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The Indefinite Deflection of Congressional Standing

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Abstract

Recent litigation brought or threatened against the administration of President Obama has brought to prominence the question of standing by Congress or its members to sue the President for nondefense or non-enforcement of federal law. Leading scholars in the field of congressional standing immediately expressed doubt that courts would entertain a suit seeking to compel enforcement of these provisions. This Article argues that the premise that suits of this sort can be maintained rests on a tenuous understanding of the Supreme Court's fitful treatment of standing by Congress or its members to sue the Executive.

The Court has never issued a definitive pronouncement on the viability of such suits, but its rulings have displayed a distinct pattern. Without expressly repudiating such suits, the Court has repeatedly passed on opportunities to affirm their validity. Based upon this pattern, it appears that a viable suit remains theoretically possible but apparently practically unattainable. Thus, this Article concludes that the Court consciously avoids recognizing legislative standing, but has left the door very slightly ajar in the event that an unanticipated case arises.

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I. INTRODUCTION

"Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[1]

In July of 2014, United States House of Representatives Speaker John Boehner announced his intention to ask the House to bring suit against the administration of President Barack Obama for alleged abuse of executive power.[2] Among the actions widely assumed to be challenged in the proposed suit were Administration delays in enforcing deadlines imposed by

1. INS v. Chadha, 462 U.S. 919, 940 (1983).

2. Jacob Gershman, *Boehner Lawsuit Against Obama Administration Has Hurdles to Clear*, WALL STREET J. (July 3, 2014, 8:00 PM), http://www.wsj.com/articles/boehner-lawsuit-against-obama-administration-has-hurdles-to-clear-1404345609.

the Patient Protection and Affordable Care Act.[3] Leading scholars in the field of congressional standing, however, immediately expressed doubt that courts would entertain a suit seeking to compel enforcement of these provisions.[4]

The premise that suits of this sort can be maintained, this Article argues, rests on a tenuous understanding of the Supreme Court's fitful treatment of standing by Congress or its members to sue the Executive. An acontextual construction of the Court's above-quoted pronouncement in *Chadha*, along with the absence of blanket repudiation of such suits by the Court, largely accounts for persistent belief that these suits can proceed. Admittedly, plausible normative arguments exist for the viability of this kind of litigation.[5] Whatever the force of this reasoning as an original matter, however, the Court's rulings support the opposite conclusion.[6] Without expressly repudiating such suits, the Court has repeatedly passed on opportunities to affirm their validity.[7] A viable suit remains theoretically possible but apparently practically unattainable.[8]

To show congressional standing's lack of moorings in the Court's jurisprudence, this Article considers the issue from three perspectives. Part II describes the constitutional doctrine of standing and the debate over whether congressional standing to ensure the integrity of federal legislation comports with the Constitution's allocation of powers. In particular, this Part focuses on divergent positions among scholars and within the District of Columbia Circuit Court of Appeals—the court that has most frequently addressed this issue. Part III examines the Supreme Court cases in which an issue of legislative or legislator standing has emerged. This Part argues that, under a fair reading of these decisions, the Court has never endorsed

3. *See id.* (referring to Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.)). The House brought a formal complaint challenging the Administration's implementation of the Act several months after Speaker Boehner's announcement. Complaint at 1, U.S. House of Representatives v. Burwell, No. 14-1967, 2015 WL 5294762 (D.D.C. Nov. 21, 2014).

4. Gershman, *supra* note 2 (quoting Tara Grove and Neal Devins). The views of Professors Grove and Devins are discussed *infra* at notes 66–79 and accompanying text.

5. *See infra* notes 83–97 and accompanying text; *see also* Raines v. Byrd, 521 U.S. 811, 828 (1997) (acknowledging that "[t]here would be nothing irrational" about a system that allowed standing by members of Congress to challenge the Executive's allegedly unconstitutional exercise of power).

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Part II.

congressional standing to bring suit to compel executive implementation of federal law. To the extent that this silence might be construed as ambiguity, Part IV asserts, the constitutional context in which the issue has arisen points toward presumptive nonrecognition of congressional standing. Specifically, this Part addresses how notions of congressional standing are in tension with the Court's approach toward three related doctrines: standing under Article III, political questions, and separation of powers.

II. THE DISPUTED APPLICATION OF STANDING DOCTRINE TO CONGRESSIONAL LITIGANTS

The question of congressional standing arises against the backdrop of broader principles the Court has developed to determine whether parties may gain access to federal court.[9] This Part begins by tracing those principles and their rationales. It then offers an overview of positions taken by scholars and the judiciary—specifically the D.C. Circuit—on whether and when Congress or its members may bring suit to uphold federal law.

A. The Idea of Standing

In formal terms, the doctrine of standing arises from the confinement of federal judicial power under Article III of the Constitution to "cases" and "controversies."[10] The Supreme Court first gave expression to the modern conception of standing in *Baker v. Carr*,[11] requiring constitutional claimants to "allege[] such a personal stake in the outcome of the controversy as to assure that concrete adverseness" needed to crystallize issues present in disputes courts are called upon to resolve.[12] Like the Court's other major doctrines of justiciability—mootness,[13] ripeness,[14] and political question[15]—

9. *See infra* Part II.A.

10. Warth v. Seldin, 422 U. S. 490, 498 (1975) (referring to U.S. CONST. art. III, § 2, cl. 1).

11. 369 U.S. 186 (1962).

12. *Id.* at 204.

13. *See* Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013) ("A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam))).

14. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ."), *abrogated on other grounds by* Califano v. Sanders, 97

standing presents a threshold that the claimant must cross to secure a hearing on the merits.[16] Moreover, while "[n]o principle is more fundamental to the judiciary's proper role . . . than the constitutional limitation of federal-court jurisdiction to actual cases or controversies,"[17] standing is perhaps the most important doctrine enforcing this limitation.[18] Even Congress, which can augment standing to bring constitutional claims with statutory causes of action, may not confer the right to sue in circumvention of Article III's standing requirements.[19]

Whether standing exists in a dispute is determined through the prism of rationales for the case or controversy requirement.[20] Ultimately, the Court has said its understanding of Article III standing derives from "a single basic idea—the idea of separation of powers."[21] Thus, denial of standing is often accompanied by articulation of the need to prevent the judiciary from overstepping its prescribed constitutional bounds.[22] Judicial insistence on scrupulous adherence to standing requirements is informed by concern about the "properly limited . . . role of the courts in a democratic society."[23] In *United States v. Richardson*,[24] Justice Powell warned that, by contrast, an overly expansive notion of standing would threaten the public's acceptance

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S. Ct. 980 (1977).

