3. A public choice perspective

Maxwell L. Stearns

3.1 INTRODUCTION

This volume boasts important contributions to the literature employing interdisciplinary perspectives to advance legal scholarship. The approaches contained within this volume include economics, philosophy, history, evolutionary dynamics, comparative law, empiricism, and behavioral economics. No less so than ideological camps, opposing methodological groupings divide the legal academy. In both cases, this is unfortunate. As this volume amply demonstrates, a more fruitful approach benefits from synergies among an array of methodologies, and treats ideology as no more than a rough starting point that for the most thoughtful scholars invariably invites more complex and nuanced inquiries into law and legal policy.

Where does public choice fit? First, we must provide a definition: Public choice is the application of economic tools to the subject matter of political science. The term “public choice” is sometimes used to describe a particular methodology, specifically interest group theory, and sometimes used more broadly as an umbrella or catch-all term covering an associated set of methodologies. In this chapter, I take the latter approach. Under the broad umbrella of public choice, I include interest group theory, social choice theory and elementary game theory, in addition to elements of price theory as is helpful in elucidating underlying concepts. Public choice liberally borrows assorted methodological tools from microeconomic theory and adapts them to sharpen the analytical focus on subjects of interest to students of politics and political theory. Because legal scholarship is necessarily concerned not only with substantive policy outcomes but also with generative processes that produce those outcomes, the study of public choice necessarily extends as well into the domain of law. Before illustrating how a public choice perspective illuminates particular questions of law and legal policy, it will be helpful to describe briefly the three main subdisciplines of public choice.
3.2 THE METHODOLOGIES OF PUBLIC CHOICE

3.2.1 Interest Group Theory

Although constituents expect government to provide those goods and services that they themselves cannot provide along with laws that serve the public interest, a precondition to any government largesse is an effective method of exerting needed pressure for such procurement. Public choice begins with the premise that the demand for beneficial government action does not animate itself (Stigler 1971, p. 3; Peltzman 1976, pp. 211–212). Instead, political entrepreneurs form pressure groups, or interest groups, in part to help generate that demand, but they do so in a manner that often diverges from more high-minded objectives of governance (Stigler 1971, pp. 3–4; Peltzman 1976, p. 212).

Interest group theory studies what motivates individuals to form interest groups and how such groups affect, or seek to affect, various organs of government – legislatures, courts, and the executive branch (including agencies) – as a means of pressuring these institutions to provide desired outputs (Olson 1965; Stearns and Zywicki 2009, pp. 49–51). The theory also considers how interest groups organize themselves to limit the benefits of successful procurement to those who have meaningfully contributed to the group’s success and how institutions respond to interest group pressures (Wilson 1973; Hayes 1981; Olson 1965; Stearns 1992).

Critics sometimes suggest that interest group theorists assume that governmental outputs are invariably the product of successful procurement efforts by narrow special interests (Farber and Frickey 1987, p. 874). Although this represents a strand of public choice scholarship, it is not a necessary implication of public choice. Legislation invariably involves a complex of influences that includes the electoral goal, partisan ideological commitments, the desire to provide public goods, and, of course, the influence of special interests. Public choice assumes that legislative processes can be meaningfully analogized to market processes in which constituents and interest groups exert the demand for legislation that members of Congress supply (Wilson 1973; Hayes 1981; Stearns and Zywicki 2009, p. 251). While this necessarily simplistic model sketches a caricature of a more nuanced legislative process, by focusing on problematic or pervasive features, it sharpens our analytical focus on the role that interest groups play in shaping overall legislative design. The analysis not only illuminates the role of interest groups in shaping the demand for legislation, but also provides analytical tools with which to assess how legislators respond to interest group pressures in the overall design and packaging of legislation.

A specific benefit that interest groups often seek from legislatures or
other government institutions is captured in the economic concept of “rent.” Rent is a price theoretical term connoting a return on capital or any productive asset above opportunity cost.\(^1\) Typically, opportunity cost is a placeholder for the expected rate of return under ordinarily competitive market conditions. Rents are thus potential returns that a firm derives after removing itself from the demands of market competition.\(^2\) “Rent seeking” thus means an effort to procure protection from competition and to secure rents that derive from the corresponding ability of successful firms, or interest groups operating on their behalf, to reduce outputs and raise price.\(^3\) Of course, the phenomenon of rent seeking is hardly new, and it should therefore not be surprising that modern interest group theory finds parallels in contemporaneous political theory surrounding the framing of the United States Constitution.

What James Madison and David Hume referred to as “factions,” modern public choice theorists instead describe as interest groups. The myriad proscriptions against factional violence that Madison and others proposed—bicameralism, presentment (the executive veto), and possibly even judicial review (Macey 1986; Posner 1986)—modern scholars would regard as the skeletal structure on which a broad array of “veto gates,” (McNollgast 1994) or “negative legislative checkpoints” (Stearns 1992), have developed. These essential features of constitutional design have been supplemented with a number of other features, including calendaring rules, the filibuster, and elaborate committee structures that provide venues at which interest groups can exert pressures on behalf of constituents who are threatened by proposed legislation or who seek specific legislative largesse (Stearns and Zywicki 2009, p. 255). Such features operate as pressure-release valves or break points within our deliberately cumbersome legislative process. Because it is generally easier to block than to pass in Congress (Stearns and Zywicki 2009, p. 255), these junctures provide venues at which interest groups can extract rents as the price of supporting, or simply not blocking, proposed legislation.

---

\(^1\) This implies that the successful rent-seeking firms will obtain protections against competition (returns in competitive markets thus represent opportunity cost) and, along with that, monopolistic rents (Stearns and Zywicki 2009, pp. 35–36, 46–49).

\(^2\) Private market conditions can also generate rents, for example, through monopolistic conditions arising from new technologies or product differentiation, but the focus here is on legislatively conferred rents (Stearns and Zywicki 2009, pp. 48–49).

\(^3\) Technically, rents comprise the difference between monopolistic profit and the ordinary rate of return, meaning under competitive conditions (Stearns and Zywicki 2009, p. 35).
Viewed optimistically, these features raise the burdens on rapidly forming majorities (read factions or interest groups) that, left to their own devices, threaten to trample upon the interests of affected minorities. Viewed less favorably, these same mechanisms provide venues at which interest groups can exert pressures in exchange for legislatively conferred rents (Easterbrook 1984). One of the main themes of public choice is that institutions designed to limit the ability of interest groups to wield excessive influence often have the counterintuitive effect of channeling such influences into another form. In this account, the very mechanisms that Madison hoped would thwart factional violence have instead, and perhaps ironically, facilitated alternative means of rent seeking.

