoretically and intuitively standing may not operate as a meaningful threshold, all the empirical and statistical evidence suggests just the opposite. For purposes of this paper, I proceed as if they are independent, but I return to this important question below.[186]

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183 The database includes 663 taxpayer lawsuits. Of these, 424 of the plaintiffs obtained standing and 181 of those who got into federal court won on the merits.

184 I thank Jason Roberts for helping to clarify my thoughts on this issue.

185 The Heckman model fits the standing model and the model on the merits with a common error structure to see if there is correlation or dependence between the error term in the standing model and that found in the merits model. This is done by comparing the basic logit models to the Heckman model with selection and performing a likelihood ratio test to see whether there is dependence or correlation between to the two error terms. In essence, the selection model helps gain efficiency: If there is a common error structure to the error terms and one fits the regular logit models, standard errors for one's variables will be bigger than they should be, which may cause the analysis to fail to uncover relationships in the data that exist. Selection models, by accounting for commonality in the error terms, if it exists, would produce smaller and more "accurate" standard errors. *See* James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 ECONOMETRICA 153 (1979) (setting out model); *see also* Richard J. Timpone, *Structure, Behavior, and Voter Turnout in the United States*, 92 AM. POL. SCI. REV. 145, 146–47 (1998) (using Heckman model to discern relationship between model of voter registration and voting model, and finding results that differ from those obtained when models are estimated separately).

186 *See infra* Part V.C.3.

2. *Estimating a More Complex Model*

In this Part, I estimate a more complex model. In addition to the legal factors found in the simple model presented in Table 2, I control for five additional independent variables: the appointing president, the plaintiff's politics, the existence of more than one possible standing status, whether standing is explicitly discussed, and the era in which the court considered the controversy.

TABLE 3: LOGIT MODEL ESTIMATING THE IMPACT OF LAW AND POLITICS ON FEDERAL, STATE, AND MUNICIPAL TAXPAYERS IN COURT

Dependent Variable = Court Decision on Standing
(Coding Protocol: 0 = denied, 1 = granted)

	Federal Taxpayer N=120	State Taxpayer N=195	Municipal Taxpayer N=219
Spending	β=1.345 S.E.=.544 Sig.=.013	β=.271 S.E.=.393 Sig.=.490	β=.280 S.E.=.386 Sig.=.469
Spending and Establishment Clause	β=1.212 S.E.=.501 Sig.=.015	β=1.643 S.E.=.537 Sig.=.002	β=.207 S.E.=.484 Sig.=.668
Party of the Appointing President	β=.148 S.E.=.485 Sig.=.760 Prob.=46%	β=.023 S.E.=.420 Sig.=.957 Prob.=83%	β=.400 S.E.=.344 Sig.=.245 Prob.=59%
Plaintiff Politics	β=1.141 S.E.=.488 Sig.=.019	β=.094 S.E.=.398 Sig.=.814	β=.748 S.E.=.340 Sig.=.028
Plaintiff Sought Standing on More Than One Ground	β=.240 S.E.=.447 Sig.=.591	β=.362 S.E.=.364 Sig.=.320	β=.432 S.E.=.323 Sig.=.181
Court Discussed Standing	β=.973 S.E.=.583 Sig.=.095	β=1.600 S.E.=.428 Sig.=.000[187]	β=1.198 S.E.=.371 Sig.=.001[188]
Case Decided After *Flast v. Cohen*	β=.098 S.E.=.574 Sig.=.941	β=.137 S.E.=.488 Sig.=.778	β=.265 S.E.=.404 Sig.=.512
Constant	β=.806 S.E.=.978 Sig.=.409	β=1.601 S.E.=.705 Sig.=.023	β=.164 S.E.=.603 Sig.=.786

Table 3 reports my findings for the more complex model. The model indicates that, for the most part, the additional facts and cir-

[187] Although I highlighted the statistically significant findings associated with courts' decisions to assume standing, as I note above, this finding is predictable. *See supra* notes 178–80 and accompanying text. Interestingly, the role of law continues to be quite strong even when the model controls for cases in which the standing decision is hidden.

[188] *See supra* note 187.

cumstances do not help to explain standing outcomes. The political makeup of the court, the status under which plaintiffs seek standing, and the doctrinal era do not impact decisions at statistically significant levels; any correlation therefore is more likely due to chance than to an association between the dependent and independent variables in the model.

Law continues to correlate with standing outcomes in the more complex model in precisely the same way, just as in the simple model estimated in Table 2. What Table 3 uncovers, however, is the important role that the *plaintiffs'* politics have in the decisionmaking process: Courts systematically favor liberal plaintiffs at statistically significant levels. The preference for liberal plaintiffs at first cut suggests that politics and law may be equally important factors in standing decisions, but a closer look at the finding reveals otherwise. Consider the types of claims that liberal plaintiffs bring to federal court vis-à-vis their conservative counterparts. In this database, liberal taxpayers tend to allege Establishment Clause violations while conservative plaintiffs are more likely to challenge spending under the Equal Protection and Due Process Clauses—two constitutional claims that the *Flast* doctrine unambiguously bars.[189] In short, the strong finding associated with the plaintiffs' politics may have more to do with the relevant legal doctrine than with the courts' own policy preferences. The model, of course, controls for the type of claim alleged, and thus the statistically significant finding nevertheless indicates that liberal plaintiffs are getting into court more often than conservative plaintiffs, even absent an Establishment Clause allegation. The fact that both Republican and Democratic appointees have a bias against conservative plaintiffs, however, lends additional support to the hypothesis that this bias is grounded in law and not in politics.[190]

These preliminary findings suggest something remarkable about the role of Supreme Court precedent in constraining judicial decisionmaking. First, it is reasonable to assume—and many scholars do—that narrow and unambiguous rules lead to predictable outcomes, while broad and inchoate rules lead to chaotic decisionmaking in the lower federal courts.[191] The Supreme Court devised a coherent and

[189] Just 7% of the conservative plaintiffs in the database alleged an Establishment Clause violation, while 46% of the liberal plaintiffs brought such a claim.

[190] If I run the model separately for Republican and Democratic appointees, I still find no statistically significant correlation between judges' politics and the standing outcomes.

[191] *See, e.g.*, Teri Jennings Peretti, *Does Judicial Independence Exist?*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 103, 110–11 (Stephen B. Burbank & Barry Friedman eds., 2002) (collecting empirical studies of judicial decisionmaking and noting findings that judges with ideological differences reach agreement on outcomes when law is clear); Pierce, *supra* note 7, at 1775 (arguing that disorga-

restrictive doctrine for federal taxpayers and this appears to have led to organized decisionmaking throughout the federal courts. Because courts have failed to articulate such a doctrine for municipal taxpayers, outcomes in this context are difficult to explain and predict. The surprising finding of the study is not that narrow rules confine while broad rules liberate judges, but that even "narrow" rules can lead to unpredictable results. The Court never explicitly mandated that lower courts apply *Flast* to state taxpayers challenging government expenditures; the only clear mandate is that state taxpayers must allege that actual spending occurred. In short, even if the Supreme Court intended lower courts to exercise greater discretion as to the state taxpayer claims appropriate for federal court jurisdiction, judges have taken it upon themselves to adopt constraining rules.[192]

What do the findings suggest about the competing theories of adjudication? Table 3 lends support to the team theory of adjudication, a theory that assumes that doctrine governs outcomes. When the legal precedent is clear, unambiguous, and narrow (or it is perceived to be such), as in the federal and state taxpayer context, judges adhere to it, apparently in an effort to achieve "correct" outcomes. With incoherent precedent, however, judges take an unpredictable approach to decisionmaking, as observed in municipal taxpayer lawsuits. *Frothingham v. Mellon* established a presumption in favor of municipal taxpayer standing but did not suggest that all municipal taxpayers had a right to be heard in federal court. Table 3 indicates that this presumption has led courts to decide these cases in an unpredictable manner. This does not mean that the team theory fails, but rather, it suggests that the correct outcome is unknowable and that judicial discretion is appropriate for deciding cases.[193] The effect of strong precedent and its ability to constrain judges undermine the

nized and chaotic precedent leads to political decisionmaking); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1059–65 (1995) (arguing that incoherent rules govern judicial review of agency decisions leading federal judges to pursue their own preferences).