15. *See Baker*, 369 U.S. at 217 (setting forth indicia of circumstances where the Court will refer a constitutional controversy to a political branch for resolution). The political question doctrine is discussed *infra* at Part IV.B.

16. *Warth*, 422 U.S. at 498; *see* Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 669 (1973) ("The essential attribute of the standing determination has always been that it was a decision whether to decide—a determination of whether the validity of the challenged government action should be passed on for this plaintiff.").

17. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976).

18. *See* Allen v. Wright, 468 U.S. 737, 750 (1984).

19. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997); Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 (1992).

20. *See Allen*, 468 U.S. at 750–52.

21. *Id*. at 752. The Court had earlier taken a different view. *See* Flast v. Cohen, 392 U.S. 83, 100–01 (1968).

22. *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches."); *Raines*, 521 U.S. at 820 (citing the Court's "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere" as grounds for refraining from bypassing standing to reach merits of important dispute); United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("Relaxation of standing requirements is directly related to the expansion of judicial power.").

23. Warth v. Seldin, 422 U.S. 490, 498 (1975).

24. 418 U.S. 166.

of the countermajoritarian implications of judicial review.[25] Refusal to address the merits where standing is deficient remits the issue at hand to the political process, in whose province matters of policy fall under our system of carefully allocated powers.[26] The barrier of standing, then, serves to restrain the judiciary from invading the prerogatives of other branches[27] and reflects the philosophy that federal courts should rule on constitutional matters "only in the last resort."[28] Additionally, deciding constitutional questions only when standing requirements are satisfied promotes the judiciary's effective performance of its own function. This restriction assures that a court's ruling is grounded in a specific factual setting,[29] parties have sufficient stake in the outcome to motivate vigorous argument,[30] and courthouse doors are not flooded with litigants seeking to vindicate ideological rather than concrete interests.[31]

25. *See id.* at 192 (Powell, J., concurring); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (describing standing requirement as stemming in part from an awareness of the "limits to the powers of an unelected, unrepresentative judiciary in our kind of government." (citations omitted)). *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) ("The jurisprudence of the Court has developed certain doctrines whose chief content is a generalizing on the timing and limits of the judicial function.").

26. *See Richardson*, 418 U.S. at 179 ("[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").

27. *See, e.g.*, Allen v. Wright, 468 U.S. 737*,* 760 (1984) (rejecting approach toward standing that would make federal courts "as virtually continuing monitors of the wisdom and soundness of Executive action" (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972))).

28. *Id.* at 738 (citation omitted); *see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974) (observing that standing's requirement of concrete injury ensures that judicial resolution of constitutional issues "does not take place unnecessarily").

29. *See Schlesinger*, 418 U.S. at 220–21 ("Concrete injury . . . is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution."); *see also* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 56–57 (2012) (stating that standing requirements prevent courts from hearing mere "hypothetical disputes").

30. *See* Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (holding standing requires that parties have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination" (quoting Baker v. Carr*,* 369 U.S. 186, 204 (1962))); Lea Brilmayer, *The Jurisdiction of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310 (1979) ("The case or controversy requirement guarantees that the individuals most affected by the challenged activity will have a role in the challenge.").

31. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 486 (1982) ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."). By ensuring that suits may only be brought by individuals actually affected by a challenged statute, the standing doctrine can also be regarded as safeguarding the value of self-determination. *See* Brilmayer, *supra* note 30, at 310–11.

In converting these rationales into standards, the Court has come to identify three core elements of standing. First, the plaintiff must demonstrate that he or she has suffered an "injury in fact."[32] Second, that injury must be "fairly . . . trace[able]" to the government action that the plaintiff is challenging.[33] Third, the plaintiff must show the likelihood that the relief being sought will redress that injury.[34] Though perhaps undemanding on the surface, this tripartite test has often thwarted plaintiffs pressing constitutional claims before the Court. The first prong—whether a legally cognizable injury exists—has proved problematic on a number of occasions.[35] This difficulty has derived in large part from the plaintiff's burden to demonstrate that the alleged injury is "actual or imminent, not 'conjectural' or 'hypothetical.'"[36] Thus, the Court has dismissed suits on the grounds that "[a]llegations of possible future injury" fall short and that an asserted threatened injury must be "certainly impending" to qualify as an injury in fact.[37] In addition, some suits have failed because plaintiffs had not suffered a harm that was "concrete and particularized."[38]

Moreover, even plaintiffs who establish a constitutionally sufficient constitutional injury may founder on the second requirement, traceability, and fail to link their injury to the government conduct at issue.[39] For

32. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

33. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976).

34. *Lujan*, 504 U.S. at 561; *see* City of Los Angeles v. Lyons, 461 U.S. 95, 128–29 (1983) (requiring plaintiff to show that "the injuries he has alleged can be remedied or prevented by some form of judicial relief"). The Court has sometimes cast standing requirements in additional ways. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 102 (1968) (Standing requires "a logical nexus between the status asserted and the claim sought to be adjudicated" (emphasis omitted)). The Court has announced, however, that injury in fact, traceability, and redressability constitute the essential components of standing. *See Lujan*, 504 U.S. at 560–61.

35. *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

36. *Id.* (quoting *Lyons*, 461 U.S. at 101–02).

37. *Id.* at 158 (citation omitted); *see* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (rejecting expenditures incurred in response to "hypothetical future harm that is not certainly impending" as basis for standing); *accord* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000); Laird v. Tatum, 408 U.S. 1, 14 (1972).

38. *Lujan*, 504 U.S. at 560; *see* Lance v. Coffman, 549 U.S. 437, 442 (2007) (denying standing where plaintiffs "assert[ed] no particularized stake in the litigation"); Warth v. Seldin, 422 U.S. 490, 501 (1975) (requiring allegation that injury to plaintiff is "distinct and palpable"); *accord* Allen v. Wright, 468 U. S. 737, 756 (1984); Sierra Club v. Morton, 405 U.S. 727, 740–41(1972).

