THE POST-*MEDELLÍN* CASE FOR LEGISLATIVE STANDING

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INTRODUCTION

After the terrorist attacks against the United States on September 11, 2001, the balance of power between the executive and legislative branches of government in this country shifted.[1] President Bush's response to the attacks included substantial steps to expand the executive's unilateral authority in the arenas of international affairs and war powers.[2] Both President Bush and President Obama have extended executive power and then staunchly protected their expansion of authority from limitation by the legislative and judicial branches.[3] Further, Bush's use of presidential signing statements to

1. *See* Peter Baker & Jim VandeHei, *Clash is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A1 (stating that President Bush "has taken what scholars call a more expansive view of his role than any commander in chief in decades"); David G. Savage, *Administration Stays Course in Legal War*, L.A. TIMES, Jan. 20, 2007, at A13 (providing an overview of the Bush administration's expansion of executive power).

2. *See* Amanda Frost, Essay, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1941 (2007) (citing the Bush administration's extraordinary rendition program and the warrantless wire tapping program as examples of controversial post-September 11th expansions of executive power). Another well known example is President Bush's use of the enemy combatant designation to avoid legal protections and international rights for certain detainees. *See infra* note 53 (discussing the line of cases addressing the rights of Guantanamo Bay detainees).

3. The application of the state secrets privilege was an early example of the Obama administration maintaining the expansion of executive power initiated by the Bush administration during the war on terrorism. Peter Finn, *Justice Dept. Uses "State Secrets" Defense; Obama Backs Bush Decision on Rendition Lawsuit*, WASH. POST, Feb. 10,

undermine legislative intent suggests that the executive's power to avoid legislative input may be virtually limitless.[4]

The Supreme Court's 2008 *Medellín v. Texas*[5] decision appeared to be an example of the judiciary reversing that trend by countering an additional assertion of executive power. In *Medellín*, the Court rejected the President's efforts to force Texas to comply with an International Court of Justice (ICJ) decision ordering reconsideration of Jose Medellín's original conviction.[6] However, while the Court facially limited the executive's power in that instance, it also opened a new avenue for the President to exercise his authority with regard to treaty interpretation.

Since its earliest days, the Court has recognized a distinction between treaty terms that are automatically binding ("self-executing") and those that require additional legislative attention ("non-self-executing").[7] However, early rulings were inconsistent and created confusion in applying this distinction.[8] In *Medellín*, the Court attempted to clarify this area of the law by endorsing a strict text-based approach to treaty interpretation.[9] Relying on that approach, the majority asserted the novel concept that a treaty term is not domestically enforceable without further action unless the language in the treaty clearly indicates that the parties intended the term to be self-executing.[10]

2009, at A4; *see also* Frost, *supra* note 2, at 1931–32 (describing how plaintiffs in suits challenging the use of the state secrets privilege argue that the executive undermines the judicial branch's role in determining the legality of state action by using the privilege).

4. *See* Phillip J. Cooper, *Signing Statements as Declaratory Judgments: The President as Judge*, 16 WM. & MARY BILL RTS. J. 253, 255 (2007) (arguing that signing statements have developed into a tool to expand executive power, limit legislative authority, and constrain the judiciary).

5. 128 S. Ct. 1346 (2008).

6. *See infra* notes 24–25 and accompanying text (discussing the ICJ holding regarding Medellín and numerous other Mexican citizens in similar circumstances).

7. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (finding that a treaty term is only domestically binding when the term operates without the need for additional legislation), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1272 (2002) ("[B]uilding on the premise of Foster v. Neilson, the Supreme Court has long distinguished between what have come to be known as self-executing and non-self-executing treaties.").

8. *See infra* notes 76–85 and accompanying text (addressing the pre-*Medellín* history of judicial interpretation of self-executing treaties).

9. *See Medellín*, 128 S. Ct. at 1358–60 (applying a text-based approach to the interpretation of the language "undertakes to comply" in the U.N. Charter).

10. *See id.* at 1359 n.5 (asserting that "the 'undertakes to comply' language confirms that further action to give effect to an ICJ judgment was contemplated").

This Comment argues that this approach to treaty interpretation creates a presumption of non-self-execution and effectively grants the executive the final say in deciding whether to enforce treaty obligations within the United States, thereby increasing executive power.[11] This Comment further argues that this increase in executive power could undermine the constitutional role of legislators in the treaty-making process.[12]

Additionally, this Comment uses a hypothetical scenario to explore how the imbalance of power created by *Medellín* may lead to a situation where senators have standing to sue in their institutional capacity.[13] This is more challenging than it initially appears because legislators have more hurdles to overcome than private parties.[14] However, if senators can show that the executive's interpretation of a treaty is inconsistent with their intent, they could claim that their votes to ratify the treaty were rendered completely ineffective, thus establishing a claim of vote nullification.[15] Vote nullification, an issue not often addressed by the Supreme Court, is the only injury that the Court has recognized as sufficient to create legislative standing.[16] Further, the senators must show that the issue is a legal one instead of a matter that is better suited for the political branches of the government.[17]

Thus, this Comment discusses the implications of *Medellín* on treaty interpretation, separation of powers, and legislative standing. Part I of this Comment discusses the development of the distinction between self-executing and non-self-executing treaties and the evolution of legislative standing. Part II presents a scenario raised by the *Medellín* holding where the executive could refuse to enforce a treaty obligation based on his unilateral interpretation that the relevant treaty terms were non-self-executing. Part III argues that the

11. *See infra* Part III.
12. *See id.*
13. *See* Coleman v. Miller, 307 U.S. 433, 438 (1939) (recognizing legislators' standing to challenge executive action based on the executive's undermining of the effectiveness of the legislators' votes).
14. *See infra* Part IV (considering the path to justiciability for legislators and the need for a concrete injury to create standing).
15. *See infra* Part IV.C (discussing the unique standing issues faced by legislators).
16. *See* David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 214 (2001) (identifying *Coleman* as the one instance where the Court recognized an institutional injury as the basis for a suit by members of Congress).
17. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (setting forth the criteria necessary to avoid nonjusticiability under the political question doctrine).

Court created a presumption of non-self-execution in the *Medellín* decision and explains how that presumption creates new executive powers. Part IV argues that if a president's interpretation is inconsistent with Congress's action on the treaty, members of Congress would have standing to sue in their institutional capacity. Additionally, this Part provides alternate recommendations to prevent the President from asserting unchecked power in treaty interpretation.

I. BACKGROUND

A. Medellín *Emphasized the Distinction Between Self-Executing Treaties and Non-Self-Executing Treaties*

In *Medellín*, the Roberts Court focused on two principle issues. First, the Court considered whether a judgment by the ICJ was enforceable as domestic law in a state court.[18] Second, the Court addressed whether a presidential order enforcing the ICJ's judgment preempted state procedural rules.[19]

In 1993, three hours after his arrest for the rape and murder of two teenagers, Jose Ernesto Medellín confessed to the crimes.[20] Between his arrest and confession, Texas police officers did not inform Medellín of his right to notify the Mexican consulate about his detention.[21] A Texas district court convicted Medellín of capital murder and sentenced him to death for his crimes.[22]

While Medellín was unsuccessfully challenging his conviction in various United States courts,[23] the ICJ considered a claim brought by Mexico against the United States pursuant to multiple international agreements.[24] The ICJ determined that Medellín and other Mexican nationals were entitled to the review and reconsideration of their

18. Medellín v. Texas, 128 S. Ct. 1346, 1353 (2008).
19. *Id.*
20. *Id.* at 1354.
21. *Id.*
22. *Id.*
23. *See, e.g.*, Medellín v. Dretke, 371 F.3d 270, 281 (5th Cir. 2004) (denying Medellín's application for a Certificate of Appealability); Medellín v. Cockrell, No. Civ.A. H-01-4078, 2003 WL 25321243, at *28 (S.D. Tex. June 25, 2003) (granting a motion for summary judgment requested by the Director of the Texas Department of Criminal Justice, Institutional Division).
24. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 24 (Mar. 31) [hereinafter *Avena*] ("The present proceedings have been brought by Mexico against the United States on the basis of the Vienna Convention, and of the Optional Protocol . . . .").

state-court convictions because of the United States's failure to inform the Mexican consulate of the Mexican nationals' detention.[25] Following the ICJ decision, the executive branch ordered state courts to give effect to that decision.[26] Based on the decision and the subsequent executive memorandum, Medellín filed a second application for a writ of habeas corpus in a Texas court.[27] The Texas Court of Criminal Appeals dismissed the application, and Medellín appealed to the United States Supreme Court.[28]

The Court specifically considered aspects of three treaties in the *Medellín* decision to decide whether the ICJ judgment was enforceable domestically. First, the Court addressed the Vienna Convention on Consular Relations (VCCR).[29] The VCCR requires arresting countries to inform the consular of the detainee's home country of the detention upon the request of the detainee.[30] The Court then considered the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol).[31] Under the Optional Protocol, the United States consented to the jurisdiction of the ICJ for all claims arising out of the VCCR.[32] Finally, the Court turned to the United Nations Charter,

25. *Id.* at 71–73.

26. Specifically, in a memorandum to Attorney General Alberto Gonzalez, President Bush stated that "the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Brief for the United States as Amicus Curiae Supporting Petitioner at 3, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984).

27. *Medellín*, 128 S. Ct. at 1353.

28. *Id.*

29. *Id.*

30. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 78, 596 U.N.T.S. 261.

31. *Medellín*, 128 S. Ct. at 1353.

32. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1964, 21 U.S.T. 325, 596 U.N.T.S. 487 (providing that disputes stemming from the VCCR are within the compulsory jurisdiction of the ICJ and any party to the dispute and Optional Protocol may bring a claim in the ICJ); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 (1987) (stating that countries may submit a dispute to the ICJ where the countries are "bound by an agreement providing for the submission to the Court of a category of disputes that includes the dispute in question"). The United States withdrew from the jurisdiction of the ICJ over general treaty and international law matters in 1986. *Id.* § 907 cmt. c. The United States announced its withdrawal from the Optional Protocol on March 7, 2005 in light of the ICJ's holding in *Avena*, thereby eliminating ICJ jurisdiction over the United States in future disputes arising from the VCCR. U.S. Dep't of State, Announcement: All Consular Notification Requirements Remain in Effect (2005), *available at* http:// travel.state.gov/news/news_2155.html#.

specifically considering a number of articles within that document.[33] Article 92 of the U.N. Charter establishes the ICJ as the principal legal body within the United Nations.[34] Article 94 states that each member of the United Nations "undertakes to comply" with any ICJ decision.[35] The Statute of the International Court of Justice grants jurisdiction to the ICJ where any other treaty provides that the ICJ will be the source of dispute resolution.[36]

In a 6-3 decision, the Court ruled that the ICJ judgment was not enforceable as federal law and that neither the judgment nor executive action could supersede a Texas law limiting successive petitions for habeas corpus.[37] The Court held that the ICJ decision did not have automatic legal effect in the United States because the various treaties did not make the enforcement of an ICJ decision binding federal law and because Congress had not passed implementing legislation.[38] Specifically, the Court determined that the "undertakes to comply" language in the U.N. Charter only committed the member nations to take additional political action to comply with future ICJ decisions.[39] The Court relied upon the treaties' text and the enforcement structure within the Optional Protocol and ICJ process to find that ICJ decisions were not legally binding.[40] The Court also ruled that the President cannot

33. *Medellín*, 128 S. Ct. at 1353–54.
34. U.N. Charter art. 92.
35. *Id.* art. 94, para. 1.
36. Statute of the International Court of Justice art. 36, para. 1, June 26, 1945, 59 Stat. 1055, 1059, 3 Bevans 1153, 1186.
37. *See Medellín*, 128 S. Ct. at 1353 (specifying the *Avena* judgment and the Presidential Memorandum as being subordinate to Texas state law). The Texas law in question limited subsequent applications for habeas corpus to applications that asserted claims and issues based on legal or factual bases not available at the time of the original application and that claimed "no rational juror could have found the applicant guilty beyond a reasonable doubt," or that claimed "no rational juror would have answered in the state's favor one or more of the special issues." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5 (Vernon Supp. 2009) (repealed 2009).
38. *Medellín*, 128 S. Ct. at 1357.
39. *See id.* at 1358 (agreeing with the President's amicus brief argument). The Court went on to say that the language in the U.N. Charter confirmed that something more was necessary for an ICJ decision to be domestically binding. *Id.* at 1359 n.5.
40. *See id.* at 1358–60 (reviewing specific language within the relevant treaties and determining that the language did not convey an intent that the terms be self-executing).

domestically execute a non-self-executing treaty without congressional approval.[41]

Justice Breyer, joined by Justices Souter and Ginsburg, wrote an extensive dissent, arguing (in part) that the majority should have relied on the Supremacy Clause and the case law applying that clause to treaties.[42] First, Breyer argued that the text-dependent approach was flawed because the dispositive language the majority sought is rarely available in treaties.[43] Second, Breyer stated that precedential case law on the subject required using a context-specific approach, considering factors such as: the language of the relevant treaties, the legal and practical implications of a decision in either direction, and any concerns from the political branches regarding the treaty terms.[44] Justice Breyer applied this approach to the relevant treaty terms in *Medellín* and found that this application resulted in the treaty being self-executing and the ICJ decision being domestically enforceable.[45]

On August 5, 2008, the Supreme Court refused to temporarily stay Medellín's death sentence, and shortly thereafter Texas officials carried out the execution.[46] Since the *Medellín* decision, scholars have debated the implications of the holding in a wide variety of fields ranging from international obligations to the death penalty in the United States.[47]

41. *See id.* at 1371 ("[T]he authority of the President to represent the United States before such bodies speaks to the President's *international* responsibilities, not any unilateral authority to create domestic law.").

