

# **Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006\***

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## **ABSTRACT**

While the standing doctrine is one of the most widely theorized and criticized doctrines in U.S. law, its origins remain controversial. One revisionist view espouses that New Deal progressive justices purposely invented the standing doctrine to *insulate* administrative agencies from judicial review. Yet existing support for this “insulation thesis” is weak. Our Article provides the first systematic empirical evidence of the historical evolution of standing. We synthesize the theory and claims underlying the insulation thesis and compile a new database of every standing issue decided, along with all contested merits votes, by the Supreme Court from 1921-2006. To overcome conventional problems of haphazard case selection, we amass, read, and classify over 1,500 cases cited in historical treatments of the doctrine, assembling a database of all standing issues contested. With modern statistical methods and this new dataset – comprised of 47,570 votes for 5,497 unique issues and 229 standing issues – we find compelling evidence for the insulation thesis. Before 1940, progressive justices disproportionately *deny* standing to plaintiffs in cases that largely involve challenges to administrative agencies. After 1940, the political valence of the standing doctrine reverses: progressives uniformly *favor* standing. Justices Douglas and Black, in particular, track this evolution (and valence reversal) of the standing doctrine. Our results challenge legal inquiries of what claims are traditionally amenable to judicial resolution and highlight the unintended consequences of judicial innovation.

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## INTRODUCTION

The standing doctrine is the Rorschach test of federal courts. In theory, the doctrine serves a distinct function, namely ensuring that a litigant is the proper party to bring a claim in court. Yet standing remains one of the most contested areas of federal law, with criticisms of the doctrine nearing the number of commentators.<sup>1</sup>

Indeed, even the most basic question of the origins of the standing doctrine eludes scholars. Conventional accounts focus on the nature of the case or controversy requirement, the collision between the administrative state and private rights-based models of judicial resolution, and caseload management.<sup>2</sup> In contrast, one revisionist account, proposed by Steven Winter and Cass Sunstein, is that progressive justices purposely invented and constitutionalized the standing doctrine in order to *insulate* New Deal agencies from judicial review.<sup>3</sup>

When advanced just twenty years ago, this New Deal “insulation thesis” inverted the conventional perception of the doctrine’s political valence. Rather than supporting the conservative goal of keeping broad-based public interest litigation out of court, restrictive standing requirements may originally have achieved precisely the opposite result: preserving and enshrining the liberal New Deal administrative state.

While provocative,<sup>4</sup> prominent,<sup>5</sup> touted by some as the “definitive history of standing,”<sup>6</sup> as “part of the canon of Constitutional Law,”<sup>7</sup> and as the now “general stock of conventional wisdom,”<sup>8</sup> the insulation thesis is thinly theorized and rests on fragile empirical grounds. In this

<sup>1</sup> See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41 (1982); Kenneth C. Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 COLUM. L. REV. 759 (1949) [hereinafter Davis, *Standing and Administrative Action*]; Kenneth C. Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008); Louis Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961) [hereinafter Jaffe, *Private Actions*]; Louis Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) [hereinafter Jaffe, *Public Actions*]; Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

<sup>2</sup> See, e.g., Berger, *supra* note 1; Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); Hessick, *supra* note 1, at 290; Jonathan Levy, *In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On*, 80 MINN. L. REV. 123, 128 (1995); Woolhandler & Nelson, *supra* note 1, at 690-2, 718.

<sup>3</sup> See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436-38 (1988) [hereinafter Sunstein, *Standing and Public Law*]; Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992) [hereinafter Sunstein, *What’s Standing?*].

<sup>4</sup> See Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 889 n.61 (2008) (describing as insulation thesis as “once novel” and “once revisionist”).

<sup>5</sup> See, e.g., William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 272 n.45 (1990); Tracey E. George & Robert J. Pushaw, Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1276 (2002) (book review); Hessick, *supra* note 1, at 276; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458-9 (1996) [hereinafter Pushaw, *Justiciability and Separation of Powers*]; Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 366 (1995) [hereinafter Stearns, *Standing and Social Choice*]; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1327 (1995) [hereinafter Stearns, *Standing Back*]; Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 306-7 (1992).

<sup>6</sup> Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1198 (2003).

<sup>7</sup> Stearns, *supra* note 4, at 889 n.61.

<sup>8</sup> Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 332 (1992).

Article, we synthesize the understanding of the insulation thesis and provide the first systematic empirical study of the historical evolution of the Supreme Court's standing doctrine. Examining over 1,500 cases cited in major historical treatments of the doctrine and backdating all merits votes to 1921, we compile a new database of every contested standing and merits issue decided by the Supreme Court from 1921-2006. We find compelling support for the insulation thesis in the New Deal period, with three central findings that refine extant accounts.

First, the insulation thesis does *not* fully explain the conception of the modern standing doctrine. From 1921-1930, standing arose largely unanimously. Progressives and conservatives exhibited no systematic disagreement as to the doctrine. Early unanimity may be consistent with an alternative explanation of caseload management, occurring at the same time of the Supreme Court's conversion to the discretionary docket.

Second, unanimity collapsed with the New Deal period, and cases from the 1930s and early 1940s provide substantial support for the insulation thesis. Standing disagreements came to embody systematic differences across justices, with progressive justices disproportionately denying (and conservatives granting) standing. The trend is most pronounced in cases involving New Deal legislation and administrative agencies. This period of liberal insulation was short, unraveling in the 1940s. By 1950, the doctrine's political valence reversed entirely. Compared to the merits, liberals were uniformly more likely to favor – and conservatives more likely to deny – standing. The contrast between the sharp conservative valence of the post-1950 period and the liberal valence of the New Deal era provides striking evidence for New Deal insulation.

Lastly, our analysis provides considerable insight into the role of individual justices in crafting the doctrine. Justice Brandeis – posited by the insulation thesis to be the early architect of the standing doctrine – was far more inclined than any other justice to raise standing in early unanimous cases. Justice Frankfurter consistently preferred a strong version of the standing doctrine. In contrast, the voting patterns of Justices Douglas and Black reflect the transformation of the doctrine. For example, Douglas voted largely to deny standing during his early years (a compelling fact missed, as far as we are aware, by existing accounts), but favored finding standing in every single case heard after 1950.<sup>9</sup>

Our Article proceeds as follows. Part I sketches the New Deal insulation thesis, discusses its practical and scholarly importance, examines its theoretical variations, and considers alternative explanations for the rise of standing. Part II surveys extant support for the theory, which is surprisingly scarce: cases cited in support of the insulation thesis are haphazardly selected, and many of these cases are uninformative about, peripheral to, or plainly contradict the insulation thesis.

Part III synthesizes the insulation thesis and spells out how to test its veracity. Given the malleability of the standing doctrine, this type of objective inquiry faces distinct difficulties. The Rorschach-like nature of standing is compounded going back in time – when the boundaries of the doctrine are less clear. These difficulties may well explain why existing historical accounts diverge so sharply. Part IV discusses our large-scale data collection effort, which addresses

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<sup>9</sup> Throughout the Article we use language consistent with the literature. First, by a “strict” or “restrictive” standing doctrine, we mean that the bar is set high for plaintiffs to assert standing in court – for example, a high pleading standard to infer that plaintiffs have suffered a particularized injury. We follow convention in using “liberalizing” of standing law to mean lowering that bar. Our data collection, outlined below and described in detail in the Appendix, formalizes what it means for a decision to “favor” standing. Second, consistent with the insulation literature, we use the terms “liberal” (and, interchangeably, “progressive”) and “conservative” to describe broad jurisprudential differences between the justices on the merits. We formalize the measurement of such differences in our statistical analysis, but the terms imply no assumptions (or conclusions) about what drives judicial behavior on the merits (e.g., “policy” preferences or “judicial realism,” as compared to jurisprudential concerns).

these hazards of historical inquiry by articulating transparent case selection criteria and compiling, reading, and classifying every case cited across a large range of historical treatises, books, and law review articles. We merge this new dataset with all merits votes cast from 1921-2006 to leverage variation across justices, time, and issues. Part V presents results, which clarify, synthesize, and unify existing accounts of the early rise of the standing doctrine. Part VI concludes with legal and policy implications.

## I. THE INSULATION THESIS

### A. The Claim: Purposive Innovation

The insulation thesis posits that New Deal progressive justices purposely invented the standing doctrine to insulate administrative agencies from judicial review. In lieu of a doctrine embedded in Article III, standing is a “distinctly twentieth century product that was fashioned out of other doctrinal materials largely through the conscious efforts of Justices Brandeis and Frankfurter.”<sup>10</sup> The development of standing was a “calculated effort”<sup>11</sup> by liberals to “assure that the state and federal governments would be free to experiment with progressive legislation.”<sup>12</sup> Professor Steven Winter, who first advanced the claim in 1988 in a seminal piece in the *Stanford Law Review*, argues that Brandeis and Frankfurter developed the standing doctrine, along with other procedural limitations, to avoid engaging in substantive due process inquiries that might invalidate progressive legislation.<sup>13</sup> Similarly, Professor Cass Sunstein argues the doctrine was borne out of New Deal faith in expert regulatory agencies and skepticism of generalist courts to deal with complex affairs of a welfare economy.<sup>14</sup> Progressive justices doubted the ability of the common law to address grave economic challenges of the Depression.<sup>15</sup> By avoiding the merits, the Court could heed Brandeis’s admonition that “the most important thing we do is not doing,”<sup>16</sup> and avoid meddling in innovations of legislative and executive branches.

The insulation thesis suggests that the doctrine was implemented by judges, albeit in fits and starts. According to Winter, Brandeis first attempted to create and constitutionalize the standing doctrine by banning shareholder derivative suits and taxpayer actions, but did not consistently seize upon constitutional arguments that were presented by the government.<sup>17</sup> After an early effort at constitutionalization, Brandeis refrained from constitutionalizing standing in his famous *Ashwander* concurrence, instead characterizing the bar against these suits as prudential.<sup>18</sup> Years later, Justice Frankfurter “single-handedly raised the phoenix of standing”<sup>19</sup> and

<sup>10</sup> Winter, *supra* note 3, at 1374.

<sup>11</sup> *Id.* at 1455.

<sup>12</sup> *Id.* at 1456.

<sup>13</sup> *Id.* at 1455.

<sup>14</sup> See Sunstein, *What’s Standing?*, *supra* note 3, at 179-80; Sunstein, *Standing and Public Law*, *supra* note 3, at 1436-38. On the specific chronology, Winter’s article appeared in July 1988, while Sunstein’s *Columbia Law Review* article appeared in November 1988, discussing Winter extensively. See, e.g., *id.* at 1434 n.8, 1437 nn.20 & 24.

<sup>15</sup> See Winter, *supra* note 3, at 1455.

<sup>16</sup> *Id.* (quoting THE FELIX FRANKFURTER PAPERS, Box 114, Folder 10 at 15 (Library of Congress photocopy of typescript of Box 114, Folders 7 and 8; holograph notes of FF conversations with LDB, Chatham, Mass., 1922-26); THE LOUIS DEMBITZ BRANDEIS PAPERS, (Library of Congress microfilm series, Part II: United States Supreme Court, October Terms, 1932-1938, Reel 33, No. 0450)).

<sup>17</sup> See, e.g., *Fairchild v. Hughes*, 258 U.S. 126 (1922).

<sup>18</sup> See Winter, *supra* note 3, at 1418; *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

<sup>19</sup> Winter, *supra* note 3, at 1418.

constitutionalized the doctrine in *Coleman v. Miller*,<sup>20</sup> a challenge to the Kansas Senate's method of ratifying the proposed Child Labor Amendment, and *McGrath*,<sup>21</sup> a challenge to the Attorney General's authority to designate particular organizations as Communist.

## B. The Importance of Insulation

The insulation thesis purports to explain the creation and constitutionalization of a pivotal doctrine. By positing that a now-constitutionalized doctrine was “invented” a century and a half after the Constitution was written, the thesis has considerable implications – practical and scholarly – for how to conceive of standing and constitutional law generally.

### 1. Practical

First, the insulation thesis concretely informs modern disputes that focus on the historical cognizability of a claim: “Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies of the sort *traditionally* amenable to, and resolved by, the judicial process.’”<sup>22</sup> The insulation thesis implies that judicial opinions, briefs, law review articles, and arguments crafted around historical cognizability may be misplaced. Consider the well-known example of *qui tam* actions, which allow an individual to bring suit in the government’s interest.<sup>23</sup> There is little evidence that the founding generation thought *qui tam* actions raised constitutional doubt, which might suggest that the original conception of Article III did not include a strict standing requirement and limitation on citizen suits.<sup>24</sup> The claim that standing is a 20<sup>th</sup> century innovation is broadly consistent with the Framers’ acceptance of *qui tam* actions, as well as host of other public actions (prerogative writs<sup>25</sup>) recognized by English courts.<sup>26</sup> Judicial efforts to reconcile modern Article III limitations with historical practice may therefore prove of limited value.

<sup>20</sup> 307 U.S. 433 (1939). Writing for the majority, Chief Justice Hughes found that the petitioners, state legislators, had standing because they had “a plain, direct and adequate interest in maintaining the effectiveness of their votes,” and that they came “directly within the provisions of the statute governing [the Court’s] appellate jurisdiction.” *Id.* at 438. Despite finding standing, the majority in *Coleman* went on to hold that the case presented a nonjusticiable political question. In a concurring opinion joined by Justices Roberts, Black, and Douglas, Justice Frankfurter argued that the petitioners did not have standing. He placed this objection firmly within the Constitution, emphasizing that, under that document, the Court could only consider cases and controversies. *Id.* at 460 (Frankfurter, J., concurring). Frankfurter’s analysis hinged on the idea of an injury distinct to the petitioners. *Id.* at 464. Unable to find one, he agreed with the Court that the Supreme Court of Kansas’s decision to deny relief should be affirmed.

<sup>21</sup> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). The Attorney General included the groups in a list which he then furnished to the Loyalty Review Board of the United States Civil Service Commission. The plaintiff organizations argued that the dissemination of this list resulted in nationwide publicity and injury to them, their reputations, and their ability to collect money and thus serve their charitable functions. Justice Burton, announcing the opinion of the Court and writing an opinion in which Justice Douglas joined, found that the Attorney General had acted beyond his power and that the petitioners had standing to sue: “[t]he touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right.” *Id.* at 140-41. Justice Frankfurter, concurring, described the questions that must be asked when a litigant seeks standing in the absence of a statute conferring it: “(a) Will the action challenged at any time substantially affect the ‘legal’ interests of any person? (b) Does the action challenged affect the petitioner with sufficient ‘directness’? (c) Is the action challenged sufficiently ‘final’?” *Id.* at 152 (Frankfurter, J., concurring). Thus, while Frankfurter would have found standing in this particular case, the insulation thesis posits that his concurrence made it harder, as a whole, for plaintiffs to obtain judicial review. See Winter, *supra* note 3, at 1451.

<sup>22</sup> *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (emphasis added) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998)).

<sup>23</sup> See, e.g., Sunstein, *What’s Standing?*, *supra* note 3, at 175.

<sup>24</sup> See *id.* at 175-76; Berger, *supra* note 1. But see Woolhandler & Nelson, *supra* note 1.

<sup>25</sup> See Pushaw, *Justiciability and Separation of Powers*, *supra* note 5, at 462.

Second, the insulation thesis shows how doctrines may *become* constitutional in the future, without legislative amendment and popular ratification. Developments internal to the standing doctrine of course already offer proof of the fluidity of the doctrine. *Linda R.S.* arguably constitutionalized causation and redressability components,<sup>27</sup> and, more recently, *Lujan* arguably moved the bar against generalized grievances from the prudential to constitutional side of the ledger.<sup>28</sup> Our evidence adds empirical proof to potential for change.

Third, the insulation thesis's focus on the roles of Justices Brandeis and Frankfurter as the principal architects of the standing doctrine underscores the power individual justices may have in creating and shaping constitutional law.<sup>29</sup> Yet the power of a few to purposely shape the law also appears overshadowed by the unintended consequences of such an effort. To the extent that the standing doctrine evolved to keep liberal claimants out of court, judicial entrepreneurialism to protect a liberal agenda may, in the long run, have had the opposite effect.

An understanding of the origins of standing, and the insulation thesis specifically, thereby has significant, concrete implications for how standing – a foundational issue of access to the courts – is litigated, adjudicated, and transformed in the future.<sup>30</sup>

## 2. *Scholarly*

No shortage of ink has been spilled on the standing doctrine, and understanding its origins constitutes a basic question for scholarship.<sup>31</sup>

On the one hand, a considerable amount of research glosses over the insulation thesis.<sup>32</sup> Perhaps this lack of awareness stems from conflicting theory and weak empirical foundations. These weaknesses militate in favor of objective examination, assessment, and understanding of the insulation thesis.

On the other hand, many accept the insulation thesis as truth, *in spite* of the lack of empirical foundation. (We document existing empirical evidence and its weaknesses more

<sup>26</sup> In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Supreme Court attempted to reconcile the *qui tam* with the constitutional standing doctrine by asserting that the relator becomes a partial assignee of the United States' claim, and thus its injury, allowing her to satisfy the injury-in-fact requirement. Sunstein however, argues that this distinction is at best a stretch. Sunstein, *What's Standing?*, *supra* note 3, at 176.

<sup>27</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973). See also Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 17-19 (1982).

<sup>28</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-578 (1992). See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 643 (1999); Ryan Guilds, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1882 & n.136 (1996); Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 329-30 (2004); David J. Weiner, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 221-24 (2001). For a related examination of how *Lujan* may hark back to the legal interest test, see *Judicial Watch v. U.S. Senate*, 432 F.3d 359, 363-66 (D.C. Cir. 2005) (Williams, J., concurring) (questioning consistency of *Lujan*'s requirement of a "legally protected interest" with "injury in fact"); *DePuy, Inc. v. Zimmer Holdings, Inc.*, 384 F. Supp. 2d 1237, 1240 (N.D. Ill. 2005) (Posner, J.) (noting that an injury in fact is not the same as a legally protected interest).

<sup>29</sup> As Winter states, "people in power get to impose their metaphors." Winter, *supra* note 3, at 1458.

<sup>30</sup> Of course, other explanations for the rise of the standing doctrine have significant practical implications as well. For example, to the extent the doctrine grew out of a concern with caseload management, it raises questions about whether other, more transparent ways of dealing with the growth of the federal docket would have been preferable.

<sup>31</sup> See, e.g., Richard A. Epstein, *Standing and Spending – The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 4 (2001); Pierce, *supra* note 1; Stearns, *supra* note 4; Sunstein, *Standing and Public Law*, *supra* note 3; Sunstein, *What's Standing?*, *supra* note 3; Woolhandler & Nelson, *supra* note 1.

<sup>32</sup> See, e.g., John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009-1010 (2002); Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1723-47 (1975). Professor Joseph Vining's book on the transformation of the standing doctrine (published before Winter) makes briefly notes standing cases in the 1930s and 1940s, concluding that "there was a period of statesmanlike self-restraint; judgment of the legitimacy of agency action was avoided by manipulation of the doctrine of standing," but does not indicate any progressive-conservative split. JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 46, 56 (1978).

exhaustively below.<sup>33</sup>) Professor Richard Pierce, for example, writes that “[m]odern standing law originated with two Justices – Brandeis and Frankfurter – during the 1920s through the 1950s,” and states that its roots “lie in a perceived need to insulate democratic institutions from activist, politically unaccountable judges who were hostile to the new preferences expressed by the people and their elected representatives.”<sup>34</sup> Pierce further broadens the idea of a politically-motivated standing jurisprudence, arguing that the mere identity of the party asserting standing determines how a standing issue will be decided.<sup>35</sup>

Professor Maxwell Stearns extends the insulation thesis to allow for strategic interaction within the judiciary, positing that the Supreme Court shapes the doctrine to empower or hinder the lower courts depending on their makeup vis-à-vis the Court. Stearns posits that the New Deal Court used standing to prevent the lower federal courts from infringing on the progressive agenda. (One might wonder why it should be easier to control the lower courts by standing versus merits decisions, but the historical perception may matter more than actual efficacy in explaining the origins of the doctrine.<sup>36</sup>) By contrast, Stearns argues, the Roberts Court may be willing to relax standing rules to facilitate decisionmaking by the lower federal courts that match its conservative outlook.<sup>37</sup>

Professor Richard Epstein incorporates the thesis into his examination of standing and the spending power.<sup>38</sup> Like Winter and Sunstein, Epstein points to *Frothingham v. Mellon*<sup>39</sup> as an example of the use of standing to serve policy ends. He posits that *Frothingham*, denying state and taxpayer standing to challenge maternal and child welfare spending, was a considered judgment to protect Congressional use of the spending power to promote such goals.<sup>40</sup>

Regardless of the normative desirability of motivations for standing, clearer theoretical conception and empirical grounding of the insulation thesis is a crucial starting point for these scholarly efforts.

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<sup>33</sup> See *infra* Part II.

<sup>34</sup> Pierce, *supra* note 1, at 1767.

<sup>35</sup> See *id.* at 1742-43 (“[Students] can predict judicial decisions in this area with much greater accuracy if they ignore doctrine and rely entirely on a simple description of the law of standing that is rooted in political science: judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges.”).

<sup>36</sup> See Stearns, *Standing and Social Choice*, *supra* note 5, at 397 (arguing that standing was a “low-cost mechanism that enabled the New Deal Court to stave off unwelcome challenges to New Deal Programs without having to incur the political costs – or embarrassment – associated with determinations on the merits that differed widely from those of a recent era typified by *Lochner*”)

<sup>37</sup> See Stearns, *supra* note 4, at 937-49.

<sup>38</sup> See Epstein, *supra* note 31, at 4-5 (accepting as fact Winter’s contention that “the doctrine of standing in American constitutional law was crafted by the progressives who were anxious to insure that their political initiatives . . . could be shielded from political attack,” but arguing against Sunstein’s theory that “*Lochner*-like” motivations were responsible for allowing standing in later cases).

<sup>39</sup> 262 U.S. 447 (1923) (consolidated actions).

<sup>40</sup> See Epstein, *supra* note 31, at 1-2, 30-36. Notably, other scholars have addressed the standing doctrine’s political valence without referring to insulation at all. New Deal insulation may not be relevant to some studies that examine only the later period; however, these works tend to assume, or seek to prove, the current political valence of standing (conservatives denying standing, liberals granting it) without questioning whether the valence has ever been different. For example, Gene R. Nichol, Jr. begins his analysis with the Warren Court’s “liberalization” of the standing doctrine. Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 306 (2002). Similarly, C.K. Rowland and Bridget Jeffrey Todd focus their standing inquiry on Nixon, Ford, Carter, and Reagan judicial appointees, finding that Republican appointees are more likely to deny standing to “underdog” plaintiffs. C.K. Rowland & Bridget Jeffrey Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal Courts*, 53 J. POL. 175, 178-83 (1991). Perhaps most significantly, Harold Spaeth’s Judicial Database, cataloging all decisions from the 1953 through 2000 terms, codes any opinion that is “pro-exercise of judicial review” or “pro-judicial review of administrative action” as “liberal.” HAROLD J. SPAETH, UNITED STATES SUPREME COURT JUDICIAL DATABASE: 1953-2000 TERMS 56 (2001).