39. *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976) (requiring plaintiffs to "allege some threatened or actual injury *resulting* from the putatively illegal action" to properly establish standing (emphasis added) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973)).

example, the Court has rejected standing for plaintiffs claiming that tax benefits extended to a third party enabled or facilitated the harm that they were complaining of.[40] A similar inability to establish the required causal connection defeated low-income plaintiffs who argued that a town's restrictive zoning ordinance was responsible for their inability to secure housing in the town.[41] In the Court's eyes, the plaintiffs' pleadings did not demonstrate that the challenged zoning restrictions—rather than other factors such as their own financial circumstances—accounted for this deprivation.[42] Following the same logic, the Court also refused to entertain a suit by the mother of an illegitimate child seeking enforcement of a child support statute against the child's father.[43] For the Court, the plaintiff's contention that such a prosecution would produce payment of child support, rather than incarceration of the father, was "only speculative."[44]

Further, a plaintiff's failure to show redressability is largely a function of a court's belief that the plaintiff's harm cannot be ascribed to the challenged government action. If the law at issue has not caused the plaintiff's harm, then its invalidation will not bring the plaintiff relief.[45] Thus, the Court announced that a challenged exclusionary zoning regime must have caused the plaintiff's harm and that the plaintiff "personally would benefit in a tangible way" from the ruling sought.[46]

Nor are the criteria plaintiffs must meet to establish standing confined to those emanating from Article III's case or controversy requirement; the Court has also recognized prudential limitations on plaintiffs' access to

40. *See Allen*, 468 U.S. at 752–53 (dismissing suit where plaintiffs asserted that grant of tax-exempt status to racially discriminatory private schools interfered with their effort to desegregate public schools); *see also Simon*, 426 U.S. at 42–43 (holding plaintiffs failed to show that IRS's allegedly illegal favorable tax treatment to hospitals restricting services to indigents was the cause of hospitals denying indigents service).

41. *See Warth*, 422 U. S. at 491 ("[T]he facts alleged [by plaintiff] fail to support an actionable casual relationship between Penfield's zoning practices and these petitioner's alleged injury.").

42. *Id.* at 502–08.

43. *Linda R.S.*, 410 U.S. at 619 ("[Appellant] does have an interest in the support of her child . . . . [But she] has made an insufficient showing of a direct nexus between the violation of her interest and the enforcement of the State's criminal laws.").

44. *Id.* at 618.

45. *See* Craig R. Gottlieb, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1085–87 (1994).

46. *Warth*, 422 U.S. at 508*; see also* Lujan v. Defs. of Wildlife, 504 U.S. 505, 570–71 (1992) (holding a plaintiff fails to establish standing where "any relief the District Court could have provided in this suit . . . was not likely to produce [the redress sought]").

federal courts.[47] Described by the Court as "closely related to Art. III concerns but essentially matters of judicial self-governance,"[48] such constraints serve to avoid judicial rulings on issues more appropriately and effectively addressed by other parts of government.[49] These "judicially self-imposed limits on the exercise of federal jurisdiction"[50] comprise principally three categories. First, the Court will not entertain claims based on "generalized grievances"[51] that are suited for resolution by the political process.[52] Second, as a general rule, the Court will not allow a plaintiff to invoke the rights of third parties in support of the plaintiff's own claim.[53] Third, the interest that the plaintiff is asserting must be "arguably within the zone of interests" that the pertinent statute or constitutional provision protects or regulates.[54]

As the preceding summary suggests, the Court's standing jurisprudence has not produced a cohesive body of readily applicable doctrine. The Court itself has acknowledged that "the concept of 'Art. III standing' has not been defined with complete consistency."[55] Scholars have been more critical; in harsh tones and large numbers, they have assailed the Court's standing doctrine as glaringly deficient.[56] Indeed, almost ritualistic denunciation of

47. *See infra* notes 48–54.

48. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting *Warth*, 422 U.S. at 500).

49. *See Warth*, 422 U.S. at 500.

50. Allen v. Wright, 468 U.S. 737, 751 (1984).

51. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); United States v. Richardson, 418 U.S. 166, 180 (1974); *see also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979) ("[A] litigant normally must assert an injury that is peculiar to himself or a group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'" (quoting *Warth*, 422 U.S. at 499)).

52. *See, e.g.*, *Richardson*, 418 U.S. at 179.

53. Kowalski v. Tesmer, 543 U.S. 125, 129, 134 (2004); *accord Warth*, 422 U.S. at 509, 514; Tileston v. Ullman, 318 U.S. 44, 46 (1943) (per curiam).

54. Ass'n of Data Processing Orgs. v. Camp, 397 U.S. 150, 153 (1970); *see* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1388–90 (2014); *accord* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177–78 (2011); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17 (2004) ("[The plaintiff lacks prudential standing because] it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing.").

55. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982).

56. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 59 (4th ed. 2011) ("Standing frequently has been identified by . . . commentators as one of the most confused

the Court's treatment of standing pervades commentary on this topic.[57] Particular disdain has been reserved for the Court's alleged manipulation of standing doctrine to avoid deciding sensitive issues[58] and to effectuate its view of a claim on the merits.[59] Against this clouded backdrop, it is unsurprising that the subject of this Article, congressional standing—with its additional layer of separation of powers considerations—has generated murky judicial guidance and divided interpretation.

B. Congressional Standing: The Debate in Principle

The Supreme Court's sparse and sometimes cryptic treatment of congressional standing to compel executive enforcement of federal law has left most of the debate on this issue to other forums. A significant body of scholarship argues the incompatibility of such standing with the Constitution's separation of powers,[60] while another deems it a necessity under that regime.[61] In addition, the D.C. Circuit's jurisdiction has made it a

areas of the law."); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 701 (2006) ("[I]t is widely perceived that the Court manipulates the injury and redressability prongs of standing.").

57. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (contending that "apparent lawlessness" of and "wildly vacillating results" in many standing cases spring from structure of prevailing standing doctrine); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988) (referring to standing's "doctrinal confusion"); Mark V. Tushnet, *The "Case or Controversy" Controversy: The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705 (1980) (describing the doctrine as "amorphous and confused").

58. *See, e.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 476 (2008); Fallon, *supra* note 56, at 655 ("Sometimes manipulation [of the standing doctrine] occurs because a court wants to avoid resolving a hard constitutional issue on the merits.").

59. *See, e.g.*, Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 640–41 (1985) ("Since [the standing doctrine] continues to be given a more lenient construction on other occasions, the decision looks very much like a rejection of the plaintiffs' claim on the merits."); *see also* Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663–64 (1977) (suggesting that standing has become a "surrogate for decisions on the merits").

60. *See, e.g.*, Jonathan Wagner, Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526, 538–39 (1982) ("In the long run, such prudential strategies will inevitably led to an accretion of executive power and a weakening of the separation of powers that broad judicial abstention was originally meant to strengthen.").