42. *See id.* at 1389 (Breyer, J., dissenting) (arguing that the majority "look[ed] for the wrong thing . . . using the wrong standard . . . in the wrong place").

43. *See id.* at 1381 ("[T]he absence or presence of language in a treaty about a provision's self-execution proves nothing at all.").

44. *See id.* at 1382–89 (considering seven factors as part of the context-specific approach to determine whether the relevant treaty terms were self-executing).

45. *Id.* at 1383.

46. *See* Manuel Roig-Franzia, *Mexican National Executed in Texas*, WASH. POST, Aug. 6, 2008, at A6 (chronicling the last-minute stay requests and execution of Jose Medellín).

47. *See generally* Opinio Juris, Medellin: An Insta-Symposium, http://opiniojuris.org/2008/03/25/medellin-an-insta-symposium/ (last visited Feb. 3, 2010) (discussing the implications of the *Medellín* holding within a broad array of legal fields including treaty obligations, the death penalty in the United States, habeas corpus rights, and the role of the legislature).

B. Medellín *Raises a New Separation of Powers Issue by Questioning Which Branch of the Government Has the Strongest Role in Treaty Enforcement*

The Roberts Court considered *Medellín* in the middle of an ongoing conflict over how much power each branch of the government should hold, particularly over national security issues. President Bush sought to extend his power in a variety of ways after the September 11th attacks, and this debate continues as President Obama has maintained that trend in some respects.[48] The executive, however, is not the only branch responsible for this shift in power. Congress plays an important role in determining the strength of the executive.[49] One example of Congress deferring significant power to the executive was the Authorization for Use of Military Force (AUMF) in 2001.[50] By authorizing President Bush to use almost unlimited power to engage in the undefined war on terrorism, Congress ceded much of its role in the oversight of executive action taken under the auspices of executing that war.[51]

The third party involved in controlling the strength of the executive is the judicial branch. Disputes between the President and the courts over the executive's role after September 11th are well chronicled.[52] At times, the judicial branch, particularly the Supreme Court, has played an active and important role in limiting the scope of the executive's power.[53] However, in other cases, courts have

48. *See, e.g.*, Anne E. Kornblut & Scott Wilson, *Obama Reports Gains Made Against Al Qaeda*, BOSTON GLOBE, Oct. 7, 2009, at A12 (recognizing that Obama has been criticized for continuing Bush's policies on wiretapping and rendition).

49. *See* Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 396 (2009) (considering the role of Congress in determining executive power and arguing that traditionally "presidential power is largely defined by the tug and pull between Congress and the White House").

50. *See* Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001) (allowing the executive to take military action in response to the September 11th attacks).

51. *See* Douglas Kriner, *Can Enhanced Oversight Repair the "Broken Branch"?*, 89 B.U. L. REV. 765, 771 (2009) (arguing that the Bush administration used the AUMF to justify a variety of programs, even against the will of Congress).

52. *See* Savage, *supra* note 1, at A1 (discussing the legal battle surrounding the expansion of executive power by the Bush administration).

53. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008) (establishing that enemy combatants were entitled to a prompt habeas corpus hearing); Hamdan v. Rumsfeld, 548 U.S. 557, 559–60, 594 (2006) (rejecting the Bush administration's claim that the Detainee Treatment Act deprived the Court of jurisdiction over a foreign national detained in Guantanamo Bay and rejecting the military commissions established by the Act as unconstitutional); Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (holding that due process requires that American citizens

granted the President broad authority to carry out the war on terrorism.[54] Further, courts have avoided involvement in certain balance of power disputes between the legislature and the executive.[55] This hesitancy is deeply rooted in American jurisprudence dating back to *Marbury v. Madison*[56] and is best reflected through the political question doctrine, as well as other theories regarding a limited judiciary.[57]

Within the broad academic debate over the impact of *Medellín* is a discussion about how its holding affects the balance of power in the United States between the executive and legislative branches. Some commentators argue that *Medellín* slowed the trend of power shifting in favor of the executive by strengthening an important legislative check on treaty enforcement.[58] Other scholars claim that *Medellín* reflects the judicial branch's attempt to retain power against both the legislative and executive branches and other outside influences.[59]

held as enemy combatants be given an opportunity to challenge their detention); *see also* Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 3 (2008) (arguing that the *Boumediene* holding rejected a significant portion of the Bush administration's antiterrorist strategy).

54. *See* El-Masri v. United States, 479 F.3d 296, 311 (4th Cir. 2007) (agreeing with the government's assertion that the state secrets privilege prevented El-Masri from bringing a suit against the government claiming that he had been tortured and illegally detained); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1250–51 (2007) (discussing the Bush administration's use of the state secrets privilege as a legal tactic to avoid judicial review of executive actions); *see also* FISA Amendments Act of 2008, Pub. L. No. 110-261, § 802, 122 Stat. 2436, 2468 (2008) (requiring that any court proceeding addressing an entity's cooperation with the government's wiretap program be dismissed upon the Attorney General's certification).

55. *See infra* notes 172–182 and accompanying text (discussing the political question doctrine).

56. 5 U.S. (1 Cranch) 137 (1803).

57. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 63 (2d ed. 2002) (identifying the political question doctrine as a limit on judicial interference with the other branches of government, particularly in the realm of foreign policy); *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) (arguing that standing is vital to preserving the limited role of the courts).

58. *See, e.g.*, Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 415 (2008) (recognizing the *Medellín* holding as a limitation on executive power relating to human rights).

59. *See, e.g.*, Jules Lobel, *The Supreme Court and Enemy Combatants*, 54 WAYNE L. REV. 1131, 1136 (2008) (arguing that *Medellín* exemplified Justice Kennedy's recent attempts to "uphold the prerogatives of the Supreme Court").

Finally, some even argue that *Medellín* raised more questions than it resolved due to the narrowness of the holding.[60]

C. Medellín *is the Latest in an Ongoing—Albeit Small—Series of Decisions that Address the Treaty-Making Process and the Distinction Between Self-Executing and Non-Self-Executing Treaties*

While drafting the Constitution, the Founders divided the treaty-making process between the legislative and executive branches. The Treaty Clause placed the power to make treaties in the hands of the President, but required the executive to obtain the advice of the Senate and the consent of at least two-thirds of the Senate's members present at the time of the vote.[61]

Today, the official treaty-making process remains consistent.[62] However, recently, the executive has relied increasingly on a tool called an "executive agreement" instead of treaties to finalize negotiations with other nations.[63] An executive agreement is a unilateral agreement between the American executive and a foreign executive outside the constitutional treaty-making process.[64] Empirical evidence published in 2009 indicates that executives tend to favor executive agreements over treaties when efficiency is the most important concern.[65] Despite the rise of executive agreements,

60. *See, e.g.*, Mary D. Hallerman, Medellin v. Texas*: The Treaties that Bind*, 43 U. RICH. L. REV. 797, 814–20 (2009) (claiming that *Medellín*'s impact may lead to unresolved questions regarding the United States's international relationships, treaty language, presidential powers, and the states' role in international treaty making).

61. *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall have Power, with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

62. *See* Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Law Making in the United States*, 117 YALE L.J. 1236, 1278–86 (2008) (explaining that the reasons for the Treaty Clause's contents were the views that senators would serve as presidential advisors and regional interests would be protected, and arguing that both reasons are presently irrelevant).

63. *See* GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS 51 (2009) ("94 percent of international agreements completed by American presidents today are executive agreements rather than treaties.").

64. *See id.* at 30 (describing executive agreements as treaties formed without the advice and consent of the Senate).

65. *See id.* at 67 (arguing that the use of executive agreements since 1949 indicates a concern for institutional efficiency rather than a desire for political evasion).

treaties entered pursuant to Article II of the Constitution still play an important role in modern foreign policy.[66]

The Supremacy Clause suggests that all treaties made under the Treaty Clause have the same legal weight as the Constitution and the laws of Congress.[67] However, the 1829 *Foster v. Neilson*[68] Supreme Court decision introduced the concept that there were two different types of treaties, some that were domestically binding and some that were not.[69] *Foster* was a land dispute case, where Foster and his partner Elam sought to eject Neilson from land in present-day Louisiana.[70] The Spanish government had sold the land to Jayme Joydra and, following a number of transactions, Foster and Elam eventually purchased the land from another party.[71] Neilson argued that Foster and Elam could not own the land because the Spanish government did not have the authority to convey the land to Joydra based on treaties that eventually assigned the land to the United States.[72]

In *Foster*, the Court determined that the two treaties at issue required the United States to recognize the Spanish transaction.[73] However, the Court held that unless Congress had implemented the relevant article of the second treaty, the required recognition could not be applied by the courts.[74] Thus, *Foster* was the first case to distinguish between self-executing treaties and non-self-executing

66. *See* Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRESIDENTIAL STUD. Q. 440, 460 (2005) (relying on quantitative models to indicate that treaties are still relevant and often a politically valuable indication that the executive intends to adhere to the terms of the international agreement).

67. *See* U.S. CONST. art. VI, cl. 2 (establishing that the "Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

68. 27 U.S. (2 Pet.) 253 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

69. *See id.* at 314 (holding that a treaty has the same effect as legislation in courts when it "operates of itself without the aid of any legislative provision").

70. *Id.* at 255.

71. *Id.* at 254–55.

72. *Id.* at 255.

73. *Id.* at 314–15; *see also* Carlos M. Vasquez, Foster v. Neilson *and* United States v. Percheman*: Judicial Enforcement of Treaties*, *in* INTERNATIONAL LAW STORIES 151, 158–69 (John E. Noyes et al. eds., 2007) (reviewing the Court's interpretation of the Treaty of San Ildefonso and the Adams-Onís Treaty).

74. *See Foster*, 27 U.S. (2 Pet.) at 314 (holding that where a treaty requires a party to engage in a specific act, the requirement is directed at the legislature and is not judicially enforceable).

treaties.[75] Specifically, the *Foster* Court recognized that in some situations, a treaty could operate without implementing legislation.[76] However, the Court also recognized that in other situations, such as the one raised in *Foster*, a treaty could not self-execute; instead, some entity had to effectuate the treaty terms.[77] Beyond this distinction, the Court offered little clarification on the differences between self-executing and non-self-executing treaties.[78]

Four years later, in *United States v. Percheman*,[79] the Court revisited the same treaty terms considered in *Foster*.[80] In *Percheman*, the Court determined that the same treaty clause it had read as non-self-executing in *Foster* was in fact self-executing.[81] This reversal was based on a reading of the Spanish version of the treaty—in *Foster*, the Court only considered the English version—and a recognition that the English version of the treaty term was ambiguous.[82] *Percheman* defined a self-executing treaty as one that achieves its goals "by force of the instrument itself."[83] The Court defined a non-self-executing treaty as one that specifically requires an additional legislative act.[84]

Over the years since those holdings, lower courts have differed in how they defined a self-executing treaty.[85] In *Medellín*, the Supreme

75. *See* Carlos M. Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 702 (1995) (arguing that the Court's statement that only treaties that operate themselves are applicable without legislative implementation created the distinction between self-executing and non-self-executing treaties).

76. *See Foster*, 27 U.S. (2 Pet.) at 314 (finding that a treaty that operates itself without the aid of legislation is equal to an act of the legislature).

77. *See id.* at 315 (relying on the treaty's requirement that the land grants be "ratified and confirmed" to determine that some entity, specifically Congress, was being directed to act).

78. *See* Vasquez, *supra* note 73, at 165 (noting that the distinction "confounded" lower courts and even confused Justice Marshall, the author of the majority opinion in *Foster*, when he revisited it in a later case).

79. 32 U.S. (7 Pet.) 51 (1833).

80. *See id.* at 89 (discussing the *Foster* Court's review of the Adams-Onís Treaty).

81. *See id.* at 88–89 (holding that the ratification and confirmation enumerated within the treaty did not require further legislative action).

82. *See id.* at 89 (acknowledging that the *Foster* Court did not consider the Spanish version of the treaty); Vasquez, *supra* note 73, at 169–70 (arguing that the newly introduced Spanish version of the treaty "gave the Court some cover to reverse" the basis of the *Foster* holding and to determine that the treaty term was ambiguous).

83. *Percheman*, 32 U.S. (7 Pet.) at 89.

84. *Id.*; *see also* Vasquez, *supra* note 73, at 171 (finding that the *Percheman* Court ruled that there must be an affirmative statement requiring an additional step for a treaty to be deemed non-self-executing).

85. *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) ("Very few courts, however, paid attention to Marshall's invented distinction between self- and non-self-operative treaties until the end of the 19th century."); Vasquez,

Court sought to clarify the difference between self-executing and non-self-executing treaties by defining those terms. According to the *Medellín* Court, self-executing treaties become the law of the land as soon as they are ratified and are thus immediately enforceable.[86] In contrast, non-self-executing treaties require legislative implementation before they can be judicially enforceable within the United States.[87]

The true impact of *Medellín* with regard to treaty interpretation is subject to substantial debate, and the questions surrounding self-execution and non-self-execution are far from resolved. It is clear that *Medellín* advanced a narrow text-centered approach to treaty interpretation[88] and rejected the presumption of self-execution promoted by a number of legal scholars.[89] Some commentators argue that *Medellín* offered new guideposts for judicial treaty interpretation.[90] Others argue that the implications of the *Medellín* holding were limited to the facts and did not substantially change the way that treaties are interpreted.[91]

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supra note 75, at 704 (claiming that courts and commentators disagree over questions of how to determine the intent of parties).

86. *See* Medellín v. Texas, 128 S. Ct. 1346, 1356 n.2 (2008) (defining a self-executing treaty as one that "has automatic domestic effect as federal law upon ratification").