3.2.2 Social Choice Theory

Whereas interest group theory studies how the incentives and structures of organizations affect law-making processes, social choice theory studies how decision-making processes themselves transform member inputs into policy or other forms of government output. Just as constituents expect law-making bodies to serve the public good, so too constituents expect law-making processes to be rational and fair. Rationality implies a minimal expectation of internal coherence in processing preferences, most notably transitivity. Fairness implies law-making processes that satisfy essential attributes of majority rule, ensure principled rather than strategic decision-making, and permit outcomes that benefit some members if others are not harmed.4 In effect, a minimal set of expectations for a fair and rational decision-making process is that some other process subject to a similar description would yield comparable outcomes with the same general set of inputs. Perhaps the most foundational insight of social choice is that any such general set of intuitions that combines minimal attributes of rationality and fairness and thus that decouples outcomes from the generative processes that produce them is elusive (Stearns 2012, p. 329). As participants and options increase, and thus as preference configurations become more complex, outputs are increasingly prone to reflect the formal and informal processes through which decision-making institutions operate.

Social choice provides a unique set of tools that prove essential in assessing the structure, tradeoffs, and efficacy of various decision-making processes. Social choice emerges from a deceptively simple insight.

---

4 Within the technical framing of Arrow’s theorem, these conditions translate to Range, Independence of Irrelevant Alternatives, Non-dictatorship, and Unanimity (Vickrey 1960, pp. 509–511; Stearns 2002).
Although we intuitively ascribe as a characteristic feature of individual rationality the assumption of transitivity – A preferred to B preferred to C implies A preferred to C – we cannot make this assumption for groups of three or more persons seeking to select among ABC in the absence of a first choice candidate even if each member individually satisfies this condition of rationality (Condorcet 1785; Arrow 1963; Black 1948; Stearns 1994, pp. 1221–1228). Social choice thus demonstrates the fallacy of seeking to ascribe personal characteristics to, or to anthropomorphize, groups.

Assuming that each individual votes sincerely, three persons holding the following rational (transitive) preferences orderings over ABC (1: ABC; 2: BCA; 3: CAB) will discover a “cycle” such that A is preferred to B is preferred to C is preferred to A, when the group seeks to identify a stable outcome through a series of unlimited binary comparisons. Not all group preferences yield cycles even absent a first choice majority winner. Thus, with the following slightly modified preferences for person 3 (from CAB to CBA), and the remaining preferences unchanged, the same process would result in B defeating both A and C by simple majority rule.5

As Nobel Laureate Kenneth Arrow proved in his famous impossibility theorem (Arrow 1963), institutional efforts to avoid the problem of cycling necessarily contravene a feature of rule-making processes that intuitively seems essential to fairness. In a sense, social choice demonstrates that no set of institutional decision-making mechanisms is perfect and thus the best we can hope for is a set of such mechanisms that are good enough for specific purposes. Social choice further demonstrates that what is good enough for one institution might well differ from what is good enough for another. The choice of decision-making rules will depend on the functions that the relevant institutions are designed to serve.

Social choice studies the conditions under which cycling versus stable group preferences are most apt to occur, how different institutions respond to the threat or actuality of cycling preferences and what the normative implications are for selecting among the various institutional choice mechanisms. In a sense, social choice and interest group theory are flip sides of a coin. Whereas interest group theory studies the incentives of groups in seeking to influence policy, social choice studies how institutional rules process interest group pressures and other inputs in generating policy outputs. Because institutions respond to such pressures in differing ways, social choice provides a means of studying complementarities among various organs of governance. As with interest group theory, modern

---

5 Defined as the Condorcet winner (Stearns and Zywicki 2009, pp. 102–103; Stearns 1994, p. 1221).
social choice theory finds historical antecedents among contemporaries of our nation’s founders.6

3.2.3 Game Theory

Game theory studies how individuals or institutions respond to specified incentives within structured interactive settings, referred to as games. These games provide a helpful lens through which to study behaviors on both the demand and supply sides of legislative processes and are thus helpful in identifying the motivations of interest groups and legislators.

The prisoners’ dilemma is particularly well known, although even that game’s full range of applications is not always well understood (McAdams 2009; Stearns and Zywicki 2009, p. 170). The game depicts two prisoners who would each benefit from cooperating with the other (meaning they each remain silent and thus both deprive the police of mutually incriminating information), with the result that each receives a very minor sentence. Yet, as a result of the payoffs they are offered (no penalty in exchange for ratting out the other prisoner if the other is silent, and a reduced sentence relative to the maximum if both follow the same defecting strategy), each has an incentive to defect, thus ratting out the other. While each would receive a lighter sentence if both remained silent, behaving rationally each instead defects, thus incurring a notably heavier sentence. The ultimate result of a prisoners’ dilemma game will depend on whether the players are placed in a single-period or multi-period game and, if the game is extended, on such factors as whether the players know when the periods of play will end and their discount rates for future rewards or punishment.

In some respects, game theory typifies the observation that a little knowledge can be dangerous: Failing to appreciate the nuances of the prisoners’ dilemma, and to appreciate the differing dynamics of other games, can result in mischaracterizations of various issues of law and public policy and thus to problematic policy prescriptions. Other games, for example, the driving game, the battle of the sexes and chicken, although less well known among legal scholars, also hold important implications within a variety of legal contexts.

Although identifying the appropriate game provides valuable insight into the policy matter under review, this alone is unlikely to resolve the

---

6 In fact, the Marquis de Condorcet, one of the earliest and most prominent social choice theorists, attempted to influence the drafting of the US Constitution based on his insights about group decision-making (McLean and Urken 1992, p. 445; Stearns 1994, pp. 1221–1228).
underlying policy decision. As is more generally true of economic analysis, game theory is often more helpful in assessing tradeoffs than in choosing among options that the game reveals. In addition, defection strategies can be socially harmful in some games yet socially optimal in others. Thus, for example, some important problems of public policy are problematic because actors find themselves in a prisoners’ dilemma, whereas other equally important problems are problematic because we have failed to place the actors in a benign prisoners’ dilemma. Consider the following illustrations.

A major impetus for replacing the Articles of Confederation with the Constitution involved notorious trade wars among the states. The Commerce Clause, especially operating in its dormant capacity, has had the benign effect of ameliorating a prisoners’ dilemma among states in which each rationally caters to its own in-state interests by erecting overt barriers to trade with producers in other states, which, if sustained, would invite a regime of reciprocal defection and thus balkanized state markets. The dormant Commerce Clause doctrine can thus be viewed as a successful (or at least partly so) vehicle that forces states into a strategy of cooperation by prohibiting the category of laws that, if sustained, would encourage a regime of reciprocal defection. In this game, cooperation among states enhances social welfare by increasing the competition among firms across state borders in the production of goods and services.