61. *See, e.g.*, Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV 1311, 1323–24 (2014) ("[E]xecutive standing depends on the intersection of Article II and Article III. The Take Care Clause of Article II imposes constitutional duties on the executive that it cannot perform without resort to Article III courts.").

fertile ground for suits asserting congressional prerogative.[62] In the absence of plain resolution by the Court, much of the commentary in both settings addresses how the constitutional structure *ought* to be construed with respect to this subject.

1. The Divergent Views of Scholars

Scholarly approaches toward congressional standing divide roughly into two opposing camps. Each, however, expresses dread of the specter of runaway power by a branch of government if its position is not embraced. Various critics believe that recognizing the ability of Congress—and especially its members—to sue the Executive for nonfeasance impermissibly expands congressional authority, extends the judicial function beyond its proper boundary, or contracts executive power.[63] Advocates, by contrast, perceive the threat to the equilibrium of power prescribed by the Constitution as emanating from a different source.[64] In their view, foreclosing congressional suits to challenge executive nonfeasance effectively transfers a portion of Article I legislative power to the Executive.[65]

Perhaps the most penetrating challenge to congressional standing to enforce or defend federal statutes appears in recent scholarship by Tara Leigh Grove, both in her own work[66] and in conjunction with Neal Devins.[67] A central part of this critique dwells on the intrinsic limits imposed on congressional functions by Article I of the Constitution. Simply put, the legislative character of Congress's power precludes Congress's direct implementation of the laws it enacts.[68] Conversely, congressional participation in defending or enforcing federal laws encroaches on the executive branch's duty to "take Care that the Laws be faithfully

62. This was particularly true of the period preceding the Supreme Court's ruling in *Raines v. Byrd*, 521 U.S. 811, 829 (1997). *Raines* is discussed *infra* at notes 179–262 and accompanying text.

63. *See infra* note 69 and accompanying text.

64. *See infra* note 93 and accompanying text.

65. *See infra* note 93 and accompanying text.

66. *See* Grove, *supra* note 61.

67. Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014).

68. *See* Grove, *supra* note 61, at 1356–57 ("No provision of the Constitution appears to give Congress the power to bring suit to enforce or defend federal statutes."); *see also* Grove & Devins, *supra* note 67, at 627–28.

executed."[69] Whatever the plausibility of policy arguments in favor of allowing Congress this arguably modest role, they must yield to the Framers' judgment that liberty is best preserved by a scrupulous separation of legislative and executive powers.[70] Moreover, from this perspective, attempts by either house of Congress to bring suit against the Executive only exacerbate the constitutional offense.[71]

Professor Grove also buttresses these textual and structural arguments with normative and practical considerations. She notes dangers that would attend Congress's discretion to choose the cases that warrant its intervention.[72] For example, Congress would have incentive to avoid political resolution of inflammatory issues, thus "'invit[ing] the judiciary to resolve those political controversies that [legislators] cannot[,] or would rather not[,] address' themselves."[73] Additionally, discretion to pick which cases to appeal where the Executive has declined to do so—or done so in an allegedly half-hearted manner—would empower Congress to target unpopular parties and causes.[74] Furthermore, little or no harm would result from denial of congressional standing[75] in these circumstances. In particular, the constitutionality of laws that the Executive does not defend would rarely go untested on appeal. The Executive has strong motivation to enforce even those laws with which it disagrees; where a court upholds such a law, the affected litigant has standing to appeal the adverse judgment.[76] Finally, lack of standing to assert the validity of federal statutes does not

69. U.S. CONST. art. II, § 3; *see* Grove, *supra* note 61, at 1365–66; Grove & Devins, *supra* note 67, at 582–83. Professor Grove specifically rebuts the argument that Congress has standing to defend—if not execute—statutes because defense of federal law does not constitute an exclusive executive function. *See* Grove, *supra* note 61, at 1359.

70. *See* Grove, *supra* note 61, at 1365 (noting James Madison's warning against danger of combining legislative and executive powers in one body*)*; *see also* Bowsher v. Synar, 478 U.S. 714, 736 (1986).

71. Grove & Devins, *supra* note 67, at 624.

72. *See* Grove, *supra* note 61, at 1362–65.

73. *Id.* at 1363 (quoting Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993)).

74. *See id.* at 1362, 1364.

75. Professor Grove would also forbid the executive branch from appealing the invalidation of a statute that it has refused to defend. *See id.* at 1368–71. *But see* Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 84–85, 87 (2014) (asserting that allowing executive standing in such instances serves appellate review's purpose of developing law by "announcing, clarifying, and harmonizing governing legal rules").

76. *See* Grove, *supra* note 61, at 1369–70.

render Congress incapable of disputing executive decisions not to defend such a law. Each house can subpoena the Attorney General to testify about the Executive's decision not to defend, and together they can impeach and remove the Attorney General or President.[77]

Other scholars, too, have discerned tension between congressional suits against the Executive and the system of separation of powers envisioned by the Constitution. One objection is that congressional power to haul the President into court would convert what are properly political issues into judicial ones.[78] This criticism is in accordance with the idea that the Court should refrain from involvement with disputes for which political remedies exist so as to conserve its resources to protect individual rights and liberties.[79] This hazard is perceived as especially pronounced in the case of suits brought by individual members of Congress.[80] Moreover, legislator suits raise two additional concerns. First, suits brought under a theory that executive non-enforcement has interfered with the legislator's duties may not meet standing's requirement that the plaintiff allege a distinct and particularized injury.[81] Second, the sheer volume of suits that this rationale might support could threaten relationships among the three branches of the federal government.[82]

By contrast, advocates of congressional standing to sue for executive nondefense or non-enforcement of laws assert a threat to the equilibrium of federal power from shielding the Executive from such suits. Denial of standing, it is said, swells executive authority at the expense of the

77. *See* Grove & Devins, *supra* note 67, at 573–76, 600, 603, 631–32.

78. *See* Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 219–23 (1990).

79. *See supra* note 25 and accompanying text.

80. *See* Glen Lavy, *Constitutional Law: Judicial Restraint and the War Powers Resolution—*Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987)*, 11 HARV. J.L. & PUB. POL'Y 849, 853 (1988) ("When legislators ask the courts to intervene in policy matters that should be decided by Congress, they are asking the courts to wield a power that has not been constitutionally given to them."); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1649 (1977) [hereinafter *Congressional Access*] (noting potential for suits brought for "ulterior political purposes"); *see also* Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 655 (1983).

81. *See* Comment, *Congressional Standing to Challenge Executive Action*, 122 U. PA. L. REV. 1366, 1366 (1974) [hereinafter *Congressional Standing*] ("In none of these suits have the congressmen alleged that the executive acts have injured them personally in any manner.").

