

**JUDICIAL DECISION MAKING UNDER THE MICROSCOPE:  
MOVING BEYOND POLITICS VERSUS PRECEDENT**

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I. INTRODUCTION

Much of the attention of the legal world and the larger public tends to focus on the Supreme Court as the principal actor of the federal judiciary. It is the decisions of the Supreme Court that garner

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press coverage and appointments to the Supreme Court bench that inspire heated debate. Yet it is clear to most familiar with the legal system that the Court's direct control over the outcomes of cases in the numerous federal appellate and trial courts, as exercised through its power of reversal, is incomplete, and in some circumstances, quite tenuous.<sup>1</sup>

The paradox between the Supreme Court's position as "the highest court in the land" and its relatively narrow sphere of direct review has inspired a broad literature on the influence of Supreme Court decisions on lower courts. Especially in recent years, scholars have grappled with the question of how the judgments of lower courts are affected by relevant Supreme Court decisions. Two major schools of thought have emerged on this issue: adherents of the "attitudinal model" have inherited the mantle of legal realists in arguing that judges are influenced far more by their personal preferences than by the dictates of higher courts,<sup>2</sup> while proponents of the "legal model" have theorized that judges do in fact abide by the governing legal regime as embodied in binding precedent.<sup>3</sup>

Various empirical studies of judicial behavior have revealed that both of these models are correct in certain respects. It appears that judges are influenced by both their own opinions and the binding precedent established by those standing above them in the judicial

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1. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 388 (2007); see also DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 4 (2002) (discussing influence of lower courts in determining substantive law); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 844 (2003) ("[The] twelve circuit courts and ninety district courts . . . as a matter of empirical fact, play a far more important role in the actual lives of citizens than does the Supreme Court. The behavior of the roughly 100 circuit judges and 500 district judges is, for most citizens most of the time, far more likely to count as 'the law' than the pronouncements of the nine denizens of the Supreme Court ensconced—for most Americans literally and for almost all metaphorically—at least a thousand miles away in a marble palace (or tomb inhabited by the living dead) in Washington, D.C.).

2. See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 315 (1997) [hereinafter Cross, *Political Science*] (criticizing "unexamined faith in the significance of legal rules").

3. See Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614 (2004). There is plentiful literature on the issue of judicial decision making, which has become especially well-developed in recent decades as academics have attempted to gather empirical evidence to illuminate what factors influence judges in their task. See generally Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2006) [hereinafter Tiller & Cross, *What is Legal Doctrine?*]. The debate between the attitudinal and legal models of judicial decision making is explored in depth below, *infra* Part IV.

hierarchy.<sup>4</sup> However, these broad conclusions leave significant exploration surrounding the exact operation of precedent on judicial decision making. Why do judges follow precedent? Are certain types of precedent more influential than others? As others have noted, the initial explanations thus far proffered for judges' obedience to precedent are insufficient to answer these and other important questions.<sup>5</sup>

One substantive area offering fertile ground for more in-depth research of judicial decision making is that of justiciability doctrine. Encompassing issues such as standing, ripeness, and mootness, "justiciability" refers to the requirement that litigants show that they are the right parties to bring the suit and that they are doing so at the right time.<sup>6</sup> Currently rooted in the mandate of Article III of the Constitution that the judicial power extends only to "cases" or "controversies,"<sup>7</sup> justiciability doctrines ostensibly screen out disputes that do not present a concrete legal controversy and are

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4. See, e.g., Sarah A. Maguire, *Precedent and Procedural Due Process: Policymaking in the Federal Courts*, 84 U. DET. MERCY L. REV. 99, 109 (2007); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1499 (1998) [hereinafter Sisk et al., *Charting the Influences on the Judicial Mind*] (detailing empirical results both supporting and undermining the thesis that judges decide cases based on personal preferences and characteristics).

5. Articles attempting to provide theoretical backing for the legal model have proposed that judges might follow precedent because of reputational concerns, a norm of respect for the rule of law, the need to communicate information about their preferences to future decision makers, or merely because it requires some effort to evade that precedent in the traditional manner of incorporating it into a reasoned legal opinion that supports a judge's preferred outcome. See Ethan Bueno De Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002) (discussing judges' use of precedent to communicate information to lower courts); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1160-68 (2005) (reviewing a number of explanations for judicial obedience to precedent); Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 745-49 (1993) (explaining that judges follow each other's precedents to avoid nonproductive competition). However, there are fewer examples of empirical studies supporting any one of these theories in particular. That may be changing, as more sophisticated investigations distinguish among the various forces affecting judicial decision making. See, e.g., Sisk et al., *Charting the Influences on the Judicial Mind*, *supra* note 4 (isolating a district court judge's potential for promotion to a higher court as a variable correlated with closer adherence to precedent); Staudt, *supra* note 3 (comparing compliance of appellate and district court judges and concluding that fear of reversal is an important factor in ensuring obedience to precedent).

6. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.1 (5th ed. 2007).

7. U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

thus more appropriately resolved by the more democratic, “political” branches.<sup>8</sup>

The application of Article III is an area of significant ideological dispute over the proper role of the judiciary, and as the Supreme Court has become more conservative over the past two or three decades, its decisions have tended toward imposing greater restrictions on the role of judicial review.<sup>9</sup> Caught between prominent Supreme Court precedents outlining strong views on the proper role of the judicial branch and doctrinal confusion creating room for lower court judges to put into operation their own opinions on this key issue, justiciability jurisprudence presents a unique

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8. See *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968) (“The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to ‘cases’ and ‘controversies.’ . . . Embodied in the words ‘cases’ and ‘controversies’ are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”). For a more in-depth discussion of justiciability doctrine, see *infra* Part II.

9. For descriptions of this general trend, see, for example, Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 334 (2004) and Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 395 (1996). A number of cases represent specific examples of this trend. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007) (“[T]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts.’ . . . [F]ederal courts sit ‘solely, to decide on the rights of individuals,’ and must ‘refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.”) (alteration in original) (citations omitted); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (“The principal purpose of the . . . limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.”); *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998) (noting that in ripeness inquiry, court must consider “whether judicial intervention would inappropriately interfere with further administrative action”); *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (making the test for prudential standing more demanding and discussing it as one of several prudential limitations on “the exercise of federal jurisdiction,’ [that] are ‘founded in concern about the proper—and properly limited—role of the courts in a democratic society’”) (citations omitted); *Lujan*, 504 U.S. at 577 (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3.”).

opportunity to examine closely whether judges will follow precedent or their own inclinations when both are viable options.

As a result of the countervailing expectations produced by the legal and attitudinal models, it is not immediately clear what effect one should predict from Supreme Court tightening of justiciability standards in recent years. In order to provide some definitive evidence regarding the practical impact of cases like *Lujan v. Defenders of Wildlife*,<sup>10</sup> as well as the larger question of what factors influence judicial decision making, this Article therefore undertakes an empirical examination of the trajectory of two justiciability doctrines, standing and ripeness, in the District of Columbia Circuit over a time span encompassing significant developments in Supreme Court jurisprudence in both areas. Specifically, the study focuses on the changes wrought in the D.C. Circuit's decisions on standing and ripeness by two major Supreme Court decisions: *Lujan v. Defenders of Wildlife*, a case that marked a sharp deviation from previously liberal standing practices,<sup>11</sup> and *Ohio Forestry Ass'n v. Sierra Club*, where the Court signaled its reluctance to entertain abstract challenges to general agency policies.<sup>12</sup>

Part II provides an overview of the historical evolution of standing and ripeness requirements, illuminating their common concern with the proper separation of powers among the branches, a doctrinal overlap suggesting that precedents tightening the standards for both would lead to similar trends in lower court decisions on these issues. Part III examines the validity of this hypothesis as tested by an empirical study of D.C. Circuit decisions involving questions of standing and ripeness. It also explores

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10. *Lujan*, 504 U.S. 555 (setting out a relatively narrow conception of standing).

11. *Id.*; see also *infra* Part II.B.

12. *Ohio Forestry*, 523 U.S. 726. Although *Ohio Forestry* did not change the ripeness test *per se* to make it either more stringent or relaxed, the opinion did thoroughly explore the issue of ripeness from an angle indicating disfavor of judicial review as a route for abstract objections to general agency policies, and thus could be considered to have the potential to signal to lower courts that they should be on guard for unripe petitions. *See id.* at 735 (“The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—post-implementation litigation.”); Herz, *supra* note 9, at 331-34 (grouping *Ohio Forestry* with other cases demonstrating the Rehnquist Court's reluctance to review certain kinds of agency action); Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 342 (2005) [hereinafter Levin, *Kenneth Culp Davis*] (“[B]ecause so much [of the context-specific ripeness test] does depend on discretion, the attitude with which the doctrine is implemented is critical.”). *But see* Ronald M. Levin, *The Year in Judicial Review, 1997-1998*, 51 ADMIN. L. REV. 389, 392 (1999) [hereinafter Levin, *Year in Judicial Review*] (arguing *Ohio Forestry* did not mark a major turning point in ripeness doctrine). For further discussion of this issue, see *infra* Part II.C.

whether the legal model or attitudinal model more accurately predicts the effect of Supreme Court precedent in this arena—whether *Lujan* and *Ohio Forestry* influence lower court outcomes.

The empirical study in Part III reveals two significant results. First, the standing data confirm that both precedent and ideology influence judges, but in a very particular way. In a phenomenon I term “selective compliance,” *Lujan* prompted judges of all political stripes to discuss standing more often, but conservative judges, sympathetic to its ideological stance, were more likely to dismiss cases on standing grounds when they raised the issue. Second, contrary to expectations, Supreme Court precedent had a much stronger influence on standing cases in the D.C. Circuit than on ripeness decisions. Despite the similar rhetoric in *Lujan* and *Ohio Forestry* as to avoiding review of abstract disputes not suitable for judicial disposition, only *Lujan* measurably pushed appellate court judges to dismiss more cases for lack of justiciability.

Part IV reviews existing models of judicial decision making to show that they do not fully explain these results. Though the various theories of the legal and attitudinal schools predict the effects of both precedent and ideology, none of them provide the rich descriptive power that would account for the phenomena observed here. Therefore, Part V proposes a possible explanation for these anomalous results: that in addition to being influenced by the usual suspects of ideology, fear of reversal, and professional norms, judges are in fact discernibly responsive to the finer details of the legal reasoning contained in higher court precedent.

Specifically, this Article suggests that both the contrasting responses of liberal and conservative justices to *Lujan* and the dissimilar effects of *Lujan* and *Ohio Forestry* may be explained as the result of judges having different perceptions of the purpose of justiciability precedent. Justiciability doctrines incorporate both constitutional concerns as to the proper separation of powers and prudential themes regarding the best use of judicial resources, with conservatives tending to be more sympathetic to the former and liberals to the latter.<sup>13</sup> This contrast may account for selective compliance, as the manifestation of conservatives’ greater

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13. Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 321-23 (2001) (identifying prudential approach to standing with liberal Warren Court and constitutional approach with conservative Burger Court); Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1614 (1993); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 389 (1995) (highlighting conservatives’ tendency to use standing doctrine to reinforce preferred constitutional boundaries between the branches).

responsiveness to the Supreme Court's dissertation on the correct constitutional role of the judiciary in *Lujan*.

Furthermore, standing and ripeness doctrine also reflect the manifold objectives of justiciability in that standing doctrine stresses the constitutional questions surrounding judicial review of government action while ripeness focuses on the practical capability of judges to decide certain kinds of cases. Since the former conception lends itself more to bright line rules while the latter is keyed more to the facts of individual cases, it makes sense that the pronouncement of general precepts by the Supreme Court would have more influence on lower courts with respect to their standing decisions. Thus, understanding justiciability as a doctrine with multiple, overlapping purposes comprehensively explains both selective compliance and the unexpectedly variant standing and ripeness results, whereas the legal and attitudinal models offer only a rough idea of why those phenomena might occur.

It is clear to most scholars that modern accounts of the decision-making process are incomplete, which has led many to search for the personal quirks of individual judges that most influence their varying applications of binding precedent. It has gone without saying that the content of legal precedent is one factor influencing lower court judges. However, the lack of in-depth discussion regarding exactly how judges read the opinions they are supposed to follow has left the exact contours of that influence undefined—are precedential opinions a gross bludgeon constraining lower court judges only at the broadest level of rhetoric, or a subtle tool swaying those decision makers in a more nuanced manner? This Article suggests that the latter is a more accurate description. While it may be important to explore the operation of judicial minds, one should not ignore that those minds have been trained to dissect legal opinions down to the last detail. That fact, one of the few common to all judges, means that those details may matter considerably in predicting the effect of a given precedent, an idea from which modern theories of judicial decision making have strayed.

## II. JUSTICIABILITY DOCTRINES

The history of justiciability reveals two countervailing forces: ad hoc judicial manipulation for ideological ends, but also a gradual crystallization as a set of doctrines centered on the issue of the proper role of the judiciary in our tripartite system of government. The recent Supreme Court precedents considered in this Article confirm this latter trend and appear to send a relatively consistent signal to lower courts that threshold justiciability tests should act as restraints on judicial intrusion into matters more suited to

consideration by the executive or legislative branches.<sup>14</sup> Therefore, the influence of Supreme Court decisions on lower court decisions should be similar within the various doctrines of standing, ripeness, and the like, because of their common usage as tools to confine judicial power to its proper scope.

At the same time, the interpretation of Article III, generally cited as the basis for justiciability restrictions,<sup>15</sup> is among the most confused topics in the law. It is described by most legal scholars as an area of unclear precedent, dubious historical roots, and ongoing controversy.<sup>16</sup> This was recently illustrated in the Supreme Court decision *Massachusetts v. EPA*,<sup>17</sup> where the Court sharply divided over the issue of standing to sue, with the majority and dissenting opinions taking vastly different views of what result was required by legal precedent and the Constitution.<sup>18</sup> While the issue was ultimately resolved in favor of granting standing in that particular case,<sup>19</sup> the battle over that question indicates that the proper

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14. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1402 (1995) (arguing that inconsistencies in application of standing doctrine do not mean it should be discarded, because no doctrine can be applied with perfect consistency and standing doctrine does serve some purpose in preventing the cycling preferences predicted by social choice theory from being revealed in the Supreme Court).