### C. Theoretical Muddiness

Despite the plausibility and importance of the insulation thesis, its precise contours remain unclear. Accounts differ considerably as to (a) whether insulation is an *exclusive* explanation for standing's conception or constitutionalization, (b) *when* insulation occurred, (c) *how* long it lasted, and (d) *whom* it characterizes (Brandeis and Frankfurter or the broader progressive-conservative split).

The insulation thesis is not a monolith. Indeed, strands vary dramatically both between and within the Winter and Sunstein accounts. Winter posits insulation as one of five factors in the development of the "modern constitutional standing doctrine," emphasizing the progressive period.<sup>41</sup> Other factors consist of the growth of federal jurisdiction through the federal question statute and the extension of removal jurisdiction; the birth of administrative law as an additional strain on the Court's workload; the strengthening of the old legal concept of *damnum absque injuria* (damage without cognizable injury) as "the central issue of theoretical concern";<sup>42</sup> and the growth of liberalism, with its focus on individual rights and process rather than end goals.<sup>43</sup>

By contrast, Sunstein relies almost exclusively on conscious insulation, focusing on both the progressive and New Deal eras.<sup>44</sup> From that account, Justices Brandeis and Frankfurter were the "principal early architects" of the doctrine, and "[t]heir goal was to insulate progressive and New Deal legislation from frequent judicial attack."<sup>45</sup> This difference of timing is nontrivial,<sup>46</sup> as progressive and New Deal conceptions of judicial review may diverge.<sup>47</sup>

As to scope, Winter's account focuses sharply on Brandeis and Frankfurter, while noting more broadly that "liberals were interested in protecting the legislative sphere from judicial interference."<sup>48</sup> More sweepingly, Sunstein concludes standing wasn't merely the bailiwick of two justices: "[m]any judges . . . sought to develop devices to minimize legal or judicial

<sup>41</sup> Winter, *supra* note 3, at 1452-57. But compare Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1519 (1990) ("[T]he 1937 paradigm shift manifested itself in areas other than those affecting the constitutionality of the regulatory state. In a few short years, two pillars of modern federal courts doctrine--constitutional standing law and the Erie decision--both made their appearance." (citations omitted)).

<sup>42</sup> Winter's use of the concept of *damnum absque injuria* to explain the rise of the standing doctrine may seem circular. His point is that this pre-existing legal doctrine was seized upon to forestall the potential problems of the new administrative state. Reliance on this concept allowed for regulations to create new interests that did not necessarily entail legal protection. *Id.* at 1453-54.

<sup>43</sup> *Id.* at 1452-55.

<sup>44</sup> Sunstein, *Standing and Public Law*, *supra* note 3, at 1436-38; Sunstein, *What's Standing?*, *supra* note 3, at 179-81.

<sup>45</sup> Sunstein, *What's Standing?*, *supra* note 3, at 179.

<sup>46</sup> Compare Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517, 529 n. 54 (2006) (noting that "the doctrine of standing was first developed by the New Deal Supreme Court"); with Staudt, *supra* note 1, at 622 n.48 ("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*"); and George & Pushaw, *supra* note 5, at 1274-75 (noting that "the Court created standing in the 1930s and 1940s primarily to deny federal judicial access to businesses challenging progressive legislation").

<sup>47</sup> See, e.g., WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 59, 320 (1994) ("The failure of progressives to support the Court-packing measure bitterly disappointed Roosevelt and the New Dealers. . . . Even though many progressives explained that they sought a more fundamental reform that would impose specific institutional limitations upon the federal courts, their refusal to accept Roosevelt's proposal suggests that respect for judicial prerogatives was more profound than their rhetoric suggested."); *id.* at 309-10 ("Faced with the alternative of transferring judicial powers to the legislative or executive branches of government, many progressives must have recognized that the judiciary, despite all its flaws, was the best agency to serve as ultimate arbiter of the Constitution."); ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 22-23 (1978) ("the Progressive realists viewed the policy-making function of judges as deviant in a democratic society").

<sup>48</sup> Winter, *supra* note 3, at 1456.

intrusions into the regulatory process,”<sup>49</sup> and although Brandeis and Frankfurter played prominent roles, standing was “used enthusiastically by judges associated with the progressive movement and the New Deal.”<sup>50</sup>

Conceptually, Winter also tells a more complex narrative about the rise of the doctrine, using cognitive and linguistic theories to trace the rise of standing from the private rights model of litigation. The Court fashioned the standing doctrine by embracing the private rights model of litigation, in which a personally-aggrieved party brings suit on her own behalf, while turning against a public rights or representational model. To this end, Winter emphasizes the individualism of the liberal movement.<sup>51</sup>

Straying from the more complex thread Winter weaves, Sunstein centers on the political point: the architects of the standing doctrine were liberal justices seeking to stop conservative brethren from overruling progressive legislation and agency action. In that sense, Sunstein’s insulation thesis is simpler, sharper, and more easily testable.<sup>52</sup>

#### D. Alternative Explanations

Not all scholars of the standing doctrine embrace the insulation thesis. A leading alternative explanation, which we call the “caseload management” thesis, is that standing served to manage the growing docket at the turn of the century. Now-judge William Fletcher, for example, notes that the creation of the standing doctrine in the 20<sup>th</sup> century was the result of “the growth of the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values.”<sup>53</sup> Similarly, Professor Kenneth Scott formalizes a functionalist, economic account of the standing doctrine.<sup>54</sup> Because (a) litigants do not pay for the marginal burden imposed on the court system with each suit, and (b) legislatures may be constrained in funding court systems to fully account for demand, backlog occurs. The standing doctrine thereby performs a form of “access screening” to reduce pressure on the judiciary.<sup>55</sup> Caseload management may be a plausible alternative to insulation – after all, justiciability doctrines developed at roughly the same time that the Supreme Court began its conversion to the discretionary docket.<sup>56</sup> To be sure, the standing doctrine might actually increase decision costs and therefore be ill-suited for caseload management. But as a matter of positive explanation for the origins of standing, the historical perception (rather than actual efficacy) of the doctrine for access screening may matter more.

<sup>49</sup> Sunstein, *Standing and Public Law*, *supra* note 3, at 1436-37.

<sup>50</sup> *Id.* at 1437.

<sup>51</sup> See Winter, *supra* note 3, at 1454.

<sup>52</sup> Sunstein further argues that the standing doctrine put a new gloss on the extant understanding that one could not sue unless a cause of action existed. See Sunstein, *What’s Standing?*, *supra* note 3, at 180.

<sup>53</sup> Fletcher, *supra* note 1, at 224, 224-28 (discussing origins of modern standing law without alluding to progressive insulation while noting that “[n]o thorough history of the development of federal standing law has been written”).

<sup>54</sup> See Kenneth E. Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645, 671-673 (1973).

<sup>55</sup> *Id.* at 672. Writes Scott: “The reduction in pressure on the judicial system resulting from a standing test arises not so much from the elimination of the individual case in which plaintiff is held to lack standing as from the likelihood of the exclusion of that type of case from the demand function and from future queues.” *Id.* at 673. Thus, to be effective in caseload management, the standing doctrine must be clear enough to discourage parties from filing suit *ex ante*. Scott concludes that the Article III inquiry as then formulated was “hardly sufficient to do the job” of screening cases for efficient caseload management. *Id.*

<sup>56</sup> See, e.g., Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008).

An altogether simpler explanation, prevalent in the courts, is that the “irreducible constitutional minimum”<sup>57</sup> has persisted in substantially identical form over time. While we might *observe* more standing cases during the New Deal period, that may be an artifact of types of cases reaching the courts – certain claims would have failed Article III at the founding, but simply weren’t raised then. We call this the “strong Article III” thesis.<sup>58</sup>

These explanations are not in principle exclusive. While Sunstein’s insulation thesis leaves little room for alternative explanations, Winter considers caseload management and the birth of the administrative state, along with insulation, as among five factors causing the rise of the standing doctrine. Professor Anthony Bellia argues an additional factor is the merging of law and equity,<sup>59</sup> while Professors Ann Woolhandler and Michael Collins argue that the insulation thesis “requires a measure of correction” to account for governmental standing.<sup>60</sup> Professor Barry Cushman deemphasizes differences between justices and offers a version confined to taxpayer standing.<sup>61</sup> Professor Robert Pushaw splits the pie differently, arguing that Brandeis was concerned with case management as a prudential matter, while Frankfurter sought to constitutionalize the doctrine to shield administrative agencies from interference.<sup>62</sup>

Even Justice Douglas’s opinions exhibit the tension, stating in 1974 that standing “serves to make the bureaucracy . . . more immune from the protests of citizens,”<sup>63</sup> while noting in 1975 that “[s]tanding has become a barrier to access to the federal courts” in light of “[t]he mounting caseload of federal courts.”<sup>64</sup> Professor Richard Stewart notes that while “[r]estrictive notions of standing have operated to ration scarce court resources,” “the hold of a formalist conceptual universe on the judicial mind is probably the most important explanation for the traditional standing doctrine.”<sup>65</sup> And citing to Winter, Fletcher notes justiciability generally rose “[f]or reasons that are not entirely clear.”<sup>66</sup> Thus, even if insulation is not the exclusive factor, a basic empirical question exists as to what weight (if any) insulation carries.

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A positive account of the origins of the standing doctrine is central to legal and scholarly inquiry surrounding the doctrine.

<sup>57</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>58</sup> For an interesting blend, see John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 & n.64 (1993) (citing the insulation thesis as support of the proposition that “[s]tanding is an apolitical limitation on judicial power” as it restricts the right of both conservative and liberal interests groups to challenge agency action).

<sup>59</sup> See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 818-9, 831-2 (2004). See also Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 951 (2008).

<sup>60</sup> Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 466-471 (1995).

<sup>61</sup> See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Law in the 1930s*, 50 BUFF. L. REV. 7, 64-66 (2002) (arguing “the principal way in which the Court sustained . . . New Deal measures was by refusing to pass upon the validity of the spending power” (quoting BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 183-84 (1942))). Interestingly, Cushman develops this proposition independently of Winter and Sunstein and documents a secondary source alluding to this use of taxpayer standing going back to 1942. See *id.*

<sup>62</sup> See Pushaw, *Justiciability and Separation of Powers*, *supra* note 5, at 458 (noting that “the Court adapted justiciability concepts to keep dockets manageable” and that “[t]he primary architect of these modifications was Justice Brandeis.”); *id.* at 458-59 (“[U]nder Frankfurter’s influence, new rules of standing and ripeness were formulated to prevent disruption of administrative agency processes.”).

<sup>63</sup> *Schlesinger v. Reservist Comm. to Stop the War*, 418 U.S. 208, 229 (1974) (Douglas, J., dissenting).

<sup>64</sup> *Warth v. Seldin*, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting). See also Peter Manus, *Wild Bill Douglas’s Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 TEMPLE L. REV. 111, 155 n.246 (1999).

<sup>65</sup> Stewart, *supra* note 32, at 1724 n.274.

<sup>66</sup> Fletcher, *supra* note 5, at 272 & n.45.

## II. WEAKNESS OF EXISTING EVIDENCE

While the insulation thesis lacks conceptual clarity, its primary weakness is less theoretical than evidentiary.<sup>67</sup> The prevailing evidence in support of insulation is a handful of cases. No clarification is offered as to how these cases are selected, and such haphazard case selection threatens the validity of any inference about the standing doctrine as a whole. How do we know that cases weren't chosen, advertently or inadvertently, to confirm the insulation thesis? Are omitted cases inconsistent with insulation? Each account of the standing doctrine appears to anchor itself in different cases, with little effort to address discrepancies. The *Chicago Junction* case, for example, plays dominantly in Louis Jaffe's canonical analysis of the development of the doctrine,<sup>68</sup> while Winter ignores its unexpected voting blocs – Brandeis finding standing for the majority and the conservative Sutherland dissenting.<sup>69</sup>

### A. Haphazard Case Selection

Even if we confine our inquiry to cases expressly cited by insulation proponents, the record remains thin. Upon examination, numerous cases contradict insulation, provide little information due to unanimity, lie at the periphery of the doctrine, or represent widely disparate time periods.

#### 1. Contrary Cases

If the standing doctrine was a purposive progressive innovation, one observable implication, which we flesh out below,<sup>70</sup> should be that conservatives dissent. After all, why would conservatives agree with efforts to bolster a progressive agenda? Yet key cases do not bear this out, and accounts of the insulation thesis largely overlook unanimity and the character of voting blocs in individual cases. Instead, extant accounts look to authorship as primary evidence: Brandeis and Frankfurter wrote a large number of opinions denying (or questioning) standing. But even taking authorship as a reliable indicator, unexpected authorships are rarely explained.

For example, insulation proponents rely on *Frothingham*,<sup>71</sup> which rejected a challenge to the constitutionality of the Maternity Act of 1921. That Act provided federal money to states cooperating with a federal agency to reduce maternal and infant mortality. The Court first rejected the standing of the state to sue, either on its own behalf or on that of its citizens. As to the individual plaintiff, Ms. Frothingham, the Court ruled that her interest in the taxation scheme supporting the Act was “shared with millions of others” and “comparatively minute and indeterminable,”<sup>72</sup> thus depriving her of standing.<sup>73</sup>

The reliance on *Frothingham* to support the insulation thesis is troubled for two reasons. First, Justice Sutherland, one of the conservatives (the so-called “Four Horsemen” of the Hughes

<sup>67</sup> We are not the first to point to these weaknesses. Stearns notes that insulation as an “explanation of the standing doctrine’s historical origins introduces its own set of anomalies.” Stearns, *supra* note 4, at 889-90. Similarly, Michael Rosman points to inconsistencies between two versions of Sunstein’s history of the doctrine concluding that “neither one is completely satisfactory.” Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 552 (1995).

<sup>68</sup> See Jaffe, *Private Actions*, *supra* note 1, at, 262-264.

<sup>69</sup> Winter, *supra* note 3, at 1422.

<sup>70</sup> See *infra* text accompanying notes 106-107.

<sup>71</sup> *Frothingham v. Mellon*, 262 U.S. 447 (1923) (consolidated cases).

<sup>72</sup> *Id.* at 487.

<sup>73</sup> The court also relied on separation-of-powers arguments and administrability concerns to deny taxpayer standing. *Id.* at 483.

Court<sup>74</sup>), authored the opinion. Second, the opinion was unanimous. The insulation thesis fails to explain why a conservative justice would not only acquiesce in, but also author, an opinion furthering a conscious progressive scheme for insulating liberal enactments.

Relying on the *Chicago Junction Case*<sup>75</sup> to support the insulation thesis is equally problematic. In that case, Justice Brandeis's majority opinion found railroad standing to challenge the Interstate Commerce Commission's grant of monopoly control to a competitor, noting that "[t]his loss is not the incident of more effective competition. It is injury inflicted by denying to the plaintiffs equality of treatment."<sup>76</sup> Justice Sutherland, joined in dissent by Justice McReynolds (yet another Horseman) and Justice Sanford, would have *denied* standing, finding purely competitive injury not cognizable. To this end, he stated that "the law will afford redress to a litigant only for injuries which invade his own legal rights," and that such was not the case here.<sup>77</sup> Justice Brandeis, thought to be the principal architect of New Deal insulation, voted to grant standing, while Justice Sutherland, conservative by conventional accounts, wrote a dissent that would have denied it. Thus, the votes in *Chicago Junction* are precisely contrary to what would be predicted on the insulation thesis.

Nor are these cases outliers on the periphery of the doctrine. To the contrary, *Frothingham* and *The Chicago Junction Case* are widely acknowledged to be foundational cases in the law of standing<sup>78</sup> and figure prominently in many accounts of the insulation thesis.<sup>79</sup>

## 2. *Unanimous Cases*

Further complicating the evidence for the insulation thesis is the norm of consensus, which prevailed in the early 20<sup>th</sup> century.<sup>80</sup> Standing was no exception to the norm. The vast majority of early cases were decided without dissent, making it difficult to argue that standing was purely a liberal innovation. After all, even if a liberal wrote a unanimous opinion for the Court denying standing, the other justices had to join.<sup>81</sup>

Proponents rely on early unanimous cases without explaining how they prove the insulation thesis. In *Fairchild* – cited by some as an early example of liberal insulation<sup>82</sup> – Justice Brandeis's opinion for a unanimous Court rejected the plaintiff's challenge to the method of ratification and the constitutionality of the 19<sup>th</sup> Amendment, stating that "[p]laintiff has only the right, possessed by every citizen, to require that the government be administered according to

<sup>74</sup> Cf. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997) (arguing that Justices Butler, McReynolds, Sutherland, and Van Devanter were not so staunchly conservative).

<sup>75</sup> 264 U.S. 258 (1924).

<sup>76</sup> *Id.* at 267.

<sup>77</sup> *Id.* at 273 (Sutherland, J., dissenting).

<sup>78</sup> See, e.g., Epstein, *supra* note 31, at 1 ("The rise of modern standing doctrine in American Constitutional Law can be traced with some precision to Justice Sutherland's opinion for a unanimous Supreme Court in *Massachusetts v. Mellon*, and its companion case of *Frothingham v. Mellon*."); Jaffe, *Private Actions*, *supra* note 1, at 262 ("It was only with the decision in the *Chicago Junction Case* – the basic case, in my opinion, until the advent of *Sanders* – that the criterion of standing was brought into focus."); Staudt, *supra* note 1, at 622 (2004) ("[T]he Supreme Court first devised the doctrine of standing (applicable to all plaintiffs in federal court) in *Frothingham v. Mellon*.").

<sup>79</sup> See, e.g., Winter, *supra* note 3, at 1422-23 (relying on the *Chicago Junction Case* as evidence that Justice Brandeis saw standing as requiring a redressable right or legal injury, while Justice Sutherland relied on "general principles"). While Winter uses *Chicago Junction* to support his theory that the term 'standing' evolved from a nonspecific metaphor to a constitutional doctrine, his failure to address the voting pattern presents a reason to question the case's support for the insulation thesis.

<sup>80</sup> See *infra* text accompanying notes 178-189.

<sup>81</sup> Explanations of early unanimity consistent with insulation may exist. For example, perhaps progressives were blessed with uncanny foresight and conservatives cursed with lack thereof. But extant accounts simply do not address unanimity.

<sup>82</sup> See, e.g., Amanda Leiter, *Substance or Illusion: The Dangers of Imposing a Standing Threshold*, 97 GEO. L. J. 391, 396 n.29 (2009); Sunstein, *Standing and Public Law*, *supra* note 3, at 1437 n.20.

law.”<sup>83</sup> Brandeis found that this general right did not entitle the plaintiff to institute a suit in federal court to determine the validity of a statute or constitutional amendment.<sup>84</sup> If *Fairchild* evinced an early effort to insulate a progressive agenda, why did no conservative justice of the *Lochner* Court dissent? The outcome of *Fairchild* is arguably more consistent with caseload management (or neutral standing principles) than with a conscious desire to protect *liberal* legislation. At the very least, the insulation thesis requires a more nuanced account (perhaps based on hidden ingenuity of progressives) of the great proportion of unanimous decisions during the early period.

One possible justification for the reliance on unanimous cases, suggested by some, is that progressives and conservatives *converged* on a private law notion of standing for different reasons: (a) liberals sought to insulate progressive legislation and administration, while (b) conservatives sought to affirm the *Lochnerian* notion that the judiciary served to protect common law interests from government.<sup>85</sup> Yet this justification is problematic in at least two ways. First, at a broad level it is very difficult to verify, as it provides no direct way to distinguish differences between justices or “neutral” explanations of caseload management. Second, it is inconsistent with the reliance by insulation proponents on *disagreements* between justices, noting, for example that “a majority of the Supreme Court rejected the Brandeis-Frankfurter position and allowed standing in cases that plausibly amounted to taxpayer suits.”<sup>86</sup>

### 3. *Peripheral Cases*

A third evidentiary weakness is that some cases offered in support of the insulation thesis do not clearly invoke the standing doctrine. Instead, they evince only a general desire to screen cases at the courthouse door or to avoid deciding certain issues. While informative, such peripheral cases do not allow us to distinguish the conceptualization and use of standing *per se*.

Take, for example, *Ashwander v. Tennessee Valley Authority*.<sup>87</sup> In that case, stockholders of the Alabama Power Company challenged a sale of the Company’s assets to the Tennessee Valley Authority, claiming that the contract was both injurious to the interests of the corporation and beyond the constitutional power of the federal government. While finding that the stockholders could sue in equity to challenge the TVA’s constitutional authority to make the deal, Chief Justice Hughes’ opinion for the majority found no constitutional infirmity.<sup>88</sup>

In concurrence, Justice Brandeis opined that the Court should have affirmed the judgment below without passing on the constitutional question. First, Brandeis argued that the stockholders did not have standing to interfere with management: “[m]ere belief that the corporate action, taken or contemplated, is illegal gives the stockholder no greater right to interfere than is possessed by any other citizen.”<sup>89</sup> He then concluded that stockholders had not

<sup>83</sup> *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Robert V. Percival & Joanna B. Groger, *Escaping the Common Law’s Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL’Y F. 119, 122 n.19 (2001) (“[B]oth supporters and opponents of the regulatory state sought to limit standing to those with common law interests at stake.”); Sunstein, *Standing and Public Law*, *supra* note 3, at 1438 (“[T]here was mutual agreement on the private-law model from those who believed in the need for a continuing role for the legal system in supervising administrative regulation, and those who thought that adjudicative controls were to a large degree anachronistic.”).

<sup>86</sup> Sunstein, *Standing and Public Law*, *supra* note 3, at 1437 n.20 (comparing *McGrath* (1951) and *Ashwander* (1936) to *Fairchild* (1922)).

<sup>87</sup> 297 U.S. 288 (1936) (cited as evidence for insulation, for example, by Sunstein, *What Standing?*, *supra* note 3, at 180 n.83; Sunstein, *Standing and Public Law*, *supra* note 3, at 1436-37 n.20).

<sup>88</sup> *Id.* at 322-23.