82. *See* Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 67 (1992) ("[V]irtually all disputes can be framed to implicate the impeachment or legislative duties of members of Congress.").

legislative branch.[83] Failure to enforce federal statutes enables the Executive to effectively nullify laws enacted by the legislative branch.[84] Thus, far from representing congressional usurpation of executive prerogative, suits to compel enforcement are brought "to prevent an unconstitutional impairment of the lawmaking function of Congress."[85] Indeed, in this view, congressional litigation in defense of statutes where the Executive has stepped aside only formally qualifies as enforcement; in essence, Congress's action to defend its statutes partakes more of a legislative than executive character.[86]

Proponents offer additional reasons why congressional suits of this nature enhance, rather than upset, the balance contemplated by the separation of powers. As a practical matter, the legislative tools theoretically available to counter executive inaction through the political process are likely to prove unavailing.[87] From this perspective, permitting

83. *See* Michael Hahn, Note, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2384 (2001); Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 970–71 (1983) [hereinafter *Executive Discretion*] ("[T]he exercise of [executive discretion to decline to enforce a law] may substantially shift authority over the effective content of federal law from the legislative to the executive branch."); *see also* United States v. Windsor, 133 S. Ct. 2675, 2688 (2013) (stating that if an Executive's agreement with a plaintiff can preclude judicial review, then such agreement gives the Executive power "to nullify Congress'[s] enactment solely on its own initiative and without any determination from the Court"); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1236–37 (2014) (arguing that Congress should play more robust role in ensuring that president implements federal laws).

84. *See* Meyer, *supra* note 82, at 121–24; *cf. Executive Discretion*, *supra* note 83, at 979–80 ("Discretion to refuse to defend statutes is subject to abuse . . . . [It] could allow the Executive to invalidate specific provisions of statutes and thereby exercise indirectly that which the Constitution denies him directly: a post-enactment item veto.").

85. Douglas R. Prince, Note, *Should Congress Defend Its Own Interests Before the Courts?*, 33 STAN. L. REV. 715, 730 (1981).

86. *See* Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-not-Defend Problem*, 81 FORDHAM L. REV. 577, 581, 590–91 (2012) (confining proposal for congressional standing to suits seeking declaratory judgment that the President is incorrect in relying on statute's asserted unconstitutionality as reason not to enforce it). *But see* Grove & Devins, *supra* note 67, at 625–30 (arguing that allowing Congress to participate in the defense of a federal statute could give Congress considerable power over the enforcement of the law).

87. *See Congressional Access*, *supra* note 80, at 1648. For example, impeachment proceedings against the abstaining official would be so drastic a response as to "preclude resort to [this] solution[] in all but the most egregious cases." *Id.* Even reliance on ordinary legislative remedies is "unduly burdensome and may effectively shield improper executive action from either congressional or judicial review." Wagner, *supra* note 60, at 537; *see* John Hart Ely, *Suppose Congress Wanted a*

suits by individual legislators can serve as a valuable counterweight to the tilt toward executive aggrandizement. One prominent scholar has urged a conception of congressional standing "permit[ting] any member to sue based on an allegation that the President has usurped legislative powers."[88] This approach rests on the principle that executive refusal to implement laws inflicts institutional injury on the legislative branch[89] and that a congressperson thereby suffers the derivative injury of impairment of his or her vote.[90] Concern that this expansive notion of injury amounts to an impermissible generalized grievance[91] is answered by distinguishing the distinctive harm to legislators from those to the public at large.[92]

In a similar vein, entertaining congressional suits of this nature is said not to entail judicial overreaching but instead redresses an imbalance between the Executive and Congress. Absent congressional access to a judicial forum, presidents would effectively be allowed to act (or refrain from acting) free from meaningful congressional constraint.[93] The courts' role in determining boundaries between the other branches of government is

War Powers Act that Worked, 88 COLUM. L. REV. 1379, 1411 (1988) (criticizing the argument that suits brought by Congress to compel the President to perform duties should be dismissed as political questions).

88. Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 903 (1983).

89. *See id.*

90. *See* Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1124–25 (1990).

91. *See supra* note 82 and accompanying text.

92. *See* James I. Alexander, Note and Comment, *No Place to Stand: The Supreme Court's Refusal to Address the Merits of Congressional Members' Line-Item Veto Challenge in* Raines v. Byrd, 6 J.L. & POL'Y 653, 685–86 (1998). In addition, the potential reach of this doctrine can be contained by limiting it to instances in which Congress or one of its houses has given its official imprimatur to the suit. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §3–20, at 457–58 (3d ed. 2000) (describing this as the "least troublesome" form of suit based on nullification of legislator's vote); *see also* R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is this, Anyway*, 62 NOTRE DAME L. REV. 1, 27–28 (1986) (opposing derivative claims by individual members but endorsing standing by Congress where "Congress, as an institution, actually has suffered injury-in-fact").

93. *See* Paul Hubschman Aloe, *Justiciability and the Limits of Presidential Foreign Policy Power*, 11 HOFSTRA L. REV. 517, 553 (1982); *Congressional Access*, *supra* note 80, at 1648 (noting practical obstacles to overturning President's action); *see also* Wagner, *supra* note 60, at 538–39 (warning that the Court's decision in Goldwater v. Carter, 444 U.S. 996 (1979), refusing to rule on a Senator's challenge to the President's unilateral termination of treaty, had the effect of upholding termination and displayed approach that could "lead to an accretion of executive power and a weakening of the separation of powers that broad judicial abstention was originally meant to strengthen").

well-established;[94] this function is illustrated by suits brought by private litigants that have called for resolution of separation of powers issues.[95] Allowing congressional suits to go forward—especially where no readily identifiable alternative plaintiff exists—would be consistent with Court decisions finding justiciability where the issue would not otherwise be litigated.[96] Moreover, presiding over these suits does not enmesh the Court in a political dispute over policy because the relevant policy is embodied in the statute that the political process has already produced.[97]

2. The D.C. Circuit's Shifting Tests

In contrast to the Supreme Court's scattered intimations of a framework for congressional standing, the D.C. Circuit Court of Appeals has squarely addressed the question on numerous occasions.[98] The D.C. Circuit's

94. *See* Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919, 940 (1983); Wagner, *supra* note 60, at 539.

95. *See* Wagner, *supra* note 60, at 539 (citing The Pocket Veto Case, 279 U.S. 655 (1929)); *Congressional Access*, *supra* note 80, at 1645–46 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 660 (1952) (Burton, J., concurring); and Myers v. United States, 272 U.S. 52 (1926), *modified by* Morrison v. Olson, 487 U.S. 654 (1988)); *see also Congressional Standing*, *supra* note 81, at 1373 (noting in support of congresspersons' standing to challenge executive action that "at least since *Marbury v. Madison* it has been clear that it is within the judicial power to declare illegal acts of a co-equal branch of government performed without constitutional authority" (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803))).