87. *See id.* (stating that a non-self-executing treaty is one that "does not by itself give rise to domestically enforceable federal law").

88. *See id.* at 1358 (declaring that the text of the treaty is the starting point for any treaty interpretation).

89. *See id.* at 1373 (Stevens, J., concurring) (arguing that the decision established no presumption favoring self-execution or non-self-execution). The Restatement explicitly identified a presumption of self-execution and legal scholars argued that, based on the Supremacy Clause and the *Percheman* holding, international treaties were presumptively self-executing unless the text of the treaty required an additional affirmative act. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 5 (1986) ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches."); *see, e.g.*, Vasquez, *supra* note 73, at 171 (identifying the "constitutional default rule" as the finding that treaties are self-executing).

90. *See, e.g.*, David J. Bederman, Medellín's *New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 530 (2008) (arguing that the *Medellín* decision reshaped the "legitimate sources that judges may use in treaty interpretation, the degree of their deference to U.S. executive branch positions, and the general canons (or default rules) to be followed when construing treaties").

91. *See, e.g.*, Janet Koven Levit, *Does* Medellín *Matter?*, 77 FORDHAM L. REV. 617, 624, 630 (2008) (arguing that the holding in *Medellín* does not change the consular notification process promoted by the VCCR and describing international law as an "interactive process").

D. Legislative Standing Hinges on the Ability of a Legislator to Prove an Injury Sufficient to Satisfy Standing Requirements While Staying Clear of Separation of Powers Concerns

As discussed in detail in Part III, *Medellín* raises concerns of an overextension of executive power.[92] One of the limited avenues for the legislature to challenge such an extension of executive power is through the legal system.[93] However, in order to succeed in court, legislators must satisfy multiple tests before getting to the merits of the issue, including: meeting the traditional standing requirements,[94] clearing the increased burden of legislative standing,[95] and avoiding the complications surrounding the political question doctrine.[96]

Standing is one of the four main criteria that must be satisfied for a claim to be justiciable in federal court.[97] If a claim is not justiciable, the court will reject the case without even considering the merits of

92. *See infra* Part III (discussing how *Medellín* allows an executive broader leeway in determining whether to enforce a treaty domestically by creating a presumption of non-self-execution).

93. While courts are generally hesitant to intervene in a dispute between Congress and the executive until it is absolutely necessary, the judiciary has stepped in at times. *See, e.g.*, U.S. House of Representatives v. U.S. Dept. of Commerce, 11 F. Supp. 2d 76, 82 (D.D.C. 1998) (barring certain census survey techniques on the grounds that they were inconsistent with congressional power).

94. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

95. *Compare* Coleman v. Miller, 307 U.S. 433, 446 (1939) (granting state legislators standing where executive action undermined the effectiveness of their vote), *with* Raines v. Byrd, 521 U.S. 811, 829–30 (1997) (rejecting a claim of legislative standing on the grounds that the legislators did not suffer a sufficient injury).

96. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (recognizing that certain issues could render a claim nonjusticiable under the political question doctrine).

97. *See* Anthony Clark Arend & Catherine B. Lotrointe, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 214 (2001) (addressing threshold requirements for access to the judicial system). The other three criteria are mootness, ripeness, and the political question doctrine. *Id.* The doctrine of mootness establishes that a case will not be heard if the "issues presented are no longer 'live'" or the parties lack an interest in the outcome. Powell v. McCormack, 395 U.S. 486, 496 (1969). A case is ripe when the issues in the case are fit for judicial consideration, and there would be hardship against a party if the court did not hear the case. Texas v. United States, 523 U.S. 296, 300–01 (1998). This concept carried over to disputes between the legislative and executive branches because there must be a true impasse between the two bodies for the dispute to be justiciable. Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring). The political question doctrine bars a claim if the issue is better suited for the executive or legislative branches of government. *See infra* notes 171–182 and accompanying text (discussing the political question doctrine and enumerating the standards from the *Baker* test).

the claim.[98] Standing addresses the question of whether a party is entitled to have a court decide the question that the party is bringing before that court.[99] Standing's role as judicial gatekeeper means that it is an important legal concept,[100] but despite its importance—or maybe because of it—standing has not been strictly defined or limited by the Court.[101] Instead, the Court has identified specific principles that it relies upon in determining standing, including: maintaining the appropriate balance of power between the judiciary and other branches of government, preserving judicial efficiency, and addressing only specific legal questions.[102]

There are two different types of standing: Article III standing and prudential standing. Article III standing is based on the constitutional limitation on the jurisdiction of federal courts to "cases and controversies."[103] In *Lujan v. Defenders of Wildlife*,[104] the Rehnquist Court established three elements required for Article III standing: an injury,[105] causation,[106] and redressability.[107]

The Supreme Court has primarily focused on the requirement that there be an actual injury when considering an Article III standing issue.[108] *Lujan* established that an injury sufficient for standing is one that is "concrete and particularized," as well as "actual or imminent,"

98. *See* Arend & Lotrointe, *supra* note 97, at 214–15 (stating that a claim does not satisfy the Constitution's case or controversy requirement if it does not meet the four justiciability standards).

99. CHEMERINSKY, *supra* note 57, at 60.

100. *See* Allen v. Wright, 468 U.S. 737, 750 (1984) (arguing that standing "is perhaps the most important" of the doctrines that fundamentally limit judicial power).

101. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982) (stating that standing has not been consistently defined in past decisions, and there is no simple way to define the term).

102. *See* CHEMERINSKY, *supra* note 57, at 61 (discussing the Court's modern position on standing and the factors it considers when addressing challenges to standing).

103. U.S. CONST. art. III, § 2; *see* Arend & Lotrointe, *supra* note 97, at 214 (noting that this phrase is "an indispensible restriction of the jurisdiction of the federal judiciary").

104. 504 U.S. 555 (1992).

105. *See id.* at 560 n.1 (establishing that the injury "must affect the plaintiff in a personal and individual way").

106. *See id.* at 560 (defining causation as a "causal connection between the injury and the conduct complained of").

107. *See id.* at 561 (requiring that there be some likelihood of the possibility of redress for the complaining party).

108. *See* Arend & Lotrointe, *supra* note 97, at 216 ("While the second and third criteria are self-explanatory, the Supreme Court has spent a great deal of time elaborating on the first criterion: the requirement of injury."); *see also* CHEMERINSKY, *supra* note 57, at 62–63 (considering the elements of causation and redressability as a single entity addressed by the courts).

rather than "conjectural or hypothetical."[109] However, that definition has not resolved questions surrounding the plaintiff's relationship to the injury and the scope of the injury itself.[110] In addressing the personal nature of the injury, the Court has held that the plaintiff must show that he was adversely affected by the alleged action.[111] In considering what injuries are sufficient for standing, the Court established that the common law, the Constitution, and statutes all establish interests sufficient for a claim to proceed.[112] The Court has not spoken definitively as to what other injuries are sufficient to establish standing.[113]

There is limited jurisprudence on the requirements for satisfying the causation and redressability elements of standing. In earlier decisions, the Court treated the two elements as part of one test.[114] However, the Court has since clarified its position and indicated that the two elements must be considered independently.[115]

Along with Article III standing, the doctrine of prudential standing incorporates three additional factors that courts consider when determining whether a party can bring a suit.[116] Specifically, the Court has recognized a general limitation on third-party standing, a prohibition against generalized grievances, and a requirement that the plaintiff be within the zone of interests protected by a statute.[117] These factors are self-imposed by the courts and can be overcome by

109. *Lujan*, 504 U.S. at 560. The Court stated that an appropriate injury would require that the plaintiff show that a "legally protected interest" was at issue. *Id.*

110. *See* CHEMERINSKY, *supra* note 57, at 64 ("Two questions arise in implementing the injury requirement: What does it mean to say that a plaintiff must personally suffer an injury; and what types of injuries are sufficient for standing?").

111. *See* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (rejecting the plaintiff's claim on the grounds that an interest in the alleged problem was not sufficient to establish standing).

112. *See* CHEMERINSKY, *supra* note 57, at 70–74 (discussing injuries sufficient to satisfy constitutional standing requirements, including injuries to common law, constitutional, and statutory rights, as well as other types of injuries, such as environmental harm or a shift in market conditions).

113. *See id.* at 73 (arguing that Supreme Court precedent does not develop a standard principle for determining which interests are sufficient to establish an injury).

114. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 505 (1975) (holding that a plaintiff must establish causation or redressability to satisfy standing requirements).

115. *See* Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (arguing that inquiry into causation must be kept separate from the inquiry into redressability).

116. *See* CHEMERINSKY, *supra* note 57, at 63 (discussing the distinction between prudential standing and constitutionally required standing).

117. *See generally id.* at 82–101 (detailing the general categories of, and limitations on, prudential standing).

legislation.[118] Consistent with the doctrine of prudential standing, one of the powers Congress has is the ability to determine and express exactly whose interests are protected by a specific statute.[119] In the 2007 *Massachusetts v. EPA*[120] decision, the Court indicated that where Congress creates a procedural right for a party to protect concrete interests, certain standing requirements are relaxed.[121] Specifically, the Court suggested that Congress can statutorily establish injuries that are sufficient to satisfy the constitutional standing requirements.[122] The Court also recognized that states are unique and merit different considerations than private entities when addressing standing questions.[123]

The implications of the doctrine of prudential standing have not been fully established. Some legal scholars take the view that prudential standing gives legislators the power to control the scope of the cases the courts consider.[124] Other commentators argue that since a plaintiff must satisfy the Article III standing requirements regardless of whether a prudential standing requirement is applicable, Congress's power to control access to the courts is limited.[125]

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118. *See* Ryan McManus, Note, *Sitting in Congress and Standing in Court: How Presidential Signing Statements Open the Door to Legislator Lawsuits*, 48 B.C. L. REV. 739, 743 (2007) (stating that at least some of the prudential requirements, including the bar against a third party claim and the requirement that the claim be within the plaintiff's "zone of interest," are independent from the courts' Article III powers, and thus can be overcome by statutory changes).

119. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153–54 (1970) (indicating that under its authority to regulate prudential standing through legislation, Congress was enlarging the class of parties who could challenge administrative action).

120. 549 U.S. 497 (2007).

121. *See id.* at 517–18 (finding that where Congress creates a procedural right, one "can assert that right without meeting all the normal standards for redressability and immediacy").

122. *See id.* at 516 (arguing that Congress has the authority to define injuries and establish causation).

123. *See id.* at 518 (providing that the limited sovereignty of states entitles them to unique standing considerations).

124. *See, e.g.*, James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions*, 13 VT. L. REV. 675, 678 (1989) (arguing that under Article III, Congress has the power to expand the scope of judicial power to review a broader variety of cases and controversies). *But see* Roberts, *supra* note 57, at 1226 (stating that Article III limits congressional power such that Congress cannot expand the scope of the case or controversy requirement).

125. *See, e.g.*, Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1562–63 (1993) (acknowledging that Congress can establish a legally created injury but it must still satisfy the requirements of Article III standing).

Standing has an important role in maintaining the separation of powers between the branches of American government. In the 1984 *Allen v. Wright*[126] decision, the Rehnquist Court explicitly stated that separation of powers considerations were integral in reviewing the causation element of standing.[127] Justice Scalia has argued that the principle of standing clearly affects the separation of powers because it can be applied to exclude an entire issue from adjudication.[128] Chief Justice Roberts's judicial philosophy hinges on applying standing as a tool to limit the judiciary's interference with the other branches of government.[129] Recently, the Roberts Court has made standing an important factor in a number of cases, indicating that for a claim to be successful, it must clearly satisfy all standing requirements.[130]

Theoretically, standing for legislators claiming an institutional injury is no different than traditional standing. In order for legislators to bring a claim in court, the claim must satisfy the Article III and prudential standing criteria stated above.[131] In the relatively small number of cases addressing the issue, however, the courts have set a higher bar for legislators seeking access to the judicial system.[132]

The Supreme Court first considered legislative standing to redress institutional injuries in 1939 in *Coleman v. Miller*.[133] In *Coleman*, twenty-one Kansas state senators as well as a number of members of

126. 468 U.S. 737 (1984).

127. *See id.* at 761 (relying on the principle of separation of powers to reject a claim that an administrative agency's policies failed to fulfill specific obligations).

128. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 892 (1983) ("[I]f all persons who could conceivably raise a particular issue are excluded, the issue is excluded as well.").

129. *See* Roberts, *supra* note 57, at 1220 (arguing that standing is vital to preserving the limited role of the courts); *see also* Jess Bravin, *Barring the Door: Court Under Roberts Limits Judicial Power*, WALL ST. J., July 2, 2007, at A1 (asserting that Roberts's theory of "judicial self-restraint" was based on limiting access to the courts).

130. *See* Krista L. Dewitt, Note, *The Revival of Standing as a Limitation to Litigation: Will Standing Cause More Cases to Fall?*, 31 AM. J. TRIAL ADVOC. 601, 602 (2008) (arguing that the Roberts Court has "refueled" the debate on whether a party satisfies the standing requirements).

131. *See generally supra* notes 104–125 and accompanying text (addressing both Article III and prudential standing requirements).

132. *See generally infra* notes 133–170 and accompanying text (discussing the leading cases in the field of legislative standing).