<sup>89</sup> *Id.* at 343 (Brandeis, J., concurring).

shown sufficient danger of irreparable injury to proceed in equity.<sup>90</sup> Finally – and most famously – Brandeis made the case for constitutional avoidance, detailing seven rules “[t]he Court developed, *for its own governance in cases confessedly within its jurisdiction*,” to avoid passing upon constitutional questions.<sup>91</sup> Among these, one rule alludes to the familiar injury-in-fact requirement: that the Court “will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.”<sup>92</sup> Justices Stone, Roberts, and Cardozo joined in Justice Brandeis’s concurrence, while Justice McReynolds dissented, finding a justiciable controversy and a constitutional violation.<sup>93</sup>

*Ashwander* certainly reveals a desire on the part of Justice Brandeis to avoid constitutional questions in general; it is less telling about the doctrine of standing in particular. Brandeis uses the language of standing, along with ideas of mootness, ripeness, estoppel, and several other doctrines, to discourage the Court from ruling on the merits. While his concurrence alludes to standing, it focuses primarily on the canon of constitutional avoidance. *Ashwander*, which is largely *not* seen as a standing case, fails to evince a conscious effort by New Dealers to insulate agency action via standing.

#### 4. *Timing*

Lastly, despite the focus on New Deal liberalism, the insulation thesis is sorely imprecise about *when* insulation occurred. The Winter and Sunstein accounts encompass cases from *Fairchild* and *Frothingham* in the 1920s to *McGrath* in 1951. The suggestion of nearly 30 years of insulation is breathtaking in light of profound transformations of the Court and constitutional law during this period. In the 1935 and 1936 terms, the Court was famously hostile to the New Deal,<sup>94</sup> but sharply reversed course in the so-called “constitutional revolution of 1937,”<sup>95</sup> followed with President Roosevelt’s eight appointments from 1937-41. Does the insulation thesis apply to the pre-1937 period? The post-1937 period? To all FDR appointees (all of whom are plausibly “liberal” compared to the pre-1937 Court)? In relying on cases from 1921-1951, the implicit answer appears to be that the insulation thesis applies across the board.

At the same time, Sunstein suggests that convergence between progressives and conservatives on a private law model of standing was dismantled sequentially, pointing to *Chicago Junction* in 1924) as broadening the “legal interest” test to encompass statutory as well as common law interests, and *Sanders Brothers* in 1940 as embracing standing to vindicate the public interest.<sup>96</sup> Again, this account remains ambiguous as to timing, spanning both pre and

<sup>90</sup> *Id.* at 344-45.

<sup>91</sup> *Id.* at 346 (emphasis added).

<sup>92</sup> *Id.* at 347-48.

<sup>93</sup> *Id.* at 356-372 (McReynolds, J., dissenting).

<sup>94</sup> See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (limiting executive authority to remove purely executive official at will); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (striking down a bankruptcy provision in the Frazier-Lemke Act); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (declaring the National Industrial Recovery Act unconstitutional under the nondelegation doctrine); *R.R. Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (invalidating government pension system for railroad employees).

<sup>95</sup> See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995); Alan Brinkley, *The Debate over the Constitutional Revolution of 1937*, 110 AMER. HIST. REV. 1046 (2005); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?* (Sept. 10, 2008) (working paper, on file with the authors), available at <http://dho.stanford.edu/research/switch.pdf>; Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AMER. HIST. REV. 1052 (2005). But see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); EDWARD G. WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); Richard D. Friedman, *Switching Time and Other thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PENN. L. REV. 1891 (1994).

<sup>96</sup> See Sunstein, *Standing and Public Law*, *supra* note 3, at 1438-39.

post-1937 periods.<sup>97</sup> One natural interpretation might be that the period of convergence (and hence, unanimity) prevailed sometime during the *Lochner* period (1905-37). After all, convergence is posited to occur between progressives seeking to insulate and conservatives seeking to affirm *Lochnerian* notions.<sup>98</sup> Yet Stearns interprets convergence to apply to the post-*Lochner* period, arguing that while it is “doubtful that the emerging liberal majority was distrustful of its own power to preserve New Deal programs,” convergence is explained by the majority’s desire to control the lower courts.<sup>99</sup>

Without more clearly defined temporal contours, objective assessment of the insulation thesis remains elusive. Given expansive periods of time, cases may be easily chosen to support or detract from the thesis.

## B. Extrinsic Evidence

Insulation proponents offer two forms of evidence extrinsic to the standing case law. First, the thesis draws some support from the private correspondence between Justices Brandeis and then-Professor Frankfurter. In one letter, Brandeis recounted that as Supreme Court justices, “the most important thing we do is not doing.”<sup>100</sup> Early on, Justice Brandeis remarked that “we must regard the field of sociology and *social legislation* as a field for discovery and invention,”<sup>101</sup> suggesting a jurisprudence that would defer to legislative enactments, particularly in the social welfare context. Consistent with this approach, Brandeis made an explicit appeal for limiting federal jurisdiction in 1936, stating that “not only should [] diversity jurisdiction be abolished (except where there is real prejudice which prevents justice in the state courts) but most of [sic] other jurisdiction added in 1875 & later should be abrogated and in no case practically should the appellate federal courts have to pass on the construction of state statutes.”<sup>102</sup>

At first blush, this correspondence might support the claim that Brandeis consciously sought to insulate New Deal legislation and agencies through standing. Yet the evidence is rough at best, fails to distinguish standing from other measures of restraint, and says little about the attitudes of other justices.

Second, the thesis draws some support from cases outside of the standing doctrine. Sunstein, for example, relies on concurrent developments in reviewability and ripeness doctrines.<sup>103</sup> Similarly, Professor Edward Purcell argues that Brandeis’s formulation of *Erie*

<sup>97</sup> Cf. Cushman, *supra* note 61 (citing cases from pre and post-1936 term for insulation of New Deal spending).

<sup>98</sup> But see Woolhandler & Collins, *supra* note 60, at 465.

<sup>99</sup> See Stearns, *Standing and Social Choice*, *supra* note 5, at 394-95 n.277.

<sup>100</sup> Winter, *supra* note 3, at 1455 (quoting THE FELIX FRANKFURTER PAPERS, Box 114, Folder 10 at 15 (Library of Congress photocopy of typescript of Box 114, Folders 7 and 8; holograph notes of FF conversations with LDB, Chatham, Mass., 1922-26); THE LOUIS DEMBITZ BRANDEIS PAPERS (Library of Congress microfilm series, Part II: United States Supreme Court, October Terms, 1932-1938, Reel 33, No. 0450)).

<sup>101</sup> Letter from Louis D. Brandeis to Felix Frankfurter (Jan. 28, 1913), in “HALF BROTHER, HALF SON”: THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 22 (Melvin I. Urofsky & David W. Levy eds. 1991) (emphasis added).

<sup>102</sup> Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 16, 1936), *id.* at 576.

<sup>103</sup> See Sunstein, *What’s Standing?*, *supra* note 3, at 180 & n.82 (citing *Switchmen’s Union v. Nat’l. Mediation Bd.*, 320 U.S. 297 (1943); *FCC v. CBS*, 311 U.S. 132 (1940); and *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)). On the development of ripeness, see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 166-75 (1998); Pushaw, *supra* note 5, at 494-6 (1996); and Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 934-5 (2008). On the development of exhaustion, see Duffy, *id.*, at 154-56.



evinces his broader belief in legislative primacy.<sup>104</sup> In *Erie*, Purcell argues, Brandeis sought to limit the power of the lower federal judiciary to interfere with progressive state law programs. While suggestive of Brandeis's efforts to defer to other branches and levels of government, Purcell's account does not speak directly to the standing doctrine or the jurisprudential preferences of the other justices, and only weakly buttresses the claim that Brandeis was the "architect" of the standing doctrine.

\* \* \*

Taken together, the evidence in support of the insulation thesis is weak. Haphazard case selection makes it difficult for readers to ascertain the representativeness or relevance of cases, and extrinsic evidence, although suggestive, falls far short of a kind of "smoking gun." None other than Winter expressed "surprise[] [at] the speed with which my revisionist claim was first credited as true."<sup>105</sup> The law and scholarship of standing could greatly benefit from theoretical synthesis and an empirical study of all relevant cases, to which we now turn.

### III. THEORETICAL CLARIFICATION

As our survey of the existing evidence shows, much of the empirical weakness stems from conceptual muddiness. What does the insulation thesis posit for which class of cases? When does it occur? How would we ascertain whether an alternative account explains the development of the standing doctrine? We first clarify the theory by articulating its primary observable implications (i.e., what we should observe if the insulation thesis is correct). These implications crystallize the challenges with which any empirical examination of the origins of standing must wrestle.

#### A. Observable Implications

Critical to assessing the validity of the insulation thesis are observable implications that differ from those produced by competing theories (caseload management or the immutable existence of Article III standing).<sup>106</sup> If a theory has no observable implications, it explains nothing we see, and is thereby impossible to verify. We spell out four.

First, cleavages in voting patterns provide the primary way to distinguish the insulation thesis from caseload management or a strong Article III view.<sup>107</sup> At least two versions of the insulation thesis are relevant for judicial voting patterns. A broad version posits that insulation was a shared goal by all progressive justices. If so, we should observe that judicial votes on standing cases reflect systematic differences between progressives and conservatives on the Court. A narrow version posits that insulation was an effort by Brandeis and Frankfurter alone.

<sup>104</sup> EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 165, 189-91 (2000).

<sup>105</sup> Winter, *supra* note 8, at 333 n.48 ("When I first claimed that standing doctrine was invented by Justices Brandeis and Frankfurter, I was unsure whether my documentation would be sufficient to overcome the conventional perception of standing as a fundamental requirement of justiciability under Article III. Indeed, when I described my project to one of my former teachers, he responded: 'Have they repealed the 'case or controversy' clause?' Consequently, I was surprised by the speed with which my revisionist claim was first credited as true and then consigned to the general stock of conventional wisdom.").

<sup>106</sup> See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 61-76 (2002).

<sup>107</sup> If progressives were concerned about caseload, but conservatives were not, the observable implications of caseload management and insulation are indistinguishable. To our knowledge, no one has made the argument that concerns about caseload correspond directly to merits preferences.

If so, Justices Brandeis and Frankfurter should be outliers in the correlation between merits and standing preferences.<sup>108</sup>

Second, if the insulation thesis holds, we should observe a reversal in the correlation between standing and merits preferences over time. Since the Warren Court, it is generally acknowledged that standing has taken a conservative political valence:<sup>109</sup> conservative justices tend to deny standing in cases, for example, involving public interest groups.<sup>110</sup> Sometime after the New Deal Court, we should detect a reversal, with conservative justices more likely to deny standing. As long as concerns about caseload management are independent of underlying merits preferences, this reversal is a prediction unique to the insulation thesis.

Third, although the scope of the insulation thesis is unclear, it should hold most strongly in actions that challenge New Deal administrative agencies. Granted, justices may have had sufficient foresight to strengthen the doctrine even when the specific case was unrelated to the New Deal, and perhaps this intuition underpins extant accounts that rely on cases not involving administrative agencies.<sup>111</sup> Such theoretical clarification is useful, advancing conceptualization of the insulation thesis. We posit, however, that the progressive-conservative split should manifest itself directly in cases closely related to the New Deal, since these plainly involve challenges to a progressive agenda. Caseload management or a strong Article III view might imply that justices should generally be more hostile to administrative challenges; but this implication posits that the *correlation* between merits and standing preferences is stronger across New Deal cases.

Finally, if the insulation thesis holds, we should observe progressive justices disproportionately raising standing in early unanimous cases, assuming some discretion in crafting opinions. We think that such discretion is plausible, in large part due to the sheer number of cases at the turn of the century. In addition, because the early cases arguably had not yet conceived of standing as a threshold issue, failure to discuss standing provides little information about the insulation thesis. It would be difficult to attribute the “push” behind New Deal insulation to progressives unless they author many of these decisions.

## B. Caveat on the Hazards of Historical Inquiry

While these observable implications in principle serve to test the validity of the insulation thesis, they also highlight the difficulty of examining standing’s historical origins.

First, as the doctrine emerged, it lacked clear definition and often stood in place for the merits (e.g., whether the plaintiff lacked a successful legal claim). Thus, it is not always obvious whether an early case involved standing. The “legal interest test,” the primary test for standing

<sup>108</sup> To the degree that the progressives are posited as forward-looking, the insulation thesis implicitly assumes some force of precedent.

<sup>109</sup> See, e.g., Stearns, *Standing and Social Choice*, *supra* note 5, at 404 (“[T]he Burger and Rehnquist Courts have tended in a substantially more conservative direction than their New Deal predecessor, [but] they have continued to employ standing to stave off challenges to a wide array of allegedly unlawful government action[.]”). But see Pierce, *supra* note 1, at 1768-9 (arguing that, like Brandeis and Frankfurter, the Burger Court used the standing doctrine to insulate legislation from “activist” judges).

<sup>110</sup> If a strong version of realism, à la Richard Pierce holds, we might instead expect that votes to *grant or deny* standing have no systematic correlation with underlying merits preferences, given that parties asserting standing can have objectives on both sides of the political spectrum.

<sup>111</sup> If one credits the New Deal progressive justices with an enormous amount of foresight, these distinctions may be irrelevant. That is, to the extent they believed that strict standing requirements would favor agency insulation over the run of cases, they might not have tailored their responses based on whether a particular case dealt with an administrative agency.

in the early period, often conflated standing with the substantive claim. Justice Reed's *McGrath* dissent, in which Justices Minton and Vinson joined, illustrates:

Standing to sue. – A question is raised by the United States as to petitioners' standing to maintain these actions. It seems unnecessary to analyze the problem in this dissent. If there should be a determination that petitioners' constitutional rights are violated by petitioners' designation [as Communists] under [the Order], it would seem they would have standing to seek redress. The 'standing' turns on the existence of the federal right. Does petitioners' designation abridge their rights under the First Amendment? Do petitioners have a constitutional right under the Due Process Clause of the Fifth Amendment to require a hearing before the Attorney General designates them as a subversive or communist organization . . . ?<sup>112</sup>

Reed's circular logic obfuscates whether the opinion addresses standing at all. It also raises a deeper question of what standing meant during the early period, and where to draw the line distinguishing standing cases from others.

Second, the New Deal Court, even when expressly addressing standing separate from the merits, often failed to distinguish it from other justiciability doctrines. Brandeis's *Ashwander* concurrence, as already noted, blends standing, mootness, ripeness, estoppel, and concepts of limitation.<sup>113</sup> Such confusion as to the issues occurred not only within a justice's discussion, but also between the justices. In *Colegrove v. Green*,<sup>114</sup> Illinois voters brought suit challenging the state law governing congressional districts. Justice Frankfurter announced the judgment dismissing the case, and focused on the presence of a political question: "[t]o sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket."<sup>115</sup> Justice Rutledge, concurring, drew upon the relationship between the Court and Congress (political question), the limited possibility of effective relief (redressability), and the lack of an absolute right on the merits to reach this conclusion (mingling merits and standing).<sup>116</sup> Justice Black, dissenting, would have found standing for petitioners.<sup>117</sup> *Colegrove* demonstrates a cacophonous justiciability conversation, with the justices lacking common understandings for each doctrine during the early period.<sup>118</sup> Such divergences exacerbate interpretation of early disagreements.<sup>119</sup>

Third, what is substantively labeled as "standing" differs across time and justices. During the early period, several doctrines that have subsequently been carved *out* of the standing jurisprudence were phrased in terms now used to discuss standing to sue. In the early years, for example, the Court analyzed "standing" to object to an unlawful search and seizure under the Fourth Amendment.<sup>120</sup> In *Goldstein v. US*,<sup>121</sup> criminal defendants brought suit challenging the use of intercepted communications to which they were not parties to induce testimony offered against them at trial. The majority found no standing, analogizing that one who is not victim to an unconstitutional search or seizure may not object to the introduction of the resulting

<sup>112</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 198-199 (1951) (Reed, J., dissenting).

<sup>113</sup> See *supra* text accompanying notes 87-92.

<sup>114</sup> 328 U.S. 549 (1946).

<sup>115</sup> *Id.* at 556.

<sup>116</sup> *Id.* at 564-567 (Rutledge, J., concurring).

<sup>117</sup> *Id.* at 568-570 (Black, J., dissenting).

<sup>118</sup> See also *Sosna v. Iowa*, 419 U.S. 393 (1975) (mootness).

<sup>119</sup> Such differences of course still continue, although with less opacity, into the modern period. Compare *Bunting v. Mellen*, 541 U.S. 1019, 1020-22 (2004) (discussing issue of mootness); with *id.* at 1026 (Scalia, J., dissenting) (characterizing issue as one of standing). See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) ("Mootness is . . . the doctrine of standing set in a time frame").

<sup>120</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>121</sup> 316 U.S. 114 (1942).

evidence.<sup>122</sup> The dissenters – Justices Frankfurter, Stone, and Murphy – would have granted standing.<sup>123</sup> In 1978, the Court, without real disagreement, and likely in delayed response to *Data Processing*, converted standing under the Fourth Amendment to an inquiry on the merits:

[T]he question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement . . . is more properly subsumed under substantive Fourth Amendment doctrine. . . . The inquiry under either approach is the same. But we think the better analysis forth-rightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.<sup>124</sup>

Similar conceptual overlap occurs for RICO,<sup>125</sup> antitrust,<sup>126</sup> and First Amendment overbreadth claims.<sup>127</sup> This overlap is methodologically challenging because *the same substantive claim* may or may not fall under the rubric of standing at any given point of time. Disagreements about standing may manifest themselves in cases that never expressly invoke the standing doctrine. And disagreements between the justices as to whether to characterize an issue as standing may not indicate any preference as to the restrictiveness of standing.

Fourth, because standing was not a constitutional threshold during the early period,<sup>128</sup> drawing an inference about a justice's view towards standing, when the issue is raised but not discussed, poses challenges.<sup>129</sup> A general rule of empirical analysis is that data collection should not depend on an answer to the very research question being posed (i.e., when standing was constitutionalized). If standing was not yet constitutional, reaching the merits in a case may say *nothing* about a justice's views on whether the parties have standing.<sup>130</sup>

<sup>122</sup> *Id.* at 121-122.

<sup>123</sup> *Id.* at 128 (Murphy, J., dissenting).

<sup>124</sup> *Rakas v. Illinois*, 439 U.S. 128, 138-39 (1978). *See also* Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L.J. 750 (2008).

<sup>125</sup> *Compare* *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (treating the statutory cause of action under RICO § 1964(c) as a standing inquiry), *with* *Beck v. Prupis*, 529 U.S. 494 (2000) (ignoring the lower courts' treatment of the case as involving standing and interpreting § 1964(c) purely as cause of action).

<sup>126</sup> *See, e.g.,* *Empagran S.A. v. F. Hoffman-Laroche*, 315 F.3d 338, 357-59 (D.C. Cir. 2003) (finding constitutional standing for plaintiffs to bring antitrust claims); Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 835-40 (1977) (discussing failure of courts to analytically separate antitrust standing from the merits of antitrust law); Eric J. Lobenfeld, *Antitrust Standing – A Somewhat Elusive Target*, 51 BROOKLYN L. REV. 525, 527 n.15 (1985) (cataloging heterogeneity of approaches to antitrust standing, including approaches that tie antitrust standing to constitutional or statutory inquiry).

<sup>127</sup> *Compare* *de la O v. Hous. Auth. Of El Paso*, 417 F.3d 495, 505 (5th Cir. 2005) (finding that overbreadth doctrine did not help *de la O* because she already had standing), *with* *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (distinguishing between overbreadth standing requirement and merits question of whether overbreadth is substantial) and *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1279 (D.C. Cir. 1993) (Randolph, J., concurring) (arguing that dissent confused standing and merits). *See* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (arguing that the “overbreadth doctrine does not in fact possess a distinctive standing component” and “is simply an examination of the merits of the substantive constitutional claim”); Henry Paul Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282-86 (1984). *But cf.* Richard H. Fallon, Jr., *The Linkage between Justiciability and Remedies – and their Connections to Substantive Rights*, 92 VA. L. REV. 633, 676 (2006) (noting that “characterization of First Amendment overbreadth doctrine as a standing rule captures important truths”).

<sup>128</sup> *See supra* text accompanying notes 16-20.

<sup>129</sup> Even in the modern period, the order of operations may depend on a justice's conception of whether standing is a mandatory threshold that bars not only consideration of the merits but also other matters that may arguably be termed jurisdictional, even if a case may be more easily disposed of on those other issues. *See* *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

<sup>130</sup> This is in contrast to the modern period, in which a failure to address standing generally represents an acknowledgment that standing exists, particularly where the Court does not dispose of the case on other grounds.

For example, in *Perkins v. Lukens Steel*,<sup>131</sup> iron and steel manufacturers sued to restrain the Secretary of Labor and officials responsible for the government's purchase of those materials from carrying out an administrative wage determination requiring them to pay a minimum wage. The majority denied standing to vindicate "general interest[s]" or protect against loss of income without direct injury to legal rights.<sup>132</sup> Justice McReynolds dissented, saying only that the judgment below – which granted an injunction to the manufacturers – should be affirmed. Had this case occurred today, we would infer that Justice McReynolds found standing: without standing to sue, a litigant could not procure an injunction. In 1940, however, this was not necessarily true; absent constitutionalization, willingness to rule on the merits may not implicitly decide standing. The early period thereby presents inherently limited information.

Lastly, and relatedly, early case law is often opaque as to whether the decision rests on prudential or constitutional grounds, making it difficult to pinpoint any discrete breakpoint of constitutionalization.<sup>133</sup>

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Given these hazards, why, then, proceed with empirical inquiry? One answer is that *any* evaluation of the insulation thesis (indeed any account of the origins of standing) necessarily entails addressing these hazards. Doctrinally, it might be most defensible to draw a hard line between (a) the merits and (b) standing as a "factual" threshold issue, including only the latter. Yet doing so effectively eliminates all cases before *Data Processing* drew this distinction in 1970.<sup>134</sup> Thus, the insulation thesis would be impossible to investigate. Extant accounts cannot circumvent these difficulties and each *implicitly* addresses these concerns when selecting cases. Without clearly articulated case selection criteria, however, it remains difficult to assess the validity of inferences drawn. The next Part shows how our data collection protocol is designed specifically to overcome these historical hazards.

## IV. DATA COLLECTION

Our data collection approach is threefold. First, to overcome haphazard case selection, we leverage a large number of sources (e.g., historical treatises, law review articles on the origins of the standing doctrine, Westlaw Key Numbers, and Lexis Headnotes) to enumerate the potential population of over 1,500 standing cases. Second, we read each of these cases to validate, classify, and disaggregate each express disagreement on a standing issue, recording votes cast by each justice as favoring or disfavoring standing, or as unclear. Third, we augment this new standing data with all judicial votes on the merits, backdating the Supreme Court Database to 1921. The resulting data encompass 47,570 votes on 5,497 unique issues and the full population of 229 standing issues on which justices expressly disagree. Using modern statistical methods, we can then capitalize on crucial variation across justices, time, and cases to assess the insulation thesis.

### A. Case Selection

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<sup>131</sup> 310 U.S. 113 (1940).

<sup>132</sup> *Id.* at 125.