By contrast, markets enhance social welfare by encouraging a regime of mutual defection among buyers on the one hand and sellers on the other. Competitive markets produce socially productive results – greater outputs at lower cost – by thwarting coordination on the supply side. Competition prevents firms from agreeing to reduce outputs as a means of enhancing price in an effort to secure monopoly rents. Competition similarly thwarts coordination on the demand side, thus preventing consumers from effecting a diminution in price by behaving as monopsonists. Antitrust laws thus place competitors within a benign prisoners’ dilemma by preventing cooperative pricing strategies that, although beneficial to producers, are

---

7 As a remarkable attribution of the Constitution’s success in avoiding one aspect of this prisoners’ dilemma, consider *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, in which Justice Stevens pointed out that “Such tariffs are ‘so patently unconstitutional that our cases reveal not a single attempt by a State to enact one’” (1997, p.575) (quoting *West Lynn Creamery, Inc. v. Healy* (1994, p.193)). Justice Thomas, in dissent, observed that the Framers might have targeted the import–export clause at this problem, although from the beginning, doctrine has centered on the commerce clause instead. 520 U.S. at 610 (Thomas, J., dissenting).
harmful to society. Thus, in contrast with regulatory competition, private markets produce socially preferred results by forging a prisoners’ dilemma among private firms that otherwise would prefer rent-producing pricing strategies.

An important test for law-making institutions is whether they succeed in channeling behavior among economic actors away from problematic and toward benign games. Because avoiding problematic games requires a change in incentives, basing a legal policy on a misunderstanding or misapplication of the relevant game can exacerbate, rather than ameliorate, the problem in question.\(^8\)

### 3.3 SELECTED APPLICATIONS

In the remainder of this chapter, I offer three applications of the preceding public choice tools that together illustrate some of the benefits of including a public choice perspective when assessing various questions of legal policy. The selected illustrations draw from each of the three main subdisciplines within public choice and also highlight some important differences between public choice and its analytical cousin, law and economics. Specifically, the analysis will demonstrate sometimes divergent results across these closely related methodological disciplines owing both to the differing analytical techniques and to the sometimes distinct normative goals that each ascribes to the institutions under review.

The first case study involves an increasingly important inquiry in private law: Should parties be free to designate choice of law contractually as a means of obtaining a preferred, and mutually agreeable, set of legal rules governing the contracts they enter into? Or, alternatively, should parties remain stuck with whatever rules happen to govern in the jurisdiction in which they enter into a contract or with whatever set of rules the somewhat arcane body of choice of law doctrine designates as controlling? The second case study involves an aspect of dormant Commerce Clause doctrine jurisprudence: Should a state that has a special endowment of a valued and scarce natural resource be permitted to impose a neutral tax that will disproportionately burden out-of-state purchasers if the anticipated effect is that the tax proceeds paid by such purchasers will substantially subsidize

---

\(^8\) Game theory is generally treated as an independent discipline or subfield within economics. Although not always included under the public choice umbrella, doing so proves helpful in applying the broader set of public choice tools to questions of public law and policy (Stearns and Zywicki 2009, pp. 168–169).
in-state tax revenues? The third involves the doctrine of standing, a critical set of rules that governs the circumstances under which parties can and cannot appear in federal court to press particular claims, and offers a positive account, grounded in social choice, of this contested doctrine.

None of the case studies definitively resolves the underlying questions of legal policy; thoughtful scholars have expressed considerable disagreement on each of these policies or rules based upon analyses informed by a variety of perspectives. Rather, the case studies each use public choice tools to situate the underlying questions of legal policy within a broader institutional context that exposes the tradeoffs associated with common criticisms of the existing rules. Public choice is often most helpful in drawing attention to overlooked features of the underlying policy question, and in so doing, recasting the terms of relevant policy debate.

3.3.1 Contractual Choice of Law

A growing literature suggests that one potentially easy fix to problematic state or local regulation is to allow those who are adversely affected to extricate themselves contractually from laws that they view as disadvantageous. Choice of law doctrine has long focused on such physical attributes as presence, for example, the connection of the parties, the contract, the accident or the losses, to the forum whose law is presumed applicable (American Law Institute 1971, § 187). To the extent that physical presence, or at least a meaningful nexus to a location, improves predictability as to which laws govern a potential future dispute, this might have much to commend it. Some commentators, however, observe that, within choice of law, there is a strong tendency of each jurisdiction to favor its own law even when choice of law rules, neutrally applied, would lead to another result (Ribstein 1994, pp. 1002–1003).

Advocates of contractual choice of law approach this problem differently. These scholars contend that the fortuity of presence potentially imposes substantial costs on contracting parties who would prefer to opt out in favor of the rules applicable in an alternative jurisdiction even if the connection of that jurisdiction to the immediate dispute is attenuated or nonexistent.

An obvious benefit of contractual choice of law is that it holds the promise of better aligning the expectations of both parties to a transaction with governing legal policy in the event that the transaction ultimately fails. This follows from the Coase theorem (Coase 1960): To the extent that geographically based choice of law constrains the selection of rules governing a contract, the transaction costs of contracting necessarily rise. With zero, or at least reduced, transaction costs, and perfect, or at least substantial,
information, resources more readily flow to their more highly valued uses. Yet, even with perfect information, for example, about the menu of available governing rules offered across state jurisdictions, the transaction costs imposed by rigid geographical constraint in choice of law inhibit contracting parties from gaining the benefit of their preferred bargain favoring the law of another jurisdiction.

Imagine, for example, that a group of women wishing to start a casino are prevented from doing so by local laws that prohibit gambling. Would-be gamblers, and our would-be casino operators, are prevented by choice of law rules from satisfying this mutual demand, thus arguably inhibiting social welfare. Although there is a demand for the services that the casino would offer, the jurisdictional ban on gambling renders such transactions illegal. The gamblers could travel to satisfy the demand during a vacation, but for those who cannot afford to travel, this is not a helpful solution, and for the would-be entrepreneur, it is a defeating solution.

Or consider an elderly woman in Idaho who wishes to buy marijuana for medical use. Further assume that, but for the ban, an in-state entrepreneur would willingly acquire, grow and sell marijuana for that purpose. Unlike the gambling example, vacation travel is insufficiently frequent to satisfy medical needs. The two potential parties to the thwarted transaction could relocate to California or the woman could do so alone and find another willing seller. However, imagine that for any number of reasons this is not feasible. If the willing seller and buyer could merely designate California law as governing their transaction, however, then they could extricate themselves from what they regard as the illiberal, contrary Idaho policy, and they could do so at substantially lower cost.

The same analysis readily extends to contracts respecting what many observers identify as consensual victimless transactions, including, for example, illicit drugs and virtually all sexual services. Certainly, there are jurisdictions with varied rules on each of these policies. Locations in and around Las Vegas, Nevada, legalize both gambling and prostitution; California has legalized medical marijuana (as have other states); and an increasing number of jurisdictions have permitted slots, if not table games (Augustson and George 2015, p.243; Rose 2010; Simoni-Wastila and Palumbo 2013).

