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Abner S. Greene

Fordham University School of Law

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INTERPRETIVE SCHIZOPHRENIA: HOW CONGRESSIONAL STANDING CAN SOLVE THE ENFORCE-BUT-NOT-DEFEND PROBLEM

*Abner S. Greene**

INTRODUCTION

Section 3 of the Defense of Marriage Act (DOMA) provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹

On February 23, 2011, Attorney General Holder informed House Speaker Boehner by letter that President Obama had determined that section 3 is unconstitutional as applied to “same-sex couples who are legally married under state law.”² Heightened scrutiny should apply, wrote Holder, and accordingly the Department of Justice (DOJ) would not defend section 3 in circuit courts where the question of the appropriate level of scrutiny was still open.³ The DOJ would defend the statute, however, were a circuit to determine that only the rational basis test need apply.⁴ Holder also wrote:

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. This course of action respects

* Leonard F. Manning Professor, Fordham Law School. I am grateful to Pamela Terry for expert research assistance. Thanks also to David Barron, Joe Landau, Ethan Leib, Dan Meltzer, and Aaron Saiger for written comments and tough questions.

1. 1 U.S.C. § 7 (2006).

2. Letter from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

3. *Id.*

4. *Id.*

the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.⁵

This means that if, say, two women are legally married under New York law and seek a federal benefit owed to a married couple, the benefits administrator must say No, the couple could then file a lawsuit, and then the DOJ will refuse to defend. If that were the end of the matter, we'd have a default judgment, but Congress could intervene as a defendant (more on this later), so we'd have a proper case between adverse parties (with, as has happened, the DOJ filing a brief supporting the married couple). This is interpretive schizophrenia⁶: the very same President is enforcing a law he believes to be unconstitutional—and harming people⁷—and then in the next breath refusing to defend the law because he believes it to be unconstitutional. As I'll say a bit about below, the "Take Care Clause" argument is a nonstarter.⁸ The best reason for the "enforce but not defend" position offered by Holder is the justiciability point: that the buck shouldn't stop with the President, as it might if he refused to enforce the law, but rather should stop with the courts or with Congress were it to repeal the law.⁹

There are two possible arguments against this position: one, that it's fine for the buck to stop with the President if he believes the law is unconstitutional;¹⁰ two, that were the President not to enforce section 3, it would be appropriate for Congress to sue the President to seek a judicial declaration regarding the statute's constitutionality, even though there would be no classically injured private party. I'll write briefly about the first possibility and then focus on the second. To summarize: On the first: although the President has broad constitutional interpretive authority, the

5. *Id.*; see also Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 17, 2012), available at http://sldn.3cdn.net/b43c938d6601df41b9_26m6bu2hc.pdf.

6. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 570 (2012) ("The Holder letter . . . is a curious blend of presidential interpretive autonomy and the DOJ's obligations to the courts . . .").

7. See Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 58 (2000) (setting forth harm from presidential enforcement of a law he deems unconstitutional, in a different setting).

8. See *infra* note 22 and accompanying text.

9. See Johnsen, *supra* note 7, at 35, 40, 41, 47–50, 51; see also Memorandum from Walter Dellinger, Assistant Att'y Gen., to Abner J. Mikva, White House Counsel ¶ 5 (Nov. 2, 1994), available at <http://www.justice.gov/olc/nonexecut.htm>. Professor Meltzer also raises a kind of interpretive chaos concern with "a regime in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress." Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1228 (2012). The alternative of the executive presumptively kowtowing to Congress and to the courts is not particularly attractive, though, and if the President exercises appropriate interpretive humility (as should all three branches), we might achieve true multi-branch constitutional dialogue. See *infra* note 13.

10. See Devins & Prakash, *supra* note 6, at 509; see also Meltzer, *supra* note 9, at 1224 (describing the argument).

passive virtues apply to him as well as to the Article III courts,¹¹ and going it alone makes less structural constitutional sense than involving both Congress and the courts. On the second: We should be open to congressional lawsuits in settings such as this, and there's a net gain from operating this way as opposed to creating scores of injured private parties who then have to engage in litigation.¹²

I. PRESIDENTIAL INTERPRETATION

There is no interpretive obligation in constitutional law. Or rather, there shouldn't be. In other words, when interpreting the U.S. Constitution, one need not defer to either prior or higher authority, even merely presumptively. Prior authority: neither the original intent (understanding) of the framers (or ratifiers) nor the original public meaning of the Constitution's text is binding on present-day interpreters. The same goes for precedent. Higher authority: what the Supreme Court thinks the Constitution means, at any moment in time, is not binding on other government officials (except that court judgments are binding). I have developed these arguments recently¹³ and will say only a bit about them here. The President has constitutional interpretive authority coordinate with that of Congress and the federal courts. Sometimes called "departmentalism," the idea is that the Constitution doesn't place interpretive authority in the courts alone; each branch of government must interpret the Constitution in carrying out its functions.¹⁴ One function of

11. See Joseph Landau, *The President and the Passive Virtues* (Sept. 6, 2012) (unpublished article) (on file with author).

12. There are several recent examples of federal benefits denied to legally married same-sex couples because of DOMA section 3. See, e.g., *Windsor v. United States*, 833 F. Supp. 2d 394, 397–98 (S.D.N.Y. 2012), *aff'd*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 15, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012) *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 379–84 (D. Mass. 2010), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012). In a nod to the difficult position the President is in when denying benefits he believes are constitutionally due, the DOJ filed in the Supreme Court a petition for a writ of certiorari before the Ninth Circuit's judgment in *Office of Personnel Management v. Golinski*, arguing for this unusually expedited review in part because "[e]xecutive departments and agencies will continue to deny federal benefits to scores of affected individuals until this Court reaches a definitive resolution of the question presented." *Petition for a Writ of Certiorari Before Judgment at 15, Office of Pers. Mgmt. v. Golinski*, No. 12-16 (U.S. July 3, 2012).