15. See CHEMERINSKY, *supra* note 6.

16. See, e.g., Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 677 (1990) (“[J]usticiability is a morass that confuses more than it clarifies.”); Melvyn R. Durchslag, *The Inevitability (and Desirability?) of Avoidance: A Response to Dean Kloppenberg*, 56 CASE W. RES. L. REV. 1043, 1053 (2006) (noting that justiciability doctrine is “all but incomprehensible”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (indicating that standing doctrine is “among the most amorphous in the entire domain of public law”) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 89th Cong. 498 (1966) (statement of Prof. Ernst Freund)). For a list of some of the more colorful epithets that have been hurled at standing, one of the most notorious justiciability doctrines in this respect, see Staudt, *supra* note 3, at 614.

17. 127 S. Ct. 1438 (2007).

18. Compare *id.* at 1455 (“[I]t is clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process.”), with *id.* at 1470 (Roberts, C.J., dissenting) (“The constitutional role of the courts, however, is to decide concrete cases—not to serve as a convenient forum for policy debates.”).

19. Notably, the hotly debated question was resolved mainly on a basis unique to the case—the fact that many of the plaintiffs were states, which have generally been treated more generously than other litigants in the standing context. *Id.* at 1454-55. While that principle allowed a decision on the particular dispute before the Court, it does not shed much light on the correct approach to more routine standing disputes involving private plaintiffs. See, e.g., *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 n.2 (D.C. Cir. 2007) (refusing to apply the relaxed

application of Article III in restraining judicial power is far from clear.

The application of justiciability precedent thus represents a tug of war between judges' personal ideas regarding the proper role of the judiciary and forceful pronouncements by Supreme Court Justices on their own views of this core constitutional issue. A more thorough discussion of the development of justiciability doctrine underlines that these two trends make this area of the law particularly amenable for analysis of the judicial decision-making process. Furthermore, exploring the details of the history of justiciability sets the stage for understanding the results of this Article's empirical study.

#### A. *Early History*

Though Article III's case or controversy requirement is now cited as the source of justiciability limitations,<sup>20</sup> when the Constitution was written there was little discussion of the meaning of that clause.<sup>21</sup> One of the only references to it was James Madison's unenlightening statement that judicial power should "be limited to cases of a Judiciary Nature," a notably circular formulation.<sup>22</sup>

Soon after the ratification of the Constitution, the courts did articulate some restraints on judicial power, such as the bar against "advisory opinions" outside the context of litigation, the immunity of executive exercise of discretionary political power from judicial review, and the political question doctrine exempting from judicial review certain inherently political issues.<sup>23</sup> Throughout the nineteenth century, however, these main justiciability doctrines remained relatively quiescent.<sup>24</sup>

In the early 1900s, mainly at the initiative of Justice Brandeis, the Supreme Court began more actively using justiciability concerns as a tool to manage dockets that were growing rapidly as the reach of

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standing analysis from *Massachusetts v. EPA* where the case before the court did not involve states as litigants).

20. See CHEMERINSKY, *supra* note 6.

21. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1763-64 (1999).

22. *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911)).

23. See Pushaw, *supra* note 9, at 436-52 (reviewing development of these doctrines).

24. *Id.* at 453. At this time, standing was merely a nonconstitutional, substantive question of whether a remedy was available for the claim asserted by a party. See Winter, *supra* note 16, at 1418-25 (discussing standing in relation to remedy).

federal law became broader.<sup>25</sup> Then, during the 1930s, a relatively liberal judiciary picked up on these doctrines as a means to achieve desired political results by averting legal challenges to expansive New Deal legislation.<sup>26</sup> This latter stage in the expansion of justiciability principles also saw a shift in their underlying rationale. Justice Brandeis had framed these as prudential, discretionary questions, concerned with effective use of judicial resources to review cases that the judiciary had the institutional capability to resolve.<sup>27</sup> But during the Depression era they were linked by their new overseer, Justice Frankfurter, to constitutional requirements of a limited role for unelected judges and separation of powers among the three branches.<sup>28</sup> This version of justiciability, though not quite distilled into the separate elements of standing, ripeness, mootness, and political question doctrine now considered to be the mainstays of Article III, was beginning to manifest modern constitutional concerns about the scope of judicial power within a three-branch system of government.<sup>29</sup> Still, until the 1970s, justiciability “inhabited a hazy middle ground between prudential concern and constitutional mandate.”<sup>30</sup>

It was the Burger Court of the 1970s and 1980s that elaborated on nascent justiciability principles to create standing and ripeness as we know them today, primarily using those doctrines to “contain the explosion of litigation to enforce public (especially constitutional)

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25. Pushaw, *supra* note 9, at 458 (noting that the creation of new vehicles for litigation, such as declaratory judgment actions, contributed to the proliferation of cases within federal jurisdiction). See generally *id.* for elaboration of this brief sketch of standing’s historical pedigree.

26. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 657 (2006); Pierce, *supra* note 21, at 1767; Pushaw, *supra* note 9, at 458.

27. Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 451 (1994).

28. *Id.* at 459-63 (criticizing Frankfurter’s attempts to trace justiciability doctrines to roots in English law and early American doctrines like the bar on advisory opinions as inaccurate and unfaithful to the Founders’ actual views regarding separation of powers). This constitutional approach to justiciability was reinforced when Alexander Bickel set out his well-known theory that the courts could use threshold screening devices such as justiciability to prevent inadvertent extension of their “undemocratic” review beyond the proper and sustainable scope of judicial power. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962); see also Pushaw, *supra* note 9, at 465-66. Though Pushaw argues that this represents a prudential use of the justiciability doctrine, it is to achieve a constitutional end of a particular relationship among the branches and thus may also be considered a constitutional approach to justiciability.

29. Pushaw, *supra* note 9, at 463.

30. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 154 (1987).

rights” occurring during this time period.<sup>31</sup> This context also cemented the link between the “passive virtues” and political conservatism, as a backlash against the use of aggressive judicial review to push forward a liberal civil rights agenda.<sup>32</sup>

By the mid-1980s, justiciability had fully assumed the Article III mantle as a tool to keep judicial power in check.<sup>33</sup> Justice O’Connor conveys this transformation in her 1984 description of justiciability doctrine:

[T]he “case or controversy” requirement [of Article III] defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are “founded in concern about the proper—and properly limited—role of the courts in a democratic society.”

All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the

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31. Pushaw, *supra* note 9, at 467 n.365; *see also* Pierce, *supra* note 21, at 1769 (“The circumstances in which the Burger Court applied its expanded version of standing strongly suggest that the Burger Court was trying once more to insulate the politically accountable branches of government from the constant assaults of activist judges.”).

32. *See* Kenneth M. Casebeer, *The Empty State and Nobody’s Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 305 (2000) (discussing the Court’s treatment of affirmative action cases); *see also* Nancy Levit, *The Caseload Conundrum, Constitutional Restraint, and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 362 (1989) (“The liberal-conservative battle regarding court access has played out over the years with liberals maintaining that current doctrines of justiciability and jurisdiction hurt underprivileged and marginal groups. Conservatives responded that this position was value-laden, and therefore not good legal argument. Conservatives, and now many law and economics adherents, called for neutral principles of adjudication, one of which is the efficient administration of the federal caseload.”); Rorie Spill Solberg & Stefanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986–2000*, 3 J. EMPIRICAL LEGAL STUD. 237, 242 (2006) (“[T]he Warren Court’s liberally-oriented activism has led conservatives to eschew activist judicial review. . . .”). *But see* William A. Taggart & Matthew R. DeZee, *A Note on Substantive Access Doctrines in the U.S. Supreme Court: A Comparative Analysis of the Warren and Burger Courts*, 38 W. POL. Q. 84 (1985) (finding no difference in provision of access between liberal Warren and conservative Burger Courts).

33. Nichol, *supra* note 30, at 159 (“[T]he Burger Court[] . . . cast[] the constitutional ‘case’ demand as an objective, concrete, independent barrier to the exercise of judicial power.”); *see also* Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 489-90 (2004) (noting the period around 1970 as when the controversy and standing link first clearly emerged); Pushaw, *supra* note 9, at 473-74.

constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.<sup>34</sup>

Justiciability had undergone a rapid transformation from a little-used, prudential legal concern to a vital part of the country's constitutional structure.

As an area intertwined with fundamental questions regarding the role of the judiciary, justiciability is now subject to heated dispute among liberal and conservative judges. Liberals are often identified with a relatively expansive vision of the role of the judiciary in constraining the other branches, while conservatives tend to favor a more restrictive view of the judiciary's power to supervise the executive and legislative branches.<sup>35</sup> The particulars of standing and ripeness doctrine, which are the focus of the empirical study discussed below,<sup>36</sup> show their common concern with this essential question of the proper scope of judicial review. Although the specific details of the threshold tests applied to determine standing and ripeness differ, their core inquiry is the same: whether the judiciary is the proper branch to hear a particular case at a particular time.

### B. Standing

Standing is both a constitutional and prudential inquiry into the injury alleged by a particular litigant.<sup>37</sup> The main concern of

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34. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citations omitted).

35. See, e.g., Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda*, 149 U. PA. L. REV. 251, 256 (2000); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 82 (2007); Ernst A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1202 (2002) (identifying conservatives seeking a limited role for the judiciary as "institutional conservatives"). This is certainly not an inevitable alignment, see Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 12 (1983), but it is fairly descriptive of the positions of liberals and conservatives sitting on the Supreme Court and D.C. Circuit during the time period in question. See, e.g., John Ferejohn, *The Law of Politics: Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 57 (2002) (describing changes in liberal stance on judicial review, with liberals currently in favor of less judicial restraint). For example, Justices Scalia and Roberts, among the most conservative current members of the Supreme Court, are well-known for their advocacy of the strict application of constitutional standing requirements. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1464-71 (2007) (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-78 (1992) (Scalia, J.).

36. See *infra* notes 93-96 and accompanying text for an explanation of why the empirical analysis centered on these two doctrines.

37. *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975); see also Lonny Sheinkopf Hoffman, *A Window into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533, 1550 (2001) (reviewing SAMUEL ISSACHAROFF ET AL., *WHEN*

standing is the question of whether the challenging party has “such a personal stake in the outcome of the controversy to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”<sup>38</sup> To determine this, under current doctrine a court looks to the three-pronged standing test: “a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.”<sup>39</sup>

Despite its linkage to the Constitution, standing has relatively shallow historical roots. Early English and American history show no requirement that plaintiffs demonstrate any particular kind of injury (or at least none rising to the level of the modern-day standing inquiry); the main requirement for litigation was that a suit be brought under a valid cause of action with an available remedy.<sup>40</sup> Different judges put forward several conceptions of standing, some constitutional, others equitable or prudential, over the years in American jurisprudence before the doctrine settled into the Article III approach discussed above.<sup>41</sup> A specific injury requirement was not explicitly connected to Article III’s case or controversy requirement until 1944.<sup>42</sup>

However, the 1923 case *Frothingham v. Mellon*<sup>43</sup> is traditionally cited as the first modern Supreme Court standing case for its imposition of an injury requirement to make a case judicially reviewable.<sup>44</sup> In *Frothingham*, the petitioner challenged a federal act appropriating money to the states to improve programs for the

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ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001)); Staudt, *supra* note 3, at 623-25.

38. Baker v. Carr, 369 U.S. 186, 204 (1962).

39. Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007).

40. Fallon, *supra* note 26, at 656-57; Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 170-79 (1992). See generally Winter, *supra* note 16 for a detailed tracing of the historical roots of standing in American courts. *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (asserting that historical evidence does support a coherent concept of standing).

41. *See generally* Winter, *supra* note 16 (offering a detailed exploration of the various iterations of standing doctrine and their coalescence into the modern day inquiry into injury, causation, and redressability).

42. Sunstein, *supra* note 40, at 169 (citing Stark v. Wickard, 321 U.S. 288 (1944)); *see also* Pierce, *supra* note 21, at 1763-65 (offering more details to support argument that standing’s link to Article III is a flimsy one).

43. 262 U.S. 447 (1923).

44. *See, e.g.*, Gilles, *supra* note 13, at 319 n.21. *But see* Winter, *supra* note 16, at 1375-76 (citing earlier case, Fairchild v. Hughes, 258 U.S. 126 (1922), as being the first such instance, but ignored by most scholars).

reduction of infant mortality as an unconstitutional taking because it would result in increasing her federal taxes.<sup>45</sup> The Supreme Court dismissed the suit, citing the litigant's "minute" interest as a taxpayer, "shared with millions of others," and the fact that the statute's effect on any future tax rates was "remote, fluctuating and uncertain."<sup>46</sup> The opinion concluded by emphasizing that under a separation-of-powers system, "neither department may invade the province of the other," and that courts cannot review legislative acts unless those acts result in some "direct injury suffered or threatened," creating a controversy with respect to which a judge may determine the applicable law.<sup>47</sup>

The causation and redressability prongs were not added to the standing inquiry until the 1970s, most explicitly in *Simon v. Eastern Kentucky Welfare Rights Organization*, where plaintiff nonprofit organizations dedicated to advocating for health services for the poor challenged an IRS ruling that hospitals denying emergency care to the uninsured were still entitled to nonprofit status.<sup>48</sup> They were denied standing because their injury at the hands of the hospitals was not fairly traceable to the IRS's decision and it was "speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services."<sup>49</sup>

Though standing doctrine was becoming more formal at this time, its application was still relatively permissive. In *Association of Data Processing Service Organizations v. Camp*, the Supreme Court held that an injury resulting in standing need not be injury to a legal interest, replacing the inquiry into whether there had been such a legal harm with a search for injury in fact.<sup>50</sup> Soon after, in 1973, the Supreme Court decided *United States v. Students Challenging Regulatory Agency Procedures*, the case often cited as the acme of liberal standing requirements for its affirmation of standing despite an extremely attenuated line of causation between the action in question (approval of a surcharge on railroad rates) and the alleged injury (environmental impacts on camping areas enjoyed by the plaintiffs).<sup>51</sup>

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45. 262 U.S. at 486.

46. *Id.* at 487.

47. *Id.* at 488.

48. 426 U.S. 26 (1976).

49. *Id.* at 41, 43.

50. 397 U.S. 150, 153-54 (1970).