[192] Some legal scholars argue that when the Supreme Court stays its hand on an issue, it enables "percolation," a process through which lower courts are able to review problems in an uninhibited manner, leading to multiple perspectives on a difficult issue. This percolation process and the variety of viewpoints it produces, in turn, enable the Supreme Court ultimately to reach the optimum outcome via temporary lower-court conflict. *See* Caminker, *supra* note 109, at 56 & n.196 (noting courts and commentators supporting percolation process); Dorf, *supra* note 125, at 65–67 (explaining benefits of delayed Supreme Court decisionmaking). *But see* Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 690 & n.2 (arguing that percolation is simply means for justifying deferral of difficult decisions and that it hurts reliability and leads to flood of litigation and forum shopping).

[193] *See* Dorf, *supra* note 125, at 65–66 (discussing importance of percolation).

finding in the three existing empirical studies discussed above—politics is not always the best predictor of outcomes. Indeed, thus far, we have not observed an important role for politics in any of the taxpayer standing contexts. Finally, Table 3 does not speak to the agency theory of adjudication, because the model does not control for the judges' position in the judicial hierarchy. In the next Section, I examine outcomes up and down the judicial chain of command and find that institutional constraints do have a strong role to play in the decisionmaking process. In short, while the team theory appears to be the most successful at explaining judicial outcomes up to this point, further investigation suggests that the agency theory of adjudication has the most explanatory value.

C. Robustness as to Institutional Factors

I now turn to the institutional factors that may help to explain standing decisions. The complex model presented in Table 3 controlled for seven explanatory variables, but the model clustered the district, appellate, and Supreme Court decisions together. If the agency theory of decisionmaking has any predictive capability, a model that clusters the data will obscure the differential approach to decisionmaking found in the trial, appellate, and Supreme Courts. This final control should not have any impact on the statistical findings, whether politics motivates court decisions at all levels, as the existing empirical literature argues, or if legal doctrine alone governs as the team theory model argues.

To test the agency theory, I estimate a statistical model with the court's decision on standing as the dependent variable and the same seven explanatory variables discussed above.[194] I run the model separately for district, appellate, and Supreme Court decisions. While this test of robustness is necessary to understand fully the predictive power of the agency theory, one drawback of sorting the cases along this dimension is that it reduces the sample size, especially at the appellate and Supreme Court levels. This means that the results may be skewed and may not show statistical significance when high levels of correlation in fact do exist, and at the same time the predicted probability calculations offer very little information. Accordingly, I present my quantitative findings in the tables below, but I also undertake a qualitative analysis of the data in order to discern nuances and to gather a more complete understanding of the decisionmaking process. After a brief discussion of my findings at the three levels of the judicial hierarchy, I return to the team and agency theories of adjudi-

194 *See supra* Part V.B.1.

cation and explain how the data supports the agency theory. Furthermore, I reject the argument of the three empirical studies discussed above that standing decisions are always rooted in political choices.

1. *District Court Standing Decisions*

Table 4 presents my findings for district court decisions. It indicates that the basic model estimated earlier continues to have purchase for explaining district court outcomes: District courts largely adhere to Supreme Court doctrine. Federal taxpayers satisfying *Flast* are likely to get into court and judges deny standing to plaintiffs who fail this test. This same outcome obtains in the state taxpayer context: *Flast* appears to control. The standing decisions in the municipal taxpayer context continue to elude explanation—none of the political or legal factors in the model correlate closely with the judges' decision to grant or deny standing.

Politics appear completely absent from the district court decision-making process. Although in the federal taxpayer context liberal plaintiffs who come into court are highly likely to get standing, this correlation, as noted above, has more to do with the legal doctrine than court politics.[195] These findings mirror the findings uncovered by the basic and more complex models investigated above.

TABLE 4: LOGIT MODEL ESTIMATING DISTRICT COURT STANDING DECISIONS

Dependent Variable = District Court's Decision on Standing
(Coding Protocol: 0 = denied, 1 = granted)

	Federal Taxpayer N=87	State Taxpayer N=133	Municipal Taxpayer N=174
Spending	β=1.435 S.E.=.663 Sig.=.0131	β=.190 S.E.=.486 Sig.=.695	β=.091 S.E.=.340 Sig.=.840
Spending and Establishment Clause	β=1.563 S.E.=.648 Sig.=.016	β=1.818 S.E.=.678 Sig.=.007	β=.274 S.E.=.578 Sig.=.636
Party of the Appointing President	β=.232 S.E.=.572 Sig.=.685	β=.339 S.E.=.477 Sig.=.477	β=.247 S.E.=.372 Sig.=.507

[195] *See supra* notes 187–90 and accompanying text. Again, I do not highlight the close correlation between a court's decision to assume standing and state and municipal taxpayer victories. The important finding is that by controlling for all the possible variations in the plaintiffs and cases, one can see that the law continues to play a noticeably strong role in district court outcomes.

	Federal Taxpayer N=87	State Taxpayer N=133	Municipal Taxpayer N=174
Plaintiff Politics	β=1.932 S.E.=.619 Sig.=.002	β=.143 S.E.=.517 Sig.=.782	β=.537 S.E.=.397 Sig.=.176
Plaintiff Sought Standing on More Than One Ground	β=.408 S.E.=.622 Sig.=.511	β=.192 S.E.=.468 Sig.=.682	β=.481 S.E.=.385 Sig.=.212
Court Discussed Standing	β=.663 S.E.=.690 Sig.=.336	β=2.056 S.E.=.573 Sig.=.000[196]	β=1.637 S.E.=.452 Sig.=.000[197]
Case Decided After *Flast v. Cohen*	β=.941 S.E.=.700 Sig.=.179	β=.050 S.E.=.633 Sig.=.938	β=.104 S.E.=.461 Sig.=.821
Constant	β=.872 S.E.=1.189 Sig.=.463	β=2.340 S.E.=.968 Sig.=.016	β=1.159 S.E.=.797 Sig.=.146

The findings presented in Table 4 unambiguously challenge Professors Rowland and Todd's finding that politics—and only politics—explains district court standing outcomes. A model that controls for both legal and political variables and that examines both explicit and implicit standing decisions leads to a very different conclusion: Law, not personal ideology, motivates federal trial court decisions on standing. Given the range of biases and limitations found in Rowland and Todd's study—problems that my study overcomes through an area-studies approach—Table 4 indicates that we now can accept the idea that, as a general matter, federal district courts look to the law and will adhere to it when the Supreme Court sets out reasonably clear doctrine.

It might be tempting to accept Rowland and Todd's conclusion that politics motivates decisions when the law is vague and incoherent and when the standing controversy seems particularly important. Given that Rowland and Todd only included decisions where the court explicitly discussed standing in their dataset, this conclusion may seem to withstand the findings in Table 4. But the data do not support even this narrow claim. In a mini-model investigating only cases in which the judge discussed standing (i.e., the most controversial cases in the database), I find that politics no more explains outcomes than does law or the other variables for which I control.[198]

[196] *See supra* note 187.

[197] *See supra* note 187.

[198] When I estimate a complex model with only court decisions that explicitly discuss standing, I do not uncover a strong role for politics. Indeed, even in a simple bivariate model (i.e., a bivariate model estimated in the following way: Standing Decision in Cases

While undermining Professors Rowland and Todd's empirical study, the district court findings presented in Table 4 lend support to the team theory of adjudication. Lower court judges appear to be team players adhering to doctrine and not their own political preferences in an attempt to reach "correct outcomes." The findings, however, also support the agency theory of adjudication. As discussed above, the agency theory would predict that district courts follow Supreme Court doctrine and not their individual political preferences, given the level of oversight and monitoring that appeals courts exercise. Litigants have a right of appeal to the circuit courts, and the higher court can and will overturn lower court decisions if the outcomes do not align with the panel's own preferences.[199] Thus, we would expect district court judges to adhere to clear precedent to avoid reversal and to decide cases subject to more ambiguous law based on their predictions of how appellate judges will decide the issue. But in no context would the model predict that the district court judges' own politics would surface as the leading explanatory variable.