<sup>133</sup> See *supra* text accompanying notes 16-20.

<sup>134</sup> See *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 ("The 'legal interest' test goes to the merits. The question of standing is different.").

Case selection represents the biggest threat to validity to studying the standing doctrine. We sketch our data collection process to make transparent (and replicable) both the process and criteria by which we selected and classified cases. Appendix A provides additional details.

### 1. *Population Enumeration by Leveraging Expertise*

Because of the sparseness of the historical record, we aim to compile a dataset of the *population* of all contested standing issues from the 1921 to 2006 terms. We use 1921 as the starting point of the observation period, as *Fairchild* and *Frothingham* in tandem are widely recognized as marking the beginning of the modern standing doctrine.<sup>135</sup>

Rather than rely on a single source or search, we leverage prevailing expertise in the form of three types of sources to compile a list of cases cited in the context of standing as the starting point for our analysis. First, the Supreme Court Database by Professor Harold Spaeth includes “issue” and “law” codes that in principle capture standing.<sup>136</sup> Second, we conduct a large number of Westlaw and Lexis searches to compile all cases tagged by Headnotes or Key Numbers as involving a standing issue, as well as all cases involving language plausibly related to standing (e.g., standing, injury in fact, citation to *Frothingham*). Given that the early standing cases do not necessarily invoke the term “standing,” we conduct overinclusive searches of the early historical period to capture as many cases as possible (e.g., legal wrong or interest, person injured, damnum). Third, we record all cases cited in 11 treatises, hornbooks, and law review articles on the development of the standing doctrine.<sup>137</sup>

<sup>135</sup> See David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 815 n. 42 (2004); Pushaw, *Justiciability and Separation of Powers*, *supra* note 5, at 472 (“The earliest modern standing decision, *Frothingham v. Mellon*, rejected a taxpayer’s constitutional challenge”); Berger, *supra* note 1, at 818-19 (“[Standing] apparently entered our law via *Frothingham* in 1923.”); Pierce, *supra* note 1, at 1768 (“[C]onsider the famous case of *Frothingham v. Mellon*, which many consider to mark the birth of modern standing law.”); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 308 n. 31 (1996); Stearns, *Standing Back*, *supra* note 5, at 1335 n.89 (citing to Winter); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2072 n.1 (1990); Sunstein, *What’s Standing?*, *supra* note 3, at 209; Winter, *supra* note 3, at 1376. See also *supra* text accompanying note 78. Specifically, we start with volume 257 of the U.S. Reports, marking the 1921 term, which includes some cases issued prior to *Fairchild*.

<sup>136</sup> While Spaeth’s data does not cover the early historical period, it is informative for the comparison across time.

<sup>137</sup> In chronological order, our sources are: LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 459-545 (1965); 3 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22 (1st ed. 1958 & Supp. 1965); 3 HENRY G. FISCHER & JOHN W. WILLIS, PIKE AND FISCHER *ADMINISTRATIVE LAW TREATISE* § 10a.3 (2d ed. 1965 & Supp. 1970); Fletcher, *supra* note 1; Winter, *supra* note 3; 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24 (2d ed. 1978 & Supp. 1989); Sunstein, *What’s Standing?*, *supra* note 3; ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.3 (4th ed. 2003); STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, & ADRIAN VERMEULE, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES* 813-887 (6th ed. 2006); 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531 (2d ed. 1984 & Supp. 2008); 3 RICHARD PIERCE, *ADMINISTRATIVE LAW TREATISE* § 16 (4th ed. 2002 & Supp. 2008); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 2 § 3 (5th ed. 2003 & Supp. 2008).

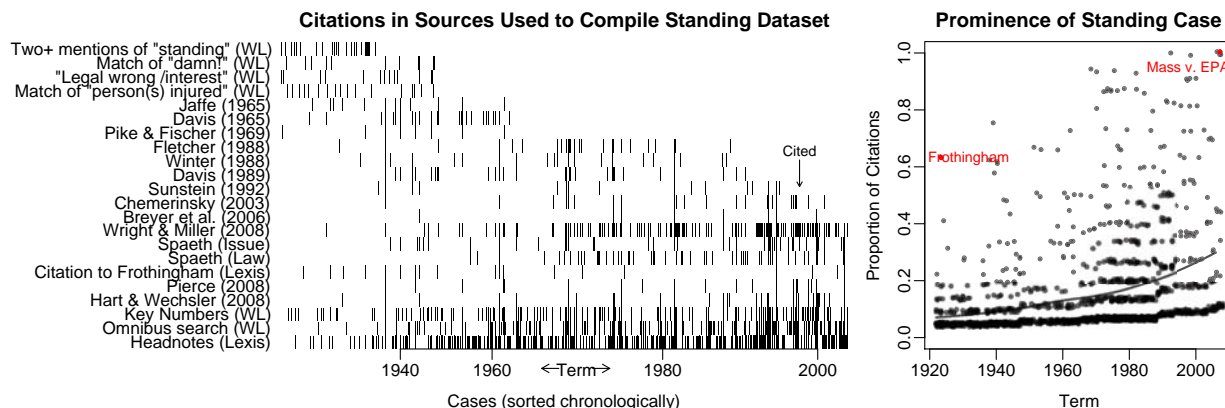


Figure 1: Summary of sources and searches used to overcome case selection bias. The left panel presents all cases cited at least once by one source. Black dash indicates citation by particular source and white indicates that a case was not cited. WL indicates Westlaw. The right panel plots the proportion of sources (randomly jittered for visibility) that mention each particular case over time. This shows that agreement as to what constitutes a standing case generally increases over time. The curve plots a smoothed upward trend.

Figure 1 provides an overview of this exhaustive process to compile all potential standing cases. Each row in the left panel represents one major source (ordered by coverage date) and the *x*-axis represents over 1,500 cases cited at least once (sorted chronologically). White cells represent lack of citation (or coverage) and black cells indicate that a case was cited by a particular source. The bottom row, for example, represents all results returned by the Lexis Headnotes, with 777 black cells representing cases discovered through this search. Wright & Miller, Westlaw, and Lexis provide the most comprehensive coverage overall, but coverage becomes considerably more sparse in the earlier historical period. Earlier treatises, such as Davis's 1965 treatise and Jaffe's 1965 treatise, as well as the early Westlaw searches fill the historical gap considerably. The right panel plots the proportion of the sources citing to any given case over time (conditional on coverage of that time period). All sources, for example, cite to *Lujan v. Defenders of Wildlife*,<sup>138</sup> *FEC v. Akins*,<sup>139</sup> and *Massachusetts v. EPA*.<sup>140</sup> The trend line, however, shows that agreement as to the core of standing decreases going back in time. *Frothingham* is discussed by two thirds of sources, but most cases are cited by only a single source.

Collecting the union of all of these sources leverages extant expertise to ensure that we cover all relevant cases. For example, conventional Westlaw searches miss *Pennsylvania v. West Virginia*,<sup>141</sup> in which Pennsylvania and Ohio sued to enjoin West Virginia from legal enforcement they believed would decrease natural gas supply from West Virginia. The majority, in an opinion by Justice Van Devanter, found standing for the states, noting that their "interests are substantial and both the [states are] threatened with serious injury . . . . [T]he state, as a representative of the public, has an interest apart from that of the individuals affected."<sup>142</sup> Justices McReynolds and Brandeis dissented, finding that the states lacked standing, although for different reasons.<sup>143</sup> Despite the lack of Westlaw coverage, the Lexis headnotes, the Pike & Fischer treatise, Winter, and citation to *Frothingham* ensure inclusion. Similarly, almost all

<sup>138</sup> 504 U.S. 555 (1992).

<sup>139</sup> 524 U.S. 11 (1998).

<sup>140</sup> 549 U.S. 497 (2006).

<sup>141</sup> 262 U.S. 553 (1923).

<sup>142</sup> *Id.* at 591-92.

<sup>143</sup> *Id.* at 610, 611.

sources (save for Davis's first edition and a search for "damnum") overlook *Frost v. Corporation Commission of Oklahoma*,<sup>144</sup> in which the majority granted standing for a competitive injury – the grant of a competitor's permit for a cotton gin – resulting from an Oklahoma statutory scheme. Justices Brandeis and Stone wrote separate dissents, focusing on the lack of a direct injury to the plaintiff.<sup>145</sup>

Nonetheless, concerns over selection bias might still loom. Winter's article, for example, might bias case selection towards consistency with the insulation thesis. There are several points in response. First, our aim here is not to *sample* from some population, but to collect *all* contested standing cases (i.e., the population). As a result, the key is to be overinclusive in conducting this enumeration at each step, thereby including Winter, as long as we've credibly captured heterogeneous ways to enumerate the population. Second, as a check for how many of our findings could potentially be driven by Winter, we calculate how many cases are attributable solely to that source. The smaller that number, the more credible our claim to have captured the population.<sup>146</sup> Here, that number is 0. Third, as independent validation, we use a forthcoming article by Professor Elizabeth Magill about the history of the standing doctrine, published after our data collection.<sup>147</sup> *Every case* cited by Magill was already included in our enumeration. Fourth, recall that these historical treatises do not agree on the historical foundations of the standing doctrine, thereby making it less likely that findings will be driven by some prior consensus of researchers. Lastly, note that the number of cases in our enumerated list (roughly 1,500) is large compared to the overall caseload. For example, by conventional criteria, there are over 5,000 merits votes for this observation period.<sup>148</sup>

As a result, we are confident that our "population enumeration" approach provides by far the most comprehensive set of cases examined.

## 2. *Inclusion Criteria*

While our list plausibly captures all cases within the periphery of the doctrine, it is decidedly overinclusive. In order to winnow down the list to the set of relevant cases, we read and classified cases for whether they involved an express disagreement on standing.

Although early cases did not uniformly employ the modern language of "standing," the cases invoke common expressions, such as whether a party has suffered a "direct"<sup>149</sup> and "redressible" "injury," whether a party is "a party in interest,"<sup>150</sup> and whether an interest is "personal"<sup>151</sup> to the plaintiff. In addition, concepts of taxpayer standing, competitive injury, and the requirement that a party must apply for a license before challenging a licensing scheme are

<sup>144</sup> 278 U.S. 515 (1929).

<sup>145</sup> *Id.* at 535 (Brandeis, J., dissenting); *id.* at 552 (Stone, J., dissenting).

<sup>146</sup> Although none of these sources is random, the intuition is similar to capture-recapture sampling used in population ecology and census enumeration. See Ivars Peterson, *Census Sampling Confusion*, 155 SCI. NEWS. 152 (1999); Howard Hogan, *The 1990 Post-Enumeration Survey: An Overview*, 46 AM. STAT. 261 (1992).

<sup>147</sup> Elizabeth Magill, *Standing for the Public: A Lost History*, VA. L. REV. (forthcoming 2009).

<sup>148</sup> Appendix A provides more detail on the merits votes. The distinction between merits and standing issues in the case discussion does not cleanly track the distinction between "merits votes" as conventionally represented in the Supreme Court Database. The latter picks the major issue of disagreement, which in some cases can be standing (e.g., in *Lujan*).

<sup>149</sup> See, e.g., *State Grange v. Benton*, 272 U.S. 525, 528 (1926).

<sup>150</sup> See, e.g., *Singer v. Union Pac. R.R. Co.*, 311 U.S. 295, 304 (1940).

<sup>151</sup> See, e.g., *Stark v. Wickard*, 321 U.S. 288, 304 (1944).



frequently invoked.<sup>152</sup> To track the scholarship on the New Deal period as closely as possible, we typically deemed these phrases and concepts as involving standing.

The animating principle of inclusion was that subjective notions of the justices as to what constituted standing should govern. While the justices often conflated standing, other justiciability doctrines, and the merits, we took them at their word: to the extent they framed the issue in a way that expressly implicated standing, we included the case. We therefore included cases in doctrinal areas subsequently carved out of the standing doctrine – for example, whether one has a reasonable expectation of privacy under Fourth Amendment law – where the opinions in these cases framed the issue as one of standing. Conversely, we did not “recharacterize” modern cases to fit the traditional conception of standing (e.g., recoding Fourth Amendment cases about the reasonable expectation of privacy as involving “standing”).

Alternative approaches would suffer from several problems. First, the insulation thesis does not describe how some hypothetical temporally-consistent doctrine would have been treated at various historical junctures. While in principle it might be possible to recharacterize all decisions in accordance with a modern (or traditional) conception of the doctrine, the insulation thesis is emphatically about how the justices conceived of the doctrine at the time they faced it. Second, separating out the merits, other justiciability doctrines, and other areas of law might leave us with virtually no information about the relevant time period. While plausible as a matter of first principles, any examination of insulation necessarily prevents such sharp (modern) separation.

Our second inclusion criterion was that a case must involve an express *disagreement* on standing.<sup>153</sup> Without disagreement, the case sheds little insight into the relative position of the justices with regard to the doctrine.<sup>154</sup> In the early period, we did not include cases in which the lack of clear constitutionalization made it impossible to determine where a particular justice stood on the standing issue.

## B. Outcome Measurement

For the entire observation period, outcome measurement involved several criteria. First, we disaggregated all unique disagreements on standing issues. Take the case of *Lujan v. Defenders of Wildlife*,<sup>155</sup> involving a challenge by environmental plaintiffs of a regulation limiting the consultation process for federal agencies under the Endangered Species Act (ESA). Justice Scalia, writing for the majority, found that litigants failed to allege particularized injury<sup>156</sup> and that the citizen suit provision was insufficient to grant standing under the ESA for a procedural injury.<sup>157</sup> Commanding only a plurality, Scalia further concluded that plaintiffs failed to show that a victory on the merits would redress the alleged harms.<sup>158</sup> As represented in the left panel of Figure 2, conventional representations of *Lujan* might focus on a single issue of whether respondents have standing (coded as 1 if a justice voted yes, or 0 if no).

<sup>152</sup> While the failure to apply for a license might fall under the exhaustion doctrine in a modern context, the early cases conceive of it as a standing-type injury inquiry: if the party hasn't applied, she hasn't been denied, so she isn't injured. Again, this demonstrates the difficulty in determining the boundaries between standing, exhaustion, and ripeness.

<sup>153</sup> As we describe below, we also include all unanimous cases from 1921-37.

<sup>154</sup> This is not true to the extent one believes that the identity of the author of a unanimous opinion is significant. See *infra* Part V.A.

<sup>155</sup> 504 U.S. 555 (1992).

<sup>156</sup> *Id.* at 562-567.

<sup>157</sup> *Id.* at 572-578.

<sup>158</sup> *Id.* at 568-571.

Instead, we disaggregated all unique issues, as represented on the right panel of Figure 2, capturing the opinions' much more fine-grained information about the justices' standing preferences. Justice Kennedy, concurring in part and joined by Justice Souter, did not join the majority's redressability finding; while he concurred in the majority's conclusion about ESA's citizen suit provision, Justice Kennedy did not foreclose the possibility that Congress could define injuries and chains of causation that would give rise to a case or controversy.<sup>159</sup> Justice Blackmun, joined by Justice O'Connor dissented on each standing issue.<sup>160</sup> Justice Stevens concluded that respondents had standing, but concurred in the judgment based on the merits of ESA's scope.<sup>161</sup> The right panel of Figure 2 encapsulates these nuances, leaving appropriately blank issues on which particular justices did not opine. To be sure, any single measure will fail to capture certain complexities in these opinions, but we view our approach as a considerable improvement over conventional methods that reduce all issues in a case to one (e.g., in the left panel) or provide only casual assessments of merits views.

Representing <i>Lujan v. Defenders of Wildlife</i>													
Conventional Coding							Nuanced Coding						
Do respondents have standing? 1 = Yes, 0 = No													
Scalia	Rehnquist	Thomas	White	Kennedy	Souter	Blackmun	Scalia	Rehnquist	Thomas	White	Kennedy	Souter	Blackmun
0	0	0	0	0	0	1	0	0	0	0	0	1	1
							Is there allegation of particularized injury?	0	0	0	0	0	1
							Is injury redressable?	0	0	0	0	1	1
							May procedural injury be statutorily defined?	0	0	0	0	1	1
							Do respondents win on the merits?	0	0	0	0	1	1
													1

Figure 2: Comparison of conventional numerical representation of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), on left panel and more nuanced representation on right panel that disaggregates the merits and discrete standing issues.

Second, we coded each vote cast as favoring or disfavoring standing. In *Lujan*, for example, Justices Kennedy, Souter, Blackmun, and O'Connor would be coded as favoring standing when reserving the possibility that Congress could define procedural injuries where ordinary standing requirements may be lacking. Coding such votes directionally requires considerable understanding of these cases and the doctrine, with the major benefit of generating better information.

Third, our principle for coding was to impute direction only where clear. In a large number of instances, imputing a direction remains difficult. For example, the justices may agree on standing, but for different *reasons* that do not squarely favor or disfavor standing; the justices may disagree *whether* an issue involve standing at all; or the justices may disagree about whether to *reach* the standing issue. While our rule means that we are left with fewer informative cases, in our statistical framework it is preferable to account for such uncertainty than to risk misclassification.<sup>162</sup>

*Association of Data Processing Service Organizations, Inc. v. Camp*<sup>163</sup> illustrates an instance where all justices agree on standing, but disagree on the analysis. In that case, a data processors' association challenged ruling by the Comptroller of Currency that national banks could make data processing services available to other banks and their customers. In an opinion by Justice Douglas, the majority determined that the plaintiffs alleged "injury in fact" from the

<sup>159</sup> *Id.* at 580 (Kennedy, J., concurring).

<sup>160</sup> *Id.* at 589-606 (Blackman, J., dissenting).

<sup>161</sup> *Id.* at 581-589 (Stevens, J., concurring).

<sup>162</sup> Specifically, in an item response theoretic framework, these disagreements can still enter (non-directionally) to estimate ideal points.

<sup>163</sup> 397 U.S. 150 (1970).

challenged action<sup>164</sup> and that the organizations, as competitors, were “arguably” within the statutory “zone of interests.”<sup>165</sup> Justice Brennan filed an opinion concurring and dissenting in part, joined by Justice White, arguing that the “zone of interests” test was wholly unnecessary, but agreeing that the plaintiff organizations had standing under the constitutional rubric.<sup>166</sup> While *Data Processing* was affirmatively an attempt to liberalize standing, we do not code the separate opinions directionally, as it is unclear (both as a matter of intent and ultimate effect) which opinion favored standing vis-à-vis the other.

Similarly, we code Justice Reed’s concurrence in *McGrath*, discussed above, as representing a disagreement regarding standing, but do not assign directionality, as Justice Reed found it “unnecessary to analyze the problem.”<sup>167</sup> In *Perkins*, the majority denied standing, but Justice McReynolds dissented only on the ground that he would have affirmed the judgment below; as a result, we did not impute a direction. We validated all coding decisions in the research team. Of 229 standing issues, 65 (28%) were not directionally coded due to such complexities.

Finally, because of the sparseness for the early period, we collected both unanimous and nonunanimous cases expressly discussing standing for 1921-1937, and examined whether the Court granted or denied standing.

### C. Merits Data and Baseline Statistical Model

Our third source of data consists of all contested merits votes from 1921-2006. Systematic measurement of “progressives” and “conservatives” are difficult to come by, particularly for the pre-1937 Court. This may explain why extant examinations of the insulation thesis have not investigated voting splits on standing cases. Our statistical approach characterizes jurisprudential differences transparently. Using all merits votes from this observation period, we determine what it means when insulation proponents claim that “liberals” or “conservatives” were more prone to favor standing.

We start with the Supreme Court Database compiled by Professor Harold Spaeth, which records merits votes for all justices from the 1937 to 2006 terms. We clean the data as outlined in Appendix A. With data on the 1926-36 terms generously provided by Lee Epstein, we further backdate this data to 1921 to cover the relevant historical period, using standard criteria to select contested merits votes.<sup>168</sup>

To provide baseline merits preferences, we apply modern statistical adjustments, detailed in Appendix B. The intuition of the approach is as follows. Jurisprudence is obviously complex and difficult to measure, just like “intelligence.” Yet educational testing routinely addresses the measurement of “intelligence” by administering standardized tests to students. To be sure, standardized tests capture only one summary of a vastly complex concept of intelligence, but the measure provides one way of summarizing differences between students.

As with standardized tests, the key for us is that we have significant overlap of justices casting votes on *common cases* to be able to place them on a meaningful dimension. This allows us to model each vote on a case, using the same class of models in educational testing, as a

<sup>164</sup> *Id.* at 152.

<sup>165</sup> *Id.* at 155-56.

<sup>166</sup> *Id.* at 168.

<sup>167</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 198 (1951).

<sup>168</sup> We limited our cases to those in which the court heard oral argument and issued at least one signed opinion, cases decided by an equally divided court, per curiam opinions in which oral argument was heard, and judgments of the court.

function of one underlying dimension. The statistical approach adjusts for differences in cases, namely whether cases generate much disagreement and whether that disagreement is explained by the underlying posited jurisprudential dimension (analogously, in an educational setting, certain test questions may not distinguish students very well).

The estimates thereby provide one summary characterizing differences in the justices based on voting patterns. Because we make no assumptions about directionality of merits decisions (a matter of political philosophy more than empirical inquiry), some constraints are required to ensure that the dimension is fixed.<sup>169</sup> Here, we constrain Justice Marshall to be negative and Justice Burger to be positive, but any reasonable constraints would yield similar results.<sup>170</sup> This approach has no substantive implication for whether the justices are voting “policy preferences” per se, but allows us to interpret the dimension as running from “liberal” to “conservative.”<sup>171</sup>

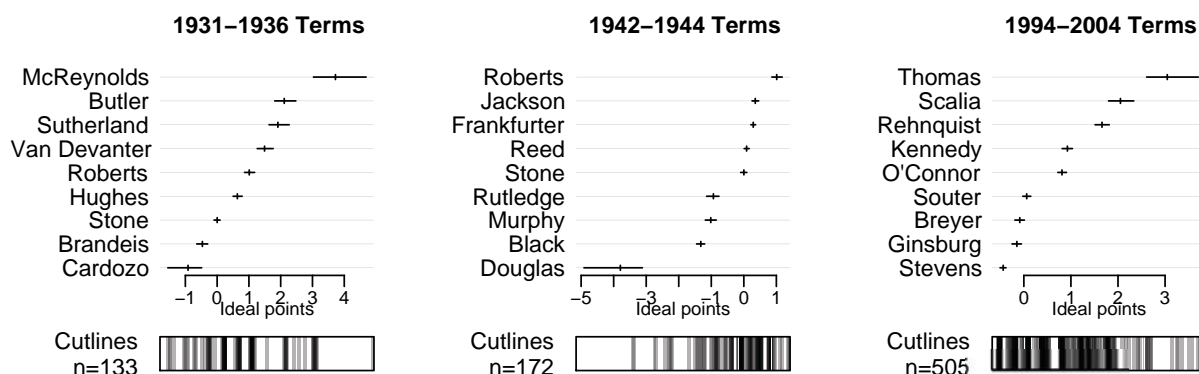


Figure 3: Illustration of ideal points of justices for three natural courts. The top panels represent the estimated locations where left can be interpreted as more “liberal” and right can be interpreted as more “conservative.” Points represent posterior medians, and segments represent 95% credible intervals. The bottom panels overlay estimated cutlines that separate the majority and minority for all decisions by that natural court.<sup>172</sup> This illustrates that only the relative positions of the justices matters: for example, the right-skewed marginal distribution of ideal points for the Rehnquist Court matches similar skew of cutlines.