51. 412 U.S. 669 (1973). The challengers alleged that the surcharge would discourage recycling by increasing the costs of transporting materials for recycling, leading to more natural resource extraction around the camping areas in question as well as more accumulation of normally recyclable materials in those areas. *Id.* at 676;

A series of cases in the 1970s and 1980s further reinforced standing's status as an Article III doctrine and cemented the injury-in-fact, causation, and redressability requirements.<sup>52</sup> Then in 1992, the Supreme Court decided *Lujan*.<sup>53</sup> The case involved environmental groups that had challenged a government regulation declaring that the Endangered Species Act, which requires federal agencies to consult with the Secretary of the Interior before taking any action that might jeopardize an endangered species, would not apply to overseas actions.<sup>54</sup> In an opinion written by Justice Scalia, the Supreme Court dismissed the case for a lack of standing.<sup>55</sup> The Court held that the litigants had not established injury in fact because they had not demonstrated personal, concrete plans to return to the overseas location of the species in question, and the statutory provision allowing the citizen suit did not itself confer standing on them.<sup>56</sup> Although the merits of this decision have been endlessly debated, it is clear that, wrong or right, *Lujan* marked a major shift in the law of standing.<sup>57</sup> Constitutional standing requirements had not previously been used to prevent a litigant from pursuing a cause of action statutorily authorized by Congress.<sup>58</sup> *Lujan* thus put the judiciary firmly in charge of policing the boundaries of Article III, rather than leaving it to the legislature to do so, and definitively cast standing as a constitutional doctrine dealing with the proper relationship between the courts and the

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*see also* Kurt S. Kusiak, Note, *Standing to Sue: A Brief Review of Current Standing Doctrine*, 71 B.U. L. REV. 667, 671 (1991) (providing more discussion of the case in a larger overview of standing doctrine).

52. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 750 (1984) (denying standing to petitioners seeking ruling that IRS had failed its obligation to deny private racially discriminatory schools tax-exempt status); *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (denying taxpayers standing to challenge government transfer of property to religious college at no cost); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (granting standing to litigants challenging housing discrimination even though they had not actually been seeking housing, but rather had merely acted as "testers" of housing practices); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (denying standing to various parties challenging town zoning ordinance).

53. 504 U.S. 555 (1992).

54. *Id.* at 559.

55. *Id.*

56. *Id.* at 564, 571-78 (allowing suit without particularized, actual injury would violate precedent requiring more than a "generalized grievance"). A plurality of the Court also argued that redressability was lacking since the consultation, even if it occurred, might not affect the consulting agency's ultimate action. *Id.* at 568-71.

57. Sunstein, *supra* note 40, at 164-65.

58. *Lujan*, 504 U.S. at 571-78 (holding that contravention of Endangered Species Act provision allowing suit does not itself establish injury sufficient for constitutional standing); *see also* Pierce, *supra* note 21, at 1766.

political branches. At the same time, the roots of standing as a prudential tool have not yet been excised from that doctrine, and it retains some of its focus on simply ensuring a concrete dispute is before the court.<sup>59</sup>

### C. Ripeness

The ripeness test, like standing, is a threshold inquiry into whether the controversy at hand is concrete enough to allow effective judicial review.<sup>60</sup> However, ripeness is concerned with when a case is brought rather than who brings it. The doctrine is intended “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.”<sup>61</sup>

“[R]ipeness is a twentieth-century creation.”<sup>62</sup> When courts were granted jurisdiction to hear pre-enforcement challenges to laws by the Declaratory Judgment Act of 1934, it created the need for some doctrine to guide them in deciding when exactly review was appropriate and when it trespassed into the forbidden ground of advisory opinions.<sup>63</sup> This Article III concern was at its height for constitutional claims, while for statutory challenges to agency action, there seemed to be more room for judicial discretion. The leading case in this latter vein, decided in 1967, is *Abbott Laboratories v.*

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59. See Herz, *supra* note 9, at 328 n.144 (noting that injury-in-fact requirement blends prudential and constitutional concerns); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 2 (2001); Stearns, *supra* note 14, at 1325 n.59.

60. Discussing the ripeness test, which balances “the fitness of the issues for judicial decision” against “the hardship to the parties of withholding” review, *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), Alexander Bickel has described it thus:

[G]overnment action may well have hurt the individual plaintiff, so that his standing in the pure or constitutional sense is beyond doubt. . . . But the action he complains of may nevertheless be in its initial stages only; if he waits a little while longer, he will be hurt more. This sounds gratuitously harsh, but the damage may not be major or irremediable. The point is that, if litigation is postponed, the Court will have before it and will be able to use, both in forming and supporting its judgment, the full rather than merely the initial impact of the statute or executive measure whose constitutionality is in question. To put it in yet another way, pure standing ensures a minimum of concreteness; the other impure elements of standing and the concept of ripeness seek further concreteness, in varying conditions that cannot be described by a fixed constitutional generalization.

BICKEL, *supra* note 28, at 123-24.

61. *Abbott Labs.*, 387 U.S. at 148.

62. Pushaw, *supra* note 9, at 493.

63. See, e.g., *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (citing Article III and separation-of-powers concerns in rejecting pre-enforcement challenge to statute regulating political campaigning by government employees).

*Gardner*, in which drug companies brought a challenge against the Food and Drug Administration's interpretation of its enabling statute to require them to disclose generic drug names on their printed materials.<sup>64</sup> In *Abbott Laboratories*, the Supreme Court first articulated a test for ripeness requiring a balancing of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."<sup>65</sup> This has remained the framework for ripeness inquiries ever since.

Despite this fact-centered prudential inquiry, constitutional concerns have crept into ripeness doctrine. In the 1970s, as the Supreme Court was casting standing in constitutional terms, it also began to discuss ripeness as a constitutional issue. For example, *Steffel v. Thompson* stated that the ripeness question in the case required the Court to "consider whether petitioner presents an 'actual controversy,' a requirement imposed by Art. III of the Constitution."<sup>66</sup>

*Ohio Forestry* applied the ripeness test to a pre-enforcement challenge to a U.S. Forest Service resource management plan.<sup>67</sup> The opinion by Justice Breyer contained separation-of-powers rhetoric regarding the danger of judicial interference in the affairs of the executive branch.<sup>68</sup> The environmental litigants alleged that the agency's plan failed to sufficiently control logging and clearcutting in national forests.<sup>69</sup> Justice Breyer's opinion for a unanimous court held that the challenge was not ripe for review because it could be more suitably heard when the plan was being applied to particular sites and the factual circumstances were more developed, especially since more procedural steps were necessary before any logging would actually occur.<sup>70</sup> The decision emphasized the need to leave the agency room to refine its plan, as well as the fact that the delay in review would not harm the petitioners but would save judicial

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64. *Abbott Labs.*, 387 U.S. at 137-39.

65. *Id.* at 149.

66. 415 U.S. 452, 458 (1974); *see also* Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 138 (1974) ("[I]ssues of ripeness involve, at least in part, the existence of a live 'Case or Controversy.'"). *See* Nichol, *supra* note 30, at 163 n.65 for more cases discussing ripeness as a constitutional doctrine.

67. 523 U.S. 726, 728 (1998).

68. *Id.* at 733. Justice Breyer quoted the admonition of *Abbott Laboratories* that ripeness analysis is necessary "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 732-33 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

69. *Id.* at 731.

70. *Id.* at 732-37.

resources in reviewing a large-scale, unfocused plan for a vast area of forest.<sup>71</sup> In its firm rejection of the Sierra Club's suit, the Supreme Court offered the most thorough explication of ripeness doctrine since *Abbott Laboratories* and cemented the Court's commitment to avoiding judicial review of abstract disputes.<sup>72</sup>

#### D. Overlap

Although standing and ripeness focus on different aspects of litigation—the *who* versus the *when*—they overlap in their common concern about limiting judicial decision making to cases where the issues have been thoroughly elaborated within a concrete factual context.<sup>73</sup> For standing, this means suits should be brought only by those who have been directly injured by the challenged action, while ripeness doctrine seeks to limit judicial review to the realm of

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71. *Id.* The Court also noted that Congress had not provided for pre-enforcement review through a statutory provision, though it had done so in other statutes. *Id.* at 737.

72. Although *Ohio Forestry* did not change the ripeness test per se to make it either more stringent or relaxed, the opinion did thoroughly explore the issue of ripeness from an angle indicating disfavor of judicial review as a route for abstract objections to general agency policies, and thus could potentially signal to lower courts that they should be on guard for unripe petitions. *See id.* at 735 (“The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—post-implementation litigation.”); Herz, *supra* note 9, at 331-34 (grouping *Ohio Forestry* with other cases demonstrating Rehnquist Court's reluctance to review certain kinds of agency action); Levin, *Kenneth Culp Davis*, *supra* note 12, at 342 (“[B]ecause so much [of the context-specific ripeness test] does depend on discretion, the attitude with which the doctrine is implemented is critical.”); *see also infra* Part II.C. *But see* Levin, *The Year in Judicial Review*, *supra* note 12, at 393 (arguing that *Ohio Forestry* did not mark a major turning point in ripeness doctrine). It is revealing to note that *Ohio Forestry* was part of a more general constriction of judicial review of government action in the 1990s, a trend exemplified by *Lujan* along with cases such as *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997), which narrowed the test for prudential standing, and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004), which, though occurring in the statutory context of review under the Administrative Procedure Act, was similar to *Ohio Forestry* in disfavoring “judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.” As one prescient commenter noted in the aftermath of the *Lujan* decision, “[o]ne area where *Defenders* may have an impact is in tightening the Court's current view of mootness and ripeness which . . . may be viewed as time-based perspectives on the injury in fact requirement.” Marshall J. Breger, *Defending Defenders: Remarks on Nichol and Pierce*, 42 DUKE L.J. 1202, 1215 (1993). Indeed, in hindsight *Lujan* appears to have been the harbinger of a Supreme Court tightening of justiciability doctrine on multiple fronts.

73. Fallon, *supra* note 26, at 658-59; Nichol, *supra* note 30, at 162 (“[R]ipeness review often has been employed to determine whether the litigant's asserted harm is real and concrete rather than speculative and conjectural. This methodology parallels standing analysis.”).

narrow, discrete actions rather than broad policies.<sup>74</sup> Though approaching this issue from two different angles, standing and ripeness seek the same end: excluding from judicial review any case that does not present a distinct and defined controversy, with a “nexus” between the dispute and the plaintiff.<sup>75</sup>

Standing and ripeness doctrines do approach the issue of concreteness in slightly different ways.<sup>76</sup> Legal commentators have observed that ripeness offers a more flexible, context-sensitive treatment of justiciability, with the *Abbott Laboratories* test offering more leeway in its application than the standing inquiry.<sup>77</sup> At least

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74. Fallon, *supra* note 26, at 658-59; see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 269 (1990) (“The Court’s duty is to ensure that it has sufficient concrete facts, and sufficiently adverse parties, to permit it to perform its proper role. Whatever the doctrinal label, these qualities exist on a continuum, and the requisite quantity should vary according to the nature of the case.”).

75. See Eric R. Claeys, Note, *The Article III, Section 2 Games: A Game-Theoretic Account of Standing and Other Justiciability Doctrines*, 67 S. CAL. L. REV. 1321, 1358-59 (1994).

76. Some might argue that the biggest difference between the two is that a dismissal on ripeness grounds merely puts litigation off until another day while standing ends it forever. This is debatable in two respects. First, the standing inquiry can at times be sensitive to the issue of whether finding a lack of standing would make any legal challenge impossible. See, e.g., *Massachusetts v. EPA*, 127 S. Ct. 1438, 1457 (2007) (holding that standing exists despite fact that agency refusal to regulate contributes only to small fraction of petitioner’s injury since “accepting that premise would doom most challenges to regulatory action”); *Covington v. Jefferson County*, 358 F.3d 626, 654 (9th Cir. 2004) (finding standing based on complex link between CFC emission and ozone depletion where “[t]o hold that there is no causation here ‘would permit virtually any contributory cause to the complex calculus of environmental harm to be ignored as too small to supply the causal nexus required for standing’” (citing *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 498 (D.C. Cir. 1990))); see also Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 315-16 (1979) (recommending that, although standing requirement offers benefits, exception should be made where no one else would litigate claim). Second, while ripeness leaves open the possibility of a future suit once circumstances have become more defined, a dismissal on ripeness grounds may end up having the same effect of a dismissal on the merits if the petitioners do not have the resources to mount another legal challenge, if delay allows an agency policy to become insurmountably entrenched, or if too long a wait leaves litigants facing the converse problem of mootness. The mere fact that the ripeness test contains a “hardship” prong shows that courts are sensitive to the fact that delay of judicial review can have irreversible consequences.

77. See Fallon, *supra* note 26, at 699, 704 (proposing a relatively low bar for standing, with more emphasis on ripeness and equitable concerns, since the latter allow more fine-tuned judgments on a rights-specific basis of the suitability of a dispute for judgment); Nichol, *supra* note 30, at 182-83. But see Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 339 (2002) [hereinafter Nichol, *Failure of Injury Analysis*] (“[T]he artificial categories of injury that have rendered the Court’s standing jurisprudence one of the most manipulated, result-oriented arenas of constitutional law.”). While the formal test for ripeness may

one author has argued that ripeness should not even be included among Article III doctrines since it is directed at prudential rather than constitutional concerns.<sup>78</sup> Standing, in contrast, has become strongly tied to Article III concerns regarding separation of powers, especially for conservatives interested in strong limitations on judicial review. Still, in certain essentials these doctrines are quite similar. Both allow judges a substantial amount of discretion in their decision making.<sup>79</sup> Both have found some footing in the requirements of Article III. And most importantly, both serve as settings for judges to apply their views regarding when and how it is appropriate for the courts to monitor the actions of other branches of government.<sup>80</sup> In

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be more flexible, academic commentary indicates that standing decisions have been subject to judicial manipulation just as much if not more.

78. Nichol, *supra* note 30, at 155-56.

Aspects of the ripeness doctrine are anomalous for a requirement rooted in the Constitution. The demands of the principle vary greatly according to the dictates and posture of the claim on the merits. . . . In short, except for those instances in which ripeness analysis is employed to eschew advisory opinions—a task performed more directly by the standing requirement—the doctrine serves goals that the Court has typically characterized as prudential rather than constitutional. It aims to fine-tune the decision-making process of the federal courts and to measure the demands of substantive constitutional principle. These tasks are essential. They are not best performed, however, by an overarching barrier to the exercise of judicial power.