One insight of public choice theory, dating back to Charles Tiebout, is that jurisdictional competition improves qualitative matching between constituent desires and legal policy, especially at the local and state levels (Tiebout 1965; Hirschman 1970). Yet, as the prior examples illustrate, relocation is at best a blunt tool in encouraging optimal jurisdictional matching. The problem is exacerbated by the reality that state jurisdictions bundle many features, including geography, climate, urban versus rural...
Methodologies of law and economics

communities, cultural norms, and of course, a countless assortment of laws. Even a significant subset of unattractive laws is therefore unlikely to spur all but the most disgruntled of residents to pursue a wholesale physical relocation to a jurisdiction that provides perhaps better laws along that one dimension, but with lesser attributes along several others.

Within a standard law-and-economics framework, liberalizing choice of law rules is win–win. Both parties freely enter into a transaction, and so we can assume – based simply on their observed conduct, or what an economist would call “revealed preferences” – that at least one is better off, and probably both are.

Although in both hypotheticals some residents oppose the substantive law selected for the relevant contracts (Nevada for gambling; California for medical marijuana), those individuals are not subject to the selected policy. In fact, within Nevada and California, there are certainly residents who would prefer the Idaho regime on these or other policies, and they too could freely opt for that legal regime in their own contracts. Contractual choice of law has the benign effect of better tailoring the preferences of individuals with their preferred policy, and it does so by removing the traditional high-cost geographical barriers to gaining such improvements to social welfare.

The law-and-economics account offers a compelling critique of an existing set of rules that limit entirely free choice of contractual choice of law designations. It is a compelling position precisely because it explains a feature of the law – geographically dictated governing rules – that is generally costly for individuals to extricate themselves from, and it offers an intuitive solution, allowing parties to contract out, that operates at seemingly low cost. Yet the claim that liberalizing choice of law is socially costless might prove mistaken.

A standard critique of liberalized choice of law rests on paternalistic justification for limiting contractual choice: Whether or not there are externalities, gambling and marijuana are sufficiently harmful that, for such matters, the state should willingly protect residents against their own contrary inclinations. Alternatively, there might be hidden externalities (costs imposed on non-contracting parties): neighbors might suffer at the hands of those who grow marijuana, even for medical use, and businesses or residential communities might find burdensome whatever changes are required to facilitate the introduction of casinos in their communities. Finally, some might suggest that contractual choice of law designations are apt to arise in contexts in which the assumption of voluntariness is suspect.9

9 As a notable illustration, consider form contracts for liability arising on cruises. See, for example, *Carnival Cruise Lines v. Shute* (1991).
To be sure, there are responses to each of these arguments from outside and within a law-and-economics framework. Although it is not possible to review all such arguments here, one is particularly notable: Competition often results in a selection among take-it-or-leave-it contracts, and even though consumers lack the ability to negotiate the individual terms of such contracts, they ultimately benefit from the diminution in price associated with such contracts. Take-it-or-leave-it contracts typically arise in competitive markets, with the attendant benefits to consumers that less competitive markets, those characterized by dickering over price or other terms, generally fail to provide. It is certainly true that consumers might regret particular contractual choices after the fact, but isolated instances of post-contractual regret cannot drive general policies on contractual choice of law.

The public choice analysis of choice of law differs from each of these techniques. The preceding analysis presents what can best be described as external critiques of proposals to liberalize choice of law rules. These are external because they largely rest on assumptions and analyses from outside economics. Public choice offers the basis for a critique within the framework of economic analysis but that applies economic tools to consider questions of institutional context and choice.

Let us assume for the moment that, with respect to the medical marijuana hypothetical, there is substantial agreement that California’s policy is, in fact, preferable to that of Idaho, and that for various reasons – resistance by a stubborn minority willing to exert pressure at a veto gate within the legislature, lobbying pressure by pharmaceuticals who anticipate competition from the nascent medical marijuana industry or law enforcement who resist claims that if legalized for this limited purpose, marijuana can be limited to those who have proper medical authorization – Idaho remains stuck with its adverse legal policy. In addition, it remains stuck with a legal regime that prevents residents who prefer the more liberal California policy from contracting around the Idaho medical marijuana ban.

Some Idahoans, those for whom these contracts are particularly vital to their well-being and who have the financial wherewithal, might physically relocate to California or another jurisdiction with more liberal rules or simply venture there as needed to obtain and use marijuana legally. To the extent that such moves occur, this furthers the Tiebout intuition that jurisdictional competition facilitates a better matching of preferred policies with the desires of state and local constituents. Yet, returning to the Coase theorem, physical relocation is certainly among the very highest of transaction costs. Except at the very local level, moving often entails changing jobs, relocating family, changing schools, affiliating with new religious or community organizations, plus other costs. Most individuals will not
incur such costs, financial and otherwise, except in extreme circumstances. Indeed, proposals to expand contractual choice of law are motivated by just this concern: It lowers the cost of regulatory exit by decoupling it from the requirement of physical exit.

However, although contractual exit is cheaper than physical exit, assuming it is costless is mistaken. Researching the laws of other states, conforming contracts to the preferred state law, and ensuring sufficient quality drafting to avoid the risk that the selected legal designation fails to hold, takes time, money, or both. Those most likely to do this successfully will tend to have relatively greater education and resources. Assume that such individuals succeed in contracting out of a particular jurisdiction’s disfavored law. What happens to those who remain opposed to the law on the books but who lack the means of contractual exit? Among those who reside in the state, those with the greatest means to push for change have just eliminated their primary incentive to invest in doing so. Recall that one of the foundational insights of interest group theory is that legislative demand does not animate itself (Stigler 1971, p. 3; Peltzman 1976, pp. 211–212). With liberal choice of law, only those adversely affected by the law but who lack the resources to avoid its operation remain subject to it. Rather than helping to form interest groups that will push for legal change, the new choice of law regime allows those who oppose the adverse law most strongly and who are likely to have the greatest resources a low-cost exit.

In effect, contractual choice of law creates its own choice: Without the regime, we capture those most motivated and capable of pushing to liberalize adverse law. With the regime, we allow those very persons to exit by contract, and force those least likely to push to change the law to remain subject to it. In effect, liberal contractual choice of law undermines a benign feature of interest group formation and participation. Frustration with existing legal rules is a primary mover in generating groups that will press for change, and liberalized choice of law, ironically, undercuts the incentives for change by removing sometimes beneficial regulatory frustration.

In contrast with the previously identified critiques of liberalized choice of law, the public choice critique is internal, meaning operating from within the framework of economic analysis. The debate over contractual choice of law is not merely about whether the inhibition on contract limits welfare enhancement for those who wish to enter into a contract that includes a choice of law provision; it is also about whether permitting contractual choice of law makes changing the law most costly for those who remain by removing those most likely to push for desired legal change.