2. *Appellate Court Standing Decisions*

Unlike in the district court context, the team and agency models begin to predict divergent results with respect to circuit court standing decisions. The statistical finding that legal doctrine governs district court decisions is thus particularly notable when contrasted with the appellate court findings presented in Table 5 below. In the appellate court context, politics is the leading predictor. Although *none* of the variables reach statistical significance for federal taxpayer standing outcomes, the judges' politics as measured by the party of the appointing president is the *only* variable that has explanatory value for state and municipal taxpayer outcomes. Democratic appointees are far more likely to grant standing to state and municipal taxpayer plaintiffs than are Republican appointees. These findings are not statistically significant, but they approach significance and have far more explanatory power than any other control variable in the model.

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that Discuss Standing=β_0 + β_1 Party of Appointing President), I uncover no correlation between law and politics at the district court level in standing decisions.

199 The district court, of course, will look to appellate court precedent for purposes of determining the best outcome to avoid reversal, but it will also look to Supreme Court doctrine given that it is impossible to know in advance which appellate judges will review the district court's opinion. *See supra* notes 132–34 and accompanying text.

TABLE 5: LOGIT MODEL ESTIMATING APPELLATE COURT STANDING DECISIONS

Dependent Variable = Appellate Court's Standing Decision
(Coding Protocol: 0 = denied, 1 = granted)

	Federal Taxpayer N=25	State Taxpayer N=35	Municipal Taxpayer N=32
Spending	β=2.558 S.E.=1.802 Sig.=.156	β=11.046 S.E.=39.379 Sig.=.779	β=1.537 S.E.=1.090 Sig.=.158
Spending and Establishment Clause	β=1.340 S.E.=1.343 Sig.=.318	β=1.924 S.E.=1.653 Sig.=.245	β=.542 S.E.=1.099 Sig.=.622
Party of the Appointing President	β=1.260 S.E.=1.893 Sig.=.503	β=5.167 S.E.=2.803 Sig.=.065	β=2.483 S.E.=1.546 Sig.=.108
Plaintiff Politics	β=.086 S.E.=1.226 Sig.=.944	β=.523 S.E.=1.136 Sig.=.645	β=1.213 S.E.=1.075 Sig.=.259
Plaintiff Sought Standing on More Than One Ground	β=.552 S.E.=1.140 Sig.=.628	β=2.149 S.E.=1.465 Sig.=.142	β=.799 S.E.=.968 Sig.=.409
Court Discussed Standing	β=9.430 S.E.=99.635 Sig.=.925	β=.095 S.E.=1.475 Sig.=.949	β=1.362 S.E.=1.523 Sig.=.371
Case Decided After *Flast v. Cohen*	β=9.579 S.E.=67.393 Sig.=.887	β=4.992 S.E.=99.668 Sig.=.960	This variable constant for all cases
Constant	β=20.086 S.E.=120.290 Sig.=.867	β=7.105 S.E.=107.219 Sig.=.047	β=3.255 S.E.=2.295 Sig.=.156

The fact that court politics correlate closely with standing decisions in the state and municipal context and not in the federal context is predictable under the agency model of adjudication. State and municipal standing decisions are not subject to heavy oversight by the Supreme Court; only once has the Supreme Court explicitly reviewed an appellate court state or municipal taxpayer standing decision.[200] Moreover, I could not find a single en banc reconsideration of a three-judge panel's decision on state or municipal taxpayer standing. With virtually no review or other such institutional constraint in this context, appellate judges are free to decide cases and reach outcomes that are in alignment with their own policy preferences.

[200] *See* Doremus v. Bd. of Educ., 342 U.S. 429, 433–35 (1952) (reversing lower court decision to grant standing to state taxpayers who challenged Bible readings in public schools); *see also supra* Part II.B.2 (discussing Supreme Court decision mandating that state taxpayers challenge actual expenditures to get into federal court).

The lack of review in the state and municipal context can be contrasted with more significant review in federal taxpayer lawsuits. As discussed above, the court returned to the standing issue five times after the 1968 decision of *Flast v. Cohen*, denying standing in three of these.[201] With more intense Supreme Court oversight, appellate court judges likely would not risk deciding federal taxpayer decisions according to their political preferences.

Why, then, is the legal doctrine governing these cases not highly correlated with outcomes? The small number of federal taxpayer decisions in federal appellate courts may explain the lack of statistically significant findings in Table 5. A close examination of the twenty-five appellate federal taxpayer cases in the database indicates that appellate courts are hostile to federal taxpayer lawsuits to a greater extent than the doctrine mandates. Only four federal taxpayers have prevailed on the standing question since *Flast*, and in all but one case—a case with facts and circumstances that mirrored *Flast*—the Supreme Court overruled the decision to grant standing.[202] The Supreme Court's resistance to federal taxpayers seems to have rendered the appellate courts similarly hostile to their claims; in fact, a number of cases presented facts that were similar to those found in *Flast*, but the appellate courts nevertheless denied the federal taxpayers standing.[203] Why are the appellate courts predisposed to deny federal taxpayers standing regardless of their own politics or the type of claim the plaintiff alleges? One inference that we might draw is that appellate judges are aware that judicial review (both en banc and by the Supreme Court) virtually is expected when it comes to lawsuits challenging federal legislation, and that this review likely will lead to a reversal. Moreover, decisions in this context are bound to get significant media attention and thus can implicate the courts' own concerns about legitimacy and the perception of objectivity.[204] In short, there appears to be an effective oversight mechanism for federal taxpayer standing decisions—so effective that judges refuse to grant standing even in contexts where it may be warranted. The important point

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[201] *See supra* Part II.B.1 (giving overview of case law). The fifth case, *Bowen v. Kendrick*, 487 U.S. 589 (1988), contained facts and circumstances that mirrored those found in *Flast*, and the Court granted standing to the taxpayers challenging the allocation of federal funds to religious educational organizations. *See supra* notes 79–81 and accompanying text.

[202] *See* Staudt, *supra* note 38, at 806–13 (providing in-depth discussion of federal taxpayer standing cases in appellate courts).

[203] *Id.* at 810–13.

[204] *See, e.g.*, William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996) (arguing that shifting tides of public opinion can affect judicial decisionmaking).

here is that the appellate courts are predictably constrained in the federal taxpayer context but not in the state and municipal taxpayer context.

The findings presented in Table 5 also undermine the team theory of adjudication, under which doctrine should govern in the appellate courts regardless of the oversight mechanisms at play. This is especially so in federal taxpayer lawsuits where the law is clear and unambiguous; under the team theory of adjudication, the law in these cases should be highly correlated with standing grants and denials. Instead, we do not see the law controlling where we expect it most, and we do see politics playing a strong role in other outcomes. If the team theory of decisionmaking is tied to adherence to legal doctrine, it fails at the circuit court level.

Finally, the appellate court findings both support and undermine the conclusions that Professor Pierce reaches in his study of appellate court environmental standing decisions. Pierce argues that politics governs standing for environmental plaintiffs, and Table 5 confirms the relationship between judicial decisions and standing outcomes in two out of three contexts. The problem with Professor Pierce's study is not his finding, but his causation argument; he argues that judicial politics explain appellate decisions because the law governing environmental plaintiff standing is unclear and therefore easily manipulable.[205] While confused law may leave judges free to impose their own policy preferences in the decisionmaking process, clear and simple law is not sufficient to assure the appellate courts adhere to it in practice. The Supreme Court has articulated clear and simple law for federal taxpayer standing, but this has not led to obedience in the appellate courts. Instead, it has led to an all-out refusal to hear federal taxpayer cases. Moreover, most federal district courts see state taxpayer cases as governed by clear and unambiguous law and yet appellate courts freely decide these cases according to their own political preferences. In the state taxpayer context, there is no effective oversight and, with this knowledge, judges freely engage in raw politics. Pierce, like virtually every other standing scholar considering mechanisms for taming politics, therefore fails to consider the two key variables that explain decisions in higher courts: Formal rules *along with* effective oversight are necessary to achieve predictable and law-abiding outcomes.