Ripeness analysis is intertwined with the posture, factual record, and substantive standards of the claim being litigated. It cannot easily be encompassed by an independent, uniform constitutional limitation on judicial authority.

*Id.*

It is unclear why this argument should stop at ripeness; many of the other justiciability doctrines, especially standing, share similar prudential aspects, not to mention a relatively tenuous connection to the case or controversy requirement. Furthermore, Nichol's argument is premised on the idea that a substantial number of ripeness decisions dealing with the issue of whether the plaintiffs have shown any ongoing harm should in fact be folded into the standing inquiry. *See id.* at 170-73.

79. *See supra* notes 37-71 and accompanying text; *see also* Bandes, *supra* note 74, at 266, 269-70 (providing examples of inconsistent application of injury and causation prongs of standing test); Nichol, *supra* note 30, at 165 (highlighting the "variable nature of the ripeness doctrine" in cases requiring some plaintiffs to wait years for claims to mature while others may bring suit upon enactment of statute).

80. *See* 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8418 (2006) ("Ripeness also involves aspects of the separation of powers. . . . If a court ruled on a nonfinal action, the agency would be able to co-opt the judicial ruling by modifying its decision. The judiciary does not want to see its decisions reduced to a nullity by subsequent administrative action. On the other hand, courts must take care that they do not take on administrative functions in violation of the assigned authority and status granted them by the Constitution. In short, the ripeness doctrine . . . helps assure that the courts exercise 'judicial power' and not powers assigned to the other branches."); Bandes, *supra* note 74, at 276 ("The spare

that respect, the trajectories of standing and ripeness should be relatively similar and attuned to a judge's beliefs about the proper use of judicial power.<sup>81</sup>

### III. EMPIRICAL DATA

The background of standing and ripeness jurisprudence suggests two hypotheses regarding the effects of *Lujan* and *Ohio Forestry* on the treatment of those two doctrines. First, the liberal stance in favor of active judicial review of government action should mean that the two decisions, which both articulated a relatively restrictive view of the judicial sphere, would influence liberal judges less strongly than conservative judges sympathetic to that vision. Second, the common rhetoric and overlapping separation-of-powers concerns contained in the two opinions indicate that lower courts should respond similarly to *Lujan* and *Ohio Forestry* in the respective areas of standing and ripeness. As it turns out, an empirical inquiry supports only the first of these hypotheses, and the results on both fronts are not exactly what would be predicted by traditional models of judicial decision making.

#### A. Methodology

In order to explore the influence of Supreme Court precedent on lower court justiciability decisions, I examined whether major Supreme Court cases changed treatment of standing and ripeness in cases challenging government action in the Court of Appeals for the District of Columbia Circuit. I confined the case population to challenges to the government rather than considering purely private disputes as well in order to narrow the inquiry to a group of lawsuits that would all be subject to a judge's view of the correct relationship

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language of article III and the broad outlines of the separation of powers and federalism principles it is meant to preserve cannot be mechanically applied. Reasoned application of the case limitation requires interpretation of the case requirement's underlying principles and their implications for the scope of federal judicial power. Value-neutrality is impossible."); Fallon, *supra* note 26, at 667.

81. See, e.g., Fallon, *supra* note 26, at 668-70, 672 n.140, 679-80 (arguing that in both standing and ripeness cases, judges exhibit concern about hearing cases that would require remedies intruding too far into the executive sphere). *But see* Bandes, *supra* note 74, at 318 ("The [Supreme] Court has tried to interpret the case requirement through a process of exclusion and inference. It has determined, on a case-by-case basis, what a case is not. For the most part, it has treated each article III problem as discrete. The result is a complex collection of doctrines which are disconnected from each other, and most of all, from any overarching, normative theory of a case.").

between the judiciary and the other branches of government.<sup>82</sup> Judges should have a relatively consistent outlook across these cases with respect to how far judicial review should intrude into the political arena, which allows for the assumption that in all of them conservative judges will tend to support deference to other branches while liberal judges will be willing to pursue a more activist course and at least consider challenges to government action on the merits.<sup>83</sup> Furthermore, justiciability questions are relatively common in litigation against the government, since that is a context in which litigants often wish to challenge controversial actions at the same time as judges will generally wish to limit the extent to which they become entangled in the decisions of the other branches.<sup>84</sup> Finally, the Supreme Court precedents in question concern challenges to government action and thus should have their strongest influence on similar cases in lower courts. The focus on suits involving the government also directed the choice of the D.C. Circuit, since that circuit is the exclusive venue for many such challenges.<sup>85</sup>

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82. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 296 (2008) (arguing that standing evolved and is appropriate only as a restraint on public litigation, not on assertions of private rights).

83. Although a judge's view of the correct amount of "space" to give a government entity might depend on the exact unit of government being challenged, the substantive issue in question, the identity of the litigant, and other factors, reliance on a relatively broad spectrum of cases ensures that the mix of cases includes plenty of "routine" disputes. This might help to avoid the selection effect of focusing on issues of particular political importance or difficulty, producing results that can speak to a range of cases. Judge Patricia Wald, while a member of the D.C. Circuit, noted that a "large proportion of [the circuit's] cases (particularly administrative law cases) have no apparent ideology to support or reject at all." Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 237 (1999). Indeed, an early attempt to code these cases according to the liberal or conservative stance of the litigant bringing the challenge was unsuccessful due to the frequency of lawsuits lacking any clear ideological valence. Further investigation of this topic would ideally take better account of the possibility of judges' preferences on the merits of a suit overriding their general beliefs regarding the proper role of judicial oversight of other branches. However, the seeming prevalence of non-ideologically contentious litigation provides some reassurance that this study's reliance on the assumption that conservative judges will generally use standing and ripeness doctrines to maintain a narrow scope for citizen challenges to government action while liberal judges will tend in the opposite direction is fairly sensible. Additionally, since this study considered the incidence of discussion of justiciability issues as well as the outcomes of such discussions, see *infra* notes 88-92 and accompanying text for some of the results as to the extent to which judges manipulated justiciability doctrine to achieve certain preferred outcomes on the merits is irrelevant.

84. See Fallon, *supra* note 26, at 687.

85. Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1202 (1992). Focusing on a single circuit also avoids the problem of inter-circuit discrepancies in attitudes regarding stare decisis. The D.C. Circuit additionally offered two other advantages: a relatively small membership, reducing the

Specifically, I investigated challenges to government action from the D.C. Circuit's published cases<sup>86</sup> in the years 1988 through 2005.<sup>87</sup>

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amount of personal variation among judges, and its relatively constant ideological composition over this time period. According to an ideological scoring of the judges, *infra* notes 97-99 and surrounding text, the average ideological score of a judge on the D.C. Circuit varied by less than 0.1 on a scale of 2.0 during the time span considered in this study.

86. The use of only published cases does pose the danger of ending up with a skewed picture of the effects of Supreme Court precedent on all litigants appearing before the D.C. Circuit, especially if judges choose not to publish opinions where they misuse or do not follow precedent. Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 328-29 (2001). However, recent studies of this process indicate that judges are relatively compliant with the traditional rules dictating when to publish a case and are subject to monitoring in making such decisions. *See id.* at 339-40; John R. Allison & Mark A. Lemley, *The (Unnoticed) Demise of the Doctrine of Equivalents*, 59 STAN. L. REV. 955, 976 (2007); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 97-103 (2001). This rationale is bolstered by a practical one: comprehensive databases of unpublished opinions, even at the appellate court level, are not readily available. *See* James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1680 (1999); Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 127 (1992); Gregory Sisk et al., *Searching for the Soul of Judicial Decision making: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 535 (2004).

Additionally, an informal review of unpublished decisions available on Westlaw that dealt with standing and ripeness over the time period in question (of which there were 285) indicates that most were summary dismissals on those grounds. This suggests that, if anything, consideration of these cases would skew these results—since many unpublished cases are summary dispositions, they are less likely to discuss standing or ripeness unless that is the ground on which the case is decided, and thus inclusion of unpublished opinions would fail to convey the number of cases in which justiciability was actually considered by the judges but deemed to be present. Published decisions, offering a fuller discussion of all issues in a case, provide a more accurate picture of a court's complete decision-making process rather than just the ground on which the case is ultimately decided. Furthermore, it may be that abusive non-publication is less of a problem in the justiciability context because publication decisions are usually made based on the merits of the case; standing or ripeness, unless they are particularly contentious or central to the case, thus seem relatively unlikely to dictate the publication decision in a given lawsuit. And since published cases are the most prominent mechanism for appellate courts to create precedent (the D.C. Circuit allows citation of unpublished opinions only for *res judicata*, not precedential purposes, D.C. CIR. R. 32.1(b)), to the extent that appellate judges are interested in furthering their policy goals by binding lower court judges, they will be just as likely to pursue ideological aims in published as unpublished precedent. *See* Sisk et al., *supra* at 535, and Bernard Trujillo, *Patterns in a Complex System: An Empirical Study of Valuation in Business Bankruptcy Cases*, 53 UCLA L. REV. 357, 365 (2005), for similar rationales justifying the exclusion of unpublished opinions from a study.

Still, it is important to note that the findings below regarding the D.C. Circuit's response to Supreme Court precedent on standing and ripeness represent only results

Each case was coded for several variables: date, the judges on the deciding panel, and whether any threshold justiciability issue was raised.<sup>88</sup> If the court did discuss any justiciability issue,<sup>89</sup> I recorded

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in published opinions and may not accurately reflect the overall effect of Supreme Court precedent in the D.C. Circuit due to selection effects. Although, to the extent that these results deal with comparisons across more than one doctrine, this issue should not be relevant since there is no reason to assume a *different* selection effect between standing and ripeness decisions. See generally Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-at-Will*, 45 CASE W. RES. L. REV. 999, 1038-46 (1995) for a more thorough discussion of the issue of using only published opinions in empirical studies.

87. I read through all published cases of the D.C. Circuit from 1988 through 2005 (procured through a search on Westlaw). I collected cases involving “challenges to government action” by a process of exclusion, including any case in which a government entity was a party but then eliminating criminal cases, prisoner litigation, cases involving internal government personnel issues (including cases brought by military personnel against their superiors), access to information cases under the Freedom of Information Act and the Privacy Act, habeas corpus cases, cases where the District of Columbia was the only government party, cases only for monetary damages, attorney’s fees cases, and cases involving trial issues (such as the enforcement of subpoenas). All of these exclusions were aimed at filtering out cases where the correct role of the judiciary in monitoring the behavior of other branches would not be an important consideration or might skew in a different direction than it would in a traditional challenge to agency action. For example, military personnel cases were excluded because of the extra deference generally given to the executive in its management of the military. See *United States v. Johnson*, 481 U.S. 681, 690-91 (1987). Although I could also have separated challenges to legislative versus executive action, I combined the two based on the belief that judges would have a similar view of the comparative advantages of either of the “political” branches in dealing with abstract policy questions. See Merrill, *supra* note 33, at 482 (“[J]udicial review of executive action and judicial review of legislative action . . . raise the same dilemma: how do we prevent courts, in the guise of enforcing their interpretation of the law, from usurping the rightful functions of the elected branches of government?”).

88. Nancy Staudt, who has authored a similar study in the arena of taxpayer standing cases, criticizes most empirical studies of standing for leaving out cases where courts do not discuss the issue of standing at all, since even there the judges make an implicit judgment that the case is justiciable. Staudt, *supra* note 3, at 619. In her own investigation, Staudt remedied that flaw by considering all cases within the subject area to determine when standing was brought up as an issue. *Id.* In this Article, I attempt to extend her approach to all cases challenging government action, and to include ripeness as well as standing. The results will inevitably be shallower, since the cases have fewer common variables, making any attempt to control for a discrete set of possibly influential variables a more onerous task; however, what is lost in depth is hopefully compensated for by the breadth of the outcomes observed, allowing for more general conclusions on judicial treatment of justiciability doctrines.

89. A case was coded as “discussing” standing or ripeness if the opinion cited at least one case on the topic. Though this did result in some cases being discarded that mentioned ripeness or standing, it did provide a bright line rule for when this variable was present. Furthermore, any selection effect resulting from this approach was not significant since it did not exclude many cases and since citation of precedent should not be correlated with any substantive outcome. Though one could argue that judges

whether the case was dismissed on that ground, kept to be considered on the merits, or dismissed on another non-merits ground. If the outcome was ambiguous—for example, if one claim was thrown out on ripeness grounds while others were kept—it was always coded as a dismissal so as to provide consistency throughout.<sup>90</sup>

This approach to coding allows a unique perspective on judicial decision making because justiciability issues, as a jurisdictional requirement, can be brought up *sua sponte* by judges themselves even if they are not raised by the parties.<sup>91</sup> Thus a study of these doctrines offers two decision points for study: when a judge decides that justiciability is enough in question to require examination by the court and when he or she decides how to rule on that issue.<sup>92</sup>

The statistical analysis centered on two justiciability doctrines, standing and ripeness, for several reasons. Foremost, both standing and ripeness were the subject of major Supreme Court decisions (*Lujan* and *Ohio Forestry*, respectively) within the time period in question. Additionally, based on an initial foray into coding of all

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are more likely to cite precedent where they are following it, this seems unlikely to be true in an area such as standing or ripeness where the factual complexity of application of the doctrine means that cases are generally cited more to establish the relevant legal test and are unlikely to actually determine the outcome by factual analogy. Additionally, a judge might be just as likely to cite a supportive precedent to conceal a decision in fact motivated by ideology.

90. The full set of data produced by this process is on file with the author and available upon request.

91. See, e.g., *Nat'l Park Hospitality Ass'n v. Dep't. of the Interior*, 538 U.S. 803, 808 (2003) (“[T]he question of ripeness may be considered on a court’s own motion.” (citations omitted)).