133. 307 U.S. 433 (1939). This remains the only case where the Supreme Court has recognized legislative standing for institutional injuries. *See, e.g.*, David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 214 (2001) (describing *Coleman* as "the one previous instance in which the Supreme Court recognized an institutional injury as a predicate for a legislative suit").

the state House of Representatives sued the Secretary of the Senate to block the endorsement of the Child Labor Amendment to the United States Constitution.[134] The respondent challenged the legislators' standing to bring such a claim on the grounds that the legislators did not have an adequate interest in the dispute.[135] The Court held that because the legislators' votes should have defeated the measure, the legislators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes."[136] The Supreme Court recognized that where a legislator's vote was negated by outside action, the legislator could assert an injury sufficient for standing; thus, the nullification of the Kansas legislators' votes was an injury sufficient to establish standing.[137]

Following *Coleman*, the D.C. Circuit took the lead in addressing legislative standing, with the criteria evolving over three different tests.[138] First, the D.C. Circuit determined that where judicial interpretation of executive action would "bear upon" the duties of the legislature, legislators had standing to sue.[139] One year later, the D.C. Circuit rejected the "bears upon" test and instead relied on vote nullification as the basis for legislative standing.[140] In a later case, the D.C. Circuit expressly limited vote nullification as the basis for legislative standing to situations where the legislative process could not remedy the injury.[141] Finally, the D.C. Circuit established the two-part equitable discretion test, under which a legislator had to

134. *See Coleman*, 307 U.S. at 436 (challenging the Lieutenant Governor's right to cast the deciding vote and arguing that the proposed Amendment "had lost its vitality" as a result of the Amendment's rejection by twenty-six states and its failure to become ratified within a reasonable period of time).

135. *Id.* at 438.

136. *See id.* (stating that the legislators' claims fell squarely within the statute providing for the Supreme Court's appellate jurisdiction and that they could properly seek redress in the Supreme Court).

137. *See id.* (finding that if standing were denied the legislators' votes would be "virtually held for naught" regardless of the fact that if their contentions were correct their votes would be sufficient to change the outcome of the resolution).

138. *See* McManus, *supra* note 118, at 749 (discussing the evolution of the D.C. Circuit's approach to legislative standing).

139. *See* Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973) (granting members of the House of Representatives standing to sue members of the executive branch to block those executive branch members from engaging in acts of war without congressional approval).

140. *See* Kennedy v. Sampson, 511 F.2d 430, 435 (D.C. Cir. 1974) (stating that "an individual legislator has standing to protect the effectiveness of his vote").

141. *See* Goldwater v. Carter, 617 F.2d 697, 702–03 (D.C. Cir. 1979) (allowing standing where senators had no opportunity to challenge the executive's termination of a treaty through the legislative process), *rev'd on other grounds*, 444 U.S. 996 (1979) (dismissing the complaint as nonjusticiable under the political question doctrine).

prove the traditional elements of standing as well as show that there were no other means to seek redress and that no other citizen could bring the claim.[142]

Fifty-eight years after *Coleman*, the Supreme Court considered legislative standing once again, hearing *Raines v. Byrd*,[143] a case specifically addressing the issue of vote nullification.[144] Four senators and two representatives who had voted against the Line Item Veto Act in their respective chambers challenged the Act as unconstitutional.[145] The Act had passed in the Senate by a vote of 69-31 and in the House of Representatives by a vote of 232-177.[146] The Court held that, for a number of reasons, the congressmen lacked standing to bring the suit because there was not a sufficient injury to their interests.[147] However, the majority concluded by noting that both chambers as a whole opposed the challenge brought by a subset of legislators in this case, that other parties may have standing to challenge the Line Item Veto Act, and that Congress could take future steps to repeal the legislation.[148]

In light of *Raines*, the D.C. Circuit has addressed legislative standing twice, in *Chenowith v. Clinton*[149] and *Campbell v. Clinton*.[150] In the 1999 *Chenowith* decision, legislators challenged President Clinton's implementation of the American Heritage Rivers Initiative on the grounds that the implementation denied them their constitutionally guaranteed right and responsibility to debate and vote on the various political issues stemming from the initiative.[151]

142. *See* Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 882 (1981) (relying on a fair application of the standing principles and a goal of not interfering with the legislative process as the basis of a two-part analysis of legislative standing cases).
143. 521 U.S. 811 (1997).
144. *See id.* at 824–26 (discussing the vote nullification theory and distinguishing *Coleman* by emphasizing the "vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power" alleged here).
145. *See id.* at 816 (challenging the Act as a violation of the bicameralism and presentment clauses of Article I).
146. *Id.* at 814.
147. *See id.* at 829 (distinguishing this case from *Coleman* because the injury asserted here was "wholly abstract and widely dispersed").
148. *See id.* (regarding as important the fact that the legislator-plaintiffs were not "authorized to represent their respective Houses of Congress in this action").
149. 181 F.3d 112 (D.C. Cir. 1999).
150. 203 F.3d 19 (D.C. Cir. 2000).
151. *See Chenowith*, 181 F.3d at 113 (explaining that President Clinton formally established the initiative by executive order and listing the various political issues arising from it, such as concerns involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of environmental policies).

Despite that problem, the court rejected the legislators' claim for standing based on the *Raines* standards.[152]

The court recognized, however, that there may still be an avenue for legislative standing based on the theory of vote nullification.[153] Specifically, the court determined that an earlier decision, *Kennedy v. Sampson*,[154] granting legislative standing to a senator who challenged the President's pocket veto of legislation that both Houses of Congress had passed may still be good law after *Raines*.[155] Addressing *Kennedy*, the court reasoned that a president's action that prevents a bill from becoming law could constitute vote nullification sufficient to satisfy the *Raines* requirements.[156]

The D.C. Circuit took a much more in-depth look at the legislative standing issue in *Campbell*. That 2000 decision arose from a challenge to President Clinton's authorization of the U.S.'s participation in international airstrikes against Yugoslavia.[157] The legislators argued that the President's actions were illegal both constitutionally and statutorily.[158] The court posited that the Supreme Court failed to adequately define vote nullification in *Campbell* and *Raines*.[159] Despite the Supreme Court's lack of clarity, the D.C. Circuit dismissed the legislators' claim based on lack of standing.[160] Judge Silberman, writing for the majority, relied heavily on the *Raines* decision to determine that where congressmen have a legislative remedy for an alleged injury, they will not have standing to assert a claim in court.[161]

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152. *See id.* at 115 (stating that the legislators' claim for standing was indistinguishable from the injury asserted in *Raines* and thus was too "widely dispersed" and "abstract" to survive).

153. *See id.* at 116–17 (suggesting that *Raines* may not undermine some of the Court's earlier decisions on legislative standing based on vote nullification).

154. 511 F.2d 430 (D.C. Cir. 1974).

155. *See Chenowith*, 181 F.3d at 116 ("Even under this narrow interpretation [of vote nullification by the *Raines* Court], one could argue that the plaintiff in *Kennedy* had standing.").

156. *See id.* at 117 (asserting that a pocket veto could create a plausible argument that executive action completely nullified legislators' votes).

157. *See* 203 F.3d 19, 20 (D.C. Cir. 2000) (stating that the NATO airstrikes against Yugoslavia were in response to Yugoslavia's occupation of Kosovo).

158. *See id.* (alleging that "the President's use of American forces against Yugoslavia was unlawful under both the War Powers Clause of the Constitution and the War Powers Resolution").

159. *See id.* at 22 ("It is, to be sure, not readily apparent what the Supreme Court meant by [the word 'nullified'].").

160. *See id.* at 23–24 (stating that the legislators may not use the federal courts to challenge the President's war-making powers).

161. *See id.* at 23 (finding that legislators could not assert a vote nullification claim because they had the legislative power to defeat President Clinton's order through a number of possible avenues, including passing a law forbidding the use of U.S. forces

Judge Randolph, in a concurring opinion, agreed that the legislators' claim would fail the *Raines* analysis but under different reasoning than Judge Silberman.[162] Instead, Judge Randolph argued that since the executive did nothing to implement the legislative actions Congress had defeated, there was no vote nullification.[163] Specifically, President Clinton took no military action that would require congressional approval under the Constitution; thus, he could not have nullified the legislators' successful votes against the declaration of war.[164] Also, by refusing to adhere to Congress's rejection of an authorizing resolution, President Clinton was not nullifying the legislators' votes on that resolution.[165] Instead, according to Judge Randolph, President Clinton was not ignoring the legislators' vote; he was simply disregarding the War Powers Resolution itself and the votes of the earlier Congress that had enacted it.[166] Thus, Judge Randolph concluded that a complaint of that nature from the legislators was not a valid reason for granting legislative standing based on vote nullification.[167]

Other lower courts have struggled to establish a clear standard for what injuries are sufficient to make out a successful vote nullification claim following *Raines*, which has led to a variety of holdings in different circuits. For example, the Sixth Circuit has taken a literal

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in the campaign, exercising the appropriations power to cut off funding, or ultimately, through impeachment).

162. *See id.* at 28, 32 (Randolph, J., concurring) (reasoning that because Congress will always have the ability to take responsive legislative action in the future, an argument that rejects legislative standing based on the legislators' ability to take future legislative action will effectively do away with the legislative standing doctrine, a result that was not clearly intended by the Supreme Court in *Raines*).

163. *See id.* at 31 (rejecting the legislative standing claim because "in terms of *Raines*[,] . . . plaintiffs had the votes 'sufficient to defeat' 'a specific legislative action' . . . but it is not true . . . that this 'legislative action' nevertheless went 'into effect'").

164. *See id.* (stating that "[t]he President has nothing to veto" and that "[he] may have acted as if he had Congress's approval, or he may have acted as if he did not need it").

165. *See id.* (explaining the automatic operation of the War Powers Resolution: unless both chambers act to approve the military action, the troops must withdraw after sixty days). The War Powers Resolution requires the President to withdraw troops within sixty days of the commencement of military action unless a majority of both chambers declares war or approves a continuation of the military action. 50 U.S.C. § 1544(b) (2006).

166. *See Campbell*, 203 F.3d at 31 (Randolph, J., concurring) ("[The legislators'] real complaint . . . is that [the President] ignored the War Powers Resolution . . . .").

167. *See id.* (recognizing that separation of powers concerns arise by allowing legislative standing on the basis asserted by the plaintiff-legislators).

approach to vote nullification.[168] In contrast, the Ninth Circuit has granted standing based on vote nullification to a party that did not have a vote in the legislature.[169]

Any claim of legislative standing faces an added hurdle because the plaintiff-legislator must also overcome the barriers imposed by the political question doctrine. While the *Raines* Court did not specifically discuss the political question doctrine, part of the reason the Court rejected standing for the legislators was because of the political nature of their claim.[170]

The political question doctrine arose out of Justice Marshall's opinion in *Marbury v. Madison*.[171] The doctrine bars courts from encroaching on an unresolved political dispute within the other branches of government by requiring that courts address an actual legal issue.[172] The impetus for the doctrine was to provide an

168. *See* Baird v. Norton, 266 F.3d 408, 412 (6th Cir. 2001) (adopting *Coleman*'s proposition that for legislators to have standing, they must possess enough votes to have reversed the actual outcome of the legislation at issue).

169. *See* Gutierrez v. Pangelinan, 276 F.3d 539, 545–46 (9th Cir. 2002) (extending legislative standing to the Governor of Guam based on vote nullification by the Guam Supreme Court because, under the operation of a Guam statute, the Governor's inaction (i.e., neither signing nor vetoing the bill) should have allowed the bill to pass, but a Guam Supreme Court ruling inverted the statute and required the Governor to take action or otherwise the legislation would be vetoed by his inaction).

170. *See* Raines v. Byrd, 521 U.S. 811, 821 (1997) (describing the legislators' claim as a loss of legislative power instead of another more concrete injury).

171. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803) (stating that certain political powers granted to the executive are "only politically examinable").

172. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (discussing the original factors that would render an issue nonjusticiable under the political question doctrine, including a textually demonstrable commitment of the issue to a political department, a lack of judicially discoverable and manageable standards for resolving the issue, the impossibility of deciding the issue without a policy determination, the inability of a court to decide the issue without eroding the respect due the other branches of government, an unusual need for adherence to a political decision already made, and the potential for embarrassment as a result of differing conclusions by each department). Some scholars have argued that there is no such doctrine and that courts are simply abiding by the constitutional delegation and separation of powers doctrines. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 601 (1976) ("The cases which are supposed to have established the political question doctrine required no such extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain."). However, the standards enumerated in *Baker* are good law, have been referenced repeatedly, and were found determinative by the Court as recently as 1993. *See* Nixon v. United States, 506 U.S. 224, 226, 238 (1993) (citing *Baker* in support of its rejection of a federal judge's challenge to his impeachment as a nonjusticiable political question).

additional tool for preserving the separation of powers and to prevent friction between the branches.[173]

The Court in *Baker v. Carr*[174] enumerated six characteristics relevant to determining whether an issue was a nonjusticiable political question.[175] The Court later determined that the *Baker* Court probably believed that not all of the factors carry equal weight, reasoning that the factors at the beginning of the list are probably more important and more certain than those towards the end.[176] In the end, judges assessing legislative standing must also consider whether the issue is one better suited for resolution in a political branch of government (i.e., the executive or legislative branch).[177]

The first *Baker* factor establishes that if the Constitution textually commits an issue to a political department, the issue is nonjusticiable.[178] Second, if there are no judicially discoverable and manageable standards for resolving the issue, it cannot be considered by the judiciary.[179] Third, an issue is a nonjusticiable political question if rendering a decision requires a policy determination from a political branch.[180] Courts have stated that the final three factors in the political question doctrine test as laid out in *Baker* are ambiguous and unreliable.[181] Those three, respectively, render a decision nonjusticiable if resolving the issue would lead to undue disrespect to one of the political branches, require unusual adherence to a prior political decision, or create embarrassment due to multiple statements on the issue from the different branches.[182]

Aside from suing the executive as individual legislators, Congress has additional tools through which members can challenge executive action or inaction. For example, Congress can use legislative tools,

173. *See Baker*, 369 U.S. at 210–11 (calling the doctrine "primarily a function of the separation of powers" because it requires a reviewing court to examine the Constitution to determine to which branch of government the matter was assigned).
174. 369 U.S. 186 (1962).
175. *See id.* at 217; *see also supra* note 172 (listing the six *Baker* political question factors).
176. *See* Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004) ("These tests are probably listed in descending order of both importance and certainty.").
177. *See Baker*, 369 U.S. at 210 (stating that the "finality [of] the actions of the political departments" is a dominant consideration when determining whether an issue is a nonjusticiable political question).
178. *Id.* at 217.
179. *Id.*
180. *Id.*
181. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 249–50 (2d Cir. 1995) (stating that the final three *Baker* elements are relevant in only the most extreme situations).
182. *Baker*, 369 U.S. at 217.

such as its appropriations power and investigative power, to punish the executive for failing to enforce duly passed legislation.[183] Alternatively, Congress can sue as a single entity in its institutional capacity.[184] Finally, Congress could pass legislation granting itself standing when the executive interprets legislation differently from how Congress wrote it or intended it.[185]

II. *MEDELLÍN* GIVES RISE TO A HYPOTHETICAL SCENARIO THAT COULD EVENTUALLY LEAD TO AN EFFECTIVE CLAIM FOR LEGISLATIVE STANDING

While there has not yet been a situation that gives rise to a claim that the executive is exceeding his power by refusing to enforce terms of a treaty, the possibility is foreseeable in light of the *Medellín* holding. For such a situation to arise, three basic conditions would have to be met. First, there must be some dispute as to whether a treaty term is self-executing.[186] Second, the Senate must assert that it intended the treaty term to be self-executing when it ratified the treaty.[187] Finally, the executive must refuse to enforce the provision that the legislative branch claims he must enforce.[188]

A dispute over whether a treaty term is self-executing could arise in a variety of situations, easily satisfying the first condition. The Supreme Court raised this question in *Medellín* when it refused to review whether terms within the VCCR were self-executing.[189] In light of that position, there is no definitive answer to questions

183. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsburg, J., concurring) ("Congress has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch.").