Public choice cannot answer the contractual choice of law debate, but it
does refocus the terms by introducing a critical institutional lens through which to consider what appears to be a hidden cost, perhaps even a blind spot, within a more traditional law-and-economics analysis. The regime might be worth the cost, but at a minimum, public choice analysis requires those who prefer the regime to consider this overlooked cost.

3.3.2 The Export Tax Doctrine

The second case study involves a rule within the larger body of dormant Commerce Clause case law that has been criticized with the tools of law and economics (Levmore 1983). In this instance, the claimed inefficiency is not forgone private market transactions, but rather, it is the forced subsidization by out-of-state purchasers of Montana’s tax coffers, and thus of its publicly funded goods and services.

In the 1970s, Montana held approximately a quarter of the nation’s total coal reserves and half the nation’s low-sulfur coal reserves. Knowing that oil and gasoline prices were rapidly rising in this period, the Montana legislature decided to impose a 30% severance tax with the understanding that the burden would be borne primarily by out-of-state purchasers. Because low-sulfur coal was a substitute for increasingly costly gas and oil, the Montana legislature rightly anticipated that the severance tax would not substantially diminish out-of-state demand.

The Supreme Court did not apply the conventional dormant Commerce Clause doctrine to the severance tax. Under that doctrine, the Supreme Court generally applies a *per se* rule of invalidity to state regulations that are facially discriminatory and that are motivated by a protectionist interest, and it generally applies strict scrutiny to regulations that possess only one of these two features, meaning to discriminatory laws coupled with a legitimate governmental purpose or to neutral laws coupled with a protectionist interest. Had the Court determined that, despite the law’s neutrality, the goal of exporting part of the state’s tax base was the equivalent of illicit protectionism, it would almost certainly have applied strict scrutiny and struck the tax down.

Instead, the Court distinguished the tax case from regulations more generally, and thus, it focused primarily on the tax’s neutrality without regard to purpose. Both in- and out-of-state purchasers were required to pay the tax, and therefore the Court applied a more relaxed four-part test. Under that test, the Court balanced the benefits Montana derived from the

---

10 Portions of this discussion are adapted from Stearns and Zywicki 2009, pp. 2–6 and Stearns 2003, pp. 64–65.
The Court determined that the tax survived despite its anticipated disproportionate impact on out-of-state purchasers. While the anticipated burden on out-of-state consumers might have suggested unfair apportionment, the Court instead reasoned that, under the balancing test, it was not the judiciary’s role to assess the extent of the burden on one group of taxpayers as compared with another, even when the group claiming the disadvantage is out of state.

Law-and-economics tools provide the basis for criticizing this result. The Montana legislature anticipated that it would be able to enact the tax without substantially affecting out-of-state purchases, at least if we assume that the demand for low-sulfur coal was inelastic and thus insensitive to price. On this assumption, imposing the severance tax, therefore, was not likely to dramatically reduce the amount of coal purchased and, as a result, the incidence of the tax was likely to be borne by consumers, who would continue to make purchases at about the same levels, rather than by the State through a reduction in sales. The external funding of Montana tax coffers appears to support this intuition, with the result that out-of-state purchasers benefitted Montanans, thus lowering their tax burdens an astounding 20 percent.

We can capture the resulting inefficiency in various ways. One approach is to consider the distorting effect of the tax within Montana on the procurement of the government-provided goods and services. The primary disciplining vehicle that ensures relatively efficient procurement of public goods rests on the representational principle dating as far back as M’Culloch v. Maryland (1819). In striking down the Maryland tax on the Second Bank of the United States, Chief Justice John Marshall observed that just as one state would not allow itself to be taxed by another, fearing that absent a political check the other state would abuse its taxation power, the United States Constitution will not permit the State of Maryland to tax a federal entity. In both cases, those citizens subject to the tax have

---

11 “We agree with appellants that the Montana tax must be evaluated under Complete Auto Transit’s four-part test. Under that test, a state tax does not offend the Commerce Clause if it ‘is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.’” Commonwealth Edison v. Montana (1981, p. 617) (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)).


13 In fact, this principle was sufficiently foundational that Marshall concluded that it supported an exception to the general constitutional structure under which states reserve all powers not delegated to the federal government, an intuition formally reflected in the Tenth Amendment. Instead, Marshall reasoned that the
no effective means with which to hold those imposing the tax politically accountable.

Applying this analysis to the Montana tax reveals an anomaly. Chief Justice Marshall suggested the obvious difficulty of allowing one state to tax another state as a relatively intuitive case. This then supported his analysis in the actual, and somewhat more difficult, case involving a state-imposed tax on a federal bank. Applying Marshall’s logic, the Montana tax, which directly burdened purchasers from another state, might be even more vulnerable to being struck down on constitutional grounds. Despite this, the Supreme Court sustained the Montana tax against a dormant Commerce Clause challenge. The Commonwealth Edison Court appears to have let Montana get away with taxation minus representation, a result that appears not only unfair but also inefficient, given the distorting effect on the procurement within Montana of public goods and services.

Once again, public choice is helpful in reframing the issues that surround this doctrine and in providing possible normative support for the seemingly problematic rule. We return, once more, to the political dynamics that gave rise to the challenged severance tax. Based on the prior doctrinal summary, it is clear that members of the Montana General Assembly appreciated that the Supreme Court’s dormant Commerce Clause doctrine prohibited a facially discriminatory tax, one that imposed burdens on out-of-state purchasers not borne by in-state purchasers. As a result, the Montana legislators devised a neutral severance tax, one that applied equally to all purchasers based on quantity rather than point of destination. Because the case involved a tax, and because the tax was neutral, Montana successfully argued against applying either the per se rule of invalidity or strict scrutiny. In fact, the state ultimately succeeded in having a lax test apply, one that was the functional equivalent to rational basis scrutiny.

Although the severance tax threatened to promote a seemingly inefficient incentive to provide government goods and services funded by out-of-state purchasers, the public choice analysis reveals two countervailing considerations. First, if the Supreme Court were to strike down the challenged severance tax based upon considerations of fairness to out-of-state coal purchasers, the precedent would create seemingly intractable burdens on future courts presented with challenged tax policies that impose differential burdens on taxpayers, but that do so in less stark terms than

power to tax a federal entity could not have been a reserved state power because it was not a power that the states initially held (M’Culloch v. Maryland 1819, p. 430). For a more contemporary application of the same principle, see U.S. Term Limits Inc. v. Thornton (1995, p. 803).
those characterized by the immediate case (Coenen 1997). Determining the acceptable incidence of a state-imposed tax burden on particular payers residing in or out of state is not conducive to clearly articulable judicial standards. For that reason, questions of tax fairness are generally left to political processes to resolve.