92. See Staudt, *supra* note 3, at 655 & n.179, for a similar approach. It should be noted that the significant ideological effects observed in this study, see *infra* Part III.B.1, rule out the alternative hypothesis that changes in standing trends are the product of a shift in pleading practices of parties rather than reflecting a trend in judicial decision making. If parties brought up standing more often post-*Lujan* because they perceived arguments regarding that issue as having greater traction in the aftermath of that case, and judges merely responded to that by deciding the question whenever it was raised in the briefs, then the results should be consistent across panels regardless of the composition of those panels. Instead, more conservative panels were more likely to raise justiciability issues than liberal panels. It is possible that parties raise standing questions more often before conservative judges because they are perceived to be more likely to rule against the opposition on standing grounds than more permissive liberal judges, but that seems unlikely given that parties will generally raise any possible argument in their favor, and can do so for justiciability without that much trouble. Furthermore, the D.C. Circuit’s decision in *Sierra Club v. EPA* in 2002, which prospectively ruled that petitioners of agency action must supplement the administrative record with evidence of standing if it is not self-evident, 292 F.3d 895, 899-900 (D.C. Cir. 2002), indicates that parties’ pleading behavior had not changed substantially since *Lujan*; otherwise they presumably would have already begun defensively providing more evidence of standing as well as bringing it up more on the offensive.

such threshold doctrines, including ripeness, standing, mootness, prudential standing,<sup>93</sup> and finality,<sup>94</sup> standing and ripeness emerged as the two used most frequently by the courts and thus most amenable to statistical analysis.<sup>95</sup> Finally, the mutual concern of these two doctrines with ensuring that courts do not review abstract disputes makes them suitable for comparison.<sup>96</sup>

Additionally, for each case, I quantified the ideology of the panel by assigning each judge a score to reflect his or her position on the political spectrum and averaging the scores of the judges on the panel. The ideology scores were assigned based on the President who nominated each judge to his or her position on the D.C. Circuit (or for judges sitting by designation, to their usual courts). The specific ratings come from Keith Poole's and Nolan McCarty's Common Space NOMINATE scores, which they calculated by sorting through presidential positions on numerous political issues to produce an aggregate quantitative score for each president from Dwight D. Eisenhower through George W. Bush.<sup>97</sup>

The possible range of scores runs from -1 to 1, with negative scores corresponding with liberal positions while positive scores correlate with conservative views. This measure has been

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93. Prudential standing was considered as a separate doctrine from standing because the legal doctrine and relevant precedents for the two issues are treated separately by the courts. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004) (explaining the "two strands" of standing jurisprudence); *Pierce*, *supra* note 21, at 1781-82 (noting that prudential standing is rooted in section 702 of the Administrative Procedure Act whereas standing is attributed to the requirements of Article III of the Constitution).

94. The finality requirement is not in fact an Article III doctrine, based instead in the language of the Administrative Procedure Act and similar statutes providing for judicial review only of "final agency action." 5 U.S.C. § 704 (2006). However, its overlap with the doctrine of ripeness has often been noted, and it has a consequently similar bearing on the relationship between the judicial and political branches. Additionally, the finality issue was also subject to a Supreme Court decision narrowing its scope in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). Thus it bears similarly on the questions addressed in this paper and was initially considered as a potential subject for study.

95. For example, across the years 1995-2005, the D.C. Circuit brought up prudential standing in only 24 cases and mootness in only 45, versus 102 cases considering ripeness and 225 considering standing in the same time period.

96. See generally *supra* Part II.B-C.

97. For the details of this method, see Nolan M. McCarty & Keith Poole, *Veto Power and Legislation: An Empirical Analysis of Executive and Legislative Bargaining from 1961 to 1986*, 11 J. L. ECON. & ORG. 282 (1995); Common Space Data, Jan. 4, 2007, <http://voteview.com/readmeb.htm> (last visited September 1, 2008). See also Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 72-74 (2002) for a similar use of Poole and McCarty's NOMINATE scores to gauge judicial ideology. For a table of these scores, see *infra* Appendix A.

demonstrated to be highly coordinated with actual party position, and also offers a more fine-grained rubric for ideology than simple coding by Democratic or Republican party membership since it is based on an individualized evaluation of each President's ideological position on a broad range of issues.<sup>98</sup> For each panel, the judges' individual ratings were averaged to determine an average panel rating (APR) that should reflect the overall ideological orientation of the decision-making group, thus affording the opportunity to observe if any of the behaviors discerned in the study were correlated with a particular ideology.<sup>99</sup>

Using this data, I compared outcomes for standing and ripeness before and after their jurisprudential turning points in *Lujan* and *Ohio Forestry* using a logistic regression.<sup>100</sup> The goal of this analysis was to determine if issuance of these precedents was correlated with a significant change in either the D.C. Circuit's references to justiciability doctrines or in their actual dispositions on standing and ripeness grounds.

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98. See Smith & Tiller, *supra* note 97; see also Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1506 (2003) [hereinafter Cross, *Decisionmaking in the Courts of Appeals*] (finding that ideological effect on judicial decision making depends on the particular President that nominated a judge, not just that president's party, and using another alternative system of scoring for presidential ideology).

99. This to some extent precludes the need to code cases based on the ideology of the outcome, which can be quite a difficult task. See Staudt, *supra* note 3, at 653 n.173; see also Cross, *Political Science*, *supra* note 2, at 290 (noting challenges in attempting to categorize case outcomes as "liberal" or "conservative"); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) (noting growth of conservative public interest groups as undermining easy assumptions about ideological content of challenges to government action); *supra* note 83. It is possible that some of these cases represent situations where judges' preferences regarding the ultimate outcome of a case led them to decide threshold justiciability issues in a manner contrary to their beliefs regarding the correct approach to judicial review of government action. David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1171 (1999) (studying just such situations in selection of preemption cases where judges' bare political preferences pointed in different direction than philosophy of regulation, and finding that the ideological orientation of outcome tended to trump vague preference as to particular method of regulation to determine judges' decisions). However, identifying the ideology of panels deciding these cases allowed an analysis of whether the issuance of *Lujan* and *Ohio Forestry* changed the behavior of panels even holding their ideology constant.

100. A logistic regression is a type of generalized linear model that fits a model curve to a set of data and allows calculation of the likelihood that the independent variables in the model explain (i.e., fit the prediction of) the dependent outcomes. For a more complete discussion of the use of such statistical methods in the legal context, a useful reference is MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* (2d ed. 2001).

### B. Results

This study produced two major findings. First, while *Lujan* affected the decision making of judges of all ideological stripes, it had a larger impact on more conservative judges (who were presumably in closer agreement with its cabined view of judicial power). Second, while standing decisions were clearly influenced by the Supreme Court's decision in *Lujan*, ripeness decisions did not change significantly subsequent to the issuance of *Ohio Forestry*.<sup>101</sup> These two outcomes, which are explained in more detail below, help to enrich the existing picture of judicial decision making.

#### 1. Standing

The Supreme Court's decision in *Lujan* was correlated with a significant rise in the D.C. Circuit's discussion of standing issues. In a study of the 2404 cases between 1988 and 2005, with 656 before and 1749 after the *Lujan* opinion was issued, the percentage of cases where standing was expressly mentioned as an issue underwent a significant increase from 7.9% before *Lujan* to 14.8% afterward.<sup>102</sup> A logistic regression shows this to be a statistically significant result<sup>103</sup> with an odds ratio (OR) of 2.02, meaning that post-*Lujan*, the D.C. Circuit was just over twice as likely to discuss standing in a given case as before.

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101. For charts showing the results for each doctrine year-by-year, see *infra* Appendix B.

102. See *infra* Table 1.

103. Whether a result is statistically significant or not is generally judged by calculating its p-value, the likelihood of getting that result under the "null hypothesis"—the hypothesis that the study seeks to reject (in this study, the hypothesis that the Supreme Court cases being considered had no effect on D.C. Circuit decisions). See FINKELSTEIN & LEVIN, *supra* note 100, at 124-26. The traditional threshold for significance is a p-value of less than 0.05, which indicates only a 5% likelihood of getting such results under the null hypothesis. See *id.*

Table 1: Standing Results

	# Cases Raising Standing	# Cases Dismissed on Standing Grounds	Total # Cases	% Total Cases Discussing Standing	% Cases Dismissed on Standing Grounds Where Standing Raised	% Total Cases Dismissed on Standing Grounds
<b>Before Lujan</b>	52	19	656	7.9%	36.5%	2.9%
<b>After Lujan</b>	259	106	1749	14.8%	40.9%	6.1%

Table 2: Standing Results Adjusted for Ideology

Average Panel Rating (APR)	Likelihood of Discussing Standing Pre- vs. Post- <i>Lujan</i> (Odds ratio)	Likelihood of Dismissing on Standing Grounds Pre- vs. Post- <i>Lujan</i> (Odds ratio)
All panels	2.06 (p < 0.001) *	0.98 (p = 0.952)
More conservative (among panels above the median APR)	2.62 (p < 0.001) *	0.97 (p = 0.942)
More liberal (among panels below the median APR)	1.61 (p = 0.025) *	1.27 (p = 0.589)

\* Statistically significant result

Adjusting these results for APR produces a more nuanced picture. To remove the confounding effect of ideology on the estimation of the odds ratio, APR was included as a covariate in the logistic regression and adjusted by APR quartiles, tertiles, and median. This offered a picture of decision making by panels segregated into subsets along the ideological spectrum. With respect to discussion of standing, the panels with APRs below the median (the more liberal panels) had a statistically significant odds ratio of 1.61, while those with APRs above the median also had a significantly increased odds ratio of 2.62. Thus, while both liberal and conservative panels were likelier to discuss standing after the Supreme Court's decision in *Lujan*, the more liberal panels were only about one and a half times more likely to do so, while more conservative panels were over two and a half times more likely to discuss standing.

In looking at outcomes,<sup>104</sup> the small number of examples available reduces the power of statistical analysis to detect significant differences.<sup>105</sup> The data available exhibited no significant correlation between the change in standing precedent and rate of standing dismissals. However, to some extent, this result is irrelevant; since there was clearly an increase in discussion of standing, the same rate of dismissal in cases where standing was explicitly mentioned was thus applied across more cases and led to more dismissals in absolute terms. As Table 1 shows, though dismissals occurred in approximately 40% of cases where standing was discussed in both time periods, since standing was discussed more often post-*Lujan*, the overall number of cases dismissed out of the pool of all cases dealing with review of government action increased from 2.9% to 6.1%. Thus, in absolute terms, *Lujan* led to more case dismissals on standing grounds in the D.C. Circuit.

This increase in dismissals does not manifest itself precisely as one might expect. Judges did not merely apply the test for standing more strictly, weighing standing with a more skeptical eye. They also appear to have raised the standing question more often. Specifically, they discussed the issue in more “marginal” cases where, before *Lujan*, standing would have gone unquestioned. Furthermore, they even dismissed some of those suits. Along the spectrum of cases, in some, standing is obviously absent, in others it is obviously present, and in others it is questionable.<sup>106</sup> However, after the decision in

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104. I should note here that I relied on the determination in an earlier study of standing doctrine that standing outcomes are independent of outcomes on the merits, and thus these two variables may be treated as independent in statistical analysis. See Staudt, *supra* note 3, at 656 (“[C]ourts do not use standing as a means of deciding the merits but instead make two independent decisions.”).

105. The smaller a sample size, the less predictive power a statistical test can provide. HyperStat Online Contents, Factors Affecting Power: Sample Size, <http://davidmlane.com/hyperstat/B81807.html> (last visited Sept. 1, 2008). Here, the small number of outcomes means that the logistic regression test will not be able to detect statistically significant trends unless they are extremely significant or the “effect size” (the difference between the before and after results) is large.

106. A number of commentators have conceptualized standing cases in this manner, acknowledging that as a fact-based inquiry, standing is better supported by the facts in some cases than others regardless of what the ultimate decision on the standing issue actually is. See Bandes, *supra* note 74, at 264 (“The factors relevant to the case determination exist on a continuum, and the Court must unavoidably make choices about where on the continuum a line should be drawn. . . . The Court must make distinctions of degree, not of kind.”); Stearns, *supra* note 14, at 1403 (discussing standing cases as lying along a spectrum). This understanding of the results may explain the relatively constant rate of dismissal before and after *Lujan* across those cases where standing was mentioned; even if cases with questionable standing were dismissed more often, the increased discussion of the issue in suits where the case for standing was relatively sound and where it would usually be granted would “dilute” the dismissal rate. The following hypothetical example illustrates how this would

*Lujan*, it appears that the standing inquiry expanded beyond the “obvious” cases where standing was clearly a possible ground for dismissal into the more questionable or “marginal” cases where in an earlier era the court might have assumed standing was present without discussion. As standing was raised as an issue in a higher proportion of cases, a higher proportion of the D.C. Circuit’s caseload was dismissed on standing grounds.

The data also show that *Lujan*’s influence in leading circuit court judges to question standing in more cases had a stronger effect on more conservative panels. In other words, ideology also has a role here, but one that is intertwined with the operation of precedent: the judges ideologically closer to the standing doctrine as articulated in *Lujan* (the conservative panels who presumably are concerned with restraining the power of unelected judges and thus supportive of the restriction of judicial review) are also more likely to abide by it. Thus, in what I term “selective compliance,” a judge who is in agreement with a decision based on personal preferences appears to be more likely to respond to it, both in raising the issue of standing more often and in applying the standing test and in applying the standing test more harshly.<sup>107</sup>

Outside of the pre- and post-*Lujan* framework, there was a significant correlation between APR and the outcome of standing decisions across all cases, confirming the role of ideology as seen in the selective compliance phenomenon. Among the 311 cases where standing was discussed, the odds ratio per a one unit increase in APR was 3.79 ( $p = 0.005$ ), indicating that an increase in conservativeness

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work: given a sample of 1000 cases pre-*Lujan* where standing was discussed, and a dismissal rate of 20%, 200 cases would be dismissed overall. If post-*Lujan* standing was discussed in 2000 cases, the same overall dismissal rate would be seen if 1000 of those cases were “obvious” and were dismissed at a 30% rate, while the other 1000 were “marginal” cases where standing was only questioned post-*Lujan* and thus were dismissed at a 10% rate. This would lead to 400 cases being dismissed overall, 300 from the obvious pool and 100 from the marginal pool, preserving the overall dismissal rate at 20% but showing that each set of cases is dismissed at a higher rate (with obvious cases rising from 20% to 30% dismissal, and marginal cases rising from 0% to 10% dismissal).