96. *See* Brilmayer, *supra* note 30, at 315–16. *But see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

97. *See* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1248–49 (2012); Aziz Z. Huq, *Enforcing (but Not Defending) "Unconstitutional" Laws*, 98 VA. L. REV. 1001, 1039–40 (2012).

98. As noted elsewhere in this Article, this discussion is confined to lawsuits meant to compel the executive branch to uphold a federal law. The ability of members to sue on matters pertaining to internal legislative governance presents a different set of considerations. *See, e.g.*, Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994) (recognizing standing by House members to challenge a House rule giving qualified votes to delegates from the District of Columbia and certain territories); Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984) (standing granted to House members challenging validity of tax law that did not originate in House), *abrogated by* Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999); Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982) (allowing suit against House majority leadership for discrimination in allocation of committee seats). Likewise, the ability of congressional committees to enforce subpoenas through litigation lies beyond the scope of this analysis. *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975) ("Issuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate."); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1085, 1145–46 (2009) (arguing that it is essential for Congress to have contempt power over

treatment of congresspersons' standing has not followed a steady trajectory and, of course, must yield to contrary decisions by the Supreme Court. Nonetheless, the various tests applied by the D.C. Circuit are instructive as to plausible approaches and considerations.

The D.C. Circuit initially displayed a highly permissive attitude toward legislators' standing. In *Mitchell v. Laird*, the court entertained a claim by thirteen congressmen that the Executive's conduct of the war in Indochina without congressional consent violated their right "to decide whether the United States should fight a war."[99] Though it rejected this rationale, the court nonetheless identified a basis for standing.[100] Under the court's formulation, members of Congress could sue where a decision in their favor would "bear upon" their duties as legislators.[101] In this instance, a declaration that the executive officials had exceeded their constitutional authority would bear upon the plaintiffs' duties to consider whether to impeach defendants and—in a different vein—whether to support the hostilities through appropriations and other means.[102]

A year later, the D.C. Circuit applied a different standard in permitting a senator's suit to proceed. In *Kennedy v. Sampson*,[103] the court recognized Senator Kennedy's standing to challenge the validity of President Nixon's exercise of a pocket veto.[104] Key to the decision was the court's ruling that "an individual legislator has standing to protect the effectiveness of his vote."[105] Thus, a senator could bring suit on the ground that an executive official's action constituted an unlawful "nullification" of his or her vote.[106]

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executive officials). *But see* Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 114–15, 118–28 (1984) (asserting congressional contempt's inapplicability to executive officials asserting executive privilege).

99. 488 F.2d 611, 613 (D.C. Cir. 1973) (referring to Congress's power to declare war under U.S. CONST. art. I, § 8).

100. *Id.* at 613–14 (repudiating implication that the President can never wage war without Congress's approval).

101. *Id.* at 614.

102. *Id.*

103. 511 F.2d 430 (D.C. Cir. 1974), *abrogated by Chenoweth*, 181 F.3d 112. The court in *Kennedy* did not expressly disavow *Mitchell*'s "bear[s] upon" language, but its later opinion in *Harrington v. Bush*, 553 F.2d 190, 207 (D.C. Cir. 1977), effectively did so.

104. *Kennedy*, 511 F.2d at 436.

105. *Id.* at 435. Senator Kennedy, who voted for the bill in question, argued that the bill had become law under the Constitution. *Id.* at 432 (citing U.S. CONST. art. I, § 7).

106. *Id.* at 436.

In a subsequent case involving a similar claim,[107] the court elaborated on its understanding of *Kennedy*'s rationale. Under *Kennedy*, either house of Congress would have standing to challenge the harm to its participation in the lawmaking process caused by an improper use of the pocket veto power.[108] This emphasis on institutional authority would ultimately place a somewhat restrictive gloss on *Kennedy*'s seemingly expansive test. Where the executive action did not nullify "a specific congressional vote or opportunity to vote,"[109] a legislator would have to show that the action amounted to a "disenfranchisement, a complete nullification or withdrawal of a voting opportunity."[110] In such an instance—including the Executive's putative failure to comply with a statute for which the legislator voted—standing would be denied if the legislative process could remedy the injury.[111]

Finally, the D.C. Circuit in *Riegle v. Federal Open Market Committee* adopted the equitable discretion test for congressional standing.[112] Reacting to asserted deficiencies in its earlier decisions,[113] the court emphasized the distinction between standing requirements and separation-of-powers concerns as grounds for dismissing congressional suits.[114] Under the equitable discretion doctrine, the court would allow congressional plaintiffs to bring claims that met the traditional elements of standing but then dismiss such claims where judicial intervention would inappropriately interfere with

107. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985).

108. *Id.* at 25–26. Judge Bork sharply disputed the holding in *Barnes*, asserting that the outcome "must inevitably lead to the destruction . . . of the separation of powers." *Id.* at 56 (Bork, J., dissenting). The very notion of legislator standing, he argued, is rooted in the illegitimate premise that "elected representatives have a separate private right, akin to a property interest, in the powers of their offices." *Id.* at 50; *see also* Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) ("[N]o officers of the United States . . . exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest.").

109. Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir. 1979).

110. *Id.*

111. *Id.* In *Goldwater* itself, the court found standing because the legislative process afforded no means of challenging the President's unilateral termination of a treaty. *See id.* at 703.

112. 656 F.2d 873, 881–82 (1981) ("Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute this court should exercise its equitable discretion to dismiss the legislator's action.").

113. *See generally id.* at 877–88 (describing conflicting principles and inconsistent prior decisions).

114. *See id.* at 879–82.

the legislative process.[115] In particular, this discretion would be exercised to reject congressional plaintiffs' actions when the plaintiffs could obtain "legislative redress" and a private citizen could bring a similar claim.[116] In practice, beginning with *Riegle* itself,[117] the concept of equitable discretion has been routinely invoked to dismiss suits by congressional plaintiffs.[118]

III. THE SUPREME COURT'S NONRECOGNITION OF CONGRESSIONAL STANDING TO SUE THE EXECUTIVE FOR FAILURE TO EXECUTE

The idea of congressional standing to defend or enforce federal statutes has drawn powerful expressions of both opposition and support. Absent explicit pronouncement by the Supreme Court, the balance of textual, structural, and consequentialist arguments remains open to debate. This Part does not revisit or assess these arguments; rather, it seeks to interpret the Court's actual treatment of legislative and legislator standing. Simply put, that treatment reflects the Court's unwillingness to this point to recognize Congress's authority to challenge a lack of executive vigor in court. Most notably, no decision of the Court has hinged on the existence of such authority in spite of opportunities for rulings on this basis.