13. See ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* chs. 3–4 (2012).

14. See, e.g., Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1421 (1999); Devins & Prakash, *supra* note 6, at 522, 526–32; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905 (1990); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1995); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 778–79 (2002).

the President is executing the laws, and he must interpret the Constitution in doing that, as well as in performing more unilateral tasks, such as exercising the pardon, veto, or commander in chief powers.¹⁵

As have others, I reject the following arguments for a more deferential presidential posture: that he should interpret the Constitution as he believes the Supreme Court would;¹⁶ that the presidential oath requires a more deferential approach;¹⁷ that the Take Care Clause does, as well;¹⁸ and that the President's power to resist legislation as unconstitutional ends with the veto power.¹⁹ The first argument is directly contradictory to the tenets of departmentalism.²⁰ The oath argument turns on an understanding of faithful execution, or of preserving, protecting, and defending the Constitution, as including deference to Congress (and the Courts), but that position begs the question whether faithful execution et al. require deference rather than (at least some degree of) interpretive independence.²¹ The same can be said of the Take Care Clause argument, i.e., whether taking care that the laws are faithfully executed requires deferring to Congress' (or the courts') view of constitutionality is the question to be discussed; maybe faithful execution means the President should not enforce

15. *But see* Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35, 37–38 (1993) (generally endorsing departmentalism, but less so regarding nonenforcement of domestic legislation; there he urges more deference to Congress).

16. *See* Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 116 (2000); Memorandum from Walter Dellinger, *supra* note 9, ¶ 4; *see also* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 113 (1993). David Strauss's views are halfway between the positions of Walter Dellinger, *see supra* note 9, and David Barron, *see infra* note 20.

17. *But see* Devins & Prakash, *supra* note 6, at 521–22, 523–26; Prakash, *supra* note 14, at 1616 (in both pieces, arguing that the oath prevents the President from enforcing laws he deems unconstitutional).

18. *But see* Devins & Prakash, *supra* note 6, at 522, 532–35; Prakash, *supra* note 14, at 1616 (in both pieces, arguing that the Take Care Clause prevents the President from enforcing laws he deems unconstitutional).

19. *See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 867 (1994).

20. *See* Prakash, *supra* note 14, at 1674; *see also* David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 81, 88 (2000) (arguing that it doesn't make sense for the President to defer to the Court when the Court's interpretive structure is based on complex tiers of deference to the political branches, and he adds that enforcement to tee up justiciability might matter only if the courts need to resolve relative interpretive authority of the President versus Congress).

21. *See* Meltzer, *supra* note 9, at 1195–96.

laws he believes to be unconstitutional.²² Finally, I join those who believe the veto power to be one stage, (non)enforcement decisions, another.²³

Although the arguments for presidential constitutional interpretive authority are strong—even in executing domestic legislation—Professor Prakash goes too far when he argues that the Constitution requires the President to “disregard unconstitutional statutes.”²⁴ The President, no less (or more) than the other branches, should engage in interpretive humility;²⁵ part of doing his job properly may involve (at least in some instances) deference to other branches’ views of constitutional meaning. My arguments against interpretive obligation are not arguments against judicial review, and inter-branch interpretive dialogue is enhanced when the President gives the courts an opportunity to weigh in on his (non)enforcement decisions based on his reading of the Constitution. Although judicial review may be less important for some President-Congress battles, enforcement *vel non* of domestic legislation usually implicates private parties in one way or another, and thus we should consider appropriate mechanisms for judicial involvement.

If the President declines to enforce a law because he deems it unconstitutional, Congress sues, the case goes to the Supreme Court, and the Court rules in favor of Congress, I am assuming the Court would issue a declaratory judgment, telling the President that his constitutional basis for nonenforcement is incorrect. How one thinks about what the President may do next depends on what sort of departmentalist one is. The weakest departmentalism would just grant the President authority to interpret the Constitution when engaged in unilateral functions such as the veto and the pardon. The strongest departmentalism would go all the way to permitting the President to disobey a court judgment in a specific case. My departmentalism is somewhere between these two; I have argued that the President may interpret the Constitution when enforcing the law and when deciding how to account for judicial precedent, but not that he may disobey court orders.²⁶ For the President to continue nonenforcement in the face of the Court’s declaring his constitutional interpretation wrong would not

22. *See id.* at 1192–96. Although I am generally sympathetic with Professor Prakash’s arguments for departmentalism, his insistence that the presidential oath and the Take Care Clause require the President to refrain from enforcing laws the President deems unconstitutional, *see supra* notes 17–18, is just as problematic as the opposing view, i.e., that the oath and the Take Care Clause require deference to Congress and the courts. Whether faithful execution requires deference, independence, or something in between, cannot be answered by the language of the presidential oath or the Take Care Clause. Structural arguments, and arguments from applied political-constitutional theory, are needed.

23. *See* Devins & Prakash, *supra* note 6, at 536–37; Prakash, *supra* note 14, at 1633–35; *see also* Memorandum from Walter Dellinger, *supra* note 9, ¶ 7.

24. Prakash, *supra* note 14, at 1616. *See generally* Devins & Prakash, *supra* note 6.

25. *See* Barron, *supra* note 20, at 90, 92; Johnsen, *supra* note 7, at 17; Dawn E. Johnsen, *What’s a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 412 (2008); Memorandum from Walter Dellinger, *supra* note 9, ¶¶ 3–4.

26. *See* GREENE, *supra* note 13, at 54, 215, 217, 228–32.

strictly speaking constitute defying a court order, but neither should we consider it merely disregard of precedent. The President should not continue his constitutionally based nonenforcement unless he has very good reasons to countermand the Court. What factors a President should consider is something I'll leave for another day.

II. CONGRESSIONAL STANDING

Had President Obama stuck to his interpretive guns and stopped enforcing section 3 of DOMA, legally married same-sex couples would receive federal benefits that legally married opposite-sex couples receive. There would be no classically injured private party; with an (increasingly narrow) Establishment Clause exception,²⁷ arguably illegal expenditure of federal funds does not usually ground standing in citizens or taxpayers. But in this scenario, the President is treating a properly enacted law as if it were no law at all. (This isn't simply a matter of enforcement discretion.) That action arguably injures the United States of America as a public corporate entity, and it arguably injures Congress, as the body that passed the law. (Whether with or without a presidential signature should not matter.) After all, if, for example, a state court invalidates a federal statute as unconstitutional, the United States, through the DOJ, may appeal that ruling, all the way up to the U.S. Supreme Court.²⁸ There, the DOJ is representing the United States, as a party injured by the state court ruling. When such a case reaches the Supreme Court, there have to be properly adverse parties to ground Article III standing, and the U.S., seeking to un-nullify its law, is such a party. If the President in effect nullifies a federal law by refusing to enforce it on constitutional grounds, things are no different than if a court declares a federal law unconstitutional. In both settings, the United States as a governmental body is harmed and should be allowed to seek judicial review in federal court. Since the President (and his DOJ) are unavailable to defend the constitutionality of a statute the President has decided neither to enforce nor to defend, it makes sense to permit Congress to seek a declaratory judgment as to the statute's constitutionality. Congress gets to represent the United States, to defend the constitutionality of a law it has passed, and to involve the third branch, the judiciary, in the constitutional determination. There are procedural complexities I'll cover in Part IV—who precisely is suing, on behalf of whom, and with what authorization. Until then, assume that Congress is suing, on behalf of either the United States or itself, with appropriate authorization.