184. *See, e.g.*, U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 79 (D.D.C. 1998) (challenging in its institutional capacity a Commerce Department and Census Bureau plan to use statistical sampling in the 2000 census as inconsistent with the Constitution and the Census Act).

185. *See, e.g.*, Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. §§ 3, 5 (2006) (proposing the establishment of standing for members of Congress to challenge the legality of any presidential signing statement, which is a statement the President drafts about a bill in conjunction with signing the bill into law).

186. *See supra* Part I.A and Part I.C (discussing self-executing and non-self-executing treaties generally and as analyzed in *Medellín*).

187. *Id.*

188. *See supra* notes 133–170 (discussing various cases in which legislators based their argument for standing in federal court on the theory of vote nullification).

189. 128 S. Ct. 1346, 1357 n.4 (2008).

surrounding the domestic impact of the VCCR as a self-executing or non-self-executing treaty.[190]

Further, there is rarely language in a treaty that explicitly indicates that the treaty term is self-executing.[191] For example, in *Medellín*, the treaty term in question said nothing as to whether additional legislation was necessary to enact ICJ judgments.[192] As Justice Breyer noted in his dissent, similar language in other treaties had been deemed sufficient to establish the self-executing nature of the treaty term.[193] Additionally, in two Supreme Court cases decided a few years apart, the Court read the same treaty term as non-self-executing in the first case but as self-executing in the second.[194] These examples suggest that a dispute over whether a treaty term is self-executing is quite possible.

To satisfy the second condition, the Senate must intend that the treaty term be self-executing at the time of ratification.[195] The

190. Even though the Court did not specifically address the issue in *Medellín*, most courts and commentators agree that the VCCR is a self-executing treaty. *See, e.g.*, Cornejo v. County of San Diego, 504 F.3d 853, 856 (9th Cir. 2007) ("There is no question that the Vienna Convention is self-executing."); Jordan J. Paust, Medellín, Avena, *the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 306 n.15 (2008) (presenting a variety of sources supporting the claim that the VCCR is a self-executing treaty). However, some scholars have identified an ongoing debate over whether the treaty is self-executing or non-self-executing. *See, e.g.*, Howard S. Schiffman, *The* LaGrand *Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099, 1130 (2002) (arguing that enacting state and federal legislation implementing the VCCR requirements would nullify any remaining argument over whether the VCCR was self-executing or non-self-executing). Finally, at least one commentator argues that the *Medellín* decision itself casts a new question as to whether the VCCR is self-executing. *See* David S. Corbett, Comment, *From* Breard *to* Medellin II*: The Vienna Convention on Consular Relations in Perspective*, 5 U. ST. THOMAS L.J. 808, 820 (2008) (stating that the *Medellín* holding was based on the Court's determination that the VCCR is a non-self-executing treaty).

191. *See Medellín*, 128 S. Ct. at 1380 (Breyer, J., dissenting) (arguing that treaty provisions the Court had previously ruled self-executing lacked clear language indicating them as such).

192. *See id.* at 1358 (majority opinion) (relying on the "undertakes to comply" language in the treaty to determine that there was a need for implementing legislation before an ICJ decision could become binding on state courts).

193. *See id.* at 1383–84 (Breyer, J., dissenting) (citing a commerce and navigation treaty between the United States and Denmark to illustrate that language that does not direct the United States to act domestically can still lead to a determination that a treaty is self-executing).

194. *Compare* Foster v. Neilson, 27 U.S. (2. Pet.) 253, 315 (1829) (determining that a specific term in the Adams-Onís Treaty required implementing legislation before it was binding on domestic courts), *with* United States v. Percheman, 32 U.S. (7 Pet.) 51, 88–89 (1833) (finding that the same term in the Adams-Onís Treaty was self-executing based on a reading of the Spanish-language version of the treaty).

195. *Medellín*, 128 S. Ct. at 1349.

Medellín Court indicated that the intent of the President and Senate when they implemented the treaty controlled the determination of whether the treaty term was self-executing.[196] Such intent could be based on the treaty negotiators' understanding at the time that the treaty was signed or the interpretation of the body charged with interpreting the treaty.[197] Alternatively, legislators could indicate their intent through a variety of legislative documents arising out of the ratification process.[198] Finally, intent could be derived from the way the other signatories to the agreement behave after they sign the treaty.[199]

The third condition, which arises from the *Medellín* holding, specifies that the President must refuse to enforce a treaty term that the Senate intended to be self-executing.[200] Based on a presumption of non-self-execution,[201] the executive would be free to assert that the treaty term was not self-executing.[202] Courts generally defer to the

196. *See id.* at 1366–67 (relying on various indicia of the intent of the President and the Senate in determining that the relevant treaty terms were non-self-executing); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) ("[T]he intention of the United States determines whether an agreement is to be self-executing in the United States . . . .").

197. *See Medellín*, 128 S. Ct. at 1361 n.9 (considering the ICJ's interpretation and understanding of the relevant treaty terms in determining whether the terms were self-executing); *see also* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) (recognizing that the negotiating and drafting history of a treaty are both relevant to treaty interpretation).

198. *See, e.g.*, *Medellín*, 128 S. Ct. at 1359–60 (examining testimony from hearings before the Senate Foreign Relations Committee in the treaty interpretation process).

199. *See Zicherman*, 516 U.S. at 226 (establishing that the post-ratification understanding of the signatories to a treaty is an important element in treaty interpretation); *see also* Carlos Manuel Vázquez, *The Separation Of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1619 (2008) (suggesting that since some countries require all treaties to be implemented through domestic legislation, U.S. courts will rarely be able to conclude that a multinational treaty is self-executing because a determination of self-execution relies on the mutual intent and actions of all parties to a treaty).

200. *Cf.* R. Jeffrey Smith, *U.S. Tried to Soften Treaty on Detainees*, WASH. POST, Sept. 8, 2009, at A3 (discussing the Bush administration's three-year effort to modify the language in a treaty to make the treaty more favorable in light of the U.S. enemy combatant policy). Although there is no direct example of such executive action, signing statements offer a strong parallel because it is another example of the executive acting contrary to legislative intent. *See* Charlie Savage, *Bush Challenges Hundreds of Laws; President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1 (arguing that the reason for President Bush's use of signing statements was to undermine legislative intent and to indicate that his interpretation of the legislation presented to him was different from Congress's).

201. *See infra* Part III (discussing the development of a presumption of non-self-execution).

202. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 34, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928) (per curiam) (asserting

executive when it comes to treaty interpretation.[203] Whether merited or not, such deference could encourage the executive to act without regard to the Senate's post-ratification position on the treaty.[204]

There are numerous examples of situations where the executive refuses to enforce an act duly passed by the legislature and signed by the President.[205] In the early 1970s, the Nixon administration broadly expanded the constitutionally accepted device of impoundment.[206] Through impoundment, the Nixon administration rejected congressional add-ons to the executive budget in numerous areas even though the budget as approved by Congress was the actual public law.[207] The Nixon administration effectively ignored duly enacted legislation—the budget—in favor of the President's own unenacted budget recommendations.[208] More recently, President Bush's use of signing statements could arguably be characterized as an overt extension of executive power despite legislative limitations.[209] Finally, with the dominant role of administrative agencies, it is not uncommon to see the executive interpret language in a manner

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that the "undertakes to comply" language in the United Nations Charter foresaw the need for action from the political branches of the government prior to making the ICJ decision domestically enforceable and thus the relevant treaty terms were not self-executing).

203. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) (granting the President the authority to make the initial determination as to whether a term is self-executing after the ratification of a treaty).

204. *See* Medellín v. Texas, 128 U.S. 1346, 1355 (2008) (referring to President Bush's memorandum that completely ignored legislative intent and stated that it was within the authority of the executive to determine that state courts must give effect to the ICJ decision regarding Medellín and the fifty-one other foreign nationals challenging the state judicial action).

205. *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 132 (1999) (arguing that the power of the executive to operate unilaterally defines the modern presidency).

206. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 204 (4th ed. 1997) (arguing that Nixon's use of impoundment "set a precedent in terms of magnitude, severity, and belligerence").

207. *See id.* at 204–05 (identifying the administration's position that legislative additions to the budget were irresponsible or meritless).

208. *See id.* at 205 ("What deserved implementation was not a President's budget but a public law.").

209. *Compare* Savage, *supra* note 200, at A1 ("President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office . . . ."), *with* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 312 (2006) (arguing that while quantitatively high, President Bush's signing statements were substantively similar to those used by his predecessors).

substantially different from the interpretation the legislature intended.[210]

Consider the following hypothetical presenting a situation that could lead to a basis for a claim of vote nullification. The President enters into a treaty with another industrialized country, with the United States understanding the treaty terms to be self-executing.[211] However, there is no direct language in the treaty that explicitly makes it self-executing.[212] The treaty requires the countries' administrative agencies to penalize factory owners if carbon emissions exceed a certain level.[213] The Senate ratifies the treaty with the understanding that the terms are self-executing.[214] During the signing president's term, no factories exceed the mandated limit, and no regulatory action is necessary. During the subsequent presidency, factories begin to exceed the limit but the executive branch refuses to take the action required by the treaty, and the President argues that he is not obligated to take such action because the treaty is non-self-executing.[215]

In the above scenario, private citizens would probably not have standing to sue because they would not satisfy the injury-in-fact

210. *See, e.g.*, U.S. House of Representatives v. U.S. Dept. of Commerce, 11 F. Supp. 2d. 76, 82 (D.D.C. 1998) (challenging the Census Bureau's interpretation of the Census Act); *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 193–94 (1978) (enjoining a federal entity from completing a dam where the completion of the dam would likely cause the extinction of an animal protected by the Endangered Species Act because the executive could only execute the laws as passed by the legislature).

211. *See* S. EXEC. REP. NO. 106-24, at 18 (2000) [hereinafter MLAT Ratification] ("For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken."); *cf.* Mutual Legal Assistance Treaty, U.S.-Cyprus, Dec. 20, 1999, T.I.A.S. No. 13,078 [hereinafter MLAT] (agreeing to provide mutual assistance in the investigation, prosecution, and prevention of crimes).

212. *See, e.g.*, MLAT, *supra* note 211 (making no reference to the legal effectiveness of the treaty in the United States).

213. *Cf.* Stockholm Convention on Persistent Organic Pollutants art. 3, May 22, 2001, 2256 U.N.T.S. 119, 218 (requiring member states to promulgate regulations to restrict the production of certain industrial chemicals).

214. *Cf.* MLAT Ratification, *supra* note 211, at 18 ("For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.").

215. This sort of reversal of position with regard to international obligations when a new administration takes office is distinctly possible. *See, e.g.*, Margaret Maffai, Comment, *Accountability for Private Military and Security Company Employees that Engage in Sex Trafficking and Related Abuses While Under Contract with the United States Overseas*, 26 WIS. INT'L L.J. 1095, 1122–23 (2009) (discussing the Bush administration's renunciation of all obligations stemming from the Rome Statute of the International Criminal Court in May of 2002 after the Clinton administration had signed the agreement in December of 2000).

requirement.[216] It is unlikely that Congress would be able to pass implementing legislation for the treaty because that would require the vote of both chambers and the President's signature, as long as less than two-thirds of congress approves, after the executive has already indicated his disapproval of the requirements by refusing to enforce them.[217] Therefore, the only remaining challenge to the executive's unilateral decision that the treaty term was non-self-executing would be for members of the Senate who intended the treaty term to be self-executing when they voted for ratification to sue alleging vote nullification.