107. Because of the scarcity of available standing outcomes, it is impossible to discern whether this is purely an ideological phenomenon or if precedent has some effect on liberal judges as well. The small number of outcomes, as explained above, makes it hard to detect statistically significant trends in judicial disposition of standing questions. A study with more outcomes would be able to discern whether more liberal panels are not just raising the issue of standing more, but also dismissing at a higher rate post-*Lujan*, which would demonstrate compliance with a precedent those judges did not agree with. Until such a study is conducted, these results do not, on their own, rule out the possibility that liberal judges engage in only surface compliance by discussing standing in cases where it previously went unquestioned, but never actually denying standing in those marginal cases.

of a panel of that magnitude correlated with almost a four times greater chance of dismissal. However, there was no significant correlation between APR and mere discussion of standing, indicating that liberal and conservative judges responded equally to *Lujan* at least as a signal to engage with the standing issue more actively.<sup>108</sup>

## 2. Ripeness

The ripeness results are most notable for their lack of significance. Across the 2405 cases considered between 1988 and 2005, the raw data shows a relatively constant rate of discussion and dismissal in comparing the 1445 cases before *Ohio Forestry* with the 960 cases after the Supreme Court decided that case:

Table 3: Ripeness Results

	# Cases Raising Ripeness	# Cases Dismissed on Ripeness Grounds	Total # Cases	% Total Cases Discussing Ripeness	% Total Cases Dismissed on Ripeness Grounds Where Ripeness Raised	% Total Cases Dismissed on Ripeness Grounds
Before <i>Ohio Forestry</i>	86	51	1445	6.0%	59.3%	3.5%
After <i>Ohio Forestry</i>	69	41	960	7.2%	59.4%	4.3%

Table 4: Ripeness Results Adjusted for Ideology

Average Panel Rating (APR)	Likelihood of Discussing Ripeness Pre- vs. Post- <i>Ohio Forestry</i> (Odds ratio)	Likelihood of Dismissing on Ripeness Grounds Pre- vs. Post- <i>Ohio Forestry</i> (Odds ratio)
All panels	1.30 (p = 0.122)	1.00 (p = 0.989)
More conservative (among panels above the median APR)	0.90 (p = 0.695)	0.76 (p = 0.587)
More liberal (among panels below the median APR)	1.57 (p = 0.043)*	1.34 (p = 0.500)

\* Statistically significant result

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108. With respect to the discussion of standing, the odds ratio for a one unit increase was 0.98, with p-value equal to 0.944, demonstrating no association between APR and chances of raising standing as an issue.

Though there was a small increase in the rate of discussion of ripeness post-*Ohio Forestry*, with an odds ratio of 1.30, this was non-significant. There was a slightly larger increase in rate of discussion by the more liberal panels with APR below the median, as compared to those with APR above the median.

As with standing, the results across all cases, regardless of time of decision, reveal a significant correlation between discussion and dismissal rates and panel ideology. Interestingly, the chances of discussing ripeness actually *decreased* with increasing conservatism of a panel—a one unit rise in the APR of a panel was associated with half the chance of discussing ripeness (OR = 0.50,  $p = 0.028$ ). This finding may explain the increase in discussion of ripeness by more liberal panels post-*Ohio Forestry*, mentioned in the paragraph above, as part of a general trend of liberal panels being concerned with ripeness and thus likelier to bring it up more often in the wake of a major Supreme Court decision on the issue. However, the root explanation for this phenomenon is initially unclear, especially since the actual outcomes of ripeness cases show the expected correlation of panel conservatism with higher dismissal rates; for each increase of one unit in APR, the odds ratio for dismissal was 5.24 ( $p = 0.019$ ), indicating that more conservative panels were more likely to dismiss on ripeness grounds.<sup>109</sup> A more in-depth consideration of this anomaly, as well as my observations regarding selective compliance and the different effects of *Ohio Forestry* and *Lujan*, suggests that some refinement of current models of judicial decision making is necessary to explain these results fully.

#### IV. JUDICIAL DECISION MAKING

In exploring the significance of these empirical results, it is helpful to explore current theories on judicial behavior and what factors influence judges in their consideration of cases. Ever since legal realists debunked the idea that judges are faithful followers of precedent, with their decisions determined by the law as set out by the legislative branch and higher courts,<sup>110</sup> academics have attempted to figure out what factors best explain judicial decision making. There is extensive literature on the topic in both the legal

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109. Perhaps this odd result was merely the product of analyzing the small sample size. Alternatively, it might be that more conservative judges do not feel the need to raise the issue of ripeness unless they use it as grounds to dismiss a case. However, that superficial explanation still begs the question of why they exhibit such behavior.

110. Cross, *Political Science*, *supra* note 2, at 255; Tiller & Cross, *What is Legal Doctrine?*, *supra* note 3, at 518-19.

and social science fields.<sup>111</sup> Generally, scholars have settled on two models of judicial behavior: the attitudinal model, which argues that judges are political beings who use legal precedent strategically to justify decisions compliant with their personal ideological views; and the legal model, which posits that precedent exerts some force on judges either by changing the costs of deciding a case a particular way, establishing norms of behavior, or through some other mechanism.<sup>112</sup>

#### A. *The Attitudinal Model*

A favorite of social scientists, the attitudinal model presumes that judges are rational actors who, unless subject to constraints, will attempt to maximize their utility by deciding cases in conformance with their personal political views.<sup>113</sup> This paradigm for judicial decision making relegates legal doctrine and precedent to a minimal role, as at most a weak constraint on judges that is used only strategically to provide a gloss of legitimacy on what are in fact ideological decisions.<sup>114</sup> Numerous studies provide empirical support for this view of judicial behavior.<sup>115</sup>

Standing in particular has been cited as an area where ideology holds sway, for two reasons: its dependence on numerous factual considerations, such that applicable precedent can be easily

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111. See, e.g., Cross, *Political Science*, *supra* note 2, at 61-62 (summarizing the existing literature).

112. These two concepts are given different names by different authors—for example, in her study of taxpayer standing, Staudt calls them the “team theory” and the “agency theory” respectively, but their general outlines remain the same. See Staudt, *supra* note 3, at 634-41.

113. Cross, *Political Science*, *supra* note 2, at 265-66. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

114. See Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733 (2003) (reviewing SEGAL & SPAETH, *supra* note 113).

115. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008) (finding political alignment of judges to be statistically significant variable in predicting outcomes in judicial review of agency decisions); Sisk et al., *Charting the Influences on the Judicial Mind*, *supra* note 4, at 1388 (citing several studies illustrating influences of judicial ideology on case outcomes); Smith & Tiller, *supra* note 97 (detailing a study showing that judges choose grounds for dismissal so as to minimize chances of review for policies they agree with and maximize review for those they oppose); see also Claeys, *supra* note 75, at 1325-34 (proposing game theoretic model using politically-motivated actors that would explain some aspects of justiciability doctrine as a tool for affecting substantive outcomes). See generally Cross, *Political Science*, *supra* note 2, at 265 (reviewing evidence for the attitudinal model and summarizing it as “substantial, if not entirely conclusive”); Lindquist & Cross, *supra* note 5, at 1160-68; Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999).

distinguished on various grounds;<sup>116</sup> and the availability of a range of inconsistent precedents from which judges can select the cases that best support whichever outcome fits best with their personal preferences.<sup>117</sup> A 1979 study of the Supreme Court showed that the Justices tended to vote to grant standing to those parties they agreed with and deny it to those parties they disliked.<sup>118</sup> Similarly, a 1991 study showed a strong correlation between ideology and standing decisions, even in district courts, which might be considered less political than the Supreme Court given their close supervision by appellate courts and less uniformly controversial caseload.<sup>119</sup>

This data corresponds with the above results, which show that ideology is one strong influence on judicial decisions regarding standing. Yet political preferences are not the only predictor of case outcomes. The attitudinal model does not illuminate the “selective compliance” phenomenon, which indicates that precedent does have some effect on even those judges who do not agree with its ideological content. This model does not explain why precedent shapes standing decisions but has no discernible effect on ripeness cases.

### B. *The Legal Model*

Although the attitudinal model plays a large role in current thinking about judicial decision making (in part because of the focus of academics on the Supreme Court, where the model has particularly large predictive power),<sup>120</sup> the traditional idea that judges follow binding precedent has enjoyed a resurgence in the form of the “legal model.”<sup>121</sup> This approach asserts that even if judges do pursue ideological ends, they are constrained in that practice by legal precedent according to the traditional principle of *stare decisis*.<sup>122</sup>

Empirical investigations confirm that even though judicial decisions are correlated with ideology, precedent is not without some influence.<sup>123</sup> Studies of the operation of Supreme Court precedent on

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116. See Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 836 n.309 (2003); see also Lindquist & Cross, *supra* note 5, at 1163.

117. See, e.g., Fallon, *supra* note 26, at 634, 638, 641; Winter, *supra* note 16, at 1373.

118. Gregory J. Rathjen & Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360 (1979).

119. C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175 (1991).

120. Tiller & Cross, *What is Legal Doctrine?*, *supra* note 3, at 525.

121. *Id.* at 519.

122. Cross, *Political Science*, *supra* note 2, at 269.

123. Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369, 403 (2005) [hereinafter Cross, *Appellate Court Adherence*] (finding that

defamation, obscenity, and search and seizure rules reveal that lower courts are obedient to the constraints of legal precedent.<sup>124</sup> However, until recently these empirical efforts were mainly directed at the simple task of showing some influence for precedent without delving any deeper and testing the many theories of why judges follow the decisions of higher courts.<sup>125</sup> The latter effort is particularly important since both this study and other empirical research indicates that the influence of ideology and precedent may vary greatly under different circumstances.

Accordingly, academics posit a number of ideas as to what incentives induce judges to follow the decisions of higher courts in particular situations.<sup>126</sup> These hypotheses generally fall into two categories: institutional theories, which focus on precedent as an institutional norm with independent value, and strategic theories, which highlight the usefulness of precedent to judges seeking to impose their own preferences on other members of the judiciary.<sup>127</sup>

### 1. Institutional Theories

The purest form of this category is the idea that judges, inculcated with professional norms regarding legal process, place objective value on the act of reaching an outcome through legal reasoning based on the application of precedent.<sup>128</sup> Additionally, some argue that judges might follow precedent because the rule of law is inherently valuable in providing a stable baseline for society to rely on.<sup>129</sup> More pragmatically, judges might obey the decisions of

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precedent has more influence on circuit court decisions than a judge's personal ideology); Cross, *Decisionmaking in the Courts of Appeals*, *supra* note 98, at 1499-1503. It is possible that the focus of many studies on the Supreme Court, as well as on controversial areas of law where judges might have particularly strong preferences, has led to an exaggerated view of the influence of ideology. Cross, *Political Science*, *supra* note 2, at 285.

124. See Lindquist & Cross, *supra* note 5, at 1174-77 (reviewing these and other studies showing effect of precedent on lower courts).

125. See, e.g., *id.*

126. See generally Tiller & Cross, *What is Legal Doctrine?*, *supra* note 3.

127. Cross, *Political Science*, *supra* note 2, at 298-300; Lindquist & Cross, *supra* note 5, at 1165-66.

128. Cross, *Political Science*, *supra* note 2, at 298-300; Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053-54 (1995) (positing that judges value both "craft" and "outcome").

129. See Bueno De Mesquita & Stephenson, *supra* note 5, at 756-57 (observing, however, that this fails to account for obedience to precedent in areas of the law where stability is not of much value, and also does not explain the incentive for a judge to produce the "public good" of compliance with a legal rule in the face of the danger that other judges will not themselves follow the precedent); Lindquist & Cross, *supra* note 5, at 1160 ("[I]n most matters it is more important that the applicable rule of law be

higher courts out of fear that ideologically motivated decision making which is too blatant or unconvincing would lead to reversal by higher courts, harm to their professional reputations as unbiased decision makers, or damage to the legitimacy of courts as an institution, all effects that might undermine their future effectiveness.<sup>130</sup> Some empirical evidence demonstrates that appellate judges are more likely to follow precedent when they are on a panel of mixed ideology, suggesting what researchers have termed a “whistleblower” effect correlated with the presence of judges of opposing beliefs, who would be especially likely to “blow the whistle” on politically motivated manipulation of precedent.<sup>131</sup>

Generally, these theories boil down to the proposition that judges follow precedent because of their beliefs about its value in ensuring societal stability and legitimacy for the judicial branch. That explanation highlights at least one factor relevant to exactly when judges will follow precedent—as the whistleblower effect indicates, concern with the reputational effects of following precedent (either for individual judges or the judicial branch as a whole) means that judges will tend to abide by higher court decisions when misbehavior on their part would be especially visible to their colleagues and the public.

Indeed, another study of precedent in the standing arena has found that the clarity of precedent is an important factor in its influence, which may reflect the fact that it is easier to detect a judge’s deviance from an unambiguous decision than one whose import is murky.<sup>132</sup> In a 2004 examination of taxpayer standing

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settled than that it be settled right.”) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)); Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 233 (2004) (explaining that courts might be seen as a branch providing stability through legal rules that might at times treat like cases unlike, with other branches responsible for supplying the benefits of change and flexibility when those are necessary).

130. Cross, *Political Science*, *supra* note 2, at 272; Emery G. Lee III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767, 771-72 (2004). *But see* Cross, *Appellate Court Adherence*, *supra* note 123 (arguing that threat of reversal cannot completely explain judges’ obedience to the principles of stare decisis).

131. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155, 2155-61 (1998) [hereinafter Cross & Tiller, *Judicial Partisanship*] (proposing that results demonstrate “whistleblower effect,” with minority judge able to exercise threat of exposure to prevent majority judges from disregarding precedent); *see also* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 346 (2004) (noting both ideological dampening on divided panels and ideological amplification on uniform ones).

132. Staudt, *supra* note 3, at 657-60 (citing this as a common assumption, supported by empirical data).

decisions, Nancy Staudt embarked on a detailed analysis of the effects of both ideology and precedent.<sup>133</sup> Criticizing previous empirical explorations of standing for declaring that standing outcomes were correlated with political preference without controlling for other possible explanatory variables,<sup>134</sup> Staudt focused on taxpayer standing decisions as a narrow arena where she could compare the influence of the leading Supreme Court case on the issue of federal taxpayer standing, *Flast v. Cohen*,<sup>135</sup> with the operation of precedent in other areas like state and municipal taxpayer standing where Supreme Court doctrine is less well-defined.<sup>136</sup> Her data indicated that in district courts, legal doctrine was the best predictor of decision outcomes.<sup>137</sup> At the appellate level, that was true only for federal taxpayer standing, where the available precedent was “clear, unambiguous, and narrow” and Supreme Court oversight was relatively prevalent.<sup>138</sup> For municipal and state standing, unclear precedent was correlated with a bigger influence of ideology on judicial decision making.<sup>139</sup>

The phenomenon of selective compliance in the standing results here may be a result of similar factors. Although *Lujan* made a strong statement regarding the proper judicial role, the particular content of the decision—hinging on the seemingly trivial fact that the

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133. *Id.* at 612-18.