27. See *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968). *But see* *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982).

28. See, e.g., 28 U.S.C. § 517 (“Interest of United States in pending suits.”).

The leading case about congressional standing is *Raines v. Byrd*,²⁹ and it distinguishes another important case, about state legislative standing, *Coleman v. Miller*.³⁰ In *Raines*, a group of U.S. Congresspersons sued in federal court to invalidate the Line Item Veto Act, claiming that the Act improperly aggrandized presidential power.³¹ The Court threw the case out, on standing grounds.³² Plaintiffs' claim, said the Court, "is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally [Plaintiffs] do not claim that they have been deprived of something to which they personally are entitled" ³³ There are three separate ideas embedded in this passage: first, that diminution of legislative power is insufficient injury for Article III standing; second, that members of Congress may not sue in federal court in their official capacity; third, that whatever injury is present is too widely shared, and not specific enough.

The first ends up being most important, because of how the Court treats *Coleman*. There, the Kansas State Senate deadlocked 20–20 on a federal constitutional amendment, and the Lieutenant Governor cast a tie-breaking vote in favor (and the State House voted yes).³⁴ Plaintiffs, in state court, were the 20 state senators who had voted no;³⁵ one of their merits arguments was that Article V of the U.S. Constitution grants amendment-ratifying power to state legislatures, which may not include the state executive. If they were right on this merits point, the amendment should have been defeated in Kansas, rather than approved. *Coleman* permitted the state senate plaintiffs, who had lost in state court, to perfect an appeal to the Supreme Court:

Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.³⁶

29. 521 U.S. 811 (1997).

30. 307 U.S. 433 (1939).

31. *Raines*, 521 U.S. at 811. This is a claim with which the Court later agreed, once it could identify some properly injured parties. See *Clinton v. City of New York*, 524 U.S. 417 (1998).

32. *Raines*, 521 U.S. at 811.

33. *Id.* at 821 (emphasis omitted).

34. *Coleman*, 307 U.S. at 435–36.

35. *Id.* at 436.

36. *Id.* at 438. In *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court held that if a state court plaintiff lacks what would be sufficient federal court standing, merely losing in the state courts cannot supply the injury necessary to bring an appeal to the U.S. Supreme Court. *Id.* at 434–35. Judge Bork suggested that after *Doremus*, *Coleman* might no longer be good law. See *Barnes v. Kline*, 759 F.2d 21, 63 n.16 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987) (mootness). But this isn't right; the state legislator plaintiffs in *Coleman* did allege standing specific to themselves—that their votes were nullified by the Lieutenant Governor's

Raines confirmed *Coleman*'s validity:

[O]ur holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.³⁷

In other words, “[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here.”³⁸ The argument for legislative standing, thus, is not that the law in question arguably impinges on legislative power or improperly adds to executive power. Rather, the argument is that legislators have standing to make sure that laws don’t become non-laws, and to make sure that non-laws don’t become laws.³⁹

When the President declares that he won’t enforce a federal statute because he deems it unconstitutional, he has completely nullified the votes of those in favor of the law, and arguably under *Coleman* any one or more of those who voted for the law may sue to set aside the President’s nonenforcement decision. After canvassing some lower court cases on both the *Raines* and *Coleman* sides of the ledger, I’ll discuss some serious separation of powers arguments against legislative standing. One conclusion is that we might indeed be wary of permitting individual federal legislators, or groups of such, to claim sufficient injury, but that if we see presidential nullification of a statute in a different light, we can see that it injures the United States or Congress, or perhaps either house, as an institution.

Several post-*Raines* cases fall on the *Raines* side of the ledger. In *Russell v. DeJongh*,⁴⁰ a Virgin Islands senator sued to set aside judicial commissions, claiming that the governor had failed to follow proper procedure. The Third Circuit dismissed the case for lack of standing:

The courts have drawn a distinction . . . between a public official’s mere disobedience of a law for which a legislator voted—which is not an

improper action. If we accept this claim of legislative injury (as *Coleman* did and as *Raines* reaffirms), there’s no *Doremus* problem. See *id.* at 28 n.15 (*Coleman* plaintiffs had injury cognizable for federal standing purposes).

Note that the principal opinion in *Coleman* is for three Justices only; they concluded that plaintiffs had standing and that the case should be dismissed as a nonjusticiable political question. See *Coleman*, 307 U.S. at 450. Four other Justices thought there was no standing, but agreed with the plurality that the case presented a nonjusticiable political question, although on somewhat different reasoning. See *id.* at 457–58 (Black, J., concurring). The remaining two Justices went straight to a merits issue, concluding that too much time had elapsed since the constitutional amendment in question had been initially proposed, and thus that Kansas’ purported ratification came too late. See *id.* at 471–72 (Butler, J., dissenting). To reach the merits, these two Justices must have believed standing was present.

37. *Raines*, 521 U.S. at 823.

38. *Id.* at 826.

39. For “law” we can substitute “legislative action” to cover the unusual nature of what was at stake in *Coleman*.

40. 491 F.3d 130 (3d Cir. 2007).

injury in fact—and an official’s “distortion of the process by which a bill becomes law” by nullifying a legislator’s vote or depriving a legislator of an opportunity to vote—which is an injury in fact.⁴¹

One aspect of the reasoning was that the legislature could still have voted down the judges; this will be relevant to the upcoming separation of powers discussion and to the question whether and to what extent legislative self-help opportunities should affect legislative standing analysis.

In *Chenoweth v. Clinton*,⁴² some House members sued to enjoin implementation of a program instituted by President Clinton, arguing that it exceeded his constitutional and statutory authority. The D.C. Circuit held there was no standing:

If, as the Court held in *Raines*, a statute that allegedly “divests [congressmen] of their constitutional role” in the legislative process does not give them standing to sue, . . . then neither does an Executive Order that allegedly deprives congressmen of their “right[] to participate and vote on legislation in a manner defined by the Constitution.”⁴³

Purported executive aggrandizement is insufficient for legislative standing and there was no claim that President Clinton had either nullified a valid law or treated as valid law something that was not so.