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[205] Pierce, *supra* note 7, at 1758–63.

3. *Supreme Court Standing Decisions*

In Table 6, I present empirical findings on Supreme Court decisionmaking. Because the data set is too small to disaggregate federal, state, and municipal taxpayers, I cluster all the petitioners together in a single model. The model uncovers a surprising finding: Supreme Court Justices, subject to the fewest institutional constraints, do not seem to make standing decisions along political lines. Legal factors, however, also have little explanatory value in this context. Although the explanatory variables, at first cut, seem to have little purchase for explaining outcomes, this might be due to the fact that the Justices engage in strategic voting, thereby obscuring the political nature of the outcomes. If the Justices grant standing to disfavored petitioners in order to deny their claims on the merits, politics will not be discernable in the standing decisions, but they will in fact be the motivating factor. To capture this interaction, I report data on the Supreme Court's decisions on the merits. Table 6 indicates that Justices act strategically when granting standing and implement policy preferences at the merits phase of the litigation.

These findings on the Supreme Court support the agency theory of judicial decisionmaking: A high court with few institutional constraints will make decisions that reflect personal policy preferences. This finding, however, does not necessarily undermine the team theory of adjudication. Given the fact that the Supreme Court hears so few cases and has nearly complete discretion as to which cases to hear, the Court is likely to hear the most novel and unexpected controversies—that is, cases for which very little precedent exists. When precedent does exist, the Court often grants certiorari to overturn the earlier outcomes because the Court has discovered an "error." Thus, to speak about doctrine and law as the motivators of correct legal outcomes at the Supreme Court level is somewhat futile.[206] Nevertheless, it should give team theorists pause to see that politics is the *best* predictor of Supreme Court outcomes. While they might not expect to see a strong role for law—in many cases there is no law—team theorists would not expect politics to be correlated highly with outcomes. If the team theory is grounded in the idea that correct outcomes dictate standing decisions more than politics, then the findings presented in Table 6 suggest that the theory has little explanatory value for the Supreme Court.

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[206] *See* Caminker, *supra* note 109, at 10–12 (discussing flexibility of stare decisis at Supreme Court level and noting that "Supreme Court decisionmaking is somewhat constrained by, but not wholly determined by, existing precedents").

TABLE 6: LOGIT MODEL ESTIMATING SUPREME COURT STANDING AND MERITS DECISIONS

Dependent Variable = Supreme Court's Standing and Merits Decisions
(Coding Protocol: 0 = petitioner loses, 1 = petitioner prevails)

	Standing Decisions N=48	Merits Decisions N=35
Spending	β=.783 S.E.=1.117 Sig.=.484	β=19.882 S.E.=119.855 Sig.=.868
Spending and Establishment Clause	β=1.401 S.E.=1.442 Sig.=.331	β=.478 S.E.=1.999 Sig.=.811
Party of the Appointing President	β=.672 S.E.=2.513 Sig.=.789	β=13.617 S.E.=7.469 Sig.=.068
Plaintiff Politics	β=.903 S.E.=1.513 Sig.=.483	β=9.310 S.E.=57.661 Sig.=.872
Plaintiff Sought Standing on More Than One Ground	β=.339 S.E.=.877 Sig.=.699	β=.779 S.E.=1.241 Sig.=.530
Court Discussed Standing	β=.790 S.E.=1.172 Sig.=.431	β=2.220 S.E.=1.611 Sig.=.168
Case Decided After *Flast v. Cohen*	β=.676 S.E.=1.172 Sig.=.564	β=6.957 S.E.=3.860 Sig.=.072
Constant	β=.392 S.E.=1.596 Sig.=.806	β=1.213 S.E.=105.282 Sig.=.991

Finally, the findings in Table 6 support Professors Rathjen and Spaeth's findings on the political nature of standing. In their study of highly controversial cases—cases in which standing was not only directly addressed but occupied much of the Justices' attention—politics play an obvious role; the Justices voted their sincere preferences and the standing outcomes perfectly aligned with the Justices' political views.[207] In my broader and more comprehensive study, I find that the Justices take a more strategic approach to the problem. In many cases, they are willing to grant standing to a disfavored petitioner in order to decide against them on the merits. Both Rathjen's and Spaeth's finding and my own finding on politics are consistent with the agency theory of adjudication. Justices in the highest court

[207] *See supra* Part IV.B (discussing Professors Rathjen and Spaeth's findings).

with little or no oversight are free to pursue (in direct or indirect ways) their own policy preferences.

D. Summary of Empirical Findings

The statistical findings presented above have implications for the theoretical models of adjudication as well as the three empirical studies on standing that currently exist in the literature. My findings suggest that both formal legal rules and individual politics have key roles to play in the decisionmaking process and that we can explain these roles only if we disaggregate standing decisions and focus on the unique constraints on judges at different levels of the judicial hierarchy. Lower court judges generally do not permit their own policy preferences to impact their legal decisions in a noticeable fashion. They will adhere closely to formal rules set out by the Supreme Court, and in situations in which such rules are absent, the judges will still avoid the temptation to engage in political decisionmaking. The lack of a correlation between law and politics is not a surprise; district courts are subject to a high level of oversight and monitoring, and this works as a powerful deterrent to political decisionmaking. The appellate courts do not follow formal rules to such a degree. In situations in which the appellate judges are reasonably sure the Supreme Court will not review their decisions, they will pursue their own political preferences irrespective of the existing legal precedent. If the formal rules exist along with a high level of oversight, appellate judges are more likely to adhere to precedent. But even in these cases judges, may interpret the precedent far more strictly than necessary to avoid deciding the controversial issue altogether and to reduce the risk of being reversed. Finally, the Supreme Court Justices, with little oversight or institutional constraints to inhibit them, make decisions that reflect their sincere policy preferences in certain contexts but engage in more strategic decisionmaking in others—all in an effort to ensure they get their favored outcome.

This collection of findings lends significant support to the agency theory of adjudication and, at the same time, undermines the team theory of decisionmaking. Tables 4, 5, and 6 also enable us to reject the argument found in the existing empirical literature that standing decisions are all politics. Standing decisions may be motivated by politics, but only when neither clear doctrine exists nor judicial monitoring takes place. These findings also may have important policy implications for legal reform—they suggest that successful reform proposals require a focus on both law and institutions. In the next Part, I

investigate two standing reform proposals and assess their viability against the empirical findings in this study.

VI
IMPLICATIONS OF EMPIRICAL FINDINGS ON PROPOSED STANDING REFORMS

A long line of scholars has studied Supreme Court standing doctrine from a normative rather than a descriptive perspective, and many of these scholars have found the doctrine to be seriously problematic. Some argue that it leads to "wildly vacillating"[208] or unfair outcomes;[209] others contend that the law is "a large-scale conceptual mistake."[210] These views have led a number of constitutional scholars to search for an improved framework to determine who has the right to be in court. In this Part, I discuss the implications of my empirical findings for two proposals that have gained support among prominent scholars theorizing on Article III standing issues. The first proposal, initially put forth by Professor Mark Tushnet and most recently supported by Professor Gene Nichol, takes a "barebones" approach to standing, one that presumes a plaintiff's right to be in court.[211] The second proposal, advocated by Professor (now Judge) William Fletcher and Professor Cass Sunstein, seeks to limit the courts' role in determining standing by tying the plaintiffs' standing rights to the underlying substantive claim of the lawsuit.[212]

Both proposals seek to limit federal courts' discretion in making standing decisions, thereby avoiding the "confusion and obfuscation that have haunted standing law for the past several decades."[213] The four authors argue that the general standing doctrine that requires the plaintiff to demonstrate an "injury in fact," caused by the defendant and redressable by the remedy sought, offers little or no assistance to federal judges faced with standing controversies.[214] Accordingly, Professors Tushnet, Nichol, Fletcher, and Sunstein offer substitutes for the existing doctrine that arguably remedy the perceived drawbacks and pitfalls of the current standing regime.[215] My goal in this Part is

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208 Fletcher, *supra* note 4, at 223.