III. *MEDELLÍN* CREATES A PRESUMPTION OF NON-SELF-EXECUTION THAT SHIFTS TREATY ENFORCEMENT POWER IN FAVOR OF THE EXECUTIVE

While the immediate effect of *Medellín* may have been to dampen executive power in the instant case, the long-term effect was just the opposite. By promoting a presumption that treaty terms are non-self-executing, the Court actually increased executive power.[218] Such a presumption gives the executive virtually unchecked power because as the above hypothetical suggests, the President can rely on that presumption to unilaterally refuse to enforce treaty terms domestically.[219] This new executive power is enhanced even further by the limited ability of legislators to assert claims for institutional injuries in American courts.[220]

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216. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (establishing that to satisfy standing requirements, an injury must be actual or imminent instead of conjectural or hypothetical); *see also* Massachusetts v. EPA, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (arguing that global warming is too generalized of an injury to satisfy the injury-in-fact requirement established in *Lujan*).

217. *See* Moe & Howell, *supra* note 205, at 143–46 (concluding that because Congress is made up of multiple members representing distinct constituencies, the President can unilaterally impede legislative efforts to change the status quo through the use of the veto power).

218. *Compare* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 153–54 (2008) (stating that in light of *Medellín*, U.S. treaties are presumed to be non-self-executing), *with* Medellín v. Texas, 128 S. Ct. 1346, 1373 (2008) (Stevens, J., concurring) (noting the Court was making its decision "[a]bsent a presumption one way or the other"), *and* Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 540–41 (2008) (rejecting arguments that there is a presumption against self-execution and suggesting that there is no presumption at all).

219. *See supra* Part II.

220. *See supra* notes 133–170 and accompanying text (discussing the higher burden for legislative standing than traditional standing).

Prior to *Medellín*, legal scholars generally recognized a presumption in favor of self-execution.[221] In *Medellín*, the Court clearly rejected that view by finding that a treaty term does not constitute domestic law if it does not either convey an intent that it be self-executing, or unless Congress has enacted implementing legislation.[222] The Court went so far as to implicitly disavow the portion of the Restatement (Third) of Foreign Relations Law of the United States supporting a presumption of self-execution.[223]

The Court went beyond simply rejecting the presumption favoring self-execution; the Court implicitly promoted a presumption that treaties are non-self-executing. The first indication that *Medellín* creates a presumption of non-self-execution was the Court's reliance on the 1884 *Head Money Cases*.[224] Those cases supported the view that domestic treaty enforcement was reliant on the honor of the governments that were party to the treaty.[225] In the same paragraph of *Medellín*, the Court cited a distinction in *The Federalist Papers* between laws and treaties, endorsing the view that treaty enforcement is dependent on the good faith of the parties.[226] A recognition that domestic treaty enforcement was based on honor, or the good faith of the parties, instead of the laws of the land in the respective countries party to a treaty suggests a view that treaties do not inherently make domestic law.[227]

Another indication of the majority's transition towards a presumption of non-self-execution was the strong endorsement of a

221. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 5 (1987) ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches . . . .").

222. Medellín v. Texas, 128 S. Ct. 1346, 1356 (2008). In his concurring opinion, Justice Stevens argued that there was no presumption favoring self-execution or non-self-execution. *Id.* at 1373 (Stevens, J., concurring).

223. *See* Bradley, *supra* note 218, at 540 (recognizing that by clearly rejecting a strong presumption for self-execution, the Court rejected the Restatement's endorsement of a low threshold for a treaty to be deemed self-executing).

224. 112 U.S. 580 (1884).

225. *Id.* at 598.

226. *Medellín*, 128 S. Ct. at 1357.

227. Many scholars view this approach as inconsistent with the Supremacy Clause, which places treaties on equal footing with legislation and regards both as the supreme law of the land. *See, e.g.*, Carlos M. Vasquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 600 (2008) (arguing that "[t]he concept of a non-self-executing treaty fits uneasily with the Supremacy Clause").

text-centered approach to treaty interpretation.[228] While the Court acknowledged that it could look at other indicia of intent, such as the negotiation and drafting history or the understanding of the parties after the treaty was implemented, it was clear that the text was the principal basis for treaty interpretation.[229] In considering the Optional Protocol, the majority adhered to a textualist approach, disfavoring factors other than the treaty's text and rejecting the dissent's multifactor analysis.[230] The Court's narrow focus on the "undertakes to comply" language in the U.N. Charter and its quick determination that the phrase did not make the treaty obligation self-executing suggest that unless the text of a treaty *expressly* makes a term self-executing, the term will be interpreted otherwise.[231]

However, as is often the case in statutory interpretation, the "plain meaning" of the Optional Protocol was not as plain as the majority suggested. In his dissent, Justice Breyer showed that the "undertakes to comply" language could easily be interpreted to create an obligation that the treaty be executed without enacting legislation.[232] At the very least, the Optional Protocol could be considered ambiguous in whether it indicated the drafters' intent regarding self-execution.[233] The majority coming down on the side of non-self-

228. *See Medellín*, 128 S. Ct. at 1357 ("The interpretation of a treaty . . . begins with its text.").

229. *Id.*

230. *See id.* at 1362 (arguing that the dissent's approach would lead to "the open-ended rough-and-tumble of factors" (internal citations and quotations omitted)).

231. *See id.* at 1358 (finding that the phrase was not an acknowledgement of its legal effect in American courts). The Court suggested that the words "shall" or "must" might have satisfied the required intent necessary to make the obligation under the U.N. Charter self-executing. *Id.*

232. *See id.* at 1384 (Breyer, J. dissenting) (using a dictionary definition of "undertake" to show that it could be interpreted to require execution). Justice Breyer argued that the majority created clear-statement presumptions that many treaties that had already been deemed self-executing would not satisfy. *Id.* at 1380. Breyer recommended a context-specific test to determine whether a treaty provision is self-executing. *Id.* at 1382. Along with his dictionary definition of "undertake," Breyer's analysis of the relevant treaties included a consideration of the language in the Spanish version of the U.N. Charter, which could be translated to say "become liable to execute." *Id.* at 1384 (internal citations omitted).

233. *See id.* at 1373 (Stevens, J. concurring) (recognizing that the U.N. Charter "does not contain the kind of unambiguous language foreclosing self-execution that is found in other treaties"). According to Justice Stevens, language that creates an obligation to enact legislation would more clearly reflect the drafters' intent. *Id.*

execution in light of the ambiguous language further endorses the view that all treaties are non-self-executing until proven otherwise.[234]

The final sign that the majority favored a presumption of non-self-execution was the high threshold the Court determined drafters must meet to show that their intent was to create a self-executing treaty.[235] As Justice Breyer pointed out in his dissent, few, if any, treaty provisions that the Court had designated as self-executing in earlier decisions would satisfy the majority's text-centered approach.[236] The only way Jose Medellín could have satisfied the Court's test would have been to identify textual language clearly showing that the parties to the treaty intended it to be self-executing, thereby indicating the Court majority's support for a presumption of non-self-execution in *Medellín*.[237]

Commentators have argued that the Court's decision seemed to support Congress's role in determining the enforceability of treaties.[238] However, the decision only limited the President's authority to domestically enforce non-self-executing treaty terms; it did not limit the President's role in deciding whether a treaty was self-executing or not.[239] In fact, by creating a presumption of non-self-execution, the Court made it possible for the executive to assert substantial power over the treaty enforcement process.[240]

234. *See* Dorf, *supra* note 218, at 154 n.147 (basing the argument that *Medellín* creates a presumption of non-self-execution on the fact that implementing language is absolutely necessary for a treaty to be self-executing).

235. *See Medellín*, 128 S. Ct. at 1381 (Breyer, J. dissenting) (noting that the majority opinion cites no case that would satisfy the text-centered approach and that the concurring opinion only supports the argument that few treaties have language clearly indicating an intent to be self-executing).

236. *See id.* at 1392–93 (listing cases as examples of the Court deciding that a treaty term was self-executing).

237. *See id.* at 1358 (majority opinion) (suggesting that if the "undertakes to comply" language contained "must" or "shall" the relevant provision of the U.N. Charter obligation would have been self-executing).

238. *See* Ilya Shapiro, Medellín v. Texas *and the Ultimate Law School Exam*, 2008 CATO SUP. CT. REV. 63, 79 (arguing that the Court determined that if a treaty was not self-executing that "signals that Congress has reserved the decision to craft enabling legislation"); Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson's* Youngstown *Taxonomy by* Hamdan *and* Medellín, 58 AM. U. L. REV. 665, 668 (2009) (providing that *Medellín* relied on the *Youngstown* scheme to determine that because the executive and the legislature disagreed on the enforceability of the ICJ decision, Congress's position was favored).

239. *See Medellín*, 128 S. Ct. at 1368 ("The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.").

240. *See supra* Part II (providing an example of an executive's abuse of the presumption of non-self-execution).

IV. THE INCREASE IN EXECUTIVE POWER CREATED BY *MEDELLÍN* REQUIRES A MEANS—PREFERABLY IN THE FORM OF LEGISLATIVE STANDING—TO CHECK THE EXECUTIVE

How can Congress check such an assertion of power by the executive? One possibility is that members of Congress could claim that such an act constitutes vote nullification because Congress's vote to implement a treaty provision is being superseded by the President's refusal to enforce that provision. However, the Court's limited jurisprudence on the issue, combined with the separation of powers concerns that the judiciary raises when considering a dispute between the legislature and the executive, would make such a claim challenging to assert.[241]

Applying the facts from the hypothetical in Part II, if the executive's interpretation of a treaty term is inconsistent with the Senate's action on the treaty, the legislators would have standing to sue in their institutional capacity. This Part first shows that the hypothetical senators' claim could meet the traditional standing requirements that all plaintiffs must satisfy when they bring a claim. Next, Section B addresses legislative standing and proves that the senators have suffered the concrete injury of vote nullification. Having survived the threshold standing questions, Section C posits that the senators' claim can survive consideration under the political question doctrine. Finally, this Part considers the alternate courses of action available to legislators if they are denied access to the courts.

A. Legislators Challenging Executive Action Following Medellín *Can Satisfy the Traditional Elements of Both Article III and Prudential Standing*

Prior to a court's consideration of the merits of the issue presented in the hypothetical, the legislator-plaintiffs would have to satisfy standing requirements. As discussed above, legislators would have to prove that there was an actual injury caused by the opposing party that a judicial decision could remedy.[242]

Legislators would satisfy the general injury requirements set forth by traditional standing jurisprudence. *Lujan* requires a plaintiff to claim that a legally protected interest is at issue.[243] Based on the

241. *See supra* Part I.D.
242. *See supra* notes 108–115 and accompanying text.
243. *See id.* Most legally protected interests fall into one of three categories: an injury to common law rights, an injury to constitutional rights, or an injury to statutory rights. *See supra* note 112 and accompanying text.

hypothetical, the injury to the legislators should satisfy those requirements because it is an injury to a constitutional right.[244] Specifically, the Constitution guarantees the Senate's role in providing advice on and consenting to the implementation of a treaty.[245] By ignoring the Senate's intent in his enforcement of the treaty, the executive in the hypothetical is violating the constitutionally guaranteed right of the Senate to consent to the United States's participation in a treaty.

Within basic standing jurisprudence, showing that there is some possible injury is only the first step in satisfying the injury requirement. The plaintiff must also assert an injury that is concrete and particularized, as well as actual or imminent, to gain standing.[246] The executive's refusal to enforce the treaty term in the hypothetical is a concrete and particularized injury because the executive's action harms the legislators individually by undermining their constitutional authority.[247] In the hypothetical, the injury satisfies the actual or imminent requirement because the executive has already refused to enforce the treaty term.[248]

As discussed below—in Section B of this Part—the hypothetical raises unique injury issues because the plaintiffs would be bringing the claim as legislators injured in their institutional capacity. However, the legislators would be able to satisfy the injury element of a traditional standing consideration.

Causation is the second element of an Article III standing test. To satisfy causation, the plaintiff must show that there was a causal relationship between the act complained of and the injury.[249] The hypothetical legislators could prove causation because the injury

244. *Cf.* Meese v. Keene, 481 U.S. 465, 473 (1987) (acknowledging a sufficient injury where the appellee claimed that the use of the term "political propaganda" abridged his First Amendment right to free speech). The injury was sufficient because the appellee claimed that the use of the term threatened to "cause him cognizable injury." *Id.* Specifically, the application of the term would harm his reputation and damage his opportunity to get re-elected to political office. *Id.*

245. U.S. CONST. art. II, § 2, cl. 2.

246. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

247. *Cf.* Warth v. Seldin, 422 U.S. 490, 508 (1975) (holding that for an injury to satisfy standing requirements, the plaintiff must allege specific facts "demonstrating that the challenged practices harm him"). The *Lujan* Court defined the "particularized" element as requiring the injury to individually and personally affect the plaintiff. 504 U.S. at 560 n.1.

248. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983) (indicating that a plaintiff must show that the injury has occurred or that he is in immediate danger of sustaining the injury).

249. *Lujan*, 504 U.S. at 560.

complained of—vote nullification—resulted from decisions and actions of the executive, the opposing party in any action resulting from the hypothetical.[250]

The final element of the Article III standing requirements is redressability. Specifically, a positive decision from the court must be likely to ameliorate the plaintiff's alleged injury.[251] In the hypothetical, the positive outcome would be a holding that the treaty was self-executing and that the executive must therefore enforce its terms—specifically through an injunction ordering performance.[252] That outcome would satisfy the redressability requirement because it would redress the alleged injury, vote nullification.[253] The principal concern leading to the redressability requirement is the judiciary's aim of avoiding advisory opinions.[254] Considering a dispute over treaty interpretation is not an advisory opinion; it instead resolves an actual dispute in favor of one branch.[255]

No prudential standing concerns arise from the senators' suit in the hypothetical. The limit on third-party standing is not a problem because the senators are asserting their own rights or interests, instead of relying on the rights of others.[256] The senators are not raising a generalized grievance because the injury is specific to them, and not something related to their status as citizens suing the government.[257] Finally, the zone of interests requirement is not

250. *Cf. Seldin*, 422 U.S. at 509 (recognizing a lack of causation where the injury complained of resulted from decisions made by an entity that was not involved in the case).