The second institutional consideration returns us to both interest group theory and game theory. Low-sulfur coal is a scarce natural resource that is stochastically dispersed among states. Allowing Montana to impose its severance tax on coal undoubtedly burdens out-of-state purchasers, at least assuming that the demand function is relatively inelastic, and it is not the sort of state law that is likely to provide out-of-state purchasers with a meaningful opportunity to reciprocate against Montana.

The Supreme Court’s dormant Commerce Clause doctrine can be best understood as promoting two sets of concerns. The Supreme Court is most apt to strike down challenged state laws under this doctrine when those laws would adversely affect the legal policies of other states, or stated differently, when those laws produce political, as distinguished from economic, externalities. These rules can best be captured in terms of two combined games, the prisoners’ dilemma and the driving game (Stearns 2003, pp. 82–97; see also Henry and Stearns 2012). In the context of state laws implicating the prisoners’ dilemma, the Supreme Court is most likely to strike down state laws that if sustained would encourage interest groups in other states to exert pressure to enact similar protectionist laws. The result of such a regime is mutual defection in which each state caters to its domestic industry at the expense of the national interest in free trade. The driving game cases arise when states have coordinated around a common pro-commerce regulatory regime, for example permitting a common truck type or mud flap, and when a single state seeks to offload the burdens of commerce by enacting a contrary law. Unlike the prisoners’ dilemma, when this situation arises, there are two preferred strategies, and each involves a coordinated regime. What makes these cases unusual is that, had the other states coordinated around the defecting state’s selected regime originally, the defecting strategy would still have resulted in the defecting state enacting a contrary law. The dormant Commerce Clause doctrine allows the Court to ensure conformity to the prior dominant rule.

This brief doctrinal background is sufficient to explain why the Supreme Court took a different approach in assessing the constitutional challenge to the Montana severance tax. Sustaining the Montana severance tax did

---

14 In the technical language of game theory, these correspond to pure Nash equilibrium strategies. For a discussion of the concept, see Chapter 4.
not threaten to generate either of these adverse games, which have been the traditional focus of the dormant Commerce Clause doctrine. The actual case result, sustaining the law based on a relatively deferential four-part test, produced an isolated wealth transfer from out-of-state purchasers to Montana citizens. It did not, however, threaten to generate reciprocal laws that undermine the objective of national political union among states and that therefore lie at the core of the dormant Commerce Clause doctrine as seen in the prisoners’ dilemma cases. In addition, the tax did not disrupt any benign coordinated legal regime that facilitates the flow of commerce among states, as seen in the driving game cases. Conversely, striking down the law would encourage future parties adversely affected by neutral tax regimes in other states to challenge laws with less dramatic effects. The Court would then be confronted with the obligation to develop a body of case law that fleshed out what is, and is not, unfair tax apportionment.

Once again, the analysis does not resolve the issues presented in Commonwealth Edison or prove the existing legal regime correct. What it does accomplish, however, is to change the terms of the debate in a manner that could justify the decision.

3.3.3 Standing

We now turn to our final case study, which involves standing, one of the most important, and contentious, Supreme Court doctrines. Among the most criticized features of modern constitutional jurisprudence, standing doctrine governs the conditions under which litigants who otherwise satisfy the statutory and rule-based jurisdictional criteria are permitted to press their claims in federal court. The US Supreme Court has divided the standing requirements into elements that are constitutional, meaning rooted in the Article III case-or-controversy requirement, and prudential, meaning rooted in policy considerations associated with the Court’s view of the nature of the proper role of judicial decision-making. The combined standing rules are notorious for seemingly inconsistent applications. While black-letter standing rules are easy to articulate, claimed inconsistent applications have led jurists and academic commentators to question the doctrine’s purposes and legitimacy.

To satisfy the constitutional prerequisites to standing, a claimant must show: (1) that he or she suffered an injury in fact; (2) that the injury caused the claimant identifiable harm; and (3) that judicial relief will afford the

15 Portions of the discussion that follow are based upon or taken from Stearns (1995a, b, 2008) and Stearns and Zywicki (2009, pp. 460–464).
Methodologies of law and economics

claintant meaningful redress for that injury. Under the Court’s prudential-standing rules, a litigant is presumptively prevented from raising the claims of others (known as third-party standing) or claims that are legally diffuse. A somewhat harder-to-articulate prudential-standing barrier, illustrated by two cases described below, prevents claims challenging as unconstitutional laws or regulations that allegedly interfere with the beneficial flow of market forces, and which, if struck down, would eventually inure to the claimant’s benefit. As shown below, we can characterize such cases as presumptively asserting that there is “no right to an undistorted market” (Stearns, 2002).

Some claim that standing doctrine’s manipulability reveals a set of underlying political motivations concerning the outcomes of contentious cases. Others contend that standing provides the Supreme Court with the means to avoid resolving divisive high-profile cases while offering a low-cost signal as to how it might resolve similar issues in the future. The Supreme Court has issued repeated – if circular – admonitions that standing ensures that disputes take proper judicial form. Although simultaneously demanding a proper judicial form and zealous advocacy, the Court has counterintuitively denied standing to highly effective public-interest organizations – for example, the Sierra Club or the National Association for the Advancement of Colored People Legal Defense Fund – instead favoring individual claimants possessing substantially fewer resources with which to press their claims.

Justice William O. Douglas once famously asserted, in Association of Data Processing Service Organizations, Inc. v. Camp (1970, p. 151), that “[g]eneralizations about standing to sue are largely worthless as such.” Despite this admonition, a few observations about standing are helpful in framing the doctrine’s historical and policy dimensions. Although the standing metaphor traces its roots to federal equity practice contemporaneous with the framing and early post-Constitution periods (one must stand at the bar of the court to invoke its equitable powers), modern standing doctrine is generally ascribed to a later period associated with the rise of the administrative state and the resulting New Deal progressivism of the 1930s (Winter 1988). Yet the New Deal standing doctrine served substantially different purposes, and took a different doctrinal form, than its more recent judicial counterpart, most notably in the Burger and Rehnquist Courts.

The New Deal Court devised standing to insulate rapidly changing progressive interpretations of substantive constitutional doctrines, including

---

16 For a contrary argument that situates certain modern standing elements in the context of an earlier period of federal judicial practice, see Woolhandler and Nelson (2004).
non-delegation, due process, and the Commerce Clause, from repeated challenges in the entrenched conservative lower federal judiciary. During this period, standing doctrines took the form of common law-based default rules (Fletcher 1988, pp. 224–225). Absent congressional guidance taking the form of a statutory specification as to who has or who lacks standing, the federal courts would seek guidance by analogy to the common law. If the claim resembled those in which common law litigants were traditionally able to sue, that counseled in favor of standing, and if the claim did not, that counseled against standing. In either case, however, Congress had the power to alter these presumptive determinations concerning the scope of standing to enforce or challenge federal regulation by specifying who had or who lacked standing by statute.