209 *See* Nichol, *supra* note 13, at 305 (noting that standing doctrine systematically "distorts constitutional litigation in favor of traditional bases of economic and social authority").

210 Sunstein, *supra* note 9, at 167.

211 Nichol, *supra* note 13, at 334–40; Tushnet, *supra* note 129, at 1706–07.

212 Fletcher, *supra* note 4, at 250–90; Sunstein, *supra* note 9, at 191.

213 Fletcher, *supra* note 4, at 291.

214 *See supra* notes 12–14 and accompanying text.

215 Some federal courts have already adopted certain aspects of both proposals that I discuss here. But the Supreme Court has never fully adopted either approach and, as I

not to assess the normative value of the proposals set forth—I accept that they are sensible in the abstract. Instead, I seek to discern whether they will do the heavy lifting necessary to achieve predictable and law-abiding standing outcomes. I argue that the proposals have certain advantages over the current standing doctrine, but both fall short of the stated goals: constraining politics and achieving predictable and law-abiding standing outcomes.

A. Professor Tushnet, Professor Nichol, and a Barebones Standing Doctrine

Professor Mark Tushnet first proposed a "barebones" standing policy in 1980.[216] His argument, couched as a response to a more complex approach to standing, is straightforward: The existing (and proposed) standing doctrine does not sort cases into appropriate categories to assure that courts grant standing to proper plaintiffs and deny standing to all others.[217] Tushnet argues that the standing doctrine is so amorphous and confused that courts can and do easily manipulate the rules, routinely producing problematic results under the guise that the law mandated the result obtained.[218] His barebones approach to standing would eliminate the chaotic collection of rules and standards and (a) insist only on real adversity between the plaintiff and defendant, and (b) require that the plaintiff be capable of generating a reasonably "concrete" and detailed record to facilitate the decisionmaking process.[219]

Professor Gene Nichol, a recent proponent of this approach, notes that the proposal would operate as a presumption in favor of standing, and that this presumption effectively would constrain politics and unfair outcomes by opening the federal courthouse doors to all types of plaintiffs—those with direct and indirect injuries as well as the privileged and underprivileged.[220] This presumption, he argues,

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argue below, the reforms would not lead to better and more predictable outcomes in any event.

216 Tushnet, *supra* note 129, at 1705–07, 1716, 1726. Actually, Professor Tushnet seemed to have the "barebones" approach in mind in an earlier piece. *See* Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 700 (1977) (advocating more "generous law of standing" which "would be limited only if a candid assessment of the plaintiff's ability to present the case adequately and a pragmatic evaluation of the factual concreteness that could be expected led to the conclusion that the necessary 'concrete adverseness' was absent").

217 Tushnet, *supra* note 129, at 1705.

218 *Id.* at 1705–06.

219 *Id.* at 1706.

220 *See* Nichol, *supra* note 13, at 305, 338. Professor Nichol has written a series of articles on standing in addition to his most recent piece on the subject. *See* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985)

would go far to dismantle the artificial categories of injury that have rendered the Court's standing jurisprudence one of the "most manipulated, result-oriented arenas of constitutional law."[221]

Professors Tushnet and Nichol do not favor eliminating the doctrine of standing altogether, nor do they argue that the presumption should always lead to standing; instead, these authors, and others who agree with them, support an open door approach that would reject standing when "strong reasons are brought to bear against its exercise."[222] Courts should presume that standing exists but deny it when important rationales counsel otherwise—for example, when the plaintiff is unable to generate an adequate factual record, or when parties with a more direct interest in challenging the alleged illegal behavior seem able or willing to come forward.[223] The authors argue, however, that federal courts should not be so quick to deny standing even if these problems exist; judges should seek to remedy the perceived problem and attempt to supplement the thin record by "inviting intervention, welcoming amicus presentations, and, in class actions, authorizing the distribution of discretionary notices."[224]

Supporters of this proposal argue that it would bar federal courts from hiding their viewpoints behind the cloak of standing and would force judges to confront meritorious issues directly—which is arguably the "most important task that any [A]rticle III tribunal faces."[225] In short, the barebones doctrine would force courts to hear cases on the merits. At the same time, the doctrine effectively would mandate that courts explain why standing is *inappropriate* in the rare cases in which the court denies it, thereby leading to greater transparency in the decisionmaking process.

If the goals are to eliminate judges' personal biases and ideological leanings and to assure more predictable and fair outcomes for litigants seeking their day in court, then my empirical findings suggest that the rule will not work very well. A presumption in favor of standing that can be circumvented only if "strong reasons" exist will open the door to—indeed, sanction—the very problem that Profes-

(illustrating problems with Burger Court standing decisions); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) (critiquing law of standing as difficult to apply and problematic in theory); Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C. L. REV. 798 (1983) (examining Supreme Court jurisprudence on standing from *Frothingham* to *Valley Forge* and suggesting alternative to private rights theory).

221 Nichol, *supra* note 13, at 339.

222 *Id.*

223 Tushnet, *supra* note 129, at 1706.

224 *Id.* at 1707.

225 *Id.* at 1726.

sors Tushnet and Nichol seek to fix. The barebones strategy does not articulate any standard for discerning between cases that fit within the presumption and those that do not, and thus federal courts will be free to continue relying on their own viewpoints and agendas at this threshold stage of the litigation; judges will grant standing to preferred plaintiffs (because the presumption exists) and deny standing to all others (because "strong reasons," such as the possibility of a better complainant coming later, counsel against standing). Although my findings indicate that district courts may not pursue this strategy with vigor, we can expect just such an approach in the appellate courts and in the Supreme Court.[226]

Professors Tushnet and Nichol might argue that it would not be easy for judges simply to deny standing to a plaintiff; they first would have to attempt to remedy the standing defect, and only when those efforts fail would judges be permitted to keep the plaintiff out of the courtroom. Moreover, under the proposed rule, judges would have to explain standing denials, and these explanations then would be subject to review. Reviewing courts would reconsider these decisions under the broad and open standard that requires a court to grant standing except in the rarest circumstances.

These arguments do not eliminate the problems that accompany the barebones approach. First, the assumption that federal judges, often overworked and backlogged, will pursue all avenues to assure that litigants get a hearing on the merits is heroic but impractical. A liberal (or conservative) judge who has no interest in granting a conservative (or liberal) plaintiff standing more likely will do just the opposite: find reasons to deny standing even if the factual record allows for a concrete decision on the issues brought into court.[227] Although federal judges who deny standing must rationalize their decisions, judges could easily use the law as a smokescreen to justify their preferred outcomes.[228] In short, judges could explain that better and more directly interested plaintiffs exist to challenge the alleged illegal behavior.

Second, the oversight and monitoring mechanisms inherent in the judicial hierarchy will offer little assistance in taming judges' inclinations to act politically. As noted above, district courts will adhere to strict Supreme Court doctrine—but only as a means of avoiding reversal by the appellate court and only if the doctrine is clear and

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226 *See supra* Part V.C.

227 *See supra* Part III.B.