Figure 3 presents merits preferences (“ideal points”) for three natural courts. The left panel presents the pre-1937 Court. The short vertical dashes represent the estimated (posterior median) ideal point, and the horizontal lines capture uncertainty. The lower panels present the estimated positions for each of 135 cases that divide the majority and minority (“cutlines”). The estimates are facially plausible. The “Four Horsemen” (McReynolds, Butler, Sutherland, and Van Devanter) anchor the right wing of the Court, while the “Three Musketeers” (Stone, Cardozo, and Brandeis) anchor the liberal wing. Chief Justice Hughes and Justice Roberts

<sup>169</sup> See Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation*, Working Paper (2007), available at <http://dho.stanford.edu/research/partisan.pdf>.

<sup>170</sup> See Joseph Bafumi, Andrew Gelman, David K. Park & Noah Kaplan, *Practical Issues in Implementing and Understanding Bayesian Ideal Point Estimation*, 13 POL. ANAL. 171 (2005).

<sup>171</sup> We do not use dynamic measures because of bridging sensitivity. See Ho & Quinn, *supra* note 95. If the jurisprudence of the justices evolves and overlap is sparse, the comparison across time may not be meaningful. The constitutional revolution of 1937 presents precisely such bridging sensitivity, with FDR appointees quickly replacing the old court. Fortunately, we are only interested in an aggregate characterization of the justices on the merits, and thereby estimate preferences fixed over time. Cf. 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. ANAL. 134, 137 (2002).

<sup>172</sup> Using the notation of Appendix B, the cutting lines represent the posterior median  $\alpha$  divided by the posterior median  $\beta$  (i.e., the estimated point in latent space where the probability of voting for the majority and minority is 0.5).

(epitomized in the switch in time that saved nine) are pivotal justices. The middle panel presents comparable estimates for the 1942-44 terms, showing the realignment that resulted from the New Deal appointees. Justices Black and Douglas, the two great liberals,<sup>173</sup> often were at odds with the (relatively) more conservative Justices Frankfurter (“leader of the Court’s conservative core”<sup>174</sup>) and Jackson over incorporation and judicial restraint. This panel also emphasizes that these estimates are relative – while Frankfurter is conservative compared to the other FDR appointees, the entire Court shifted to the left of the pre-1937 Court. For comparison, the right panel presents estimates for the Rehnquist Court, which are consistent with conventional wisdom. The cutlines also show that the cardinal location (or apparent “left skew” of the ideal points) is entirely relative: most of the cutlines that divide the majority and minority are also towards the left on the cardinal scale. The cluster of cutlines in the space between Justices O’Connor and Souter represent the frequent 5-4 split on the Rehnquist Court.

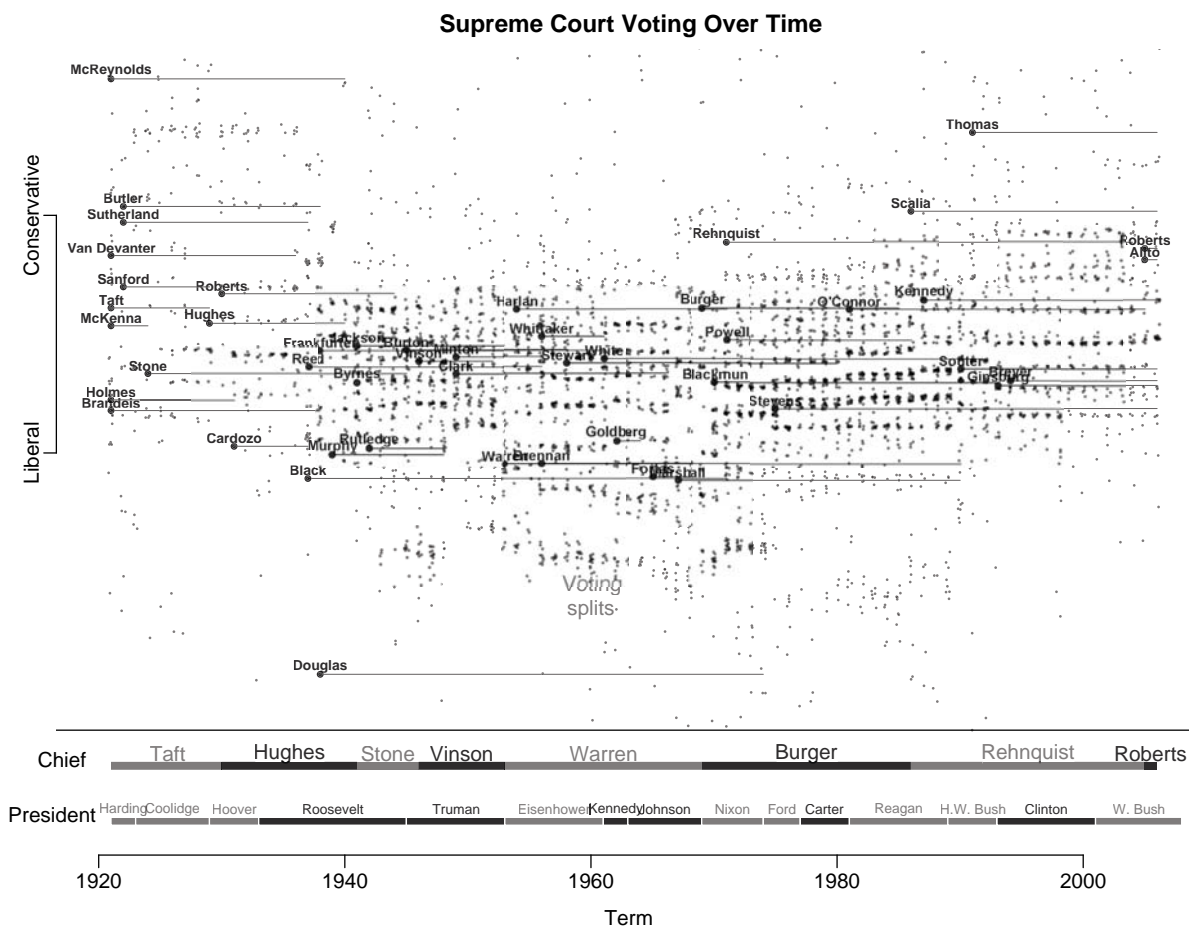


Figure 4: Supreme Court ideal points over time from static model of pooled dataset, including merits and standing issues. Bottom panels plot chief justices and presidents during relevant time periods. Large black dots indicate start of service, and grey lines trace period of service. Small grey dots represent cutting points<sup>175</sup> that model the voting splits on all contested issues. For example, the mass of grey dots separating Douglas from the rest of the Court model Douglas’s propensity to dissent solo.

<sup>173</sup> See, e.g., BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 240 (1993).

<sup>174</sup> *Id.* at 241.

<sup>175</sup> See *supra* note 172.

Lastly, Figure 4 provides an overview of these baseline merits estimates on the y-axis and time on the x-axis.<sup>176</sup> Each large black dot represents the beginning of service for a justice, and the grey lines depict the length of service for each justice. To compare across time, the merits dimension is on the y-axis, meaning that higher locations mean more conservative merits preferences and lower locations mean more liberal preferences. The faint grey dots represent estimated voting splits (cutlines) for all cases, and the bottom lines denote the Chief Justice and President at the relevant time period. Justice Douglas's occupation at the bottom (or "left") of the dimension stems from his propensity – styled by some as a "The Great Dissenter"<sup>177</sup> – to dissent solo. The gradual evolution upwards of voting splits around Blackmun's service is indicative of his evolution over time. The shift beginning in 1936 shows the transformation of the FDR Court. The shift back to the right beginning in the 1970s is a function of the Nixon appointees. Most important for our purposes, these merits estimates systematically capture the baseline that insulation proponents have in mind, when positing that "liberals" or "conservatives" were more prone to favor standing.

\* \* \*

With this new and comprehensive data, we can now assess the evidence for the insulation thesis.

## V. RESULTS

We present our analysis chronologically, as it reveals three broad periods: (1) a period of unanimity from 1921 to the early 1930s, when favoring standing had no particular valence save for Brandeis's disproportionate raising of standing in unanimous cases; (2) a period of insulation in the 1930s to the early 1940s, when liberals systematically favored standing and conservatives systematically denied it; and (3) the modern consensus beginning in the 1940s, when the standing doctrine has a consistently conservative valence. Taken together, these pieces of evidence provide compelling evidence for – and refine in crucial ways – the insulation thesis.

### A. The Unanimous Rise of Standing

The period from 1921 to 1930 is characterized by relative unanimity. Our data reveal only eight contested standing cases, compared to some 35 unanimous cases that expressly discuss standing,<sup>178</sup> many of which are cited by insulation proponents.<sup>179</sup> Figure 5 shows the

<sup>176</sup> To be precise this pooled model includes merits votes augmented by all standing issues. Because the number of standing issues is small relative to the number of merits votes (and there are no directionality constraints on any case parameters), results are substantially identical excluding standing issues.

<sup>177</sup> Brian Mackey, *High Court Sheds Light on Justices' Thoughts*, CHI. DAILY L. BULL., May 4, 2006, at 26.

<sup>178</sup> To be sure, the actual count is uncertain, as it depends on an invariably difficult threshold of what counts as an express discussion of standing. This complication is diminished when we focus on express disagreements.

<sup>179</sup> Winter, for example, includes in his discussion a large number of unanimous cases (page numbers in Winter, *supra* note 3, are provided parenthetically): *Leser v. Garnett*, 258 U.S. 130 (1922) (p. 1442); *Fairchild v. Hughes*, 258 U.S. 126 (1922) (p. 1376); *Hodges v. Snyder*, 261 U.S. 600 (1923) (p. 1413 n.226); *Keller v. Potomac Elec. Co.*, 261 U.S. 428 (1923) (p. 1395 n.115); *Frothingham v. Mellon*, 262 U.S. 447 (1923) (p. 1376); *Edward Hines Yellow Pine Trs v. United States*, 263 U.S. 143 (1923) (p. 1454 n.481); *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405 (1925) (p. 1400 n.148); *Tutun v. United States*, 270 U.S. 568 (1926) (p. 1395 n.115); *Gen. Inv. Co. v. N.Y. Cent. R. Co.*, 271 U.S. 228 (1926) (p. 1425 n.289); *State Grange v. Benton*, 272 U.S. 525 (1926) (p. 1425); *Nixon v. Herndon*, 273 U.S. 536 (1927) (p. 1451 n.462); *Willing v. Chi. Auditorium Ass'n.*, 277 U.S. 274 (1928) (p. 1457); *Ex Parte Bakelite*, 279 U.S. 438 (1929) (p. 1414 n.234); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930) (p. 1454 n.481); *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933) (p. 1398 n.135); *United*

temporal trend for the 1921-36 terms, showing a slight decrease over time, which is not offset by an increase in contested standing issues.

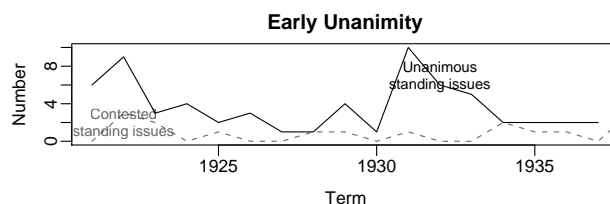


Figure 5: Early unanimity on the Court. The solid line plots the number of unanimous standing issues expressly decided by Court compared to the dashed line of contested standing issues from 1921-1936.

This unanimous rise of standing challenges a strong version of the insulation thesis, which fails to grapple with the early period. Why would conservative justices join standing decisions that serve to insulate progressive legislation? We suggest there are at least three considerations in evaluating insulation in the face of unanimity.

First, relative unanimity isn't surprising. After all, the Court's practice with regard to separate opinions has moved to-and-fro throughout its history.<sup>180</sup> The very early Court issued opinions *seriatim*; Justice Marshall changed this practice, establishing a single opinion of the Court in order to enhance its legitimacy and power. Unanimity then dominated the Court for a century, possibly out of habit and because of the judicial philosophies of Chief Justices.<sup>181</sup> Chief Justice Hughes discouraged dissent to shield internal disagreements from public view, resulting in roughly 9% of opinions issued with dissents during his tenure from 1930-1941.<sup>182</sup> Early unanimity on standing in that sense merely reflects the norm of consensus.<sup>183</sup> That said, disagreements about the progressive agenda certainly manifested themselves on the increasingly fractured Hughes Court, with strong divisions between the Cardozo, Stone, and Brandeis on the one hand, and Van Devanter, Butler, McReynolds, and Sutherland on the other (as shown in Figure 3 and Figure 4). If standing disagreements are, at their core, about the progressive state, the puzzle then becomes why disagreements didn't emerge more prominently in the early period.

Second, even if unanimous opinions evince agreement on an outcome, they may mask disagreement as to *rationale*. Recall Sunstein's convergence argument that progressives and conservatives converged on the private law model of standing – and thus often denied to hear litigants' cases – for diametrically opposed reasons. Liberals sought to insulate progressive legislation and administration, while conservatives sought to affirm Lochnerian ideas of judicial

States *ex rel.* Chicago G.W.R. v. ICC, 294 U.S. 50 (1935) (p. 1446 n.431); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (p. 1457 n.497); *Ex Parte* Levitt, 302 U.S. 633 (1937) (p. 1449 n.441); Ala. Power Co. v. Ickes, 302 U.S. 464 (1938) (p. 1445 n.426).

<sup>180</sup> See M. Todd Henderson, *From 'Seriatim' to Consensus and Back Again: A Theory of Dissent* 3 (Univ. of Chi. Law & Econ., Olin Working Paper No. 363, 2008), available at <http://ssrn.com/abstract=1019074>.

<sup>181</sup> See *id.* at 29. The percentage of opinions with dissent from Justice Marshall's tenure (1801-1835) through Justice Taft's tenure (1921-1929) ranged from a low of 4% under Justice Marshall to a high of 9% under Justices Taney, Chase, and Hughes.

<sup>182</sup> See *id.* at 28-29.

<sup>183</sup> Dissenting opinions spike after Chief Justice Hughes' tenure. Chief Justice Stone – who took control of the Court in 1941 – was more open to dissenting opinions, and often dissented himself, perhaps because of his background as an academic. See *id.* at 30. According to Henderson, it was primarily Stone's leadership, and not the changing docket, that caused the percentage of opinions with dissents to spike to 27% during his time as Chief Justice. See *id.* at 31. Thus, to the extent we see greater disagreement on standing issues in subsequent courts, this may be the result of public airing of internal divisions that long existed but were previously kept from the public.

protection limited to common law interests.<sup>184</sup> This notion of convergence, however, remains underspecified. Why and when, if ever, should we see the dismantling of unanimity? In the absence of some specificity, convergence is consistent with everything and thereby explains nothing.<sup>185</sup>

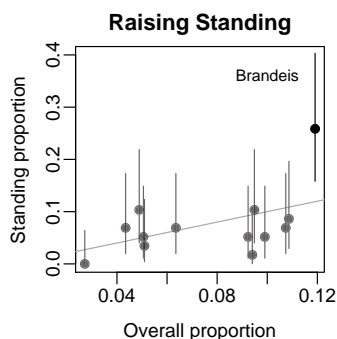


Figure 6: Propensity to raise standing in unanimous cases, 1921-37. This panel displays the proportion of unanimous opinions authored by each justice on the *x*-axis against the proportion of unanimous opinions expressly discussing standing authored by each justice. Lines represent confidence intervals, and the angled line represents no difference in propensity to raise standing and author unanimous opinions. This shows that Brandeis appeared significantly more likely to raise standing issues.

Does data on authorship bear out distinct notions of the doctrine? Figure 6 lends some credence to a special role for Brandeis, but not for a general progressive-conservative cleavage. The figure plots the proportion of overall opinions authored (to account for general propensity to write) against the proportion of standing decisions authored by justices serving from 1921-37, with vertical lines representing confidence intervals. If there are no differences in the propensity to raise standing, the intervals should intersect with the grey line. This is the case for all justices, except for Brandeis, who was significantly more likely to raise standing issues in unanimous opinions, denying standing more than 80% of the time.

<sup>184</sup> See Sunstein, *Standing and Public Law*, *supra* note 3, at 1438 (“[T]here was mutual agreement on the private-law model from those who believed in the need for a continuing role for the legal system in supervising administrative regulation, and those who thought that adjudicative controls were to a large degree anachronistic.”). See also Percival & Groger, *supra* note 85, at 122 n.19 (“[B]oth supporters and opponents of the regulatory state sought to limit standing to those with common law interests at stake”).

<sup>185</sup> See EDWARD R. TUFTE, *BEAUTIFUL EVIDENCE* 12-45 (2006); GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY* 100-05 (1994).



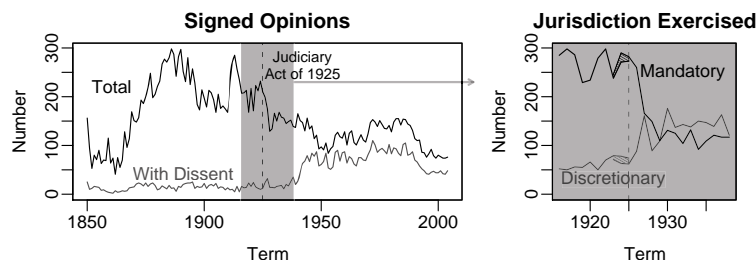


Figure 7: Supreme Court caseload and the transformation to the discretionary docket. The left panel plots the total number of signed opinions in black, and those with dissents in grey. After the Judiciary Act of 1925, the dissent rate increases dramatically. The right panel plots data collected by Felix Frankfurter on cases falling under the Court's mandatory jurisdiction in black and discretionary jurisdiction in grey from 1916-38.<sup>186</sup> The shaded areas represent slight discrepancies for overlapping periods both covered by Felix Frankfurter in different volumes. The drop in the caseload appears attributable primarily to cases falling under the Court's mandatory jurisdiction.

Finally, an alternative explanation of early unanimity is that of caseload management (of course closely related to the norm of unanimity). To contextualize this, the left panel of Figure 7 presents the number of cases with signed opinions and dissents from 1850 to the present. The total number of cases spikes in the middle of the 19th century, potentially accounting for the impetus to provide the Court with more control over the docket. The vertical line represents the Judiciary Act of 1925, with the number of signed opinions dropping sharply in subsequent terms and continuing to gradually decrease. The right panel disaggregates the 1916-38 period according to the type of jurisdiction exercised, showing how the 1925 Act reduced caseload primarily by diminishing the Court's mandatory jurisdiction.

Although the record is thin, there are perhaps three reasons to suggest that caseload management accounts for early standing cases better than insulation. First, *Frothingham* and its progeny appear at precisely the time when the Court is most publicly concerned about its caseload. Justice Taft played an active role in lobbying the Congress to statutorily provide the Court with more discretion over its docket, culminating in the Judiciary Act of 1925.<sup>187</sup> Second, as suggested by Fletcher, standing can serve as a functional substitute to dispose of cases when the Court does not have discretionary jurisdiction.<sup>188</sup> Third, the timing corresponds to the fact that *Frothingham* and the highest number of unanimous standing cases occur before 1925, with a gradual decline in unanimous standing cases concurrent to gradual conversion to the discretionary docket.

<sup>186</sup> The source for the left panel is LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM* 227-231 (4th ed. 2007). The source for the right panel for 1916-25 is FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 295 (1927). For 1922-38, our data is compiled from yearly reports by then-Professor Frankfurter in the Harvard Law Review. See Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 10 (1928); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33, 39 (1929); *id.*, 1929, 44 HARV. L. REV. 1, 7 (1930); *id.*, 1930, 45 HARV. L. REV. 271, 277 (1931); *id.*, 1931, 46 HARV. L. REV. 226, 233 (1932); Felix Frankfurter & Henry M. Hart, Jr., *id.*, 1932, 47 HARV. L. REV. 245, 254 (1933); *id.*, 1933, 48 HARV. L. REV. 238, 243 (1934); *id.*, 1934, 49 HARV. L. REV. 68, 73 (1935); Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 591 (1938); Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 588 (1940).

<sup>187</sup> See Sternberg, *supra* note 56, at 9.

<sup>188</sup> See Fletcher, *supra* note 5, at 278. Fletcher also notes that justiciability can serve a comparable function when the rule of four makes it difficult to dismiss a case as improvidently granted as a matter of the Court's discretionary certiorari jurisdiction. *Id.* at 278 n.76.

Of course, caseload management faces one problem: Brandeis was the only justice who *opposed* the Judiciary Act of 1925.<sup>189</sup> While Brandeis's opposition suggests he wasn't much concerned about caseloads, it may also be explained by the fact that he viewed standing as a functional substitute for discretionary jurisdiction. Caseload management thereby reconceptualizes Sunstein's convergence: insulation may explain Brandeis's agitation, while concerns over caseload management, shared by all other eight justices who expressly signed onto the Judiciary Act of 1925, explain unanimous agreement. Indeed, this may be more persuasive than Lochnerian-progressive convergence: after all, Sunstein casts insulation as a broad cleavage between progressives and conservatives, but the early data show that it was solely Brandeis who disproportionately raised standing, tracking the 8-1 split on the 1925 Act precisely.

In the end, the historical evidence so far leaves us with little definitive proof. What's clear is that proponents of the insulation thesis have insufficiently grappled with the early unanimous rise of the doctrine.

## B. Standing as Liberal Insulation

We now examine the critical question of whether voting blocs sustain the insulation thesis based on all standing cases in the record.