251. *See Lujan*, 504 U.S. at 561 (establishing that redress for the complaining party must be at least likely to satisfy standing requirements).

252. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 142 (1991) (stating that courts commonly grant specific relief by ordering governmental actors to comply with a law); *cf.* Allen Z. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 271 (1997) ("To remedy the consequences of breach of treaty . . . specific performance is *theoretically* available under public international law . . . .").

253. *Cf.* Sprint Commc'n Co. v. APCC Servs., 128 S. Ct. 2531, 2543 (2008) (holding that assignees could satisfy the redressability element of standing even if they immediately transferred any award they received to the assignor).

254. *See* CHEMERINSKY, *supra* note 57, at 78 (noting the position of defenders of the redressability requirement).

255. *See id.* at 54–55 (recognizing that the key elements that make a case justiciable, instead of an advisory opinion, are a dispute between adverse parties and the likelihood of some change or effect if the outcome favors the plaintiff).

256. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (stating that a party cannot base his claim on the legal rights or interests of a third party).

257. *See id.* (finding that where a harm is equally shared by a large class of citizens, that harm is generally not sufficient for standing).

applicable because the senators' right is a constitutional one, not one established by legislation.[258]

B. Medellín *Creates a Situation Where Legislators Can Satisfy the More Stringent Requirements Necessary to Establish Legislative Standing*

While satisfying the standing requirements may appear straightforward, the courts' failure to clearly define vote nullification affects the legislators' ability to effectively assert that injury in the hypothetical scenario presented in Part II. The Supreme Court has recognized that legislators have a legal "interest in maintaining the effectiveness of their vote."[259] However, *Coleman* is the only case where the Supreme Court has recognized legislative standing as an injury and considered the merits of the case.[260]

The hypothetical presented in Part II provides a situation where the executive refused to enforce a treaty provision, deeming it non-self-executing when the Senate at the time of ratification intended the provision to be self-executing.[261] There is an extremely high threshold that the legislators must overcome to prove that the effectiveness of their votes has been compromised and that vote nullification is an injury sufficient to satisfy standing requirements.[262] For example, the senators must show that they had enough votes to shift the outcome of the vote one way, but the outcome was inconsistent with that vote.[263] This is not to suggest that at least sixty-seven senators who voted to ratify a treaty must be parties to the suit;

258. *See* CHEMERINSKY, *supra* note 57, at 97 ("[T]he zone of interests requirement is used only in statutory cases, usually involving administrative law issues.").

259. Coleman v. Miller, 307 U.S. 433, 438 (1939).

260. *See supra* notes 133–137 and accompanying text (discussing *Coleman* as the basis for a claim of legislative standing).

261. *See supra* Part II (providing a hypothetical that forms the basis of a claim of vote nullification).

262. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 814, 829 (1997) (denying a claim of legislative standing where federal legislators argued that the executive's ability to cancel spending and tax benefit measures after he had signed them into law constituted vote nullification).

263. *Compare Coleman*, 307 U.S. at 436–37 (recognizing vote nullification as an injury when all twenty state senators who voted against ratification sued, joined by one other senator and three state house members, and where the vote at issue was a twenty-twenty tie in the state senate), *with Raines*, 521 U.S. at 814 (rejecting the claim of vote nullification where only four senators and two congressmen sued and the outcome of the vote was determined by a thirty-eight vote margin in the Senate and a fifty-five vote margin in the House).

instead any plaintiff must be able to show that he successfully voted for one outcome but the opposite outcome was effectuated.[264]

Like the legislators in *Coleman*, the senators in the hypothetical suffered the concrete injury of vote nullification because they have a "plain, direct, and adequate" interest in maintaining the effectiveness of their vote establishing a treaty provision as self-executing.[265] When the executive undermined the senators' interest in protecting the effectiveness of their votes by refusing to enforce the treaty obligation, the senators sustained an injury identical to the injury suffered by the legislators in *Coleman*.[266]

Specifically, in the hypothetical, when the senators voted to ratify the treaty, they understood that the treaty required the executive branch to take specific action.[267] Their vote to ratify the treaty would have been, at least in part, contingent upon an expectation that the executive branch would carry out the required action.[268] The executive's refusal to enforce the treaty obligation completely undermined the purpose and effectiveness of the senators' vote, thus placing the senators in a situation similar to the legislators in *Coleman* and *Kennedy*.[269]

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264. *See, e.g.*, *Raines*, 521 U.S. at 824 (declining legislators' analogy between their case and *Coleman* because "[t]hey have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated"). The Court based the determination that the plaintiff-legislators were not sufficiently injured to establish standing not on the number of plaintiffs, but on the fact that they appeared to be attempting to reverse a political loss through the judicial branch. *Id.*

265. *Cf. Coleman*, 307 U.S. at 438 (granting standing to senators claiming vote nullification where executive action completely undermined the effectiveness of their votes against the ratification of a constitutional amendment).

266. *Id.*

267. *Cf. id.* (acknowledging an injury where an insufficient number of senators voted to ratify a constitutional amendment but the state endorsed ratification despite that, undermining the legislature's expectation that the amendment would not be ratified).

268. The Senate often explicitly states whether or not it intends a treaty to be self-executing when it is considering the treaty for ratification, suggesting that it is a factor in the decision. *See, e.g.*, S. EXEC. REP. NO. 108-8, at 3 (2003) (commenting that "[n]o separate implementing legislation is necessary for this purpose" with regard to the Montreal Convention).

269. *Compare Coleman*, 307 U.S. at 438 (finding vote nullification where half of the state senate voted against ratifying a constitutional amendment but the amendment was ratified despite the vote), *and* Kennedy v. Sampson, 511 F.2d 430, 442 (D.C. Cir. 1974) (recognizing vote nullification where the both chambers of Congress voted to pass legislation but it was not implemented by the executive), *with Raines*, 521 U.S. at 829 (rejecting a claim of vote nullification in a challenge of the executive's application of legislation overwhelmingly passed in both chambers), *and* Campbell v.

The situation facing the hypothetical senators also satisfies the post-*Raines* legislative standing considerations discussed in *Chenowith* and *Campbell* because the executive's refusal to enforce the treaty obligation completely nullified the senators' votes.[270] The senators' claim would survive for the same reason that the *Chenowith* court suggested the *Kennedy* holding was valid: the executive's refusal to recognize properly approved legislative action constitutes complete nullification of the votes to pass that legislation.[271] In the hypothetical, the senators voted to require the executive to recognize the treaty as self-executing, and his refusal is equivalent to the inappropriate pocket veto in *Kennedy*.[272]

Further, the executive's refusal to recognize the treaty as self-executing is complete nullification based on Justice Randolph's concurrence in *Campbell*.[273] In the hypothetical, the senators required the executive to view the treaty term as self-executing through their approval of the treaty; the executive's refusal to effectuate that treaty term means that the senators' votes were "for naught."[274] Applying the analysis invoked by Judge Randolph: "in the language of *Raines*," the hypothetical senators had sufficient votes to pass the treaty with a self-executing term, but this legislative action did not go "'into

Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000) (denying legislative standing where the executive's action was only tangentially related to legislative votes).

270. *See* Chenowith v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999) (recognizing that an unconstitutional pocket veto of legislation duly passed by Congress could satisfy the *Raines* complete nullification requirement); *see also Campbell*, 203 F.3d at 31 (Randolph, J., concurring) (arguing that if legislation prohibiting executive action had passed both chambers and the executive had taken the action regardless, the legislators would have a valid claim of complete nullification).

271. *See Chenowith*, 181 F.3d at 116–17 (arguing that *Kennedy* would probably satisfy the narrow vote nullification requirements implemented by the Court in *Raines* because it was sufficiently similar to *Coleman*).

272. *See id.* at 117 (finding that the pocket veto in *Kennedy* constituted complete nullification because it was the executive's action that "prevented the bill from becoming law" instead of a lack of legislative support).

273. *See Campbell*, 203 F.3d at 31 (Randolph, J., concurring) (suggesting that if the President had declared war despite Congress's rejection of the declaration of war the legislators would have standing because the actions they voted to prohibit were executed anyway, thus nullifying the effectiveness of their votes).

274. *Cf. id.* (positing that if the President had taken action inconsistent with Congress's rejection of the declaration of war, the legislative votes would have been rendered meaningless).

effect.'"[275] This basis is sufficient to grant the senators standing based on a claim of vote nullification.[276]

Unlike the situation in *Raines*, recognizing legislative standing is the last (and only) resort to limiting the assertion of the executive in the hypothetical.[277] The senators' standing claim is strengthened by the fact that there is no viable alternate remedy for the legislators.[278] In the hypothetical, legislative recourse would be unlikely because implementing legislation would have to pass both chambers and survive executive consideration.[279] This is an unreasonable expectation because ratification only requires consideration from the Senate.[280] Further, a court would likely recognize legislative standing because no private party could challenge the executive's action.[281] | It would be extremely difficult for a private individual to prove the injury, causation, and redressability elements of Article III standing in the hypothetical.[282]

C. Legislators Seeking a Judicial Solution to Executive Action Under Medellín *Can Avoid Raising a Non-Justiciable Political Question*

A suit to challenge the executive's inaction in this situation would not raise a political question that the courts would be unable or

275. *See id.* (considering a step-by-step application of the *Raines* requirements for vote nullification to the legislators' claim).

276. *Compare* Kennedy v. Sampson, 511 F.2d 430, 431 (D.C. Cir. 1974) (determining that the executive's refusal to implement duly passed legislation was vote nullification), *with Campbell*, 203 F.3d at 31 (Randolph, J., concurring) (arguing that the vote nullification claim was unfounded because the executive action was not sufficiently related to the legislative action).

277. *See* Raines v. Byrd, 521 U.S. 811, 829 (1997) (implying that if there was no other opportunity to challenge the line item veto the outcome of the case might have been different and that the legislative standing question certainly would have been considered differently).

278. *See id.* (suggesting that since members of Congress could repeal the Line Item Veto Act or remove appropriation bills from the measure's scope, they have other opportunities for recourse). *But see Campbell*, 203 F.3d at 32 (Randolph, J., concurring) (arguing that the general ability to vote for or against new legislation in response to executive action does not negate legislative standing for a claim of vote nullification).

279. *See supra* note 217 and accompanying text (discussing the hurdles to the enactment of the Senate's intent); *see also* U.S. CONST. art. I, § 7, cl. 2 (providing for the presentment and enactment of legislation and enumerating the veto override process).

280. *See* U.S. CONST. art. II, § 2, cl. 2 (enumerating the treaty-making process).

281. *See Raines*, 521 U.S. at 829–30 (suggesting that when a private party can challenge the constitutionality of an act, the Court should not unnecessarily intercede in the dispute between the political branches).

282. *See supra* note 216 and accompanying text.

unwilling to answer. Specifically, the legislators would seek an injunctive order compelling executive action.[283] The overarching issue in the suit would be whether the treaty term was self-executing; essentially it would be the same type of treaty interpretation in which the Court has regularly engaged.[284]

In reviewing whether an issue raises a nonjusticiable political question, courts generally apply the six-part *Baker* test. The Supreme Court has recognized that some of the elements are more important and clearly supported than others.[285] Applying the *Baker* test to the hypothetical scenario above proves that a legislative suit would not raise an issue violating the political question doctrine.[286]

First, the Constitution does not commit resolution of this issue to one of the political departments. In determining whether the Constitution textually commits the resolution of the issue to a political branch, the Court must interpret the constitutional grant of treaty-making powers—specifically the Treaty Clause.[287] The Treaty Clause authorizes the executive to make treaties with the advice and consent of the Senate.[288] The Treaty Clause does not mention treaty interpretation.[289] The only clause that could be read to encompass treaty interpretation is the Supremacy Clause.[290] The Supremacy Clause does not expressly state that one branch must enforce or

283. *See supra* note 252 and accompanying text.

284. For example, in *Foster v. Neilson*, the Court found that specific terms in the Adams-Onís treaty were not judicially enforceable absent implementing legislation. 27 U.S. (2 Pet.) 253, 314 (1829). Shortly thereafter, in *United States v. Percheman*, the Court overruled *Foster* and held that the terms in the Adams-Onís treaty addressed in that case were in fact self-executing based on the Spanish-language version of the treaty. 32 U.S. (7 Pet.) 51, 88–89 (1833). And recently, in *Medellín v. Texas*, the Court interpreted the text of the provisions of the U.N. Charter to determine that ICJ decisions were not domestically enforceable without implementing legislation. 128 S. Ct. 1346, 1358–60 (2008).

285. *See* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (stating that the political question tests as listed in *Baker* "are probably listed in descending order of both importance and certainty").

286. *See supra* notes 172–182 and accompanying text (discussing the political question doctrine and listing the factors in the *Baker* test).

287. *See* Powell v. McCormack, 395 U.S. 486, 521 (1969) (establishing that review of a textual commitment requires an interpretation of relevant constitutional language). In *Powell*, the Court rejected the argument that the ability of Congress to exclude members was a nonjusticiable political issue because the Constitution allows Congress to judge the qualifications of its own members. *Id.* at 522.