Following a period of liberalized standing that helped facilitate the Warren Court’s rights-based jurisprudence, the Burger and Rehnquist Courts retrenched on standing, making it a centerpiece of their more conservative jurisprudence. The Burger and Rehnquist Courts divided standing rules into constitutional and prudential components, grounding the constitutional elements in the Article III case-or-controversy requirement. Although the Court generally afforded Congress substantial latitude to broaden standing by statute, in *Lujan v. Defenders of Wildlife* (1992), a narrow Rehnquist Court majority for the first time held that claimants relying on a broad citizen-standing provision in a federal environmental statute had to demonstrate a nexus, or linkage, between a claimed personal injury and the alleged legal violation that was reminiscent of common law notions of injury. In such cases as *Allen v. Wright* (1984), the Court had grounded standing doctrine in the separation-of-powers concern that the federal judiciary not interfere with the power of Congress to monitor the executive branch, whereas Justice Antonin Scalia, writing for the *Lujan* majority, instead grounded standing in Article II and the very different concern that the federal judiciary not interfere with the proper exercise of executive discretion.

Early commentators were quick to condemn *Lujan* as an affront to traditional separation-of-powers principles (e.g., Sunstein 1992). Under such principles, it is ironic to protect congressional monitoring of executive powers by invalidating the standing provision of a federal statute through which Congress created a private attorney-general mechanism designed to enhance such monitoring.

The claimed doctrinal inconsistencies are perhaps no more pronounced than in the final standing category – no right to an undistorted market.

Illustrating this final category will not only help to demonstrate the nature of standing’s notorious doctrinal inconsistencies, but also it will lay the foundation for an alternative positive account of standing grounded in the theory of social choice.

In *Allen v. Wright*, the Supreme Court prevented a nationwide class of African-American parents from suing under the Fourteenth Amendment equal protection clause to challenge an Internal Revenue Service policy that automatically afforded tax-exempt status to organizations under the umbrella of another already tax-exempt entity. Claimants maintained that the effect was to provide such status to a nationwide group of private elementary and secondary schools alleged to discriminate on racial grounds. Although the claimants contended that the challenged policy adversely affected integration in the public schools that their children attended (by subsidizing “white flight”), the Court denied standing on the ground that parties of interest not before the Court (including parents and school officials) controlled multiple links in the chain of causation between striking down the challenged Internal Revenue Service policy and any claimed adverse effects with respect to the racial composition of those public schools. In other words, achieving the desired result of integration turned in substantial part on the decisions of several actors, not all of whom were parties to the *Allen* case.

By contrast, in *Board of Regents v. Bakke* (1978), the Court afforded standing to a rejected medical school applicant who alleged that the school’s race-based affirmative action program, which set aside 16 out of 100 seats for specified minorities, violated the equal protection clause. The *Bakke* Court determined that the rejected applicant was injured in his inability to apply for all 100 seats and thus had standing. The difficulty is that, while the *Bakke* Court granted standing, Bakke’s ultimate admission, like the desired public school integration in *Allen*, turned on an equally complex series of decisions by parties not before the Court. In *Bakke*, this included, for example, decisions of officials at the University of California-Davis and other medical schools and of other minority and non-minority applicants. In both *Allen* and *Bakke*, the claimants had challenged a rule based upon equal protection that they alleged interfered with market conditions (for public school integration and for admission to medical school, respectively) to their detriment. Yet the *Allen* Court denied standing, while the *Bakke* Court granted it.

Comparing the doctrinal standing elements with those in a tort action for negligence – injury, cause in fact, proximate cause, and breach of duty – will help to place these and other doctrinal anomalies in a proper context. In tort, the risk of attenuated causation has resulted in splitting factual, or *but-for*, cause from legally recognized, or *proximate*, cause. In standing, by
contrast, the attenuation problem instead centers on the question of injury. Indeed, several of the most contentious standing decisions – including *Allen* and *Bakke* – can readily be cast in terms of whether the claimant has suffered a cognizable judicial injury. As William Fletcher has explained, however, we cannot dismiss an allegation of injury other than to assert that the claimant is lying (Fletcher 1988). Instead, standing’s injury prong necessarily devolves to the question whether a federal court will credit as a matter of legal policy particular categories of claimed injuries for purposes of justiciability. Fletcher further contends that the answer to this question turns on the substantive content of the underlying legal source upon which the plaintiff relies in asserting a particular claim.

Turning to the prudential-standing barriers will help to explain the analytical impasse associated with standing’s injury requirement. Consider the case of *Gilmore v. Utah* (1976). Gary Gilmore’s mother was denied standing to press her son’s constitutional claims in a case that resulted in his conviction for capital murder and sentence of death. While the Supreme Court readily dismissed her claim as contravening the rule against third-party standing, a simple expedient could, in theory, have avoided that seemingly intuitive result. If Mrs. Gilmore (or anyone else) had recast her claim to state that, without regard to Gary Gilmore’s welfare, as a citizen of the United States she was offended that someone was scheduled to be executed in violation of the Constitution, then whatever the merits of the underlying constitutional claim, there would no longer be any problem associated with third-party standing. However strong or weak the claim, it affects her as a first-party, rather than third-party, claimant.

This seeming play on words underscores the function of the second prudential-standing barrier, the presumptive prohibition against diffuse-harm standing. In theory, any person seeking to present a third-party claim could recast it as a first-party claim, but in doing so, would most often be forced to articulate a claim that fails to distinguish the claimant from the public at large. The claimant, like members of the public in general, is offended that the government has engaged in a course of conduct in violation of the law that has adversely affected someone, somewhere. The presumptive barrier against diffuse-harm standing thus limits the power of litigants to translate third-party harms into first-party claims. At the same time, however, if we assume such persons to be truthful, the rule effectively prevents litigants from seeking to vindicate certain classes of first-party claims by holding those claims off limits unless and until they emerge in a context that is no longer diffuse, but rather is specific to an individual.

Once again, this brings us back to the tort-standing connection. As Benjamin Cardozo famously observed, “proof of negligence in the
air . . . will not do.” Instead, a litigant must await an act of negligence that produces actual injury to bring suit. Even then, the injury must affect the claimant rather than some other person. Whereas allowing claims for hypothetical negligent acts that have not yet caused injury as the basis for suit might prevent actual future injury, the common law tort system insists that we wait. Most hypothetical acts of negligence never cause injury, and so the actual tort regime simultaneously conserves scarce judicial resources and ensures that those cases actually litigated arise in contexts that are most likely to produce actual harm.

In evaluating standing, however, the tort comparison only takes us so far. However important conserving judicial resources may be, it is an unlikely justification for standing’s injury requirement. If standing doctrine was initially motivated by the progressive desire to insulate emerging administrative programs from judicial attack, from the perspective of later conservative jurists who disfavored progressivism, the attendant costs of such programs almost certainly exceeded the value of saved judicial resources resulting from strict standing doctrine. Yet the generally conservative Burger and Rehnquist Courts not only placed great stress on standing doctrine, but also gave it a constitutional cast initially grounded in the Article III case-or-controversy requirement.