A. Attempts by Congress to Defend Federal Law

The closest the Court has come to recognizing congressional authority to defend a federal law in court is its opinion in *Immigration and Naturalization Service v. Chadha*.[119] There, the Immigration and

115. *See id.* at 882. This approach was originally proposed in an oft-cited article by Judge McGowan. *See* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 263 (1981).

116. *Riegle*, 656 F.2d at 882; *accord* Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561, 565 (D.C. Cir. 1987) ("[I]f a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action.").

117. *See Riegle*, 656 F.2d at 882 ("[T]here can be no doubt that Senator Riegle's congressional colleagues are capable of affording him substantial relief.").

118. *See, e.g.*, Conyers v. Reagan, 578 F. Supp. 324, 326 (D.D.C. 1984) (dismissing suit to halt President's military action in Grenada as alleged violation of Constitution's War Powers Clause); *see also* Dessem, *supra* note 92, at 10 ("[I]t is difficult to imagine situations in which some form of 'legislative redress' is not available to a plaintiff congressman."). *See generally* Meyer, *supra* note 82, at 87–89 (noting additional examples).

119. 462 U.S. 919 (1983).

Naturalization Service (INS) had determined that Chadha, a nonresident alien, was subject to deportation.[120] Pursuant to statutory authority, the Attorney General then suspended Chadha's deportation.[121] Under the statute's one-house legislative veto provision, however, the House of Representatives overrode the Attorney General's decision and ordered that Chadha be deported.[122] Chadha, in turn, challenged the constitutionality of the legislative veto, without which he could remain in the country.[123] While eventually striking down legislative vetoes as impermissible devices,[124] the Court first considered whether the Executive's agreement with Chadha's legal contention drained the dispute of the real adverseness needed for an Article III case or controversy.[125] The Court ruled in favor of justiciability on two principal grounds.[126] One was that notwithstanding the Executive's endorsement of Chadha's legal position, it still intended to carry out his deportation.[127] The other was that Congress's participation in the litigation, arguing in favor of the legislative veto's validity, ensured the presence of "concrete adverseness."[128]

It was this very participation by Congress that gives rise to the proposition that Congress has standing to defend a federal law when the executive branch declines to do so.[129] The origin and nature of that participation, however, belie the notion that *Chadha* embodies an underlying principle of congressional access to the courts in these circumstances. First, it should be emphasized that Congress's presence was not necessary for the Court to entertain the suit.[130] The Court determined that the INS's stated intention to deport Chadha created sufficient adverseness between the parties.[131] In addition, the Court found that the INS's challenge to the court

120. *Id.* at 923.
121. *Id.* at 923–24.
122. *Id.* at 925–27.
123. *Id.* at 928.
124. *Id.* at 944–59 (discussing the "bicameralism and presentment requirements" imposed on congressional action by Article I).
125. *Id.* at 939 ("The argument rests on the fact that Chadha and the INS take the same position on the constitutionality of the one-House veto.").
126. *Id.* at 939–40.
127. *See id.*
128. *Id.* at 939.
129. *See* Greene, *supra* note 86, at 597.
130. *Chadha*, 462 U.S. at 939.
131. *Id.*

of appeals ruling against it made the INS an "aggrieved party" authorized to appeal that decision to the Court.[132] Therefore, *Chadha*'s holding does not rest on finding that the House or Senate had standing to appeal the Ninth Circuit's ruling.[133]

These considerations help to place in perspective the passage in *Chadha* most supportive of congressional standing: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[134] Even putting aside the Court's dubious reading of its own precedent,[135] this language should be viewed as signifying a less formal conception of "the proper party" than that of a requisite litigant. Indeed, the Court in this same passage described the participation of the House and Senate as a means of alleviating prudential concerns about standing.[136] The House and Senate had joined the litigation as constructive amici curiae, not formal parties.[137] Here, then, Congress was a "proper party" to champion the legislative veto in the sense that the Court upheld the propriety of the court of appeals' invitation and acceptance of briefs by both parties.[138] This understanding of *Chadha*'s reach is bolstered by the Court's characterization of Congress's involvement in *Chadha* three decades after the decision.[139] In that instance, the Court likened the acceptance of Congress's briefs in *Chadha* to the Court's practice of entertaining arguments made by amici when the Solicitor General confesses error concerning the judgment below.[140] In context, then, the *Chadha* Court's assertion of Congress's place in this type of suit—suggestive of congressional prerogative when read in isolation—actually "provides scant support for congressional standing to represent the federal

132. *Id.* at 930–31.

133. *See id*.

134. *Id.* at 940.

135. *See* Grove, *supra* note 61, at 1360–62, 1361 n.242 ("Notably, the Court did not supply a basis for its assertion that there was a 'long' history of congressional defense of statutes. The Court cited only two cases—*Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968) and *United States v. Lovett*, 328 U.S. 3030 (1948) . . . . But *Cheng Fan Kwok* did not involve Congress at all . . . . [I]n *Lovett*, of course, the House participated only as amicus.").

136. *See Chadha*, 462 U.S. at 940.

137. Chadha v. INS, 634 F.2d 408, 411 (9th Cir. 1981), *aff'd*, 462 U.S. 919 (1983).

138. *See id.*

139. *See* United States v. Windsor, 133 S. Ct. 2675, 2687 (2013).

140. *Id.* (citing Dickerson v. United States, 530 U.S. 428 (2000)).

government in court."[141]

Moreover, even if one assumed—again, inaccurately—that *Chadha* established some sort of principle of legislative standing, it would have to be a highly idiosyncratic one with slight bearing on the broader question of congressional standing. Certainly the opinion cannot plausibly be read as conferring on Congress, or one of its houses, power to inject itself as a formal party into suits where it objects to the Executive's refusal to defend a federal law. The Court itself later capsulized *Chadha* as holding that when the INS declined to defend the one-house veto provision on appeal, Congress was "a proper party to defend [the] measure's validity where both Houses, by resolution, had authorized intervention in the lawsuit."[142] Further, the Court's specific reference to the facts of the case suggests an especially particularized version of the precedent that had been set. The statute at issue in *Chadha* authorized each house of Congress to upset certain executive actions; since then, the Court has not applied *Chadha* to sustain legislative standing in any other setting.[143] At most, then, *Chadha*'s passage can be read—albeit unpersuasively—to allow Congress standing to defend its structural role (as in *Chadha*) but not to defend a particular statute. The Court's decision in *United States v. Windsor* reinforces a minimal conception of congressional standing under *Chadha*.[144] In *Windsor*, the Court sidestepped an obvious opportunity to affirm congressional standing to appeal in the face of executive acquiescence, choosing instead to rely on a questionable[145] theory of executive standing to bring the appeal. The Second Circuit Court of Appeals had struck down a provision of the Defense of Marriage Act (DOMA),[146] confining legally cognizable marriages to those between a man and a woman.[147] After the Department of Justice had announced it would no longer defend the provision, both the district court and the Second Circuit allowed the House of Representatives—through the

141. Grove, *supra* note 61, at 1361.

142. Arizonans for Official English v. Arizona, 520 U.S. 43, 65 n.20 (1997).

143. Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1548 (2012).