288. U.S. CONST. art. II, § 2, cl. 2.

289. *See id.*

290. *See* U.S. CONST. art. VI, cl. 2 (suggesting that treaties carry the same weight as the Constitution and the laws made pursuant to the Constitution).

interpret the efficacy of treaties.[291] Based on a reading of the Treaty Clause and the Supremacy Clause, the Constitution does not relegate the final word in treaty interpretation to a political branch. In fact, one could argue that the judicial branch is the division of government to which the Constitution has relegated that power.[292]

Second, the judiciary would be perfectly capable of discovering and managing a standard to resolve the issue raised in the hypothetical. To satisfy the second *Baker* requirement, the Court must resolve the issue by setting forth clear rules.[293] Additionally, at least to some extent, future courts must be able to effectively rely on the test enunciated by the Court.[294] Because the issue raised in the hypothetical is ultimately one of treaty interpretation, courts have already discovered and established a manageable—if not reliable—standard to resolve the issue.[295]

Third, there is not a policy question at issue in the hypothetical; instead, the question is simply whether the treaty term is self-executing and whether the executive must act in accordance with the treaty obligation. In attempting to clarify this element of the *Baker* test, courts have indicated that where rendering a decision requires the balancing of a variety of social or political interests, that decision is barred as a nonjusticiable policy determination.[296] In the hypothetical, the balancing of political or social interests would not be necessary because that would have been conducted by the executive in drafting the treaty and the legislature in consenting to the treaty.[297] Instead, the court would only have to determine

291. *See id.*

292. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006) (stating that treaty interpretation "is emphatically the province and duty of the judicial department, headed by the one supreme Court") (internal quotations and citations omitted). *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("If two laws conflict with each other, the courts must decide on the operation of each.").

293. *See* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (arguing that the laws established by the courts must be "principled, rational, and based upon reasonable distinctions").

294. *See id.* at 281–82 (rejecting an earlier test and finding that gerrymandering claims are nonjusticiable on political grounds because the earlier test was unmanageable in that other courts could not rely on the test).

295. *See* Medellín v. Texas, 128 S. Ct. 1346, 1357 (2008) (applying a text-based treaty interpretation aimed at discovering the intent of the parties to the treaty).

296. *See, e.g.*, Smith v. Babcock, 19 F.3d 257, 266 (6th Cir. 1994) ("[T]he balancing of the relevant interests is quintessentially a political question most appropriately resolved by the elected branches of government.").

297. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009) (recognizing that certain foreign policy

whether the parties to the treaty intended the term to be self-executing based on the text of the treaty and the other elements discussed in *Medellín*.[298]

The final three elements in the *Baker* test do not merit independent consideration; they are the least important and least certain aspects of the test.[299] In reviewing an issue for its justiciability under the political question doctrine, the Court has glossed over these three tests.[300] Further, relying on that position, an issue is likely to fail one of those three tests only in the most extreme situations.[301] Foreign policy and treaty making are not inherently categorized as one of those extreme situations.[302] In *Powell*, the Court rejected claims of nonjusticiability per the final three tests by citing the judicial branch's constitutional authority.[303] Consistent with that standard, resolving disputes between the legislature and the executive over the interpretation of a treaty to the detriment of one branch's position would not fail one of the final three *Baker* tests.[304]

In *Raines*, the Court suggested that if there were no alternate means to address the issue in that case, the outcome might have been

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interests may require initial consideration from a political branch and thus could raise a nonjusticiable political issue for courts).

298. *See supra* note 40 and accompanying text (discussing the relevant aspects of a treaty for the purposes of interpreting the treaty-makers' intent).

299. *See Vieth*, 541 U.S. at 278 (discussing the final three *Baker* tests: the inability of a court to decide the issue without eroding the respect due the other branches of government, an unusual need for adherence to a political decision already made, and the potential for embarrassment as a result of differing conclusions by each department).

300. *See* Powell v. McCormack, 395 U.S. 486, 548–49 (1969) (addressing the final five *Baker* tests in two cursory paragraphs after addressing the first test for nearly thirty pages).

301. *See* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) ("The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.").

302. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) (arguing that the fact that a case addresses a matter of foreign policy does not automatically make it nonjusticiable).

303. *See Powell*, 395 U.S. at 549 ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.").

304. *Cf.* U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 104 (D.D.C. 1998) (resolving a dispute between the legislature and the executive regarding the census without causing undue disrespect to a political branch, breaching an unusual need for adherence to an existing political decision, or producing multifarious statements on the issue).

different.[305] Specifically, the *Raines* Court indicated that Congress could legislate its way out of the problem or a private party could sue for the injury.[306] In the hypothetical scenario, there would be no sufficient alternative to restore the value of the Senate's vote to ratify a self-executing treaty term other than granting legislators standing to sue for vote nullification.[307] The Senate could not simply legislate around the issue because any bill would need support from the House and the President; specifically, traditional legislation would have to cross a different threshold than treaty ratification.[308] Additionally, due to the abstract nature of the injury, no private party would be able to satisfy the injury-in-fact requirement of Article III standing based on the facts of the hypothetical.[309]

Courts should recognize legislators' standing in this situation because the best way to equalize the balance of power between the executive and legislative branches in light of the *Medellín* holding would be for courts to recognize legislative standing in instances where Congress challenges the executive's refusal to enforce a treaty.[310] It would then be the duty of the judiciary to interpret the treaty provision or the implementing legislation to determine if the terms of the treaty were self-executing.[311] The courts are perfectly

305. *See* Raines v. Byrd, 521 U.S. 811, 829–30 (1997) (recognizing that Congress could take legislative steps to remedy the plaintiffs' complaint or another party could have a constitutional challenge to the case).

306. *Id.*

307. *See supra* notes 216–217 and accompanying text (addressing barriers to alternative methods of challenging executive action).

308. *Compare* U.S. CONST. art. II, § 2, cl. 2 (requiring the consent of two-thirds of the Senate for treaty ratification), *with* U.S. CONST. art. I, § 7 (requiring that legislation pass both chambers of Congress and be approved by the executive or that both chambers vote to supersede the executive's veto by a two-thirds vote).

309. *See* Roberts, *supra* note 57, at 1223–24 (arguing that based on Article III standing limitations, courts should only hear cases as a "last resort" and when a decision is consistent with separation of powers and appropriate for judicial consideration); *see also* Paul Alexander Fortenberry & Daniel Canton Beck, *Chief Justice Roberts—Constitutional Interpretations of Article III and the Commerce Clause: Will the "Hapless Toad" and "John Q. Public" Have Any Protection in the Roberts Court?*, 13 U. BALT. J. ENVTL. L. 55, 73 (2005) (arguing that Chief Justice Roberts opposes citizen suits to the extent that they force the courts to take action constitutionally assigned to the executive). *But see* Massachusetts v. EPA, 549 U.S. 497, 520–21 (2007) (recognizing standing for a state's challenge of the EPA's failure to enforce the Clean Air Act while acknowledging that states receive unique standing considerations in some situations).

310. *See supra* Part IV.B (arguing that legislators in the hypothetical would satisfy both traditional and legislative standing requirements).

311. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 957 (1994) ("[O]ur courts have a *duty* to interpret treaties.").

capable of undertaking this level of analysis as evidenced by *Medellín* and countless other cases in the Supreme Court and lower courts.[312]

D. If Courts Refuse to Recognize Legislative Standing in the Situation Created By Medellín*, Alternate Steps Would Be Available to the Legislative Branch*

If courts do refuse to grant the hypothetical senators' standing, there are other, possibly futile, steps that Congress could take in trying to implement its intent. First, Congress could try to pass legislation that clarifies the body's intent with regard to the treaty or the provision.[313] As traditional legislation, this, of course, would be subject to presidential veto, and if the executive was acting contrary to legislative intent, it is unlikely that he would sign legislation forcing him to alter his course of action.[314] Reversing the President's veto in this situation would require a two-thirds majority in both chambers, a significant constitutional hurdle.[315]

Alternatively, Congress could use its legislative powers—such as the budget and appropriations process or its investigative role—as persuasive tools to change the executive's course of action.[316] Finally, either chamber of Congress could sue as an entire body challenging the President's enforcement of the treaty provision.[317] Each of the above steps would require a higher level of support than the actual vote to ratify the treaty, and they do not qualify as suitable alternatives to legislative standing under *Raines*.[318]

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312. *See* Medellín v. Texas, 128 S. Ct. 1346, 1392–93 (2008) (Breyer, J., dissenting) (listing cases where the Supreme Court has determined that a treaty term was self-executing); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987) ("Courts . . . have final authority to interpret an international agreement . . . ."). *See generally* Bederman, *supra* note 311, at 955–63 (discussing the courts' constitutional obligation to interpret treaties).

313. *See* U.S. CONST. art. I, § 7, cl. 2 (establishing the legislative powers of Congress and requiring presentment).

314. *See supra* note 217 and accompanying text (discussing the barriers to enactment against the executive's will).

315. *See* U.S. CONST. art. I, § 7, cl. 2 (enumerating the veto and veto override process).

316. *See* Sanchez-Espinosa v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985) (O'Connor, J., concurring) (identifying legislative powers that serve as a check on the executive).

317. *See, e.g.*, U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 82 (D.D.C. 1998) (acknowledging the House of Representative's standing to sue and challenge the Census Bureau's use of statistical sampling in the census as inconsistent with the Census Act).

318. *See* Campbell v. Clinton, 203 F.3d 19, 32 (D.C. Cir. 2000) (Randolph, J., concurring) (contending that under *Raines*, just because Congress can vote on the

The best alternate course of action for Congress would be to preemptively pass legislation recognizing and defining the injury of vote nullification.[319] Under some interpretations of the doctrine of prudential standing, Congress can control the scope of the cases that courts consider by defining the injury and causation elements.[320] If Congress created a clearly defined injury, the courts may even relax certain elements of Article III standing.[321] However, some view the doctrine of prudential standing as an additional limit within Article III standing and would reject congressional efforts to expand standing under that doctrine to a claim that did not meet the Article III requirements.[322]

CONCLUSION

Medellín increased executive power to the extent that presidential action can undermine the votes of members of Congress, thus establishing legislative standing for those members. The holding shifted the balance of power towards the executive by creating a presumption that treaties are non-self-executing.[323] The Roberts Court developed the presumption by holding that unless the text of a treaty clearly indicates that self-execution was the intent of the parties, the treaty is non-self-executing.[324] The shift in power allows

issue in the future does not automatically mean that an earlier vote on the same issue has not been nullified).

319. *See* Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) (recognizing a lower threshold to satisfy redressability and immediacy requirements when a party asserts a procedural right).

320. *See supra* note 124 and accompanying text (arguing that legislation could relax the Article III standing elements).

321. *See generally* John D. Echevarria, *Critiquing* Laidlaw*: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 DUKE ENVTL. L. & POL'Y F. 287, 295–301 (2001) (addressing the Court's modern approach to recognizing congressionally created rights of action under Article III); Martin Kellner, *Congressional Grants of Standing in Administrative Law and Judicial Review: Proposing a New Standing Doctrine from a Delegation Perspective*, 30 HAMLINE L. REV. 315, 328–33 (2007) (discussing Congress's ability to create a case or controversy by passing laws creating legal rights).

322. *See supra* note 125 and accompanying text (suggesting that Article III standing requirements establish a ceiling for justiciable claims).

323. *See supra* Part III (discussing the establishment of a presumption of non-self-execution).

324. *See* Medellín v. Texas, 128 S. Ct. 1346, 1357 (2008) (basing the treaty review on an analysis of the text and requiring some textual indicia of intent that the treaty be self-executing).

the executive to make the final determination of whether a treaty is domestically enforceable.[325]

Members of the legislature have limited opportunities to respond to an executive who interprets a treaty provision differently than the Senate intended. If members of the Senate sued to force the President to execute the treaty obligations consistent with the Senate's intent at the time of ratification, those members would have standing.[326] Senators challenging the executive's inaction would satisfy the traditional Article III requirements of standing because they would be able to assert a concrete injury, show causation, and satisfy redressability standards.[327] The senators' claim would not raise any prudential standing concerns because it is not a third party claim, a generalized grievance, or within the purview of a statute.[328]

The senators would also overcome the specific barriers created by their role as legislators. The senators in the hypothetical would claim an injury sufficient to overcome the barriers associated with legislative standing.[329] Specifically, the legislators would be able to effectively assert a claim of vote nullification because executive inaction would completely undermine the effectiveness of their votes to ratify the treaty as self-executing.[330] Further, the legislative suit would not raise a nonjusticiable political question.[331]

In the end, courts should recognize legislative standing in the hypothetical situation. However, if they do not, the legislature has other options in checking the type of executive action presented in the hypothetical. For example, both chambers could sue as an entity, vote to withhold funding, or pass implementing legislation.[332] Alternatively, Congress could attempt to expand the scope of

325. *See supra* Part II (presenting a hypothetical situation where the executive refuses to enforce treaty provisions).
326. *See supra* Part IV.A (applying the hypothetical to the traditional standing test).
327. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (enumerating the requirements for Article III standing).
328. *See supra* notes 124–125 and accompanying text (discussing the applicability of prudential standing).
329. *See supra* Part IV.B (considering the requirements for legislative standing).
330. *See* Coleman v. Miller, 307 U.S. 433, 438 (1939) (recognizing that legislators have an interest in maintaining the effectiveness of their votes).
331. *See supra* Part IV.C (addressing the relevance of the political question doctrine in light of the hypothetical).
332. *See supra* Part IV.D (considering alternate possibilities for legislators to respond to an executive's expansion of power).

legislative standing by passing legislation recognizing a cause of action for vote nullification.[333]

If Congress is barred from asserting a vote nullification claim in light of the *Medellín* holding, the Court will have significantly increased executive power. The only way to maintain an appropriate balance of power in treaty enforcement is either for courts to recognize vote nullification or for Congress to step forward and protect its powers in advance.

333. *See supra* notes 320–322 and accompanying text (discussing the possibility of creating a cause of action through legislation).