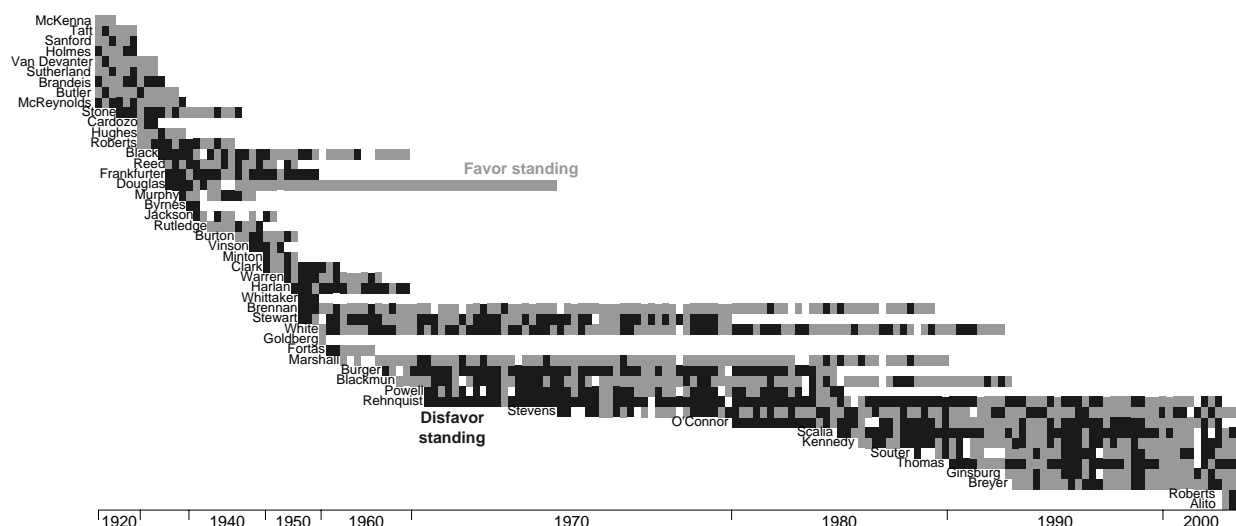


Figure 8: Express standing disagreements over time, sorted by date of decision on the *x*-axis and by order of service on Court. A grey cell indicates that a justice cast a vote favoring standing and a black cell indicates that a justice cast a vote disfavoring standing.

Figure 8 provides an overview of all standing issues with directional disagreements, organized chronologically on the *x*-axis with justices on the *y*-axis. Grey cells indicate votes favoring standing and black cells indicate votes disfavoring standing. The figure highlights the difficulty of historical inquiry, with few cases pre-1970, and many justices casting only a handful of votes on standing issues (e.g., Taft, Cardozo, Hughes). Nonetheless, suggestive trends emerge

<sup>189</sup> Justice Brandeis opposed this measure, ostensibly fearful of giving greater power to the conservative Court. This suggests that, while other justices may have agreed to deny standing in particular cases as a form of caseload management, Justice Brandeis was likely more strategic. Despite this intuition, Pushaw argues that Brandeis's motivation was primarily caseload management, with an "accompanying goal (not always achieved) of shielding progressive legislation from constitutional attacks in court." See Pushaw, *Justiciability and Separation of Powers*, *supra* note 5, at 458 n.309.

from the longer-serving justices. Justice Brandeis (seventh row, top left) favored and disfavored standing roughly at the same rate (favoring standing in 4 of 10 issues), while Justice Frankfurter (16th row) disfavored standing throughout his career (17 of 22 issues). Justice Douglas, on the other hand, denied standing for a handful of cases prior to 1946, but favored standing in every one of 49 issues thereafter. His post-1946 liberal conception of standing is of course consistent with conventional perceptions. Dissenting in *Sierra Club v. Morton*, Douglas famously cited to an article entitled *Should Trees Have Standing?*:

The critical question of ‘standing’ would be simplified . . . if we fashioned a federal rule that allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. . . . The voice of the inanimate object . . . should not be stilled.<sup>190</sup>

Moving beyond individual votes, Figure 9 plots the correlation between merits views on the  $x$ -axis and the proportion of times a justice favors standing. The left panel plots pre-1940 cases and the right panel plots post-1940 cases. Each circle represents one justice, with the area weighted by the number of cases, and lines represent iterated linear fits to the data (accounting for measurement error in merits views).<sup>191</sup> Although necessarily based on small sample sizes, Figure 9 provides strong evidence in favor of the insulation thesis: before 1940, liberals were far more likely to deny standing, while conservatives were far more likely to grant it. After 1940, that pattern reverses. The figure also shows that insulation is not confined to individuals. Justice Frankfurter, for example, is no mere outlier in Figure 9, as standing disagreements reflect underlying differences between progressives and conservatives.

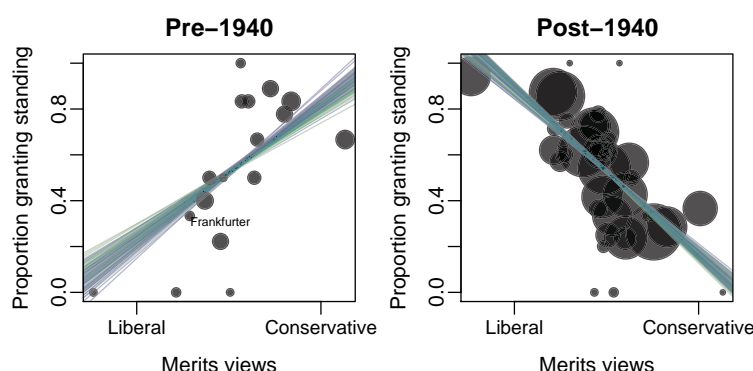


Figure 9: Reversal in merits-standing preferences over time. The left (right) panel presents pooled merits ideal points on the  $x$ -axis against the proportion of votes cast by each justice favoring standing in contested cases from pre-1940 (post-1940) cases. The area of each observation is proportional to the number of issues. To account for measurement uncertainty, the green lines represent least squares fits to the data from 50 draws of the posterior distribution of merits ideal points, and blue lines represent robust MM fits to the same data.

To examine the timing of insulation in more detail, Figure 10 plots how standing disagreements correlate with underlying merits preferences case by case. The left panel presents what we might expect to see under insulation: liberals should deny standing during the early

<sup>190</sup> 405 U.S. 727, 742, 749 (1972).

<sup>191</sup> Because our data contains the population of standing disagreements, the relevant source of uncertainty is measurement error (not sampling variability). The linear fits take random draws from the posterior of ideal points to account for such uncertainty. In no instance does the slope of the line intersect reverse in sign, providing reassurance that the correlation is not driven by measurement error. In the Appendix, we alternatively treat standing preferences as a latent variable, adjusting for measurement uncertainty. The robust MM estimator reduces the influence of outliers. See generally PETER J. HUBER, *ROBUST STATISTICS* (2004).

period, but at some point after the New Deal, the more familiar conservative valence of the doctrine should prevail. The right panel plots the empirically estimated trends, providing significant information as to the timing. In the 1920s, standing disagreements had unpredictable valence, centered around the horizontal line. Beginning around 1930, we observe a number of cases in which liberals deny standing relative to conservatives. In *US v. Rock-Royal*,<sup>192</sup> for example, the Court considered a challenge to minimum milk prices under the Agricultural Marketing Act of 1937. Justice Reed, joined by Justices Black, Douglas, Frankfurter, and Stone, denied standing to milk companies to challenge the statutory authority of the pricing scheme. Dissenting, Justice Roberts, joined by Justices McReynolds, Butler, and Hughes, would have found an injury to the milk companies.

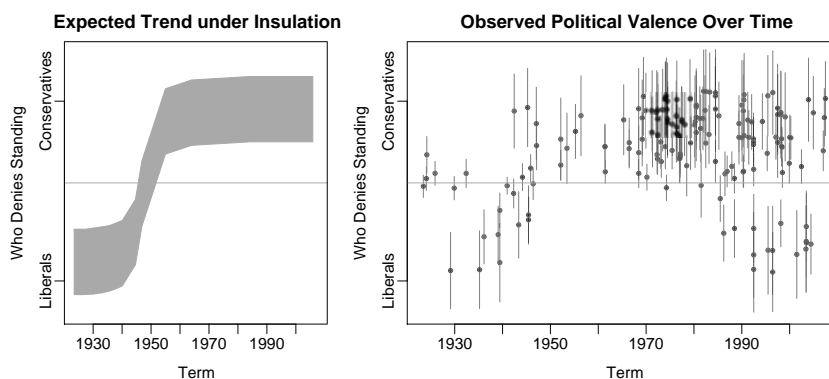


Figure 10: Case specific summaries of valence of denying standing. The left panel plots what one might expect under the insulation thesis, namely that liberals deny standing from approximately 1920 through 1950. The right panel plots the estimated valence for each case (“discrimination parameters,” plus or minus one standard deviation), showing a pattern consistent in the 1930s with insulation, particularly in contrast to the sharp conservative valence post-1950.

Similarly, in *FCC v. National Broadcasting Company*<sup>193</sup> Justice Roberts, joined by Justices Stone, Reed, and Jackson, found that a competitor station, as a party aggrieved, had the right to appeal. Justice Frankfurter dissented, arguing that the competitor station had not made a sufficient showing that its interests were substantially impaired by the grant as to give it standing to appeal. Justice Douglas also dissented, agreeing with Justice Frankfurter on standing, emphasizing that the competitor station failed to prove a case or controversy based on substantial and immediate private injury.

Although *Rock-Royal* and *NBC* strongly corroborate the insulation thesis – in the New Deal period with very few standing disagreements – they are not mentioned by major accounts of the insulation thesis.<sup>194</sup> Figure 10 also shows how *Data Processing* changed the scope of standing, with the number of contested standing issues increasing sharply in 1970. Most persuasive about insulation in Figure 10 is that we do not see a single case with a liberal valence for 30 years after 1950.<sup>195</sup>

<sup>192</sup> 307 U.S. 533 (1939).

<sup>193</sup> 319 U.S. 239 (1943).

<sup>194</sup> See Winter, *supra* note 3; Sunstein, *What’s Standing?*, *supra* note 3; Sunstein, *Standing and Public Law*, *supra* note 3.

<sup>195</sup> We discuss the cluster of cases beginning in the late 1980s that involve liberals denying standing, *infra* Part VI.

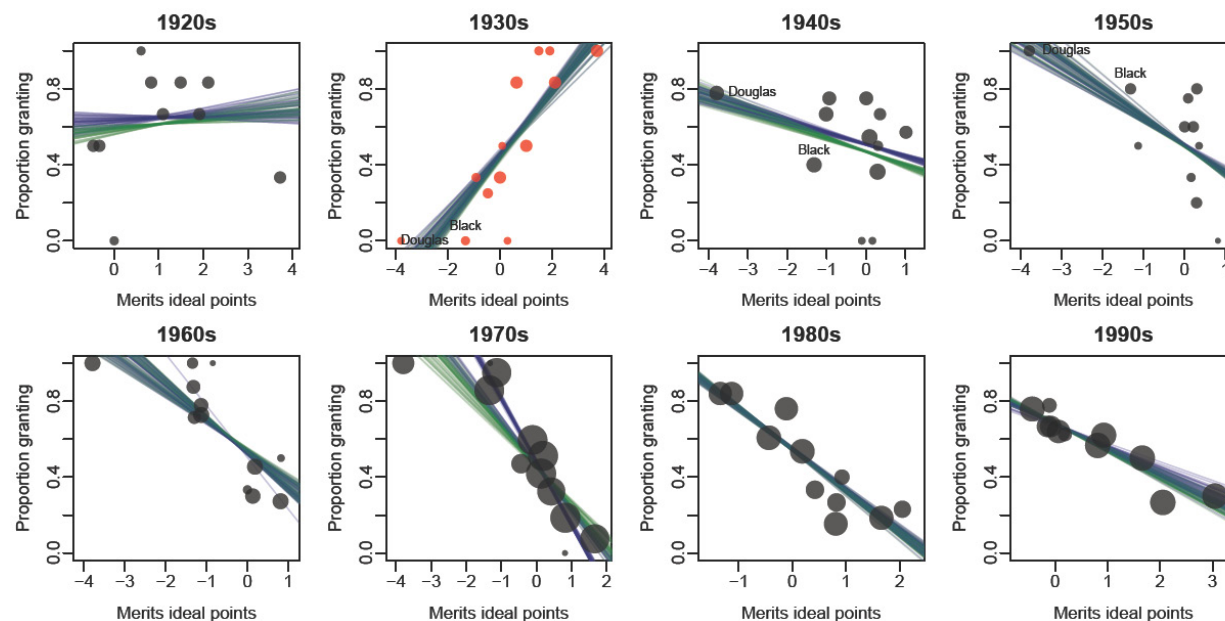


Figure 11: Decade by decade trends of correlation between merits and standing. The first panel shows that at its inception, standing had little correlation with the merits. In the 1930s, liberals are less likely to grant standing. Beginning in the 1940s, that trend reverses and stays the same for all decades, with liberals more likely to grant standing. Green lines represent least squares fits to the data from 50 draws of the posterior distribution of merits ideal points. Blue lines represent robust MM fits to the same data.

Figure 11 plots the merits-standing correlation decade by decade. The figure shows that progressive insulation started slowly in the 1920s, peaked in the 1930s, and reversed sometime in the 1940s. By 1950 at the latest, progressive insulation was a thing of the past.

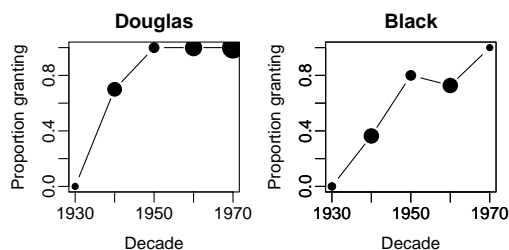


Figure 12: Decade trends in the propensity to grant standing for Justices Douglas and Black. These plots illustrate how evolutions in the justices' individual standing preferences account for the valence reversal of the doctrine.

The effect does not appear to be due to judicial appointments. Justices Douglas and Black, for example, track the evolution of the doctrine, denying standing in the 1930s but growing to accept a liberalized standing doctrine.<sup>196</sup> Figure 12 highlights these justices' individual evolutions. This evidence is particularly persuasive for the insulation thesis, as it otherwise contradicts conventional wisdom. Conventional accounts state that Douglas exhibited

<sup>196</sup> It may be significant that both Justices Black and Justice Douglas had thriving political careers and did not serve as judges prior to their service on the court. Cf. Lee Epstein, Andrew Martin, Kevin M. Quinn & Jeffrey A. Segal, *Circuit Effects: How the Norm of Federal Judicial Experiences Biases the Supreme Court*, U. PENN. L. REV. (forthcoming, 2009).

a “liberal interpretation of the standing doctrine,”<sup>197</sup> favoring standing even for the inanimate object and concurring in *Flast v. Cohen* that *Frothingham* should be explicitly overruled.<sup>198</sup> “For Douglas, the matter of access was critical: the Supreme Court's doors must always remain open for the oppressed minorities and individuals to bring their cases for judicial review by the Court.”<sup>199</sup>

Although Justice Black’s standing jurisprudence is not as widely known as Douglas’s, the evolution is similarly persuasive given general perceptions. Professor Akhil Amar, for example, notes that “[l]ike standing, ripeness obviously turns on one’s conception not of article III, but of the substantive interests asserted. A first amendment absolutist like Hugo Black and a balancer like Felix Frankfurter will predictably disagree. . . .”<sup>200</sup> Similarly, Professor Stengle notes that Justice Black’s opinion in *United States ex rel. Marcus v. Hess* directed that *qui tam* informers were entitled to a liberal interpretation of standing.<sup>201</sup> In light of these perceptions, it’s striking that the early *conservative* standing jurisprudence of Black and Douglas are, to our knowledge, ignored by proponents of the insulation thesis.<sup>202</sup>

### C. The Reversal of Standing

While the data demonstrate that New Deal insulation was complete sometime in the 1940s, how did the doctrine come to take the opposite political valence? Several plausible historical accounts exist.

First, there is the passage of the Administrative Procedure Act (APA) in 1946 and the underlying politics of the New Deal.<sup>203</sup> The APA established foundational procedures for agency promulgation of regulations and orders and judicial review thereof. As Professor Shepherd has noted, “the fight over the APA was a pitched political battle for the life of the New Deal,”<sup>204</sup> with conservatives viewing administrative procedures as a way to rein in New Deal agencies. While procedures were proposed for a decade prior to 1946, one compelling explanation for the timing of APA’s ultimate passage in 1946 centers on the weakening New

<sup>197</sup> Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 218 (2002).

<sup>198</sup> *Flast v. Cohen*, 392 U.S. 83, 107 (1968) (Douglas, J., concurring).

<sup>199</sup> Howard Ball & Phillip Cooper, *Fighting Justices: Hugo L. Black and William O. Douglas and Supreme Court Conflict*, 38 AM. J. LEGAL HIST. 1, 18 (1994).

<sup>200</sup> Akhil Reed Amar, *Law Story: Hart and Wechsler’s The Federal Courts and the Federal System* by Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David Shapiro, 102 HARV. L. REV. 688, 720 (1989).

<sup>201</sup> See Linda J. Stengle, *Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement Through the Public Disclosure Bar of the False Claims Act*, 33 DEL. J. CORP. L. 471, 482 (2008) (discussing 317 U.S. 537, 540-41 (1943)).

<sup>202</sup> We are aware of only a handful of allusions to the transformations of Black and Douglas. First, in biographical treatments of Douglas, some mention is made of his and Black’s explicit rejection of Frankfurter’s position from *Minersville School Dist. v. Gobotis*, 310 U.S. 586 (1940), to *Jones v. Opelika*, 316 U.S. 584 (1942), the latter of which involved an express disagreement on standing. See WILLIAM O. DOUGLAS, *THE COURT YEARS, 1937-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 45 (1980); BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 187-88, 202 (2003). Second, Professor Peter Manus examines Douglas’s environmental decisions, finding “a progression -- although at times rash and even faltering -- in Justice Douglas’s view of the judicial role in a democracy with a steeply rising administrative presence” with *Tarrant County*, 402 U.S. 916 (1971), “marking Justice Douglas’s abandonment of his earlier, more traditionally judicial view of environmental issues as matters of *deference to agencies*.” Manus, *supra* note 64, at 163, 167 (emphasis added). Third, Ball and Cooper note, “Douglas also clashed with his colleagues in the later years over access to the Court.” Ball & Cooper, *supra* note 199, at 18 (emphasis added). Fourth, as to Black, Newman mentions that “[f]our terms had given Black a ready grasp of the Court’s processes. He now dealt easily with intricate matters. His initial doubts about the legitimacy of judicial review had almost completely evaporated.” ROGER K. NEWMAN, *HUGO BLACK* 286 (1994).

<sup>203</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946).

<sup>204</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1560 (1996). See also Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).



Deal coalition: by making it harder to change agency policy, the APA came to represent a means to *preserve* the administrative state in light of the waning New Deal coalition.<sup>205</sup> The APA, ensuring the survival of the New Deal, may thereby have removed any progressive impulse to use standing to protect agency autonomy.<sup>206</sup> What makes the APA story incomplete, however, is that while the APA established procedural defaults and provided for judicial review of agency statutory interpretation, at least with respect to standing it arguably codified extant understandings.<sup>207</sup>

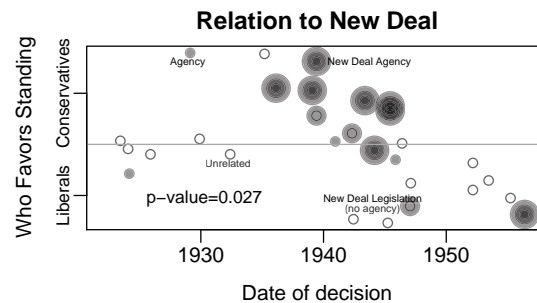


Figure 13: What explains the drop in the 1940s? This figure shows that simple measures of whether a case involved an administrative agency, New Deal legislation, or a New Deal agency is strongly correlated with whether conservatives favored standing in a case. In 1950, cases are no longer closely related to the New Deal, explaining the gradual reversal of the political valence of the doctrine.

Second, while standing in the 1930s may have represented a fight about the administrative state, by the 1940s and 1950s – with a judiciary generally more hospitable to the administrative state – the doctrine may have become associated with different issues on the FDR Court.<sup>208</sup> Standing, for example, came to be associated more with notions about incorporation of constitutional rights against the states,<sup>209</sup> and the Warren Court’s expansion of individual rights in the “new property” and criminal contexts.

Figure 13 plots the valence of standing disagreements for all cases from 1921-1955 (a condensed version of the right panel of Figure 10) to examine correlates of the shift. The shading and size of the circles denote three indicators of pertinence to the New Deal, namely whether the case involved New Deal legislation, an agency, or a New Deal agency.<sup>210</sup>

<sup>205</sup> See McNollGast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999) [hereinafter McNollGast, *Political Origins*]. On the general use of administrative procedures for political control, see, e.g., Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127 (1994); Stephen J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POLI. SCI. REV. 663 (1998); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992); McNollGast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

<sup>206</sup> Cf. McNollGast, *Political Origins*, *supra* note 205, at 200 (“By granting authority to the (New Deal dominated) courts to interpret agency statutes, [the APA] prevents the new (Republican dominated) agency officials from altering policy by announcing a new interpretation of the statute.”).

<sup>207</sup> See Magill, *supra* note 147, at 11 (finding that when APA was enacted in 1946, its language reflected the state of standing law requiring a party seeking to invoke federal jurisdiction to allege either a legal wrong or point to a Congressional statute including a “party aggrieved” clause allowing those without legal rights to bring actions on behalf of the public). See also Davis, *Standing and Administrative Action*, *supra* note 1, at 795 (citing the Attorney General’s statement that Section 10(a) of the APA reflected existing law). Moreover, by the time the APA was read to relax standing requirements in *Data Processing*, the liberals may simply have been less concerned about protecting the now-well-entrenched New Deal agencies that had become an established part of everyday life. But see Duffy, *supra* note 103, at 133.

<sup>208</sup> See Stearns, *supra* note 5; McNollGast, *Political Origins*, *supra* note 205, at 183.

<sup>209</sup> See, e.g., *Adamson v. California*, 332 U.S. 46 (1947).

<sup>210</sup> Specifically, this coding involves whether there is a challenge to (a) federal legislation enacted 1933-39, (b) action of an agency created during the New Deal, and (c) action of any agency.

Consistent with the insulation thesis, cases above the origin (i.e., with conservatives favoring standing) are disproportionately related to the New Deal (in darker and larger circles). After the mid-1940s, the valence shifts, with significantly fewer cases pertaining to the New Deal. This provides suggestive evidence that the goal of insulation faded away.

Third, the (related) rise of public interest litigation and law firms may also have played a role in the reversal of standing's valence.<sup>211</sup> The public interest bar emerged during the 1960s as part of larger social and political movements seeking to improve quality of life through government action.<sup>212</sup> During the 1960s and 1970s, Congress passed several statutes creating new regulatory agencies and establishing environmental and consumer safety standards. What's more, several statutes included language allowing those "adversely affected" to sue to remedy administrative failure.<sup>213</sup> Public interest lawyers, litigants, and policymakers increasingly relied on litigation to advance goals previously committed to the political realm. Such public rights litigation may have disproportionately triggered conservative concerns over the role of courts in the rights revolution.