In *Campbell v. Clinton*,⁴⁴ “[a] number of congressmen, led by Tom Campbell of California, filed suit claiming that the President violated the War Powers Resolution and the War Powers Clause of the Constitution by directing U.S. forces’ participation in the recent NATO campaign in Yugoslavia.”⁴⁵ Again, the D.C. Circuit dismissed the case for lack of standing.⁴⁶ Although the court focused on whether the legislators had self-help available against the President (they did, said the court), it also more simply concluded that this was a *Raines* and not a *Coleman* case because President Clinton didn’t arguably nullify valid law, or the opposite.

Finally, in *Daughtrey v. Carter*,⁴⁷ a pre-*Raines* case, two Congresspersons sued, arguing that President Carter’s pardoning of Vietnam War draft evaders violated immigration and other laws.⁴⁸ On various grounds, the D.C. Circuit held there was no standing.⁴⁹ The main point was that the Congresspersons shared an interest that all citizens have in presidential enforcement of the law, and thus stated a generalized grievance, insufficient for standing. We may distinguish *Daughtrey* from the present hypothetical case—a potential lawsuit against President Obama for failure to enforce DOMA section 3—in several ways: *Daughtrey*

41. *Id.* at 135.

42. 181 F.3d 112 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000).

43. *Id.* at 115 (alterations in original).

44. 203 F.3d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).

45. *Id.* at 19.

46. *Id.* at 24.

47. 584 F.2d 1050 (D.C. Cir. 1978).

48. *Id.* at 1053.

49. *Id.* at 1058.

involved the pardon power, arguably plenary in the President and nonreviewable (making it a nonjusticiable political question case); I'm trying to develop an argument for Congress' suing, not for individual members' suing; and *Daughtrey* did not involve nonenforcement on the ground that the President deemed a particular law unconstitutional.

Two post-*Raines* cases, and one decided before *Raines*, are properly sorted with *Coleman*. All three were "pocket veto" cases, i.e., each raised the merits question whether executive inaction resulted in a bill becoming a law. Here's Article I, Section 7 of the U.S. Constitution on the subject:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.⁵⁰

In *Kennedy v. Sampson*,⁵¹ Congress passed a bill and sent it to President Nixon.⁵² Congress adjourned eight days after the bill was passed, but the Senate authorized an agent to receive presidential messages during the adjournment.⁵³ On the tenth day after the bill was passed, the President indicated he would not sign the bill, but did not formally veto it⁵⁴ (i.e., did not "return" the bill to Congress). Senator Edward M. Kennedy, who had voted for the bill, sued two federal officials, seeking a judicial declaration that the bill had become a law and an order that it be published as such. The D.C. Circuit held that Kennedy had standing:

In the present case, appellee has alleged that conduct by officials of the executive branch amounted to an illegal nullification not only of Congress' exercise of its power, but also of appellee's exercise of his power. In the language of the *Coleman* opinion, appellee's object in this lawsuit is to vindicate the effectiveness of his vote. No more essential interest could be asserted by a legislator. We are satisfied, therefore, that the purposes of the standing doctrine are fully served in this litigation.⁵⁵

This makes sense; if plaintiff is correct on the merits,⁵⁶ then the officials' refusal to treat the bill as law nullified an otherwise valid law, and, following *Coleman*, as a member of the body that had voted for the law, plaintiff had standing to protect the validity of his vote.⁵⁷ (Recall that in *Coleman* plaintiffs alleged the obverse—that their votes, collectively,

50. U.S. CONST. art. I, § 7.

51. 511 F.2d 430 (D.C. Cir. 1974).

52. *Id.* at 432.

53. *Id.*

54. *Id.*

55. *Id.* at 436.

56. On the merits, the court held that because Congress had made arrangements to receive a presidential veto during its adjournment, the President had not pocket vetoed the bill, and thus it became law. *See id.* at 436–42.

57. Post-*Raines*, *Chenoweth* confirmed this understanding of *Kennedy* as still good law. *See Chenoweth v. Clinton*, 181 F.3d 112, 116–17 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000).

resulted in no-law but that defendants were treating the matter otherwise.) Again, whether an individual legislator (or legislators) is the proper plaintiff in such a case, as opposed to the body itself, is a difficult question that I shall address below.

In *Barnes v. Kline*,⁵⁸ plaintiffs were the Senate, the Speaker of the House, the bipartisan leadership of the House, and members of the House. The merits issue was similar to that in *Kennedy*—whether congressional adjournment prevented return of a bill from the President, thus rendering his inaction a pocket veto, or whether congressional authorization of agents to receive a presidential veto meant that the bill became law when the President failed to act.⁵⁹ The intervening *Raines* case notwithstanding, the court followed *Kennedy* and held that legislative standing was appropriate. After all, in upholding standing for an individual legislator, the *Kennedy* court had indicated:

[T]hat either house of Congress clearly would have had standing to challenge the injury to its participation in the lawmaking process, since it is the Senate and the House of Representatives that pass legislation under Article I, and [alleged] improper exercise of the pocket veto power infringes that right more directly than it does the right of individual members to vote on proposed legislation.⁶⁰

Finally, in *Gutierrez v. Pangelinan*,⁶¹ the Governor of Guam neither signed nor vetoed a bill, but rather returned it to the legislature with a memorandum stating his understanding that the bill would become law without his signature. Two legislators who had voted against the bill sued in Guam court for a declaration that the bill had not become a law, but rather that the Governor had pocket vetoed the law.⁶² The lower court ruled for the Governor, but the Guam high court reversed, holding that the Governor had pocket vetoed the bill.⁶³ As authorized by federal law, the Governor appealed to the Ninth Circuit, which held that he had appellate standing:

For purposes of standing, Governor Gutierrez's position in this litigation is analogous to that of the senators in *Coleman*. He argues that § 1423i granted the Governor the power to allow Bill 495 to pass into law by neither signing nor vetoing it. The Guam Supreme Court's ruling, however, had the opposite effect: the Governor's inaction, in light of the legislature's failure to adopt appropriate procedures for receipt of the bill

58. 759 F.2d 21 (D.C. Cir. 1985), *vacated on other grounds sub nom.* *Burke v. Barnes*, 479 U.S. 361 (1987) (mootness).

59. The court resolved the merits issue as it had in *Kennedy*, holding that by authorizing agents to accept a presidential veto, Congress had (essentially) eliminated the possibility of a pocket veto during an adjournment. *See id.* at 30–41. The court refused to distinguish between the intrasession adjournment in *Kennedy* and the intersession adjournment here. *Id.* at 40.

60. *Id.* at 26.

61. 276 F.3d 539 (9th Cir.), *cert. denied*, 537 U.S. 825 (2002).

62. *Id.* at 543.