Once again, public choice provides the basis for an alternative account of this seemingly problematic doctrine. This time the analysis requires the introduction of tools from social choice. The social choice account of standing suggests that standing doctrine in the Burger and Rehnquist Courts served a very different purpose than it had in the earlier New Deal period. The New Deal Court developed standing to insulate its own rapidly changing substantive doctrine from challenge in conservative lower federal courts. By contrast, the Burger and Rehnquist Courts redeployed standing to ensure a different form of judicial discipline, one less concerned with controlling lower federal courts with which it disagreed than with ensuring the predictability of its own outputs. For historical reasons, the Burger and Rehnquist Courts (and continuing into the Roberts Court) tended to be characterized by no fewer than three persistent, but non-dominant, camps. These included not only liberal holdovers from the earlier Warren Court era, but also conservative appointees whose task it was to restore the liberal Supreme Court to a more modest role. The difficulty is that the conservative jurists split into two camps, those willing to affirmatively retrench on an earlier generation of liberal precedent with which they disagreed, even if that meant direct overruling, and those who took a more process-oriented

middle ground, one that respected precedent, but that was not willing to expand upon disfavored liberal doctrines.

Not surprisingly, this new set of coalitions produced its own set of anomalies as the so-called moderate conservatives, including Justices Potter Stewart, Lewis Powell, Sandra Day O’Connor, and, currently, Anthony Kennedy, forged sometimes unpredictable alliances with justices ideologically to their right or left. In doing so, they increased the number of analytical frameworks for addressing newly presented constitutional issues. A major insight of social choice is that increasing the number of options also increases the likelihood that the decision-makers will view those options as implicating more than a single normative dimension, for example, liberal to conservative. When this occurs, the Court’s members are less likely to have a common center of gravity or dominant median position, which presupposes a common normative frame of reference. Stated differently, as the members of the Court offer an increasing number of analytical frameworks, this reduces the likelihood that the members will settle on a common framework that helps facilitate meaningful compromise. Instead, the Court’s members were increasingly prone to holding intransitive, or cyclical, preferences, at least with respect to an important subset of divisive constitutional issues.

Social choice demonstrates that, in a group with three or more individuals, each of whom holds transitive preferences (meaning A preferred to B preferred to C implies A preferred to C), the assumption of transitivity will not always characterize the preferences of the group as a whole. For example, in a group holding certain ordinal preferences (ABC, BCA, CAB), a regime of simple majority voting over all conceivable pairwise comparisons reveals a “cycle,” such that separate and overlapping majorities prefer A to B and B to C, but C to A. When such a cycle arises, a common method of ensuring a stable outcome involves limiting the number of choices relative to options. In parliamentary procedure, for example, rules that limit reconsideration of defeated alternatives accomplish this objective by disallowing the requisite number of binary comparisons to disclose that a previously defeated alternative is preferred in a direct comparison by majority rule to the option that ultimately prevailed. In appellate courts, *stare decisis*, or presumptive adherence to precedent, proves the judicial equivalent of this time-honored cycle-breaking rule. The difficulty is that, by preventing reconsideration of once-defeated alternatives, *stare decisis* ensures that, in at least some instances, substantive outcomes will turn on the order in which cases are presented for review.

A social-choice analysis of standing demonstrates that, although *stare decisis* renders developing doctrine to some extent arbitrary, or path dependent, the results are normatively legitimate provided that the critical
path of case decisions is governed by fortuitous events, those beyond the
control of the litigants themselves, rather than by the efforts of ideologi-
cally motivated interest groups to press cases in the most beneficial order
for purposes of advancing their substantive doctrinal agenda.

In this analysis, the various standing rules – requiring injury in fact, cau-
sation and redressability and presuming against third-party and diffuse-
harm standing – all increase the probability that those seeking to litigate
in federal court are doing so as a means of securing judicial relief, despite
any precedent that they might create along the way, rather than as a means
of creating a precedent, despite an attenuated connection to actual judicial
relief. While the *Allen* and *Bakke* cases appear in tension, this framework
provides a basis for reconciliation. Both cases involve challenges to govern-
mental practices alleged to violate equal protection, which if struck down
would benefit the claimant or, in *Allen*, the claimants’ children. Yet *Allen*
possesses characteristic features that pulled in favor of presuming a desire
to affect precedent (seeking to strike a law affecting a nationwide class)
with little prospect of specific litigant relief, while *Bakke* possessed features
that instead favored presuming the need for specific judicial relief (striking
a single school’s offending policy to allow one person to study medicine) in
spite of the case’s potential precedential implications.

The difficulty that the Burger and Rehnquist Courts confronted was that
litigants were motivated to time case orderings to maximum effect as a means
of affecting a desired path of precedent. The constitutional and prudential
standing rules articulated in those Courts combine to make more difficult
the ability of litigants to control case orderings to affect desired substantive
document. By insisting upon an injury, affecting the claimant, that is condu-
cive to traditional judicial redress, the Court is in effect demanding a random
set of determinants governing the order of cases that could affect constitu-
tional doctrine. The prudential rules further these normative considerations
by removing obvious categories of cases – those affecting other persons or
affecting persons generally – that would enhance the power of ideologically
motivated litigants to favorably manipulate case orderings. The cases in the
final category – no right to an undistorted market – can be explained based
upon which set of characteristic features dominate, those that correlate with
the desire of a litigant to obtain relief or those that correlate with the desire
of the claimants to push law in a more favorable direction.

Standing remains, and will continue to remain, a contentious body
of case law, no less so in the Roberts Court. 19 This short chapter cannot

---

19 See, for example, *Spokeo Inc. v. Robins*. For my analysis of this case, see
provide a comprehensive review, but rather, it was intended to demonstrate the value of viewing this doctrine with the tools of public choice.

3.4 CONCLUSION

Economic analysis rarely provides definitive answers to policy questions. What it instead does is identify critical tradeoffs, tradeoffs that change the nature of the questions worth asking. In this chapter I did not provide a complete analysis of any of the three doctrines discussed — contractual choice of law, the export taxation doctrine, and standing. Instead, I provided an alternative lens that provides the basis for answering some of the important criticism of these doctrines. Resolving the ultimate questions concerning these and other questions of law requires us to consider and challenge our premises, and those premises are informed by a variety of perspectives, including several introduced in this volume. By helping to reframe the underlying questions, public choice can also help sharpen the debate on critical issues of law and public policy.

ACKNOWLEDGMENT

Special thanks to Chelsea Jones and Laura Tallerico for their excellent research assistance and to Sue McCarty for her outstanding library support.

REFERENCES

Books and Articles


Methodologies of law and economics


**Cases**

**Supreme Court**


**Other**