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Given the sparseness of the historical record, the support for the insulation thesis is surprisingly strong. For a discrete period around the New Deal, voting blocs substantiate the liberal reliance on standing to insulate administrative agencies.

## VI. IMPLICATIONS

Our study provides the first systematic empirical confirmation for the insulation thesis. We conclude with four brief implications.

### A. Historical Cognizability

A strong version of the insulation thesis decidedly rejects current practice by litigators, judges, and legal scholars to ascertain whether a particular type of action was cognizable when the Constitution was written.<sup>214</sup> Our evidence bolsters this point, although less conclusively.

First, standing existed before a period of clear insulation, largely unanimously in the 1920s. Contrary to a strong theory of insulation, the seeds of the doctrine existed before strong progressive-conservative cleavages characterized standing disagreements. Therefore, our findings do not necessarily rule out the strong Article III thesis and suggest that inquiries of historical cognizability are at least *possible*.

At the same time, our study shows that the contours of the doctrine are inkblots in time (recall Figure 1). Agreement among scholars of the core doctrine decreases considerably in

<sup>211</sup> Some scholars, including Justice Scalia, argue that the relaxation of standing requirements helped *create* the market for public interest law firms by assuring "prompt access to the courts by those interested in conducting the [public policy] debate." Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893 (1983).

<sup>212</sup> Magill, *supra* note 137, at 35.

<sup>213</sup> *Id.* at 37-40 (citing Clean Air Act of 1970, Pub. L. 91-604, §304(a), 84 Stat. 1676 (1970); Federal Water Pollution Control Act Amendments of 1972 §2(505), 33 U.S.C. §1365 (1972); MPRSA of 1972 §105(g), 33 U.S.C. §1415(g) (1972); Noise Control Act of 1972 §12, 43 U.S.C. §4911 (1972); ESA of 1973 §11(g), 16 U.S.C. §1540(g) (1973); TSCA of 1976 §20, 15 U.S.C. §2619 (1976); Consumer Product Safety Act, Pub. L. 92-573, §11(a), 86 Stat. 1218 (1972)).

<sup>214</sup> See, e.g., *Sprint Commc'n. v. APCC Serv.*, 128 S.Ct. 2531 (2008) (standing of assignee-for-collection to raise assignor's claims); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (standing of False Claims Act relator to bring civil qui tam action); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (standing of environmental group to bring enforcement action against private party under Emergency Planning and Community Right-to-Know Act of 1986).



earlier periods. Our research thereby underscores that historical cognizability, while in principle possible, may be quite difficult. While reliable scholarship in this area finds a “possibility” that the original understanding of Article III included standing requirements, that inquiry is considerably different from determining how claims of a particular class were treated in the case law. Any single case may represent an outlier, and without some enumeration of all relevant cases adjudicating standing for that particular class of claims, inferences are likely to be unreliable.

In addition, while insulation may not explain the initial conception of the doctrine, our evidence points to the drastic changes in the doctrine over time. Such evolution makes the historical inquiry a moving target.

Recent case law illustrates these hazards. In *Sprint Communications Co. v. APCC Services*,<sup>215</sup> the majority and dissent engaged in a lengthy debate about the historical ability of assignees for collection to litigate the assignor’s claims. First, they disagreed on framing the issue as (1) whether assignee standing was recognized over two hundred years ago, or (2) whether assignee-for-collection standing, in particular, existed.<sup>216</sup> The majority, at least implicitly, adopted the former. Its opinion looked as far back as 16<sup>th</sup> century English practice,<sup>217</sup> concluding after several pages of discussion that “at the time of the founding (and in some States well before then) the law did permit the assignment of legal title to at least some choses in action.”<sup>218</sup> The dissent framed the question more narrowly, and retorted that *some* states refused to recognize assignee-for-collection suits.<sup>219</sup> The opinions engaged in a debate about which position held the majority during the 19<sup>th</sup> century.<sup>220</sup> Unable to come to consensus, the majority found standing where the dissent would not. By framing the question differently and drawing on different cases and states’ historical practices, the opinions came to contrary conclusions about the historical cognizability of assignee-for-collection suits. Pages devoted to the question may project histories where the record provides little evidence.

## B. Separation of Powers

The standing doctrine is often justified – and criticized – on separation of powers grounds.<sup>221</sup> While the broad implications of the insulation thesis on separation of powers are

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<sup>215</sup> 128 S.Ct. 2531 (2008).

<sup>216</sup> *Id.* at 2553 (arguing that the relevant tradition is the more narrow one of an assignee who does not maintain a right to substantive recovery).

<sup>217</sup> *Id.* at 2536.

<sup>218</sup> *Id.* at 2538.

<sup>219</sup> *Id.* at 2555-2556 (Roberts, J., dissenting).

<sup>220</sup> *Id.* at 2555 (arguing that the refusal to hear such suits was “substantially more widespread than the majority acknowledges”).

<sup>221</sup> Scholars often present standing and the other justiciability doctrines as *limiting* the Court’s power vis-à-vis the other branches, thereby sustaining the separation of powers. Such scholars argue that liberalized judicial review can undermine the other branches’ efforts at governing. Standing thereby “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.” Scalia, *supra* note 211, at 894. A second view sees the standing doctrine not merely as mediating power between the courts on one hand and the political branches on the other, but also between the legislative and executive branches. The disagreement between Justice Scalia, writing for the majority, and Justice Blackmun in dissent in *Lujan* reveals this tension. Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) with *id.* at 601-605 (Blackmun, J., dissenting). Still other scholars argue that standing may limit the federal courts’ traditional role in representing the people by remedying unlawful actions by the political branches. See Pushaw, *supra* note 5, at 455. This view sees a strong standing doctrine as undercutting the balance of power by aggrandizing the other branches. By contrast, lesser standing requirements, and more judicial review, provide a vigorous check on the political branches, thereby protecting individual liberty. See *id.* at 456. Our data cannot directly address this debate.

complex, our finding of a post-1940 flip in the standing doctrine's valence provides empirical documentation of its inter-branch effects. The judicial invocation of standing appears to depend on other branches of federal and state government. Progressive insulation during the 1930s reveals that the justices used a restrictive standing doctrine to protect the progressive agenda of the federal and state political branches. Conversely, judges disinclined towards current lawmakers may, all other things being equal, tend to weaken standing to permit challenges to the in-party's legislative and administrative agenda. If the former use is insulation, the second might be considered exposure. This pattern of insulation and exposure may functionally "smooth" policy outcomes over time, serving as a strong sword and shield for the judicial majority, and helping to explain the use of the standing doctrine throughout the 20<sup>th</sup> century.

### C. Constitutional Evolution and The Role of Individual Justices

Our evidence demonstrates a sharp shift in the valence of standing around 1950. From 1950-1980, nearly every standing issue took a conservative valence. While this sheds much light on the historical evolution of standing, our data is also suggestive of the potential for future progress.

In particular, our data reveals that the conservative mantle of standing began to show cracks in recent decades. Beginning in 1986, liberals disproportionately deny standing in a small set of issues. One explanation might rest solely on the backgrounds of litigants coming before the Court,<sup>222</sup> yet this seems implausible given the long run of three decades without a single case of liberals favoring standing.

Examining these cases reveals a more interesting insight, namely the unique role of Justice Stevens in contemporary standing doctrine. Generally, the insulation thesis posits major roles for individual justices in shaping constitutional doctrine. Justice Stevens wrote an opinion (majority, concurring, or dissenting) in nine of the eleven cases in which liberals voted to deny standing after 1986;<sup>223</sup> in a tenth, he joined an opinion arguing against recognizing competitor standing.<sup>224</sup> These votes are inconsistent with casual assessments of his standing philosophy as decidedly liberal.<sup>225</sup> Moreover, the broad range of plaintiffs to whom Justice Stevens voted to

<sup>222</sup> Pierce, *supra* note 1, at 1754-55 (finding that, in *Nat'l Credit Union Admin. v. First Nat'l Bank and Trust Co.*, 522 U.S. 479 (1998), *Steel Co.*, 523 U.S. 83, *Lujan*, 504 U.S. 555, *Lewis v. Casey*, 518 U.S. 343 (1996), and *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517 (1996), someone with no knowledge of the law of standing could predict the outcome of thirty-one of the thirty-three votes cast by Justices with "clear ideological preferences" based solely on those preferences).

<sup>223</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (Stevens, J., delivering opinion for the court); *Nike v. Kasky*, 539 U.S. 654, 656 (2003) (Stevens, J., concurring); *Gratz v. Bollinger*, 539 U.S. 244, 282 (2003) (Stevens, J., dissenting); *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 813 (2003) (Stevens, J., concurring); *Palazzolo v. R.I.*, 533 U.S. 606, 637 (2001) (Stevens, J., concurring and dissenting); *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting); *Miller v. Johnson*, 515 U.S. 900, 929 (1995) (Stevens, J., dissenting); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1061 (1992) (Stevens, J., dissenting); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (Stevens, J., delivering opinion for the court).

<sup>224</sup> *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479 (1998).

<sup>225</sup> Kelso and Kelso characterize Justice Stevens as the one instrumentalist remaining on the Court, meaning that he views the judicial role "primarily as an instrument to achieve justice in society." Thus, they expect him to be less likely to defer to legislative agendas, and to represent the "single vote for allowing the concept of standing to expand." Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine, and Results*, 28 U.TOL. L. REV. 93, 101, 103, 147 (1996). Similarly, Danner and Samaha state that "no one on the Court is more reluctant to forfeit the possibility of meaningful judicial review on the merits," and thus classify Justice Stevens's approach to justiciability doctrines and other "litigation roadblocks," including standing, as rather broad. Allison Marston Danner & Adam Marcus Samaha, *Judicial Oversight in Two Dimensions: Charting Area and Intensity in the Decisions of Justice Stevens*, 74 FORDHAM L. REV. 2051, 2053, 2075 and n.139 (2006). While they thus posit a philosophy of broad judicial review, Danner and Samaha argue that Justice Stevens advocates for "tempering the intensity of judicial review when exercised." *Id.* at 2074. The votes are consistent with some scholarship on Justice Stevens's standing preferences in particular contexts such as the racial districting cases. See, e.g.,

deny standing suggests that political motivations simply may not explain his work in this area. Most interestingly, Stevens's votes suggest the potential for a realignment of standing in the future, just as standing and merits preferences realigned in the 1940s.<sup>226</sup> If conservatives of the Vinson and early Warren Courts co-opted the liberal New Deal standing doctrine, liberals may yet readopt the standing doctrine in the future.

Most generally, our results provide strong evidence of the dynamic dimensionality of constitutional law, as well as the cyclical nature of doctrinal evolution.<sup>227</sup> This cyclicity has been widely theorized across disparate areas of the law, from torts<sup>228</sup> to property,<sup>229</sup> federal courts<sup>230</sup> to constitutional law,<sup>231</sup> and statutory interpretation<sup>232</sup> to administrative law.<sup>233</sup> While baseline merits models often used in political science (which typically assume unidimensionality<sup>234</sup>) provide transparent ways of characterizing the merits views of the justices, they alone may also miss the most crucial *doctrinal evolution*, such as New Deal insulation and Justice Stevens's recent standing jurisprudence.

#### D. Judicial Innovation and Unintended Consequences

Lastly, the story of insulation speaks to the promise and perils of judicial innovation. Consider standing in contrast to the now-landmark case of *Chevron*,<sup>235</sup> which came to be interpreted as a watershed moment for judicial deference to agency interpretations of law. It is generally acknowledged that Justice Stevens, the author of the opinion, merely sought to restate

Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 441 (1999) (arguing that Justice Stevens denies standing to white plaintiffs in the racial districting cases because he conceptualizes voting as a group right, and whites are unable "to point to, much less prove, any dilution or other disadvantage" to their racial group).

<sup>226</sup> Changes in the standing preferences of other justices over time also invite greater scholarly attention. For example, Justice Rehnquist favored standing far more frequently later in his career. Again, this might be attributable to the cases coming before the Court; perhaps, after 1990, litigants came to the Court more frequently to contest the legislative and executive efforts of a Democratic government. It is also possible that Justice Rehnquist's views of standing evolved independently.

<sup>227</sup> See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-10 (1949) (describing cyclicity of legal evolution).

<sup>228</sup> See Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991) (conducting economic analysis that predicts cycling between rules and standards in tort law); Nicolas P. Terry, *Collapsing Torts*, 25 CONN. L. REV. 717, 718 (1993) (arguing that "cyclical collapsing and uncollapsing of tort doctrines are standard techniques used by judges as they continually adjust the degree of loss reallocation and deterrence").

<sup>229</sup> See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (documenting the cyclicity of crystalline rules and muddy standards in property law).

<sup>230</sup> See Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 878-84 (2001) (book review); PURCELL, *supra* note 104.

<sup>231</sup> See Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 333-42 (1995) (documenting reinvigoration and retreat in economic rights).

<sup>232</sup> See William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 715 n.72 (1987); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001).

<sup>233</sup> See Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996) (positing that deference is explained by policy proximity of Supreme Court to executive versus agency); *but see* Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657 (2004).

<sup>234</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001); Paul H. Edelman, *The Dimension of the Supreme Court*, 20 CONST. COMMENT. 557 (2005); Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 365 (2007); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV. 743 (2005).

<sup>235</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

existing law.<sup>236</sup> If *Chevron* underscores the unanticipated consequences when judges purport to change little, our study shows that perverse effects may ensue even when judges aim to change a lot.

The insulation thesis paints a story of purposive and powerful judicial craftsmanship. While the justices agitating for judicial restraint may have succeeded in the short run in protecting the progressive agenda, in the long term such goals were ultimately thwarted by unintended consequences. The short period of New Deal insulation was followed only by a long period of conservative “cooptation” of standing to retard the rights revolution.

Similarly, in *Data Processing* Justice Douglas expressly intended to liberalize the law of standing,<sup>237</sup> but the effect may ultimately have been to restrict it. Justice Brennan argued that the Article III injury requirement was “the only one that need be made to determine standing,”<sup>238</sup> and that by adding an additional requirement (the “zone of interests”), the majority embarked upon a “useless and unnecessary exercise” that “encourage[d] badly reasoned decisions, which may well deny justice.”<sup>239</sup> As noted by one scholar, “the zone of interests test is a manipulable one which may be used to *limit* standing.”<sup>240</sup> By erecting a second hurdle, *Data Processing*’s aim to liberalize in theory may have restricted in fact.

*Data Processing* and the insulation thesis thereby give pause to the potential for sweeping judicial innovation.

\* \* \*

Justice Douglas famously remarked that “[g]eneralizations about standing to sue are largely worthless as such.”<sup>241</sup> The doctrine has long served as a punching bag for constitutional and administrative law scholars, precisely because of its malleability. Our study shows that malleability notwithstanding, systematic, positive, and empirical inquiry into the history of standing’s evolution is possible. It places the insulation thesis on firm empirical ground, and provides deep insight into the origins of this foundational doctrine of U.S. law.

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<sup>236</sup> See *Christensen v. Harris County*, 529 U.S. 576, 595 n.2 (2000) (Stevens, J., dissenting); *id.* at 596 (Breyer, J., dissenting); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* (Peter L. Strauss ed., 2006).

<sup>237</sup> *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (“Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.”).

<sup>238</sup> *Id.* at 168 (Brennan, J. dissenting and concurring).

<sup>239</sup> *Id.* at 170.

<sup>240</sup> Manus, *supra* note 64, at 162 (emphasis added).

<sup>241</sup> 397 U.S. 150 (1970).

## APPENDIX<sup>242</sup>

### A. DATA COLLECTION PROTOCOL

#### 1. Merits Data

Our data on merits votes from 1921 to 2006 compiles information from multiple sources, summarized in Table 1.<sup>243</sup>

Terms	Source	<i>n</i>	
1953 – 2006	Original U.S. Supreme Court Judicial Database	6277	Spaeth
1946 – 1952	Vinson-Warren Court Database	761	
1937 – 1945	Roosevelt Court Database	<u>1445</u>	
		8483	
1926 – 1936	Lee Epstein	227	Backdating
1921 – 1926	New data collection	<u>118</u>	
		345	

Table 1: Summary of sources to compile merits data. The first three rows represent the conventional Spaeth dataset (including unanimous cases, but excluding cases added in Table 2). The bottom two rows represent backdating efforts undertaken by us with Lee Epstein (excluding unanimous cases). We hand-validated all cases from 1921-36 against the U.S. Reports. *n* represents the number of cases for each period.

We follow conventional criteria in selecting cases.<sup>244</sup> We distinguished individual cases by docket number and selected cases where the Court heard oral argument and issued at least one signed opinion, cases decided by an equally divided Court, per curiam opinions in which oral argument was heard, and judgments of the Court. Per curiam opinions in which oral argument was not heard, and memorandum cases such as motions, orders, writs of certiorari judgments, and decrees were excluded.

Lee Epstein generously provided merits votes from 1926-36. We hand-validated all of this data against the U.S. Reports, backdating to 1921 to collect votes for all non-unanimous cases. We included cases with partial dissents as nonunanimous, but excluded concurrences agreeing on the judgment.

#### 2. Validation

We validated the data and clarified inconsistencies, such as missing cases and blank votes, as summarized in Table 2.

<sup>242</sup> With Neal Ubriani.

<sup>243</sup> We start with volume 257 of the U.S. Reports.

<sup>244</sup> See, e.g., Daniel E. Ho & Kevin M. Quinn, *Measuring Explicit Political Positions of Media*, 3 Q.J. POLI. SCI. 353, 359 (2008); Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects only Non-War Cases*, 80 N.Y.U. L. REV. 1, 43-45 (2005); Martin & Quinn, *supra* note 171, at 137.

Source	Cases added	Vote discrepancies	Units removed
Spaeth	67	701	--
Vinson-Warren	0	198	--
Roosevelt	0	58	43
Epstein	49	6	2

Table 2: Summary of data validation for existing data. “Cases added” refers to cases added to underlying data. “Vote discrepancies” represent the number of cases with inconsistent votes – for Spaeth, these represent the difference in recorded votes between the directional and majority codings. “Units removed” indicate the number of rows deleted from the Roosevelt and Epstein databases because (a) they represent duplicate votes, (b) they did not capture the primary disagreement, or (c) one case for the Epstein period (where the focus was on nonunanimous cases) was unanimous.

First, vote discrepancies resulted primarily from differences in Spaeth’s directional and non-directional codings. Directional codings represent the political valence of the case, ascribing a “liberal” or “conservative” stance to each justice’s vote. Majority codings record which justices were in the majority and minority. While identical for most cases, directional codings are missing for some cases. We rely on majority-minority codings. Table 2 shows the amount of information gained, resulting in 701 more cases for the 1953-2006 terms.

Second, in conducting the search for standing cases, we discovered cases with express disagreements about standing that were excluded by conventional criteria. Such informative cases, consisting of cases with written opinions but no oral argument, orally argued per curiams, and other “back of the book” memorandum cases such as writs of certiorari with dissents, were added.

Third, unlike the original Spaeth data, the Roosevelt dataset does not necessarily reduce all voting blocs to a primary one. For example, some cases record a partial dissent as a majority vote in one row and as a dissent in the second.<sup>245</sup> For consistency of representing the primary disagreement, we included only the row recording the dissent. In rare cases where two partial dissents were irreconcilable, we kept both rows.

Finally, our validation of the 1926-36 terms uncovered certain missing cases and vote discrepancies.

### 3. Standing Enumeration

Our population enumeration of standing cases draws from three categories of sources: (a) Westlaw and Lexis, (b) secondary literature, and (c) Spaeth’s issue and law codings.

(a) Legal Databases. We primarily relied on Westlaw and Lexis subject headings – Westlaw’s Key Numbers and Lexis’ Headnotes – recording any case returned by the search starting with volume 257 of U.S. Reports.<sup>246</sup> The Westlaw Key Number search string was:<sup>247</sup>

```
SY,DI(has have had lack +2 standing) | 13K13 | 51K2154 | 78K1328 | 92VI(A) |
149EK649 | 170AK103.1 | 211K200 | 349IV | 258AK1082 | (41K20(1) TO(51) | 101K190 |
101K207 | 101K320(6) | 268K33(9) | 268K33(10) | 268K121 /P standing) | (TO(29T /P
action | proceeding | enforcement | remedy | relief /P standing "persons
entitled")) (TO(parties | standing | "persons entitled") /P HE(standing))
```

All cases with appropriate Lexis Headnotes were retrieved under the following topics and jurisdiction:

Jurisdiction: U.S. Supreme Court Cases, Lawyers’ Edition

<sup>245</sup> In *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502 (1941), the Court decides two issues. In the first, the order is reversed, while in the second, the order is affirmed. Justice Roberts, dissenting in part, believes both judgments should be affirmed. The Roosevelt Court database codes the case as two rows: one is unanimous, while the other has Roberts dissenting. We deleted the unanimous row, retaining the case’s disagreement on the merits.

<sup>246</sup> We did not include cases from which no positions could be inferred, such as single justice orders or per curiam opinions with no dissents.

<sup>247</sup> For clarity, we include “[|]” to denote disjunctive “or” statements, which are not formally recognized by Westlaw. While 211K200, 258AK1082, and 268K33(10) are plausibly about standing, they return no search results for the Supreme Court for our observation period, and are included only for completeness.

Administrative Law > Governmental Information > Freedom of Information > Enforcement > Reviewability > Standing  
 Administrative Law > Judicial Review > Reviewability > Standing  
 Antitrust & Trade Law > Private Actions > Standing  
 Bankruptcy Law > Case Administration > Commencement > Involuntary Cases > Standing  
 Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Standing  
 Civil Procedure > Justiciability > Standing  
 Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Standing  
 Constitutional Law > The Judiciary > Case or Controversy > Standing  
 Copyright Law > Civil Infringement Actions > Standing  
 Criminal Law & Procedure > Habeas Corpus > Procedure > Next-Friend Standing  
 Criminal Law & Procedure > Search & Seizure > Standing  
 Estate, Gift, and Trust Law > Will Contests > Standing  
 Family Law > Child Support > Standing  
 Immigration Law > Judicial Review > Standing  
 Insurance Law > Life Insurance > Insurable Interests > Standing to Challenge  
 Real Property Law > Landlord & Tenant > Lease Agreements > Standing  
 Securities Law > Liability > RICO Actions > Standing  
 Securities Law > Liability > Security Exchange Act of 1934 Actions > Implied Private Rights of Action > Standing  
 Trademark Law > U.S. Trademark Trial & Appeal Board Proceedings > Cancellations > Standing  
 Trademark Law > U.S. Trademark Trial & Appeal Board Proceedings > Oppositions > Standing  
 Trademark Law > Federal Unfair Competition Law > Lanham Act > Standing  
 Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Standing

One apparent discrepancy between Key Numbers and Headnotes is that the latter includes forms of automated topic coding in addition to attorney classifications, while the former represents exclusively attorney work product, making it more reliable. Lexis Headnotes are retrieved and grouped according to a set of relevant search terms specific to each topic trail.