228 Judges, for example, could argue that third parties and amici curiae failed to provide the detail necessary to ensure that the court makes a good decision.

unambiguous.[229] If the doctrine is open-ended, district courts will pursue a more chaotic approach to decisionmaking.[230] Even if we view the presumption for standing as a narrow and clear doctrine—thus mitigating the impact of politics at the district court level—appellate court review will undermine the doctrine completely. When the losing litigant appeals to the circuit court for review of the standing decision, the court likely will pursue its own political agenda, especially if the Supreme Court is unlikely to grant certiorari to the case.[231] At the Supreme Court level, if certiorari is granted, the presumption of standing will fare no better than it did in the appellate courts: The Justices routinely pursue their own policy preferences, and a presumption of standing with exceptions for "strong reasons" likely would not impact this agenda.[232] In short, with the possible exception of the district courts, the barebones proposal will open the door even wider for judges to pursue their preferred policy outcomes.

Indeed, the barebones approach will open the door to judicial policymaking in a manner that the current doctrine now forecloses. Consider the application of the current standing doctrine to federal taxpayers in court. Under current Supreme Court doctrine, federal taxpayers unambiguously have standing if they challenge Article I, Section 8 spending projects under the Establishment Clause. Federal courts largely adhere to this narrow and refined doctrine at every level of the judicial hierarchy.[233] If the Supreme Court adopts the Tushnet/Nichol proposal, however, judges could deny federal taxpayers the right to be in court simply because they thought a better complainant (e.g., one more directly harmed by the legislation and with more information for the record) might come forward. The current doctrine, grounded in *Flast v. Cohen*, would not permit a court to deny standing for this reason. Unless Professors Tushnet and Nichol are willing to take the position that in certain circumstances federal judges cannot deny standing, the proposed presumption always will provide the court with a mechanism to grant or deny standing based on personal viewpoints.

The empirical data on current municipal taxpayer standing supports these criticisms. The standing presumption advocated by Professors Tushnet and Nichol is very similar to the presumption for standing that the Supreme Court established in 1923 for municipal

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229 *See supra* Part V.C.1.

230 *See supra* note 198 and accompanying text.

231 *See supra* notes 200–02 and accompanying text.

232 *See supra* notes 206–08 and accompanying text.

233 *See supra* notes 195–205 and accompanying text.

taxpayers seeking to challenge local government expenditures.[234] This presumption, set out in *Frothingham v. Mellon*, has led courts up and down the judicial chain of command to make standing decisions that are erratic and arguably unfair. There is no discernible pattern to district court municipal taxpayer standing decisions.[235] Appellate court decisions are explainable, but not by any coherent law or doctrine. Rather, the standing outcomes can be understood only by reference to the appellate judges' own political viewpoints.[236] When the Supreme Court has granted certiorari to municipal taxpayers challenging government expenditures, the presumption for standing has enabled the Court simply to hold for or against the petitioners depending on their (policy-oriented) view of the merits without considering the standing issue.[237] The experience with municipal taxpayer standing thus indicates that judges can and will be constrained only by extremely narrow rules and effective oversight.[238]

Advocates of the barebones approach might argue that while it cannot eliminate controversy or politics from the courts, it can force decisionmaking out from under the shadow of a complicated standing doctrine. The barebones approach will provide transparency by requiring federal judges to show *why* they believe the plaintiff has no right to be in court.[239] A rule that requires the judge to grant standing unless she offers an explanation for why standing is not appropriate will place standing issues "in the sunshine" with the rest of constitutional law.[240]

It is unlikely, however, that Professors Tushnet and Nichol and others seek transparency as an end in itself; transparency usually is viewed as a means to some other stated aim or goal. The problem here is that transparency does not necessarily achieve the goal of ensuring uniformity and predictability. If courts make political deci-

234 *See supra* note 95 and accompanying text.

235 *See supra* note 195 and accompanying text.

236 *See supra* notes 200–06 and accompanying text.

237 *See supra* notes 203–07 and accompanying text.

238 Professors Tushnet and Nichol's proposal, however, would apply to all individuals in court and not just municipal taxpayers seeking to challenge allegedly unconstitutional government expenditures. Their proposal would not lead necessarily to precisely the same outcome I observed in this study for a number of reasons, the most important of which involves a possible dynamic between the *federal* judiciary and *municipal* government employees. Federal courts may feel compelled to consider the alleged bad acts of local actors, but this same mindset may not exist when federal judges consider controversies with different litigants. That is to say, we cannot extrapolate with certainty that the presumption will lead to precisely the same outcomes as we observed here, but we can make a strong argument that the broad and general outcomes associated with a mere presumption will lead to manipulation in the court.

239 *See* Nichol, *supra* note 13, at 339–40; Tushnet, *supra* note 129, at 1705–06.

240 Nichol, *supra* note 13, at 340.

sions (or decisions motivated by the fear of reversal) but use legal rationales as a "justification" for the outcome, litigants will be unable to predict outcomes. Moreover, as just noted, judicial oversight will not lead to better and more law-abiding decisions—instead the higher court simply will substitute its own political preference for that of the lower court.[241]

Perhaps Professors Tushnet and Nichol should have gone one step further in their argument. Rather than advocating a presumption for standing, with escape hatches for cases in which "strong reasons" exist for denying the plaintiffs the right to be in court, the authors should have advocated a rule that *mandates* that courts hear all cases. But it is doubtful that the authors would adopt this position since they do not go so far as to say that standing is a completely useless feature of the legal system. Article III permits federal courts to hear only "Cases" and "Controversies," and the standing doctrine assures that courts do not render mere advisory opinions on potential controversies. Just as important, federal courts must be able to render a decision grounded in a fairly well-developed factual record. As soon as the barebones doctrine seeks to ensure the presence of injury and facts, it leads judges back to the drawing board to determine which cases satisfy these requirements—when the presumption for standing is warranted, and when it should be overcome by sufficiently strong reasons to keep the plaintiff out of court.

B. Professor Fletcher, Professor Sunstein, and Standing as a Question of Substantive Law

Professor (now Judge) Fletcher wrote in 1988 that "[s]tanding decisions, whatever the Court chooses to call them, are decisions on the merits."[242] In his landmark article, *The Structure of Standing*, Professor Fletcher agreed with countless scholars who have critiqued standing outcomes as erratic, unpredictable, and often in fundamental conflict with one another.[243] Fletcher argued that these observations most likely were explained by deep ideological divisions on the Court with regard to the merits of the cases rather than by the Justices' unique views on a separate and independent standing doctrine.[244] In short, Professor Fletcher argued that standing was a proxy for the merits, and for this reason he advocated that the Supreme Court abandon the question of who should be able to enforce legal rights, as

241 *See supra* notes 200–08 and accompanying text.
242 Fletcher, *supra* note 4, at 266.
243 *See id.* at 221–22 & n.4 (citing complaints about standing law and proposed changes).
244 *See id.* at 221, 236–37.

well as the ideas that standing is a preliminary jurisdictional issue and that Article III requires a showing of "injury in fact."[245] He argued that "to think, or pretend, that a single law of standing can be applied uniformly to all causes of action is to produce confusion, intellectual dishonesty, and chaos."[246]

The solution, according to Professor Fletcher, centers on the idea that standing is inextricably linked to the merits of the case. According to Fletcher, courts should view standing as a question of substantive law, and thus the outcomes in each case should vary as the substantive law varies.[247] Under this framework, standing outcomes will depend on the particular federal statute or constitutional provision at issue. Congress, Fletcher argues, should have essentially unlimited power to define the class of persons entitled to enforce statutory duties.[248] Similarly, the Constitution should be read not only to provide the source of constitutional duties, but also as the primary descriptor of who is entitled to enforce these duties.[249]

This approach does not eliminate the concept of standing. Instead, it argues for an assessment of injury as a purely legal matter rather than as a factual matter. Under current doctrine, courts must determine whether an "injury in fact" exists based on an investigation of the factual circumstances of the case. Professor Fletcher argues that this investigation inevitably collapses into judgments about the merits of the case.[250] He argues that because all plaintiffs allege that they have suffered injuries, judges who deny standing either must believe that certain plaintiffs simply lie about their injuries or they must base their denials on their own personal, normative judgments of what ought to be a judicially cognizable "injury in fact."[251] If the doctrine requires federal courts to look to the substantive law rather than to their own normative judgments, they might reach better and fairer outcomes, because the controversy would be resolved as a matter of positive law. Importantly, Fletcher and others who support this par-

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245 *Id.* at 223.