63. *Id.* at 543–44.

from the Governor, resulted in a pocket veto of Bill 495. Under *Coleman* and *Raines*, the nullification of Governor Gutierrez's asserted prerogative establishes his standing.⁶⁴

The Ninth Circuit also said, as an aside, “[i]t is doubtful that Plaintiffs would have had standing to seek relief in federal court at the outset of this case.”⁶⁵ This seems wrong. Under *Coleman*, and consistent with *Kennedy* and *Barnes*, the legislators would have had standing to seek a declaration that what the Governor deemed to be a law was in fact no-law.⁶⁶

Thus, from the case law there's a fairly straightforward argument to treat a presidential decision not to enforce a statute, because he deems the statute unconstitutional, as a *Coleman*-type case. The injury to the legislature (or legislators; I'm finessing that distinction for the moment) isn't just that the President has arguably aggrandized his power or diluted legislative power. Rather, it's a more fundamental concern with legal validity—the President has arguably treated valid law as if it were invalid law. There's one possible stumbling point here. *Raines* approves legislative standing from *Coleman* if an arguably valid law “does not go into effect.”⁶⁷ In the type of case I'm discussing, the law formally goes into effect—and then it becomes ineffectual because of presidential nonenforcement on constitutional grounds. How does *Clinton v. City of New York*⁶⁸ affect this analysis? There, the Court held unconstitutional the Line Item Veto Act (LIVA), which gave the President the power to cancel spending items in laws that had been enacted through proper Article I, Section 7 process.⁶⁹ Such cancellation prevented the item “from having legal force or effect.”⁷⁰ The Court's reasoning was not elaborate: To make a law, or to repeal a law, a bill must go through bicameralism and presentment (and then possible veto override). For Congress to give the President power to cancel a spending item and thereby prevent it from having legal force or effect is to skirt the constitutionally mandated process for repealing legislation. In distinguishing presidential enforcement discretion and discretionary spending power, the Court held that the LIVA was special because it alone

64. *Id.* at 546. On the merits, the court agreed with plaintiffs that the bill had not properly become law. *See id.* at 547–49.

65. *Id.* at 544.

66. If I were relying on *Coleman* to develop a case for the standing of individual legislators, then the pocket veto cases might not strictly speaking fit, because in none of those cases was the entire bloc of legislators who voted for a bill suing, nor would such be a perfect analogy, because *Coleman* involved a necessary bloc of half the legislators for the unusual tie type case to arise. *See supra* notes 34–36 and accompanying text for a discussion of *Coleman*. But I am relying on *Coleman* more generally for its concern with the action of an elected official—there, the Lieutenant Governor's “no” vote—that nullifies a purportedly legitimate legislative act. And I am developing an argument for institutional standing, not for the standing of individual legislators.

67. *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

68. 524 U.S. 417 (1998).

69. *Id.* at 421.

70. *Id.* at 437 (quoting 2 U.S.C. § 691e(4)(B)–(C) (2006)).

“gives the President the unilateral power to change the text of duly enacted statutes.”⁷¹

The scenario with which I’m concerned does not involve a statute giving the President unilateral power to change the text of duly enacted statutes, nor does it involve his grabbing such power. Thus, perhaps one could argue that presidential refusal to enforce a law—because he deems it unconstitutional—is unproblematic in the way that the *Clinton* dicta suggests executive enforcement and spending decisions may be unproblematic. I resist this claim, though, for two reasons (apart from the fact that I’m discussing *Clinton* dicta and that *Clinton* did not consider a case such as the one I’m discussing). First, although we might normally think that presidential enforcement and spending decisions are noninjurious (in and of themselves, as opposed to specific persons who might be injured), a decision not to enforce a statute on constitutional grounds is different. It is tantamount to nullifying the statute. It renders law non-law. Arguably this injures the body politic generally and Congress specifically. Second, the discussion in *Clinton* is about the constitutionality of Congress’ giving the President a certain type of power (and we could extend the reasoning to a situation in which the President himself sought to grab such power). The issue I’m treating is the threshold one of standing, of what counts as sufficient injury for a federal court to reach the merits. Even if presidential nonenforcement on constitutional grounds doesn’t amount to changing the text of duly enacted statutes (i.e., rendering them formally without legal effect), it arguably counts as nullifying legislative votes in the *Coleman* way, sufficient for standing.

III. SOME ARGUMENTS AGAINST CONGRESSIONAL STANDING, AND RESPONSES

In two D.C. Circuit cases,⁷² Judge Bork and then-Judge Scalia argued against congressional standing. Their arguments, plus those of some scholars, offer various reasons grounded in separation of powers to resist permitting members of Congress (and perhaps Congress as an institution) to sue in federal court to challenge presidential action or inaction. I first summarize these arguments, and then attempt to rebut them.

First, as Judge Bork maintained, “except where a conventional lawsuit requires a judicial resolution, much of the allocation of powers is best left to political struggle and compromise Moreover, I know of no grave consequences for our constitutional system that have flowed from political struggles between Congress and the President.”⁷³ Similarly, then-Judge Scalia wrote: “we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those

71. *Id.* at 447.

72. See *supra* notes 58–60 and accompanying text (*Barnes*); *infra* note 74 and accompanying text (*Moore*).

73. *Barnes v. Kline*, 759 F.2d 21, 55 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987) (mootness).

branches regarding their respective powers.”⁷⁴ D.C. Circuit Judge McGowan, although open in principle to congressional standing, nonetheless invoked a cognate idea when he suggested the court could dismiss cases on a theory of equitable (or remedial) discretion, focusing on whether Congress has self-help mechanisms to battle the President.⁷⁵

Second, perhaps the President’s power to take care that the laws are faithfully executed, and perhaps part of his executive power more broadly, involve making determinations regarding the constitutionality of legislation, at various stages, including both the veto and enforcement. On this view, in the kind of situation I am discussing, permitting anyone but a classically injured private party to sue improperly gives Congress or Congresspersons, with the assistance of the courts, the power to execute and enforce the law.⁷⁶ This is similar to one of the arguments Justice Scalia offered in rejecting citizen suits in *Lujan v. Defenders of Wildlife*.⁷⁷ Another aspect of this second point is that if Congress sues to enforce the law, it is taking on an executive function, perhaps unconstitutionally, as per cases such as *Bowsher v. Synar*.⁷⁸

Third, perhaps the simplest separation of powers argument against legislative standing, at least when we’re considering various forms of claims against the executive, is that legislators are suing in their official capacity as representatives of citizens, for an injury that is shared by all those represented.⁷⁹ Following a line of Supreme Court holdings,⁸⁰ this sort of case should accordingly be dismissed as a generalized grievance, insufficient to support standing. In other words, perhaps such lawsuits lack the concrete adversariness that is the hallmark of the Court’s Article III case or controversy jurisprudence.