In Westlaw we also conducted broader searches, starting with volume 257 of the U.S. Reports, where standing is mentioned at least five times, as well as searching for a variety of standing-related terms:

```
(atleast5(standing) | (pruden! /10 standing) | (zone! /10 interest!) | ("third party" /10 standing) | (general! /10 grievance))
```

We also searched for all cases citing to *Frothingham v. Mellon* – generally considered the origin of the standing doctrine<sup>248</sup> – Shephardizing in Lexis.

Given the low number of standing disagreements found for the 1921 to 1945 terms, we performed targeted searches for language loosely used to refer to the doctrine in this period, with the following search:

```
(da(bef 12/31/1946) & ("legal interest" | "legal wrong" | damn! | "party injured" | "parties injured" | "person injured" | "persons injured")) | (da(bef 1/1/1938) & atleast2(standing))
```

(b) Secondary Literature. We further recorded all citations in casebook and treatise chapters focusing on standing. For completeness, any case mentioned in these chapters and decided starting with volume 257 of the U.S. Reports – even if not clearly related to standing – was added to a list of standing cases.<sup>249</sup>

(c) Issue Codings. The Spaeth dataset contains two subject variables: “issue” and “law.” The “issue” variable “identifies the context in which the legal basis for decision . . . appears.”<sup>250</sup> All cases classified as “standing to sue” were included in our list.<sup>251</sup> The “law” variable codes the primary legal provision considered by the case.

<sup>248</sup> See discussion *supra* note 135.

<sup>249</sup> For a list of these sources, see *supra* note 137. This component did not include cases recursively: that is, we did not include cases cited internally in passages from relevant cases.

<sup>250</sup> HAROLD SPAETH, SUPREME COURT JUDICIAL DATABASE: 1953-2000 TERMS 43 (2001).

<sup>251</sup> All issue codes in the 800s are labeled as “standing to sue,” including: 801 adversary parties, 802 direct injury, 803 legal injury, 804 personal injury, 805 justiciable question, 806 live dispute, 807 parens patriae standing, 808 statutory standing, 809 private or implied cause of action, 810 taxpayer’s suit, and 811 miscellaneous. Although this includes sub-issues that are in fact not part of the standing doctrine, our aim here was to create an over inclusive list.

We included any cases relating to the Constitution's case or controversy requirement, since this would be overinclusive in capturing cases relevant to Article III standing.

### 3. Measuring Standing Votes

While we spell out our criteria for an express standing disagreement in Subparts IV.A.2 and IV.B above, we spell out details here on our process of reading, disaggregating, and classifying standing cases, which occurred over the course of over half a year. All coding was done exclusively within the three-person research team.

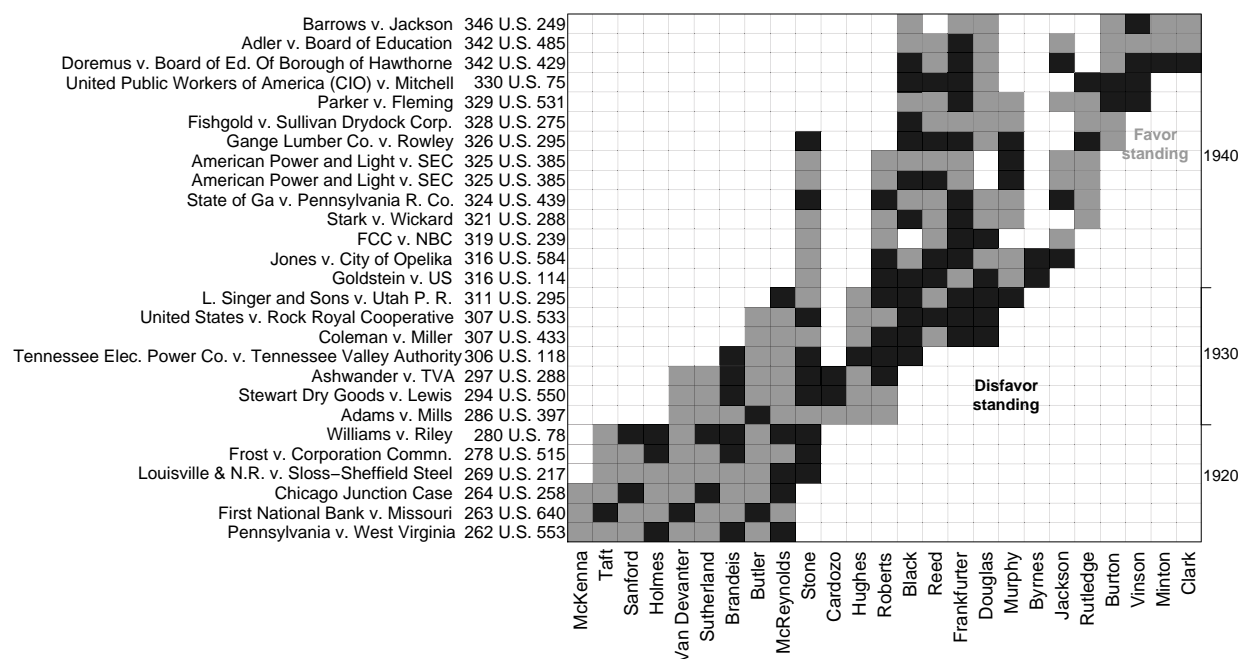


Figure 14: Standing disagreements for 1923 through 1952 Court terms. This figure highlights all express and directional disagreements on standing for the relevant historical period of interest. (*American Power and Light* is represented twice due to two unique standing issues in the case.)

Our general strategy was *not* to recode any existing values in the merits dataset, but rather to augment it with information relevant to standing. When a disagreement on standing was not represented by the existing voting bloc, we augmented the data with a vector representing the standing disagreement.<sup>252</sup> Since we only learn about differences in standing preferences through disagreements, we do not include unanimous standing opinions, although we include information contained in unique voting blocs (partial concurrences, partial dissents, etc.). Second, we denote whether any row (representing an extant merits vote or new standing voting bloc) encodes an express disagreement on an issue of standing. Third, when a row involves an express disagreement on standing, we record whether the majority voting bloc favored standing, disfavored standing, or was unclear.

Figure 14 provides our standing data with express, directional disagreements on standing for pre-1952 terms of the Court. Black cells indicate a vote disfavoring standing, while grey cells indicate a vote favoring standing. This figure shows the key cases marking the New Deal period of insulation.

*Northeastern Florida Chapter of Contractors v. City of Jacksonville*<sup>253</sup> provides an example of express standing disagreements that have unclear valence. The justices expressly disagreed on whether to decide standing. Justice Thomas joined by Justices Rehnquist, White, Stevens, Scalia, Kennedy, and Souter, reached the issue: “We hold that the case is not moot, and we now turn to the question on which we granted

<sup>252</sup> See *supra* text accompanying notes 155-167.

<sup>253</sup> 508 U.S. 656 (1993).



certiorari: whether petitioner has standing to challenge Jacksonville's ordinance.”<sup>254</sup> In contrast, Justice O'Connor, joined by Justice Blackmun, dissented: “I believe this case more closely resembles those cases in which we have found mootness than it does *City of Mesquite*. Accordingly, I would not reach the standing question decided by the majority.”<sup>255</sup>

In total, our research yielded 229 standing disagreements from 192 cases. Table 3 summarizes the path to these 192 cases by source (in columns), giving total numbers in the first row, number of cases cited (and hence reviewed) by sources, and lastly the number of cases with express standing disagreements. The total number of cases in our dataset is 9,100. We reviewed a total of 1,568 cases, resulting in 192 cases with standing disagreements. The number of cases with standing disagreements differs from the total number of disagreements (voting blocs) because some cases contain more than one standing issue.

	1937-06	1921-36	Added Merits Votes	Unanimous Backdating (1921-37)	Total
Number of cases	8440	392	67	201	9100
Nonunanimous cases	4946	392	58	--	5396
Number of cases reviewed / cited	1242	64	61	201	1568
Cases with standing disagreements	170	11	11	--	192

Table 3: Summary of sources for all units of analysis. The first row indicates the number of cases from four different sources. The second row indicates the number of corresponding nonunanimous opinions. The third row indicates the number of cases cited by any sources about standing (Westlaw, Lexis, secondary literature, Spaeth) and hence reviewed. The last row indicates the number of cases with express standing disagreements. The top left cell of 8440 from 1937-2006 equals to 8483 (the total number of Spaeth cases in Table 1) minus 43 units removed in Table 2. The 392 cases from 1921-1936 equal to 345 (the last row of Table 1) plus 49 cases added to Epstein (the last row of Table 2), minus 2 units removed as noted in Table 2. The units of analysis in the pooled IRT model are 5,497 issues, which represent 5,396 nonunanimous cases plus 101 augmented standing issues (the middle cell in the first row of Table 4). Nine unanimous merits votes were added (67-58) by secondary reference. The 1,568 cases reviewed / cited represent each of the columns in Figure 1.

Table 4 provides the breakdown of 229 standing disagreements: 128 cases conventionally represented in the Spaeth database capture standing disagreements, with “merits” votes meaning the major disagreement in the case. For example, as discussed in Subpart IV.B, the Spaeth representation of *Lujan* captures the major 6-3 disagreement of whether the plaintiffs have alleged facts sufficient to infer Article III standing. Our classification of these cases added 101 express standing disagreements, a considerable increase in information. Second, while we augmented conventional votes with 101 voting blocs, a larger fraction of this data contains non-directional standing disagreements (42 of 101). These voting blocs are still informative to differentiate standing preferences, but less informative about the insulation thesis.

<sup>254</sup> *Id.* at 663.

<sup>255</sup> *Id.* at 669 (O'Connor, J., dissenting).

	“Merits” votes	Added standing issues	Total
<b>Standing disagreements captured</b>	128	101	229
Majority favors standing	53	34	87
Majority disfavors standing	52	22	74
No majority favoring / disfavoring standing	23	45	68

Table 4: This table summarizes sources for voting blocs on express disagreements about standing. The “merits” column indicates voting blocs conventionally represented in the Spaeth data. The column of “added standing issues” counts the number of voting blocs added to the conventional database. The number of added standing issues where the majority doesn’t favor or disfavor standing includes 42 voting blocs with non-directional disagreements and 3 “tied” voting blocs.

Finally, Table 5 provides summary statistics of the accuracy of the Spaeth issue codings for nonunanimous cases in the overlapping period. The issue coding correctly classifies only 43 of 109 standing disagreements represented in the Spaeth “merits” votes. (The remaining 19 of the 128 “merits” votes disagreements come from our other sources.) Similarly, the issue coding identifies fewer than half of the cases in which “merits” codings actually involve standing disagreements.

		<b>Truth</b>	
		Standing disagreement	No standing disagreement
<b>Spaeth “issue” coding</b>	Standing	43	56
	No standing	66	4781

Table 5: Summary of the accuracy of the Spaeth “issue” codings for all non-unanimous cases that are primary units under conventional criteria during overlapping observation periods (1937-2006). The rows indicate whether the “issue” coding involves standing and the columns indicate the true assessment of the case. For 99 nonunanimous cases coded as standing issues, only 43 actually involve the doctrine. The sum of all four cells equals the number of nonunanimous cases in the Spaeth data (1937-2006) (i.e., 4946 in the second row and first column of Table 4). This table provides a lower bound as to undercoverage of Spaeth issue codes, because all secondary standing disagreements are excluded. The sum of “true” standing disagreements (109=43+66) does not equal to 128 “merits” standing disagreements (the top left cell in Table 4) because of omitted cases and the fact that Spaeth does not cover pre-1937 terms.

### 3. Early Unanimity

Because of early unanimity, we examined whether the justices deny or grant standing and the author of each opinion for the 1921 to 1936 terms. For this period, the language used to discuss standing can be opaque.<sup>256</sup> Language leading to an inference that a unanimous decision involved a grant (or denial) of standing included: “plaintiff is (not) entitled to bring this suit,” “plaintiff has (not) suffered injury,” “plaintiff is (not) a party aggrieved,” “plaintiff has (no) interest,” and “plaintiff can (not) complain.”

Such language of course still had to be interpreted in the context and framing of the issue to make an ultimate determination. For example, the Court wrote in *Home Furniture v. United States*:<sup>257</sup> “[T]he bill alleged no probable *direct legal injury* to appellants except such as might arise out of changed conditions in respect of transportation to and from the city of El Paso. Accordingly, they had *no proper cause of complaint* unless the order had definite relation to transportation.”<sup>258</sup> However, these sentences are deceptive. In assessing whether the bill involved “transportation,” the Court was actually determining which district court was the appropriate venue for the plaintiff to bring suit. Because the opinion discussed only that jurisdictional issue, it was not coded as involving standing.

Lastly, in order to draw a comparison between a justice’s propensity to write about standing against his propensity to write in general, we also determined the number of unanimous opinions authored by each

<sup>256</sup> See *supra* text accompanying notes 112-133.

<sup>257</sup> 271 U.S. 456 (1926).

<sup>258</sup> *Id.* at 547 (emphases added).

justice from 1921 to 1937, with a search of Westlaw. We used 10/12/1921 – the day before the first case of the 1921 term was decided – as our start date.

```
JU([Justice Name]) & da(aft 10/12/1921 & bef 1/1/1938) % SY(Day Clarke Pitney
McKenna Taft Sanford Holmes "Van Devanter" Sutherland Cardozo Brandeis Butler
McReynolds Hughes Roberts Stone) % DIS(Day Clarke Pitney McKenna Taft Sanford
Holmes "Van Devanter" Sutherland Cardozo Brandeis Butler McReynolds Hughes Roberts
Stone)
```

## B. STATISTICAL MODEL

To estimate the merits viewpoints of justices, we use the following (now standard) item-response theoretic (IRT) approach.<sup>259</sup> Let  $K$  denote the set of all cases before the Court. Let  $J$  denote the set of justices, with  $J_k$  representing the set of justices who participated in case  $k$ .

The observed data consist of the votes of the justices (denoted  $\mathbf{Y}$ ). An element of  $\mathbf{Y}$  is coded as:

$$y_{jk} = \begin{cases} 0 & \text{if } j \text{ is in the minority on case } k \\ 1 & \text{if } j \text{ is in the majority on case } k \\ \text{missing} & \text{if } j \text{ did not vote on case } k \end{cases}$$

The sampling density for the model is given by:

$$p(\mathbf{Y} | \alpha, \beta, \theta) = \prod_{k \in K} \left\{ \prod_{j \in J_k} \Phi(-\alpha_k + \beta_k \theta_j)^{y_{jk}} [1 - \Phi(-\alpha_k + \beta_k \theta_j)]^{1-y_{jk}} \right\}.$$

$\theta_j$  represents the merits preference of Justice  $j$ . We adopt a Bayesian framework, assuming prior distributions for model parameters and sampling from the joint posterior distribution with Markov chain Monte Carlo methods.<sup>260</sup> We assume a priori that: (1)  $(\alpha_k, \beta_k)$  follow independent bivariate normal distributions with mean 0 and variance 5 for each  $k$ , and (2) ideal points follow independent standard normal distributions.

We draw a sample of 1,000,000 from the joint posterior with a burn-in of 50,000 simulations and thinning interval of 1,000. Standard diagnostics suggest convergence.

## C. ROBUSTNESS

### 1. Pooling the Merits

Our baseline merits estimates pool all units of analysis in our consolidated data, including merits votes and augmented standing votes. While pooling is convenient for purposes of using item specific parameters to assess the insulation thesis (see, e.g., Figure 10), standing disagreements also inform inferences we draw about the merits votes and thereby could bias our assessment of the correlation between standing and the merits. To assess sensitivity to such a pooling assumption, we can reestimate the merits model discarding all cases not conventionally in the merits analysis (i.e., all cases we've augmented to the data). Figure 15 presents the

<sup>259</sup> See Joshua D. Clinton, Simon Jackman & Douglas Rivers, *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355 (2004); Ho & Quinn, *supra* note 244; Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. (forthcoming, 2008); Martin & Quinn, *supra* note 171. See also KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997). For an alternative approach that accounts for the costs of dissent, see Joshua B. Fischman, *Decision-Making Under a Norm of Consensus: A Structural Analysis of Three-Judge Panels* (2008) (working paper).

<sup>260</sup> See Andrew D. Martin, Kevin M. Quinn & Jong Hee Park, *MCMCpack: Markov chain Monte Carlo (MCMC) Package* (Version 0.9-4 2008).

correlation with merits ideal points used throughout the paper and merits ideal points discarding all augmented data. The estimates are effectively identical. This result makes intuitive sense, as (a) the number of standing issues is small relative to all merits votes, (b) there are no constraints on discrimination parameters, and (c) standing issues “load” onto the merits dimension (only in different ways pre and post-1940).

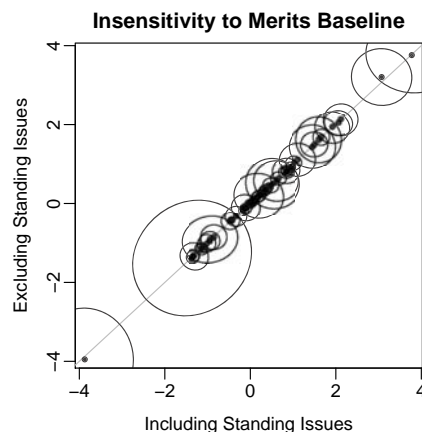


Figure 15: Robustness to measurement of merits. The  $x$ -axis represents the merits estimates used throughout the Article, pooling merits and standing issues. The  $y$ -axis represents the estimates excluding any augmented standing issues, which corresponds most directly to conventional estimates. Because standing issues represent such a small fraction of the overall data, the estimates are substantially identical.

## 2. Timing

One question that arises from Figure 11 is the robustness of the finding to date cutoffs. To explore this, we truncate the sample for date breakpoints for every observed standing case with a clear directional disagreement, keeping the merits ideal points constant. For each of 164 points of truncation,<sup>261</sup> we calculate the correlation between merits views and standing by regressing the proportion of a justice’s votes granting standing on one draw of the merits views using ordinary least squares. The coefficient thereby represents the merits-standing correlation averaged across cases on or before the cutoff. For each cutoff, we repeat this for 100 draws of the merits views to account for measurement uncertainty. Figure 16 plots the resulting correlation on the  $y$ -axis across truncation periods on the  $x$ -axis. For example, a value above the horizontal line in 1930 indicates that the correlation is positive across all cases from 1921-30, meaning that liberals disproportionately deny standing; conversely a value below the horizontal line indicates that the correlation is negative across cases from 1921-30, meaning that liberals disproportionately grant standing. This figure corroborates the decade-by-decade trends of Figure 11 at a more granular level: standing was largely unpredictable based on the merits during the 1920s, exhibits a period of insulation in the 1930s, and turns sharply to a long period of a conservative valence beginning in the 1950s.

<sup>261</sup> 164 units correspond to the total directional disagreements in Table 4 (86+75) plus three “tied” directional disagreements.

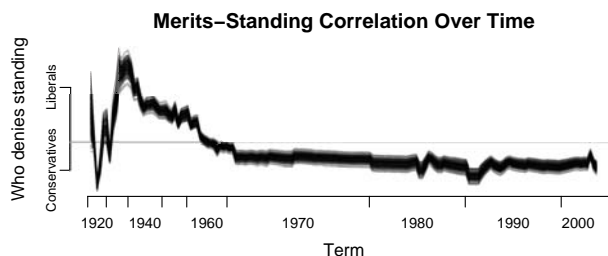


Figure 16: Breakpoint sensitivity analysis. This plot presents coefficients from least squares models of the proportion of cases granting standing against 100 draws of merits ideal points using each of 164 cases as a running breakpoint (i.e.,  $164 \times 100 = 16,400$  coefficients). Each of the 100 lines represents the coefficient series for a draw. This figure shows that cleavages in the 1920s were unpredictable, but that there was a short spike for which the insulation thesis holds, followed by prolonged conservative valence of standing.

### 3. Measurement Uncertainty in Standing Views

Figure 9 adjusts for uncertainty in the measurement of the merits views, treating – for ease of interpretation and because the standing cases represent the population – the proportion of votes favoring standing as fixed. Alternatively, we can treat both standing and merits views as measured with error.<sup>262</sup> To do so, we apply the same type of IRT model to subsets (pre-1940 and post-1940) of the standing data with directional disagreements. To account for directional coding we constrain the prior of  $\beta_k$  to be mean -2 and variance 5.<sup>263</sup> Because the outcome is directionally coded as 1 if favoring standing and as 0 if disfavoring standing, we can interpret  $\theta_j$  as the standing view of justice  $j$ , with negative values indicating more “liberal” conceptions of the doctrine (i.e., a lower barrier) and positive values indicating more conservative conceptions of the doctrine (i.e., more restrictive requirements). Even with very small sample sizes in the pre-1940 subset ( $n=13$ ), Figure 17 shows that the valence flip remains robust. To account for measurement uncertainty, the lines present least squares and robust MM fits to 100 random draws of the posterior distributions of standing and merits views. In no instance does the slope reverse sign within the time period.

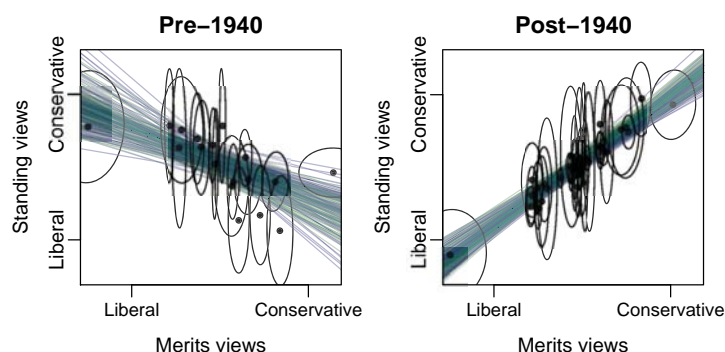


Figure 17: Accounting for measurement uncertainty in merits and standing views. The ellipses represent 95 percent credible intervals. The major axis is generally shorter than the minor axis due to the large number of merits issues and small number of standing issues. The left (right) panel plots pooled merits views against the standing views for cases with directional disagreements from before 1940 (after 1940). Green (blue) lines represent least squares (robust MM) fits to 100 random draws of the posterior distributions. This figure shows that the reversal in valence is robust to measurement uncertainty.

<sup>262</sup> One justification for doing so is that we do not observe justices casting votes on all cases.

<sup>263</sup> Other reasonable specifications exist, but given that the standing data is quite sparse, bridging sensitivity becomes acute with moderately strong assumptions, such as those we impose on the discrimination parameters here.