134. Staudt does not comment on a 1979 article by Rathjen and Spaeth in her argument that earlier studies had only looked at the influence of ideology on standing decisions. See Rathjen & Spaeth, *supra* note 118. The Rathjen and Spaeth study examined Burger Court decisions regarding access doctrines including standing specifically to see whether the justices were motivated by pure ideology, their philosophy regarding access to judicial review, or administrative/legal concerns regarding the best use of judicial resources. *Id.* at 366-67. They found their data was best explained by all three of these factors together, explicitly stating that judicial ideology was not the dominant factor in these decisions. *Id.* at 374. The article also looked at the motivators for individual justices, which also turned out to be a mix of the above three concerns, although for some justices one or another in particular was more influential on decision making. *Id.* at 378-79 tbl. 4. Though Rathjen and Spaeth did not address the effect of precedent in their study, they did show that the influence of ideology could be moderated by the presence of other concerns, such as the need to conserve court resources to consider only those cases best suited to judicial review. *Id.* at 380-81.

135. 392 U.S. 83 (1968).

136. Staudt, *supra* note 3, at 665.

137. *Id.* at 659, 661-63.

138. *Id.* at 663-66.

139. *Id.* at 664-66. Staudt actually found overzealous compliance with Supreme Court precedent, with appellate courts taking the Court's distaste for federal taxpayer suits in certain situations and extending it to reject almost all federal taxpayer suits. *Id.* at 665. She traces this to the fact that the Supreme Court is especially likely to hear federal taxpayer suits, and thus circuit courts are especially subject to the threat of reversal. *Id.* at 666.

litigants had failed to purchase plane tickets or otherwise demonstrate their intent to return to see the animals whose endangerment they alleged would harm their interest in studying the species—undermines the opinion’s ability to provide any broad legal rule.<sup>140</sup> Thus liberal judges were relatively free to stray from Justice Scalia’s vision of judicial restraint in reviewing executive branch decisions. At the same time, the benefits of superficially appearing to comply with the Supreme Court’s decision by at least discussing the issue of standing more often explains the data indicating that *Lujan* increased the rate of discussion of standing by liberal as well as conservative members of the D.C. Circuit.<sup>141</sup>

However, the reputational understanding of the operation of precedent does not explain the contrasting standing and ripeness results here. Although there are some differences between the *Lujan* and *Ohio Forestry* opinions, commentators have certainly never argued that standing doctrine is clearer or less ambiguous than ripeness precedent.<sup>142</sup> Both revolve around fact-centered inquiries that many have noted are easy to manipulate for ideological ends without risking detection. Supreme Court review of standing decisions is unlikely, further reducing the odds that the attention of the public or a judge’s colleagues will be drawn to deviation from

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140. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *see also id.* at 592 (Blackmun, J., dissenting) (requiring the purchase of tickets is an “empty formality”); Nichol, *Failure of Injury Analysis*, *supra* note 77, at 316 (standing should not rest on “so slender . . . a reed”); Sunstein, *supra* note 40, at 213 (“If a court could set aside executive action at the behest of plaintiffs with a plane ticket, why does the Take Care Clause forbid it from doing so at the behest of plaintiffs without a ticket?”).

141. *Lujan* might also paradoxically have made it easier for liberal judges to advance their ideological goals in some situations. Since standing is an independent threshold determination, judges may avoid distasteful decisions on the merits of a case by dismissing it on standing grounds. Some liberal judges’ compliance with *Lujan* thus may constitute a strategic choice to veil ideological manipulation in favor of a liberal outcome with a decision on ostensibly neutral justiciability grounds. Some research indicates that judges pursue similar options in parallel situations where one of two possible grounds for a decision is less controversial. *See, e.g.*, Smith & Tiller, *supra* note 97, at 81 (finding that judges choose to dismiss administrative law on statutory interpretation versus reasoning process grounds according to extent of agreement with merits of agency decision and desire to avoid higher court review); Emerson H. Tiller & Pablo T. Spiller, *Judicial Choice of Legal Doctrines*, 8 J. L. ECON. & ORG. 8, 10-11 (1992) (outlining strategic choices between constitutional versus non-constitutional grounds for decision); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. L. ECON. & ORG. 349, 369-70 (1999) (creating model to explain strategic choice of decision instrument).

142. By contrast, Staudt compared federal taxpayer standing, where there is a single definitive case, and municipal and state taxpayer standing, where the Supreme Court has yet to rule at all. *See Staudt, supra* note 3, at 664.

precedent.<sup>143</sup> This set of theories thus does not fully explain the empirical data in this Article.

## 2. Strategic Theories

Judges may alternatively, or additionally, find virtue in following precedent because it is useful in advancing their substantive goals. Most simply, precedent might offer a valuable shortcut in reasoning, allowing judges to rely on resources invested by past courts in determining a correct decision.<sup>144</sup> Following precedent might also encourage a general respect for *stare decisis* that will make a judge's own decisions more influential.<sup>145</sup> Relying on accepted legal reasoning might keep a controversial opinion from attracting negative attention.<sup>146</sup> Or, in a theory proposed by Ethan Bueno De Mesquita and Matthew Stephenson, an underlying line of precedent might provide a judge's individual decision with richer informational content and thus help better communicate a judge's preferences to lower courts.<sup>147</sup> Essentially, tapping into a line of cases allows appellate judges to communicate a more in-depth and nuanced picture of a particular legal rule to a trial court by providing a set of examples of the rule's application.<sup>148</sup> By comparison, if a judge departs from precedent, she can provide only one example of the new rule's application: in the case at hand.<sup>149</sup> At the same time, the judge may gain from breaking with precedent by substituting a legal rule closer to her preferences, since even if the judge can nudge a legal

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143. Indeed, Staudt found much more orthodox adherence to precedent on taxpayer standing by district courts, which she attributed to their being subject to effective judicial oversight. *Id.* at 661-63. To the extent appellate courts exhibited similar behavior, she attributed their obedience to the Supreme Court's unusual dedication to monitoring compliance with its federal taxpayer standing doctrine. *Id.* at 640, 663-64; *see also* Cross, *Appellate Court Adherence*, *supra* note 123, at 369 (arguing the threat of reversal is insufficient to ensure appellate court compliance with precedent); Cross, *Decisionmaking in the Courts of Appeals*, *supra* note 98, at 1483 (stating that chances of Supreme Court review are generally low for appellate judges).

144. *See* Lindquist & Cross, *supra* note 5, at 1165-66. However, this argument is susceptible to the charge that it ignores judges' countervailing incentive to ignore the decisions of judges whose opinions don't match their personal preferences.

145. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); O'Hara, *supra* note 5, at 748-53 (proposing game-theoretic account in which judges might follow precedent in order to sustain a jurisprudential norm that allows their own policy preferences to be incorporated into legal doctrine through that same operation of precedent).

146. *See* Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 790-94 (2008) (explaining the value of "plausibility" in judicial decisions).

147. Bueno De Mesquita & Stephenson, *supra* note 5, at 755.

148. *See id.* at 757.

149. *See id.* at 758.

outcome in her preferred direction without outright abandoning precedent, that effort becomes more costly (in terms of research and intellectual effort needed to integrate the opinion with existing law) the further the outcome deviates from the precedent.<sup>150</sup> Recognizing that precedent is not infinitely manipulable to conform with any ideological view, Bueno De Mesquita and Stephenson model judicial decision making as a tradeoff between achieving her preferred outcomes and communicating her preferences clearly to lower courts.<sup>151</sup>

This last model is especially useful because it predicts that certain factors related to the information content of the precedent and preferences of the judge will influence judicial use of precedent: the disparity between the precedential rule and the judge's preferred outcome, the age of the precedent, the difficulty of making new rulings compatible with existing precedent, and the quality (in terms of accuracy) of communication between judges.<sup>152</sup> It is also one of few theories to point out a specific cost of disobeying precedent—the loss of the history of a legal rule over time that helps to accurately convey the rule's nuances and guide a lower court in its application.

This “informational theory” understanding may account for selective compliance as a function of the attractiveness of precedent as a vehicle for communicating preferences to lower courts. For liberal judges, *Lujan* probably contains less useful information, and thus it is worth the cost to grant standing even where a more conservative judge might read that opinion to require dismissal on standing grounds.

But this explanation is somewhat weak in three respects. First, Bueno De Mesquita and Stephenson hypothesize based on this theory

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150. *See id.* at 758, 765. The authors formulate several new hypotheses based on this model, such as the thesis that strict legal rules will produce periods of little deviation from precedent, but punctuated with sharp breaks, whereas legal standards will allow gradual drifts away from precedent without outright abandonment of it. *Id.* at 765.

151. If nothing else, the need to shape arguments for why existing precedent supports a judge's preferred outcome that will enable an opinion to pass muster imposes some cost on a judge in terms of time and effort spent in research and drafting the decision. Here, the term “pass muster” is meant to account for a number of reasons why judges might want their colleagues to at least *perceive* them to be obeying precedent. These include motivations such as the desire to maintain their professional reputation or a norm of collegiality. *See supra* Part IV.B. Indeed, judges may even have a personal preference for following precedent wherever possible, for instance because it makes people more likely to comply with the law or because it saves them some effort by allowing them to rely on the reasoning of past judges, and thus prefer an opinion that justifies its conclusion under existing precedent, even if by tortuous reasoning, to an opinion that explicitly breaks from precedent. *See* Bueno De Mesquita & Stephenson, *supra* note 5, at 756-57.

152. *Id.* at 756.

that there will be great deference to precedent in complex areas of law where long lines of precedent are necessary to properly communicate with trial judges.<sup>153</sup> On its surface, standing seems an ideal example of such a complicated doctrine due to its dependence on case-specific facts and its uncertain rationale, and thus the finding that precedent has a relatively large influence is consistent with the informational approach. However, rather than serving as a rich source of comparative examples, standing doctrine has often been excoriated as a conflicting mess of contradictory decisions. Furthermore, if *Lujan* gave liberals no advantage in communicating their preferences regarding standing, it is unclear why that decision would prompt a significant increase in their discussion of the issue.

Second, that account does not explain why the ripeness results, involving a doctrine similar in many respects including its complexity and long line of precedent, do not exhibit a similar trend. Finally, the informational approach does not account for the observation that liberal judges discussed ripeness more often in their cases after the issuance of *Ohio Forestry*, and appear more likely to raise the question of ripeness overall, yet this change was not connected to any significant change in the disposition of ripeness issues that might induce such references to the informational content of *Ohio Forestry*.

#### V. EXTENDING JUDICIAL DECISION-MAKING THEORY

Overall, the current theories of when and why judges follow precedent are insufficient to fully explain the fate of *Lujan* and *Ohio Forestry* in the D.C. Circuit. Therefore, this Article suggests that the effect of a precedent is not just a factor of how difficult it is to disobey, or whether it contains useful factual analogies, or any other reason related to how useful it is to a judge in achieving a particular ideological goal. These conceptions of judicial decision making as an outcome-oriented process ignore one of the basic ideas underlying our system of written judicial opinions: how a judge reaches a result is as important as the result itself. In the legal market, judges sell their reasoning as much as their particular substantive opinions.

This precept is important to the results of this study because justiciability doctrine encompasses two distinct forms of reasoning: the constitutional and the prudential. This Part explores the hypothesis that the results of this study as to both standing and ripeness are at least somewhat a result of judges' abstract preferences regarding these two approaches to justiciability, not just their views on whether judicial review is warranted in a particular case. The explanatory power of this hypothesis suggests that a

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153. *See id.* at 764-65.

“reasoning-based” theory of judicial decision making may be a useful supplement to current views on how judges employ precedent.

A. *The Standing Findings*

As detailed above, standing’s focus on ensuring concrete disputes rests on two different legal rationales—constitutional, separation-of-powers preferences and prudential considerations regarding effective use of judicial resources. One study of the Supreme Court’s rulings on access to judicial review found that both rationales played a role in the Court’s decisions, with variation among the individual Justices as to who was pursuing which goals.<sup>154</sup> Furthermore, in considering these two purposes of standing doctrine, judges seem to break down along ideological lines, with conservative judges emphasizing the need to maintain definite, bright-line rules constraining the power of the unelected judiciary while liberal judges focus on the vagaries of an individual case in determining whether it is a well-defined dispute that they are competent to resolve.

Justice Scalia’s opinion in *Lujan* certainly fits best with the constitutional strain of standing doctrine. A representative sample of his rhetoric casts standing as a constitutional bulwark against the diminution of executive power:

If the concrete injury requirement has the separation-of-powers significance we have always said . . . [t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.”<sup>155</sup>

Thus the rise in standing dismissals by conservative judges of the D.C. Circuit might reflect a responsive dedication to maintaining that constitutional line rather than mechanical obedience to *Lujan*’s

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154. Rathjen & Spaeth, *supra* note 118, at 364-67, 374. Although these results might seem to contradict the assertion above that standing has for the most part been transformed into a separation-of-powers doctrine, Rathjen and Spaeth conducted their study in the 1970s, before that doctrinal transition was complete.

155. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992); *see also id.* at 576 (“Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those ‘Cases’ and ‘Controversies’ that are the business of the courts rather than of the political branches. ‘The province of the court,’ as Chief Justice Marshall said in *Marbury v. Madison*, ‘is, solely, to decide on the rights of individuals.’ Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”).

holding. This is a satisfying explanation because it circumvents the potentially troublesome point that the particular facts of *Lujan* do not seem to extend easily to other cases; as mentioned above, *Lujan's* holding rests on somewhat trivial and unique details regarding the particular situation of the litigants in that case.

Correspondingly, *Lujan's* rhetoric regarding the need for strict standing requirements to maintain separation of powers would have little attraction for liberal judges concerned with the prudential aspects of the particular circumstances before them. At the same time, liberals' increased discussion of standing post-*Lujan* might conceivably constitute an attempt to refocus the standing inquiry on those prudential concerns. That might explain the higher discussion rate by liberals in conjunction with little change in their actual disposition of standing questions.