246 *Id.* at 290. Professor Fletcher somewhat overstates the problem. As noted above, while the Supreme Court nominally has a single standing doctrine, in practice many doctrines have evolved to address the diverse factual scenarios the courts face. For an outline of the specific doctrine applicable to taxpayers in federal court, see *supra* notes 69–81 and accompanying text.

247 *See id.* at 223–24.

248 *See id.* at 223–24, 253–65. Professor Fletcher was not the only one to take this view; Justices Harlan and White also advocated that the Court base standing decisions on substantive law. *See* Flast v. Cohen, 392 U.S. 83, 131–33 (1968) (Harlan, J., dissenting); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring).

249 *See* Fletcher, *supra* note 4, at 224, 265–76.

250 *See id.* at 230–33.

251 *See id.* at 231–32.

ticular reform do not take the position that the proposal will necessarily make standing decisions easy and uncontroversial or completely free of judicial discretion.[252] Instead, they argue, the confusion that has plagued standing law for several decades will diminish to appropriate levels.[253] Moreover, the approach effectively would remove discretion from the federal judiciary; judges would decide standing issues by looking to statutes and the Constitution and by considering the legislators' and the Framers' intent.

Under Professor Fletcher's proposed standing doctrine, the courts should defer to congressional authority to determine who has standing to litigate statutory claims. Over the course of the last decade, Professor Sunstein has investigated and elaborated upon Professor Fletcher's approach in a series of fascinating law review articles that have focused on federal statutes and congressional decisions to grant litigants standing.[254] Arguing that the current standing doctrine is not only a "large-scale conceptual mistake,"[255] but also one that finds no support in the text or history of Article III, Professor Sunstein has expressed strong support for a reform that makes standing a matter of substantive law. His recent investigations of standing have concentrated less on the normative case for the proposal and more on individual Supreme Court decisions that have either accepted or rejected standing as a matter of substantive law.

Professor Sunstein argued in a 1992 article that the Supreme Court needlessly creates problems and puzzles in the standing context when it disregards congressional grants of standing and relies upon its own confused precedent to decide the issue.[256] If the Court allows standing when Congress authorizes it, outcomes are easy and predictable, but if the Supreme Court reconsiders standing in every case, even those governed by statute, litigants will be subject to the justices' whims. In *Lujan v. Defenders of Wildlife*,[257] for example, the Court considered a federal statute that awarded environmental plaintiffs the right to challenge certain government activities. The Court invalidated the congressional grant of standing as a violation of the Article III "injury in fact" requirement; in the Court's view, the plaintiffs

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252 *See id.* at 291.

253 *See id.*

254 *See* Cass R. Sunstein, *Informational Regulation and Information Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613 (1999) [hereinafter Sunstein, *Informational Regulation*]; Sunstein, *supra* note 9; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

255 Sunstein, *supra* note 9, at 167.

256 *See id.* at 164–67.

257 504 U.S. 555 (1992).

alleged no such injury.[258] Arguing that *Lujan* is an example of flawed decisionmaking, Professor Sunstein nevertheless notes that in many cases the beneficiaries of regulatory statutes like that in *Lujan* still could bring lawsuits, but that various other would-be plaintiffs' right to be in court is drawn into sharp question.[259]

In a 1999 article, Sunstein concludes that the Court reached the correct decision in *Federal Election Commission v. Akins*,[260] a suit in which the Court allowed standing pursuant to a congressional directive even though the petitioner did not clearly satisfy the "injury in fact" test.[261] Professor Sunstein suggests that the advantage of the "standing as substantive law" approach is that it bars the federal courts from deciding standing based on normative and policy-oriented views; the decision to grant or deny becomes a matter of congressional and not judicial resolution.[262] Deprived of any discretion, federal courts cannot produce erratic and politicized outcomes; standing decisions will become predictable and fair in the sense that they will reflect the preferences expressed in the electoral arena.[263]

The argument that standing should not be a matter of fact but of substantive law is eminently reasonable. Moreover, if a revised standing doctrine successfully constrains judicial politics by removing the Court's ability to decide, we theoretically could obtain better outcomes.[264] The difficult empirical question, however, still remains: How will judges actually decide standing controversies under this proposed policy reform?

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258 *See id.* at 562–64.

259 Sunstein, *supra* note 9, at 216–221. To overcome uncertainties on the standing question, Sunstein proposed a mechanism for Congress to assure the viability of future lawsuits: Congress should offer a cash bounty or specifically devise property rights in citizens generally in contexts in which it sought to allow litigation. *Id.* at 232–35. These mechanisms would satisfy effectively the Court's injury-in-fact requirement, satisfy the Article III case and controversy requirement, and tie standing decisions to substantive statutory law. In short, Professor Sunstein sought to outsmart the Court at its own game by assuring that Congress wrote legislation that created real stakes in legal controversies, thereby satisfying Supreme Court standing precedent.

260 524 U.S. 11 (1998).

261 *See* Sunstein, *Informational Regulation*, *supra* note 254, at 637, 642–43. The plaintiff in *Akins* based standing on a broad and general claim associated with the dissemination of information, and arguably the harm alleged did not satisfy the injury in fact requirement. *See Akins*, 524 U.S. at 20–25 (finding that although grievance was "generalized," plaintiffs satisfied "injury in fact" requirement because injury was "concrete" and "particular" and claim was authorized by Congress); *cf. id.* at 35–36 (1998) (Scalia, J., dissenting) (criticizing finding of standing because alleged injury was not "particularized" or "differentiated").

262 *See* Sunstein, *Informational Regulation*, *supra* note 254, at 616–17.

263 *See id.* at 616–17, 643. McNollgast, however, argues that this is already the case. *See* McNollgast, *supra* note 16, at 1666–68.

264 Not all scholars would agree with this claim. *See* McNollgast, *supra* note 16, at 1668.

By tying standing to the underlying law, standing questions essentially become a matter of statutory interpretation. A court need only examine the statute conferring the substantive right to determine if Congress intended a particular plaintiff to have standing. But herein we begin to face problems of enormous complexity. Courts and scholars long have debated the appropriate means for uncovering the meaning behind a statute. Some argue that courts must apply liberal canons of interpretation while others advocate the use of strict canons.[265] Courts and commentators also hotly have debated the utility of legislative history—the use of which often leads courts to interpret a statute differently than one would expect simply from reading the statute's plain text.[266] Indeed, many scholars have noted that the Supreme Court's own approach to interpretive questions (let alone the lower federal courts' divergent approaches to the problem) is markedly unstable and fluctuating and leads to dramatically different outcomes on similar issues over the course of time.[267] Deferring to substantive law, in short, does not foreclose judicial discretion.

The taxpayer standing data discussed above illustrates the problems that exist when there is no clear and unambiguous doctrine to control courts: In the absence of guidance, courts make decisions according to their own personal and political beliefs. Because the Supreme Court never has articulated a clear rule for interpreting congressional statutes, federal courts are free to interpret as they please. In fact, the two recent cases that led Professor Sunstein to write on the topic demonstrate why the proposal to make standing a matter of substantive law is destined to face the same problems that led the authors to advocate the reform in the first place. *Lujan* and *Akins* show that statutes do not always provide easy answers and that this, in turn, enables the Court to accept congressional directives *or* reject them based on the justices' own policy preferences at the time they consider the case. *Lujan* and *Akins*, decided just seven years apart, both involved generalized grievances and a federal statute indicating that

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265 *See* Tushnet, *supra* note 216, at 670 (noting that Justice White seemed to advocate liberal canons of statutory interpretation while Justice Harlan seemed to approve of stricter canons).