I will respond to the first two points together. First, I am arguing for congressional standing only in cases that may reasonably be seen as on the *Coleman* side of the *Coleman-Raines* divide. Specifically, I am making a case only for congressional standing to seek a judicial declaration in

74. *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in the result), *cert. denied*, 469 U.S. 1106 (1985); *see also Raines v. Byrd*, 521 U.S. 811, 832–35 (1997) (Souter, J., concurring in the judgment); Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL’Y 209, 277–81 (2001); Barron, *supra* note 20, at 99–100.

75. *See* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 244 (1981).

76. *See* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1567–69 (2012).

77. 504 U.S. 555, 577 (1992).

78. 478 U.S. 714 (1986).

79. *See* *Barnes v. Kline*, 759 F.2d 21, 48–51 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987) (mootness); *cf. Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) (“The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.”).

80. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

response to a stated presidential decision not to enforce a statute he deems unconstitutional. I am not arguing for congressional standing in the bevy of other types of disputes that might arise between Congress and the President. Thus, I can accept *arguendo* whatever weight there is to the Bork-Scalia argument in favor of letting the political branches duke it out, except in *Coleman*-type cases.

Second, as Carlin Meyer argues, forcing Congress to combat presidential constitutional nonenforcement outside the courts is costly, and arguably shifts the burden of action in a constitutionally inappropriate direction.⁸¹ After all, in the kind of case with which we're concerned, Congress has already surmounted the difficult bicameralism and presentment process, only to find a President asserting an ex-post executive check on properly enacted legislation. Congress could begin impeachment proceedings, or try to tie the President's hands in other ways, but these are costly and complex and, more to the point, not directly responsive to the matter at hand. Why not get all three branches into the mix?

Third, although generally speaking the legislature legislates, the executive executes, and the judiciary judges, the federal government's system of divided powers is more complex than that. The legislature also impeaches and convicts, and confirms or rejects nominees; the executive also signs or vetoes legislation; the judiciary also often departs from a purely case-deciding function, interpreting law in many strictly unnecessary ways, such as when it issues dicta, alternative holdings, or, as the Court recently announced permissible, hears appeals from prevailing parties because of the possible precedential effect of lower court rulings.⁸² Further, all three branches, including the executive, properly interpret the Constitution in the kind of situation with which we're concerned. Allowing Congress to step in as enforcer of the law—in a limited way, by asking for a judicial declaration of constitutionality—makes sense in a system of divided but also hybrid powers, which permits the President effectively to nullify a law by deeming it unconstitutional. If we're going to follow departmentalism to the end of presidential constitutional nonenforcement—as I've suggested we should, to save private parties from harm and to save the President from interpretive schizophrenia—then we should see law enforcement as, occasionally, multi-branch in nature as well.

Bowsher is not to the contrary. Congress had enacted a complex scheme to balance the budget, delegating significant policymaking power to the Comptroller General, who was removable by joint resolution of Congress only (i.e., through bicameralism and presentment).⁸³ The majority viewed the Comptroller General's delegated power as executive, and found it unconstitutional for Congress to have removal power, even with

81. See Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve As Counterweight?*, 54 U. PITT. L. REV. 63, 84–93 (1992); see also Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 960–62 (2012).

82. See *Camreta v. Greene*, 131 S. Ct. 2020 (2011).

83. See *Bowsher v. Synar*, 478 U.S. 714, 717–19, 727–28 (1986).

presentment, in such a situation: “Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.”⁸⁴ Concurring in the judgment, Justice Stevens concluded that the Comptroller General was an agent of Congress (not only because of its removal power), that he exercised policymaking power, and that:

Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office. That principle, I believe, is applicable to the Comptroller General.⁸⁵

On Justice Stevens’ logic, there would be no *Bowsher* problem were Congress to sue the President in cases of presidential constitutional nonenforcement, because Congress isn’t making policy in so doing, nor is a subset of Congress doing so were the House or Senate alone to sue. On the majority’s logic, things are a bit closer, because Congress’ suing the President may be deemed taking over an executive function; generally it is the President through the DOJ who litigates to support the constitutionality of federal law (more on this below). But Congress is not here controlling the execution of law. And the President, after all, has expressly abdicated his law enforcement function, so Congress may be seen, in this limited type of case, as stepping into a power vacuum. It’s just another instance of mixing and mingling of powers, acceptable to ensure a proper balance of power and a three-branch solution.⁸⁶

Fourth, we should reject the Scalia-esque argument that placing execution of the law outside of the President’s control violates either the Take Care Clause or the vesting of executive power in “a President of the United States of America.”⁸⁷ This was a phony argument in *Lujan*.⁸⁸ The citizen-suit provision there was unconstitutional because it sought to permit as plaintiffs in federal court anyone with an argument that a federal agency had violated the law, without a specific claim of harm. This is an Article III problem, violating our conception of a case or controversy.⁸⁹ It is not otherwise inappropriate for Congress to create new statutory rights and enable a potentially vast array of citizens to seek relief in federal court when they believe an agency has not properly executed the law and when they can assert harm specific to themselves. That the Court upheld

84. *Id.* at 734.

85. *Id.* at 737 (Stevens, J., concurring in the judgment) (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

86. On the virtues of multi-branch solutions, see Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. (forthcoming 2012).

87. U.S. CONST. art. II, § 1.

88. 504 U.S. 555 (1992).

89. *See id.* at 573–78, 580–81 (1992) (Kennedy, J., concurring in part and in the judgment).

independent agencies in *Humphrey's Executor v. United States*⁹⁰ and *Morrison v. Olson*⁹¹ is further evidence that Congress may alienate executive power from the President, albeit with limits. If we properly see Congress as injured in an instance of presidential constitutional nonenforcement, or properly speaking on behalf of an injured United States, then it is not similar to a citizen-suit plaintiff; rather, it has taken over law execution power only after the President has refused to exercise such power, it is acting in a limited type of case, and it is doing so consistent with an understanding of nonplenary executive power in the President.