This account, focused on judges' preferences with respect to the reasoning of a case rather than its results, is certainly not meant to discount the theories explored above. Indeed, this picture of standing doctrine fits well with the reputational explanation, in that liberal judges might find it especially easy to stray from the precepts of *Lujan*; a prudential understanding of justiciability would suggest they are entitled to more discretion in departing from the governing case law depending on the unique facts of the case before them without violating professional norms regarding obedience to precedent. Similarly, viewing standing doctrine as a set of prudential guidelines, rather than a firm constitutional rule developed in multiple factual settings, would make its informational content less important to liberal judges willing to be flexible in their application of Article III requirements.

#### *B. The Ripeness Findings*

The true utility of the reasoning-based explanation of precedential effects is in explaining the standing-ripeness disparity. If both of these justiciability tests are rooted in Article III, as the Supreme Court has asserted in the last few decades, then they should trend similarly in response to similar decisions signaling that the Supreme Court wishes to be more restrictive in allowing judicial review of government actions—they should be merely different facets of the same constitutionally rooted “concreteness test.”

However, while standing and ripeness overlap in their concern with avoiding adjudication of abstract disputes, ripeness is far more of a prudential doctrine than a constitutional one, with separation-of-powers concerns grafted into its jurisprudence only relatively

recently.<sup>156</sup> The contrast with standing doctrine is highlighted in comparing the constitutional rhetoric of *Lujan*, excerpted briefly above, with the prudentially-oriented *Ohio Forestry* opinion:

As this Court has previously pointed out, the ripeness requirement is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”<sup>157</sup>

The *Ohio Forestry* analysis accordingly balances the practical factors of fitness of the issue for judicial review and the hardship on the parties of delaying resolution.<sup>158</sup> While *Ohio Forestry* was certainly compatible with the Supreme Court’s casting of ripeness as a constitutional doctrine, the majority of the opinion focused on pragmatic reasons to delay review: the non-binding nature of the management plan at issue, the availability of later opportunities to challenge its component details, the need to allow the agency an opportunity to further refine its approach, and the waste of judicial resources in reviewing a highly complex plan without the benefit of a particular factual context to illustrate its strengths and weaknesses.<sup>159</sup> The decision pronounced no general constitutional rule. Tellingly, the opinion by Justice Breyer, a liberal justice, indicated that one argument raised too late for consideration might have tipped the balance of these factors the other way.<sup>160</sup>

Explication of ripeness as a mainly prudential doctrine is consistent with the most mysterious result above, liberal judges’ higher responsiveness to *Ohio Forestry* in terms of their discussion rates. This prudentially-oriented application of the doctrine by Justice Breyer might speak more to the concerns of liberal members of the D.C. Circuit, focusing on utilization of the ripeness doctrine as a way to screen out disputes not suited to judicial review. The *Ohio*

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156. The *Abbott Laboratories* test currently used to determine ripeness was formulated in the 1960s, before ripeness doctrine was “constitutionalized,” and reflects prudential concerns such as hardship to the parties and the possible waste of judicial resources in hearing a case before its facts have been fully developed. See *supra* Part.II.C.

157. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); see also *id.* at 735 (“The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—post-implementation litigation.”).

158. See *id.* at 738-39.

159. See *id.* at 733-37.

160. See *id.* at 738-39.

*Forestry* approach to ripeness has less to offer more conservative judges who see ripeness as a way to buttress bright lines between the proper judicial sphere and the domains of other branches, and thus are less concerned with the particular circumstances of individual cases before them. This divide creates a picture of a doctrine appealing to liberals for its conception of justiciability but more practically useful for conservative judges interested in restricting judicial review, thus explaining why liberal judges responded to *Ohio Forestry* by discussing ripeness doctrine more often, yet conservative judges remained much more likely to dismiss on ripeness grounds.

C. *Theoretical Foundations for the Reasoning-Based Account*

As delightful as it is to have a potential explanation for the results here, a single empirical study cannot itself support an entirely new theory of judicial decision making. However, the idea that judges might call on precedent for the details of its reasoning as much as its substantive slant also gains credence from its consonance with larger understandings of judicial behavior.

Above all, this account is in some ways only an extension of current theories. Recently, scholars in the area of judicial decision making have proposed an alternative to the view of judges as conscious manipulators of precedent for their own individual ends. The psychological concept of “motivated reasoning” theorizes that people will perceive information supportive of their pre-existing beliefs as more legitimate than that contradicting their preferences.<sup>161</sup> According to this understanding of judicial decision making, judges are more or less responsive to a case depending on their individual beliefs because their ideology leads them to perceive any case in the light most supportive of their own particular position. There is ample real-world evidence of this cognitive process,<sup>162</sup> and at least one study has shown that it affects judges in their decision making.<sup>163</sup> One explanation of the “whistleblower” effect discussed above,<sup>164</sup> in which judges’ behavior becomes less ideological when

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161. Cross, *Decisionmaking in the Courts of Appeals*, *supra* note 98, at 1477; Sunstein et al., *supra* note 131, at 344 (using this phenomenon to explain why having a judge of opposite ideological orientation will dampen ideological behavior of that panel, since a minority judge can confront majority judges if she sees them engaging in such “motivated reasoning”).

162. See, e.g., Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision making*, 68 J. POL. 308 (2006); Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755 (2006).

163. See C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 171 (1996) (finding that use of “cognitive shortcuts” by district court judges leads to politically influenced results).

164. Cross & Tiller, *Judicial Partisanship*, *supra* note 131, at 2156.

they are on panels with colleagues of different parties, is that the presence of a minority party judge on a panel diminished the influence of ideology, indicating that such judges might reduce the bias of majority judges by pointing out the flaws in their “motivated reasoning.”<sup>165</sup>

The motivated reasoning thesis fits well with the reasoning-based conception of precedential influence because it suggests that judges do not intentionally manipulate or pick out precedent based on ideological preferences; rather, they are simply more receptive to the elements of a decision that mesh with their own beliefs. Judges might thus be responsive to a precedent because it employs a reasoning process that they agree with, not just because its facts or ideological content support their desired outcome in a case.<sup>166</sup>

This concept is attractive because it is compatible with the theory that professional socialization indoctrinates judges with the norm of following precedent, and judges comply with that norm in order to succeed within the profession or because they have internalized it.<sup>167</sup> Thus, both liberal and conservative judges might perceive themselves as in full compliance with the norm of following precedent while in reality they were applying divergent treatment to the cases before them. Additionally, this take on the influence of precedent accords with many judges’ own perception that they care about the reasoning of their decisions, not just the particular result.<sup>168</sup> As one critic of a purely attitudinal approach has argued,

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165. Sunstein et al., *supra* note 131, at 344-46.

166. Professor Alexander Volokh has proposed a theory under which judges consciously select particular interpretive approaches to achieve certain substantive results, but he acknowledges that such a model need not assume that all judges act in such a way or that they do so consciously. Volokh, *supra* note 146, at 777-78, 800 n.155.

167. Tiller & Cross, *What is Legal Doctrine?*, *supra* note 3, at 530.

168. See Kim, *supra* note 1, at 387 (noting that strategic models of judicial decision making fail to account for “internal perspectives . . . of judges and lawyers who participate in the system” and who “report that . . . [l]egal rules influence how cases come out, even though they may not determine the result in all cases”); see also Cross, *Decisionmaking in the Courts of Appeals*, *supra* note 98, at 1466-67. One member of the Second Circuit asserted that while the immediate results of cases attract the attention of the public,

[i]t is the explanation for the result, however, that attracts the attention of the legal profession—judges of other courts who review the decision on appeal, or attempt to comply with it on remand, or decide whether or not to follow it in another jurisdiction; lawyers who enlist the decision when it helps, distinguish it when it hurts, and ponder it when advising a client; and especially students of the law, whether standing at the front of the classroom or sitting at the rear.

Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 201 (1984). While disdaining “results-

even if judges care about whether the outcome in a given case advances their preferred policy, they likely care about whether it conforms to legal norms as well. Judges may have a variety of legal preferences regarding matters such as the appropriate mode of interpreting statutes, or the relevance of foreign legal materials, and these preferences may vary from judge to judge.<sup>169</sup>

Those preferences regarding particular legal rules or principles may influence the decision in a case as much, if not more, than the desire to reach a specific holding on the facts, especially since persuasive reasoning may have more influence on future cases than an outcome based on ideologically-rooted analysis.

Furthermore, some initial empirical research bears out the importance of the content of legal reasoning in a precedent in addition to its specific holding. Analyzing the behavior of the Supreme Court, Mark J. Richards and Herbert M. Kritzer suggested that the Justices might be responsive to precedent because “[d]ecision structures . . . structure *how* justices go about deciding cases even if they do not directly constrain the votes of justices”—in other words, the reasoning of a particular area influences how judges think about the cases before them regardless of any factual parallels.<sup>170</sup>

Specifically, the authors of that study analyzed the effects of a change in First Amendment precedent by the Supreme Court on later decisions of the same body. They found that the alteration of the legal framework for considering an issue, though lacking substantive content, did influence the Court in later cases.<sup>171</sup> To explain this result, they posited the idea of jurisprudential “regimes” of precedent, whereby legal doctrine is originally created to facilitate coordination between the Justices that would not be possible if each merely followed his or her own policy preferences, but continues to influence judicial decision making afterward by establishing a constrained universe of relevant factors or setting a particular standard for review.<sup>172</sup> As Kritzer and Richards concluded,

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oriented” jurisprudence, judges may still be attracted to precedents that contain appealing reasoning compatible with “the law as they understand it.” *Id.* at 204.

169. Kim, *supra* note 1, at 404.

170. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 307 (2002).

171. *Id.* at 314-15.

172. *Id.* at 308, 315. The authors acknowledge the relevance to this finding of “neoinstitutionalism,” the theory that “political actors create institutions and institutions . . . in turn structure the actions of political agents,” and of international regime theory, which argues that “ideas matter as they become imbedded in institutional frameworks.” *Id.* at 315.

[l]eaving jurisprudence out of the analytic framework fails to recognize both the distinctive nature of courts and the theoretical point that ideas and institutions matter. Ideas can take on a life of their own and become institutionalized because they serve to frame how people think about political issues, how they evaluate the actions of others, and how they try to persuade others to their own perspective.<sup>173</sup>

#### D. Next Steps

This Article proposes an account that may usefully enrich current conceptions of the judicial decision-making process. However, further study is needed to substantiate that the legal reasoning in precedents may be as important as their ideological content in determining how they affect the behavior of lower courts. While justiciability jurisprudence is relatively unique in its distinctive constitutional and prudential strains, there are several legal topics where conflicting interpretive approaches may provide similar opportunities to observe whether a judge is more responsive to precedent where it contains an appealing analytical method, even where its specific disposition or holding is not in accord with the judge's ideological preferences. For example, questions of statutory or constitutional interpretation may be subject to markedly different modes of construction by liberal and conservative judges;<sup>174</sup> it could be illuminating to investigate whether judges are more receptive to cases that utilize the interpretive tools they prefer.

While direct testing of this Article's hypothesis is vital, in the meantime, it might be helpful simply to acknowledge the possibility that the influence of precedent operates on a subtler level than giving a judge a choice between either following its result exactly or diverging from its holding in pursuit of ideological goals. While the legal and attitudinal models are important conceptual tools, and often very powerful predictors of judicial behavior, too close a focus on the naked forces of politics and reputation tends to produce a deceptively simple and ultimately not fully accurate picture of the decision-making process. At the very least, this Article prompts those studying judicial decision making to stretch beyond the project of

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173. *Id.* at 306.

174. Numerous articles discuss opposing schools of statutory and constitutional interpretation as correlating with a judge's ideological position, such as conservatives' tendency toward textualist readings versus liberals' preference for taking into account legislative history and purpose. *See, e.g.*, Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 28 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828 (2006).

quantifying the influences of ideology and precedent;<sup>175</sup> it is equally as important to look more deeply into how ideology and precedent might interact, such as when the reasoning set out in an opinion affects how lower court judges receive its content.

## VI. CONCLUSION

The results of this study turned out to be surprising in that, though aspects of both the legal and attitudinal models were borne out in expected ways, existing accounts of judicial decision making could not fully explain the particular empirical results. The positive effect of this gap between theory and reality is that it points to areas where we must continue to develop our understanding of how and why judges reach particular legal conclusions, especially in terms of their response to ostensibly binding precedent. This Article suggests one possible elaboration on current theory, the idea that judges value the promotion of particular methods of legal reasoning as well as the attainment of specific results in a given case.

Not only will expanding our view of the factors in judge's behavior allow for a richer account of how law operates in the real world, but it also offers some much needed validation of the legal profession. It would be disheartening to believe that all the attention lawyers, judges, and other parties devote to arguing and expounding the nuances of legal analysis as part of the judicial process is merely wasted effort. Given the results of this study, there may yet be hope that legal reasoning is a real force in determining legal outcomes.

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175. Cross, *Political Science*, *supra* note 2, at 309 (arguing for need to take next step of integrating the legal and attitudinal models rather than simply elaborating on them).

Appendix A: Presidential Common Space NOMINATE Scores

EISENHOWER	0.199
KENNEDY	-0.52
JOHNSON	-0.377
NIXON	0.422
FORD	0.406
CARTER	-0.543
REAGAN	0.581
BUSH I	0.528
CLINTON	-0.432
BUSH II	0.47

Appendix B: Trends Over Time in Standing and Ripeness Decisions

Chart 1: Standing Results over Time

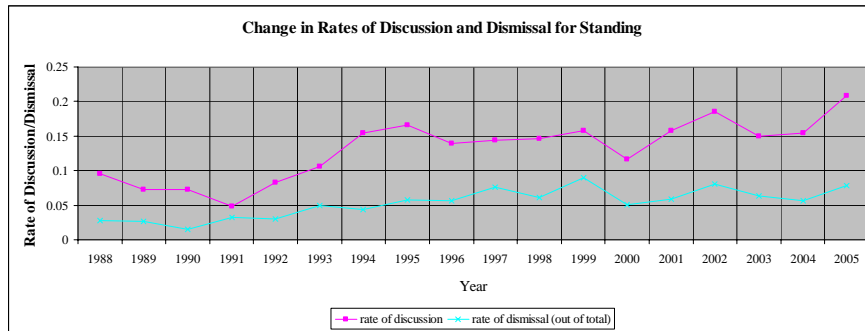


Chart 2: Ripeness Results over Time