266 The legislative history debate began as early as 1930. *See generally* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). For more contemporary discussion of the issue, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 207–38 (1994); ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–37 (1997); Daniel B. Rodriquez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003) (adopting new approach to reading legislative history and applying it to Civil Rights Act of 1964).

267 *E.g.*, Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001).

the plaintiffs could sue in federal court to redress the alleged harm.[268] Professor Sunstein argues that the Court erred in *Lujan* and decided *Akins* correctly.[269] Assuming that standing should be a matter of substantive law, it is easy to agree with him, but my question is: What will restrain the Court in future cases from denying standing in the face of a congressional mandate?[270]

Professor Sunstein's own investigation of the problem suggests that the reform likely will fail to constrain federal courts. Through a series of stylized illustrations of standing controversies set forth in a recent article, Sunstein seeks to gain a nuanced understanding of the possible interplay between the Court and Congress and to determine in what circumstances the Court should defer.[271] Sunstein hypothesizes "easy" and "hard" standing cases and offers an interesting doctrinal analysis that courts might undertake in the aftermath of *Akins*. For example, he notes that plaintiffs who allege injury (nondisclosure of workplace risks, for example) should get standing even in the absence of a statute.[272] Where Congress adopts a statute, the Court still must investigate whether the plaintiffs fall within the zone of interests protected by the statute.[273] And even if the statute appears to protect the particular plaintiffs, the Court nevertheless can invoke prudential considerations to deny standing.[274] In the majority of his illustrations, Professor Sunstein notes that a host of statutory interpretation problems would lead to "hard cases" and consequently could justify conflicting outcomes.[275]

Even if the Court accepted the standing proposal that mandates that judges look to substantive law for purposes of deciding outcomes,

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268 In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court considered an environmental plaintiff's challenge to a regulation that withdrew the protection of the Endangered Species Act from foreign soil and found that the plaintiff lacked standing. *Id.* at 558–59, 578. In *Federal Election Commission v. Akins*, 524 U.S. 11 (1997), the Court found standing for voters who challenged a decision by the Federal Election Commission not to classify an organization as a "political committee" under the Federal Election Commission Act, thus removing any obligation from the organization to fulfill disclosure and record-keeping requirements. *Id.* at 14–26.

269 *See supra* notes 257–64 and accompanying text.

270 *E.g.*, *Lujan*, 504 U.S. at 578 (denying standing on grounds that petitioners failed to satisfy constitutional criteria); Muskrat v. United States, 219 U.S. 346 (1911) (barring Native Americans from federal court notwithstanding congressional authorization to bring suit).

271 *See* Sunstein, *Informational Regulation*, *supra* note 254, at 667–70.

272 *Id.* at 667.

273 *Id.* at 667–70.

274 *See id.* at 668 (noting that standing probably should be denied for prudential reasons to "television viewers as such" who challenge television station's failure to follow federally mandated rating system).

275 *See id.* at 668–70.

considerable room for judicial discretion still exists in Sunstein's proposal for two reasons. First, Congress does not always speak with perfect clarity, leaving courts to decide on their own whether the substantive law requires standing. Second, even if Congress explicitly creates standing rights in the legislation, courts might perceive confusion for strategic reasons or defer to constitutional and prudential rationales for deciding the case contrary to stated congressional intent. Unfortunately, this leaves us with a standing doctrine that, in effect, mandates that federal courts defer to Congress when they believe that Congress intended to grant standing *and* when the courts do not believe that other important considerations counsel against hearing the case. In short, it is likely that courts will defer to Congress when they favor a plaintiff and find reasons to deny standing to disfavored plaintiffs. A rule of deference without clear and unambiguous rules, as we know, does not necessarily tie the hands of federal judges.

Professors Fletcher and Sunstein give no consideration to the problem of oversight, but it is likely that none exists to deter the judicial discretion that they both find problematic. If the Court adopts the "standing as substantive law" policy, Congress could exercise oversight by revising statutes to create clear standing when the courts get it wrong. But this would require constant congressional monitoring of court decisions (at every level of the judicial hierarchy) and then the use of political capital to reverse unfavorable outcomes. Empirical evidence shows that Congress sometimes will pay attention to court outcomes, at least at the Supreme Court level,[276] but uncovering problematic legal outcomes and then updating legislation still may not necessarily be the end of the game. The plaintiffs who come into federal court under the revised law may receive precisely the same treatment if the judge finds constitutional reasons to keep them out. Congress's recourse in this situation is far more limited.[277]

I have been examining standing in the statutory context, but the problems become even more bewildering when constitutional allega-

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[276] *See* Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003) (testing hypothesis that Supreme Court will strike legislation that it knows Congress does not like, in order to avoid congressional retaliation, and concluding that Court will do so when ideologically aligned with Congress); *see also* ESKRIDGE, *supra* note 266, at 262 (investigating congressional response to Supreme Court decisionmaking in civil rights context).

[277] Although the conventional wisdom is that short of a constitutional amendment, Congress can do very little if the Court strikes down legislation as unconstitutional, some scholars believe that Congress can fight back. *See, e.g.*, Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 595–611 (2001) (noting costs and benefits to Supreme Court if it undertakes this strategy to avoid congressional overrulings).

tions are at issue—a context in which no legislative oversight exists (besides the amendment process) and where the Framers offered very little instruction. In the constitutional context, the "standing as substantive law" proposal requires courts to examine the underlying constitutional framework to determine whether the Framers intended particular plaintiffs to have a federal cause of action. This approach may lead courts to read some provisions broadly, to allow unrestricted access to federal courts, and other provisions very narrowly. For example, Professor Fletcher (as well as Justices Stewart, Fortas, and Brennan) argued that the Establishment Clause could not be realized fully unless courts allowed a broad range of individuals to challenge government activities.[278] The Due Process and Equal Protection Clauses, however, arguably do not require broad standing rules; in these cases, courts must address plaintiffs' standing rights by examining the type of injury suffered as well as the existence of "tight causal connections" between the claim and the redress sought.[279] Professor Fletcher's point is that courts should tie standing to the underlying purpose of the constitutional right at issue.

But once advocates of the "standing as substantive law" proposal acknowledge that judicial decisions need not be subject to a strict and narrow rule but should be grounded in abstract conceptions of the constitutional right at issue, the type of injury alleged, and the causal relationships between the injury and the alleged violation, it becomes clear that judges will decide cases in accord with their own values and perspectives and then will rationalize them with well-crafted legal opinions. In fact, the concepts of injury, rights, and causal connections exist in the current standing doctrine, and these abstractions have not led to coherent outcomes.[280] Unless the substantive law doctrine leads to very narrow standing rules, it will not effectuate Fletcher's and Sunstein's goals of eradicating politics from standing decisions.

CONCLUSION

Standing scholars long have criticized federal court standing doctrine for its chaotic and political nature. This Article suggests that some of those critiques are overbroad. Standing outcomes are not inevitably political, and in certain circumstances politics appear to play no role whatsoever. Outcomes are above politics when lower federal courts are subject to clear and unambiguous standing rules and when effective judicial monitoring exists.

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278 Fletcher, *supra* note 4, at 269.

279 *Id.* at 272–76.

280 *See supra* Part II.A.

The findings here are robust and have important implications for scholars undertaking empirical studies of threshold legal issues. Empiricists seeking to explain standing outcomes should devise models that move beyond judicial politics as the sole explanatory value for decisionmaking. A more nuanced model that controls for legal and institutional variables greatly would expand our understanding of judicial standing outcomes and at the same time offer more guidance for legal reform down the road.

At the same time, scholars and policy analysts who seek reform of federal standing doctrine should consider more closely the empirical findings in large-*n* quantitative studies. Normative proposals, while infinitely rational in the abstract, tend to ignore the important legal and institutional variables that make true reform possible. This study confirms the value of reform proposals for legal change, but also highlights the relevance of empirical work for achieving the desired doctrinal improvements.