I also reject the claim that a congressional suit against the President for constitutionally based nonenforcement is no more than a generalized grievance. I'm not sure, however, whether individual Congresspersons (or groups of Congresspersons) should have standing to sue here. They do under *Coleman*, as I have suggested, under the theory that their votes are nullified by constitutional, categorical nonenforcement. But *Coleman* itself is an unusual case, about whether the legislature itself ratified or failed to ratify a constitutional amendment.⁹² There, the legislative body could not have been an appropriate plaintiff. In the pocket veto cases, and in the kind of case I'm discussing, we can clearly see the legislature pitted against the executive, claiming a kind of nullification of valid law, or the obverse. In such cases, the argument that individual legislators merely act as representatives of their constituents, and don't have a separate cognizable interest in the enforcement of laws, at least not in federal court, is a powerful one. Rather than attempt to overcome that, I would rather turn to what seems an easier and more obvious route for standing, namely, permitting Congress itself to sue. Whether this means Congress as a body or either house as a body, we could see Congress as itself injured when the President says, "that thing you passed that we all agree is a law that I'm supposed to enforce? I'm going to treat it as a nullity." Alternatively, we could see Congress as speaking on behalf of the United States, seeking a judicial determination of the law's validity, just as the DOJ routinely does when courts around the country challenge or invalidate federal law.

It's worth addressing three knotty issues here. First, if Congress is suing on its own behalf rather than on behalf of the United States, may either house sue separately, or must they sue together? Second, the Congress that enacts a law, such as DOMA, will often not be the same Congress that sues the President who isn't enforcing the law. Who is injured here? Third, such nonenforcement may be seen as temporary. After all, the current President or a future President could reverse course and decide to enforce the law. Is there really injury from the current moment of nonenforcement?

As to the first issue, the Constitution constitutes each house as a separate body, gives each some separate responsibilities, and requires each

90. 295 U.S. 602 (1935).

91. 487 U.S. 654 (1988).

92. See *supra* notes 34–36 and accompanying text.

separately to pass a bill to enact it into law (and to override a presidential veto). Thus, it's plausible to think of each house as separately injured when a bill it has played a necessary (though not sufficient) role in passing is nullified by the President. If the insufficiency of either house's vote is troubling in thinking about injury, then we could move to the model of suing on behalf of the United States or on behalf of the Congress as a whole.

As to the second issue, if we properly see Congress as injured by the type of presidential nonenforcement I'm discussing, then we should understand the institution as injured, not individual legislators. And the institution is a continuing one. Think of Hart's elegant depersonalization of a legal system when he discusses "the *continuity* of the authority to make law" and the "*persistence* of laws long after their maker and those who rendered him habitual obedience have perished."⁹³ Thus, Congress (and perhaps either house) as an institution has an ongoing interest in its laws being treated as at least presumptively valid and worthy of enforcement by the President.

As to the third issue, although presidential nonenforcement on constitutional grounds may be altered by a sitting or future President, if one otherwise accepts the idea of the United States or Congress as injured from such nonenforcement, then it's not clear why the only remedial option should be to wait it out (and perhaps cajole the President, now or later, to change course). Judicial precedent is also changeable, but if, for example, a circuit court strikes down a federal law, we permit the United States via the DOJ to appeal the matter. We don't say, "maybe you could convince the circuit in the next case to take another look at the issue." Although we might sometimes think of judicial precedent as more impervious to change, we should think of injury to the United States, or to Congress or either house, as ongoing when either a court or the President treats a valid law as if it were invalid on constitutional grounds.

What about concrete adversariness? We don't have to worry about the adversariness piece—this is not Joe Blow waking up in the morning, reading about some agency action he thinks is illegal, and suing. That is, it's not a citizen suit. Congress is directly harmed when its laws are treated as non-laws and has every reason to be a vigorous adversary to defend its turf.

The concreteness piece is harder.⁹⁴ When the President enforces DOMA section 3, injured same-sex couples can sue, and the facts of their cases provide standard concreteness—specific facts from specific injured persons. If the President were not to enforce DOMA section 3, then legally married same-sex couples would get appropriate federal benefits, and were Congress to sue, it wouldn't be to take away specific benefits from specific couples. So we wouldn't have the standard sort of concreteness the Court says Article III adjudication requires. But we would have many real-world

93. H.L.A. HART, *THE CONCEPT OF LAW* 51 (2d ed. 1994).

94. See Hall, *supra* note 76, at 1570.

examples of how the President's nonenforcement policy operates. It would be easy enough to find records of specific federal benefits going to specific legally married same-sex couples, and the Congress vs. President litigation could rely on such examples. Concreteness operates as a proxy for adversariness, which would be present here. It also operates to ensure focused rather than abstract adjudication, which would be compromised here, but because of the examples of legally married same-sex couples' receiving benefits under a presidential policy of not enforcing DOMA section 3 on constitutional grounds, it would be only somewhat compromised. The latter is not all that different from how facts would be presented in a declaratory judgment action by members of a same-sex couple deciding whether to get married in a state that permits it, and wanting to know whether they would or would not receive certain federal benefits, in a setting in which the answer to that question would affect their decision to get married.

IV. PRACTICAL QUESTIONS ABOUT IMPLEMENTING CONGRESSIONAL STANDING

Finally, I turn to practical questions about implementing congressional standing to sue when the President engages in nonenforcement because he believes a law is unconstitutional.⁹⁵ Ideally, Congress would sue on behalf of the United States, stepping into the shoes the executive (via the DOJ) usually fills. A federal statute seems to set parameters on who may speak for the United States in this way, however. 28 U.S.C. § 516 is titled "Conduct of litigation reserved to Department of Justice," and it provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."⁹⁶ And although 28 U.S.C. § 530D requires the Attorney General to notify Congress when DOJ is engaging in constitutionally based nonenforcement,⁹⁷ neither it nor any other federal statute authorizes Congress, or either house, to litigate on behalf of the United States.⁹⁸ Provisions of 2 U.S.C. § 288 establish the

95. Professor Meltzer argues against the solution I recommend because (a) as plaintiff, the lawyer might have to develop an evidentiary record, and this is something DOJ is expert at, not congressional counsel, (b) Congress' view might not "fully register with the courts" if DOJ and a private party are taking the opposing view, and (c) Congress would have to follow various procedures and that will depend on which political party is in charge at any given time. See Meltzer, *supra* note 9, at 1210–12. Regarding (a), Congress can hire expert litigation counsel (and has done so). See Frost, *supra* note 81, at 955–56 (discussing Congress' amping up its participation in litigation). Regarding (b), I would hope courts would decide cases on the merits, and not on who's arguing them. Regarding (c), I agree with Meltzer, and thus there will be occasions in which majorities in both houses will agree with the President and not sue to set aside nonenforcement.

96. 28 U.S.C. § 516 (2006).

97. *Id.* § 530D(a)(1).

98. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973).

Office of Senate Legal Counsel, and among other things authorize the Counsel to appear in court on behalf of the Senate, as intervenor or amicus curiae, to defend the Senate's or Congress' constitutional prerogatives.⁹⁹ The statute provides that intervention is permissible only if constitutional standing is also present.¹⁰⁰ Under this law, the Counsel could properly appear on behalf of the Senate to defend a law the President had elected not to defend—we should see Congress as injured in such instances, as argued above.¹⁰¹ But the law neither authorizes the Counsel to appear on behalf of the United States nor grants it power to sue as a plaintiff, even if only on behalf of the Senate or Congress.

There's no parallel statute for House Counsel. 2 U.S.C. § 130f describes some matters relating to the House General Counsel not relevant here, and states that the term “General Counsel of the House of Representatives” means “the head of the Office of General Counsel established and operating under clause 8 of rule II of the Rules of the House of Representatives.”¹⁰² That Rule dictates some procedures for directing the Counsel, but otherwise just states that the Counsel's purpose is to “provid[e] legal assistance and representation to the House.”¹⁰³ That, too, doesn't satisfy § 516's requirement that litigation in which the United States is “interested”—which I am reading as coterminous with “on behalf of the United States”—be “authorized by law” if done outside of the DOJ.

Congress could pass a statute authorizing the Senate or House Counsel, or counsel representing both houses jointly, to litigate—as plaintiff or defendant-intervenor—on behalf of the United States when the President asserts he will not enforce a statute because he believes the statute is unconstitutional. There are several roughly parallel examples of federal courts permitting legislators or legislative bodies, or other persons, to appear on behalf of states.¹⁰⁴ If one agrees that Congress, or either house,

99. See 2 U.S.C. §§ 288, 288b(c), 288e(a) (2006).

100. See *id.* § 288e(a).

101. *Newdow v. U.S. Congress*, 313 F.3d 495 (9th Cir. 2002), is not to the contrary. There, the Ninth Circuit denied intervention to the Senate to defend the constitutionality of the federally authorized pledge of allegiance. The DOJ was also defending the law, and the Ninth Circuit didn't think the Senate alleged Article III injury, a predicate to intervention under § 288e (a). My contention in the text is that the Senate (or Congress) is injured when the President, on constitutional grounds, categorically refuses to enforce a properly enacted law.

102. 2 U.S.C. § 130f(c)(1).

103. RULES OF THE HOUSE OF REPRESENTATIVES, 112TH CONG., R. II(8) (2011), available at <http://clerk.house.gov/legislative/house-rules.pdf>. For a discussion of Senate and House Counsel, see Frost, *supra* note 81, at 942–45.

104. See, e.g., *Karcher v. May*, 484 U.S. 72, 82 (1987) (“New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals”); *Perry v. Brown*, 671 F.3d 1052, 1064–74 (9th Cir. 2012) (California law authorizes supporters of a proposition to defend it on appeal, speaking for the state when the state's elected leaders refuse to do so); *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1339 (D.C. Cir. 1999) (state legislative council not authorized to sue on behalf of the state; inference that it would be acceptable party if so authorized); *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998) (“legislators may obtain standing to defend the constitutionality of a legislative enactment

has Article III standing in the kind of case we're discussing, federal law authorization of Congress to appear on behalf of the United States should work as well.

What if Congress, or either house, were to appear on its own behalf, rather than on behalf of the United States? As I've argued, standing should be available here, and then the question is whether such appearances have been authorized by law. The provisions that establish the Senate Counsel also authorize intervention, when approved by Senate Resolution.¹⁰⁵ Those provisions do not speak to Senate Counsel's power to sue, so perhaps they would have to be amended to so provide. Or perhaps not. Nothing in federal law precludes the Senate or its Counsel from appearing on behalf of Congress, or the Senate, as plaintiff. Thus, perhaps a concurrent resolution of Congress (majority vote in both houses, without presentment), or simply a Senate resolution, would suffice to authorize Senate Counsel to sue on behalf of Congress or the Senate. The relevant House Rule authorizes House Counsel to represent the House under direction of the Speaker, "who shall consult with a Bipartisan Legal Advisory Group."¹⁰⁶ This Rule arguably is sufficient for House Counsel to appear on behalf of the House in the kind of case I'm discussing, as either plaintiff or defendant-intervenor, if authorized by the Speaker.¹⁰⁷ As mentioned above, there's no reason Congress couldn't formalize this by concurrent resolution, either as a standing matter or in one-off votes. Or the House could do so by its own resolution.

when authorized by state law"; no such authorization in the case at bar). The Court has expressly left open the question whether the Take Care Clause or the Appointments Clause might render unconstitutional statutes authorizing private parties to sue to recover funds on behalf of the United States ("qui tam" suits). *See* *Vt. Agency of Natural Res. v. United States ex rel. Jonathan Stevens*, 529 U.S. 765 (2000) (otherwise holding that "qui tam" plaintiffs have Article III standing and that states are not persons under the relevant statute and thus not subject to liability).

105. *See* 2 U.S.C. § 288b(c). In *INS v. Chadha*, 462 U.S. 919 (1983), both houses specifically authorized intervention to defend the constitutionality of a statute when the INS was refusing to defend it. *See id.* The Court said, "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.* at 940.

106. RULES OF THE HOUSE OF REPRESENTATIVES, *supra* note 103, at R. II(8).

107. It has worked for House intervention as a defendant in the DOMA section 3 cases that President Obama has refused to defend. *See, e.g.,* *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 15, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012). The magistrate judge approved House intervention in *Windsor* by applying F.R.C.P. Rule 24(a)(2). *See* 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011). I take no position on whether application of that rule, or any federal intervention rule, is necessary in cases such as this (as opposed to following the trail from 2 U.S.C. § 130f through House Rule II(8) and the Speaker's direction of the House Counsel).

CONCLUSION

So, we have a way out of the interpretive schizophrenia that occurs when a President deems a statute unconstitutional, decides he cannot defend it in court, but enforces the law nonetheless *so that he can injure someone* and thus create a classically justiciable federal court case. Presidents should, at least sometimes, not enforce statutes they deem unconstitutional; that's part of seeing the authority for interpreting the Constitution as residing in multiple repositories of power, in all government officials, not just courts. This same notion of blended powers should allow us to see Congress as an appropriate plaintiff in federal court to challenge presidential constitutional nonenforcement. Congress, or either house, is injured when the President treats a properly enacted law as if it were a nullity; or we can see Congress, or either house, as suing on behalf of an injured United States.