144. 133 S. Ct. at 2675.

145. *See* Grove, *supra* note 61, at 1315–16 (criticizing the Court's recognition of standing in *Windsor* in light of the government's agreement with invalidation of federal statute by court of appeals); *see also* Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 73 (2014) (indicating similar criticism).

146. Defense of Marriage Act, 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675.

147. Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675.

House's Bipartisan Legal Advisory Group (BLAG)—to enter the suit to argue the provision's constitutionality.[148] Because the district court had not allowed BLAG to enter the suit as a right,[149] however, the question of BLAG's standing to appeal the Second Circuit's decision remained unsettled when the case came before the Court.[150] It remained unresolved, for the Court found that it "need not decide" whether standing by the House was requisite to the Court's acceptance of the appeal.[151] Instead, the Court ruled that the United States, in refusing to pay the tax refund for which the plaintiff had sued,[152] had incurred sufficient injury for standing to appeal the Second Circuit's ruling.[153]

The government's standing in *Windsor*, then, is derived from its continued enforcement of a law whose constitutionality it had officially disputed.[154] In explaining this unusual result,[155] the Court declared that the adverseness potentially lacking in some circumstances was assured here by BLAG's "sharp adversarial presentation of the issues."[156] Further, dismissing the appeal would produce prolonged and extensive litigation, leaving the rights and privileges of countless individuals in abeyance until a procedurally uncomplicated case could reach the Court.[157] More broadly, termination of a suit because the Executive endorses the plaintiff's position

148. *See Windsor*, 133 S. Ct. at 2684.

149. *See id.* (explaining that BLAG was permitted to intervene as an interested party, not enter the suit as of right, because the United States "already was represented").

150. *Id.* at 2675.

151. *Id.* at 2688.

152. Windsor was the surviving spouse of a same-sex couple whose marriage was legal under New York law. *Id*. at 2682. Because of DOMA's restriction, she had not been entitled to the exemption otherwise given to spouses under federal estate tax law. *Id.*

153. *See id*. at 2684–87.

154. *See id.* at 2684.

155. Perhaps the closest resemblance to *Windsor* in this respect is *United States v. Lovett*, 328 U.S. 303 (1946). There, the United States was allowed to appeal a decision, despite agreeing with the outcome, by withholding funds to which the respondents were entitled under the lower court's ruling. *See id.* at 313–14. In *Lovett*, the House of Representatives also sought to intervene to defend the provision that the Executive considered unconstitutional. *Id.* at 305–06. House-appointed counsel was permitted to participate as amicus curiae "by special leave of Court." *Id.* at 304. It must be a matter of speculation whether the Court in *Windsor* and *Lovett* consciously avoided addressing the question of the House's standing. Executive standing to appeal through enforcement of a statute whose validity it disavowed, however, accomplished the same result. *See generally Windsor*, 133 S. Ct. at 2684.

156. *Windsor*, 133 S. Ct. at 2687–88.

157. *Id.* at 2688.

that a law is unconstitutional would undermine both judicial and congressional authority.[158] Such a disposition would effectively enable the Executive to dismantle Congress's handiwork without an opportunity for the Court to perform its role as final arbiter of the Constitution's meaning.[159]

Thus, while the *Windsor* Court did not expressly reject the notion of House standing, it went to conspicuous lengths to devise an alternative basis for appeal. Scholarly criticism aside,[160] the Court itself acknowledged that "unusual and urgent circumstances" had propelled it to assume jurisdiction.[161] Moreover, the Court emphasized its expectation that resorting to this rationale for executive standing would rarely recur.[162] That the *Windsor* Court embraced, with obvious reluctance, a tenuous theory of executive standing does not inherently discredit other possible theories of standing.[163] At the very least, however, *Windsor* offers grounds for skepticism that a house of Congress is entitled to assume the role of defendant when the Executive elects to enforce, but not defend, a federal law.[164]

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158. *See id.* ("[I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review . . . . This would undermine the clear dictate of the separation-of-powers principle.").

159. *See id.*

160. *See* Grove*, supra* note 61, at 1315; *see also Windsor*, 133 S. Ct. at 2699–701 (Scalia, J., dissenting) (arguing there was no controversy before the Court because both parties sought not to have the Court "provide relief from the judgment below but to say that that judgment was correct"); *cf. id.* at 2711–12 (Alito, J., dissenting) (suggesting that the Court was asked in *Windsor* "to render an advisory opinion").

161. *Windsor*, 133 S. Ct. at 2689 ("[T]his case is not routine."). The *Windsor* Court's omission of citation to United States v. Lovett, 328 U.S. 303 (1946), perhaps also signals its resistance to implying that its holding implicated a wider doctrine of executive standing. Such an intention would buttress the inference that the Court employed executive standing strategically to avoid confronting the question of the House's standing. *See supra* note 155.

162. *See Windsor*, 133 S. Ct. at 2689 ("[T]here is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal.").

163. *See generally id.* at 2684–87 (discussing "whether either the Government or BLAG, or both of them," could meet the requirements of standing before the Court).

164. Congress's attempt to defend a federal law after the Executive has declined to do so also raises a larger question of congressional standing, viz., *whose* interest Congress purports to represent. TRIBE, *supra* note 92, at 456–57. In such circumstances, Congress might be plausibly viewed as seeking either to represent the United States or itself. *Id.* A corollary question is whether the United States may have more than one representative in federal litigation. The Supreme Court appears to have allowed a state to have more than one representative and, moreover, a state's multiple representatives to assert conflicting positions. *See* Va. Office For Prot. and Advocacy v. Stewart, 131 S. Ct. 1632, 1640–41 (2011). State legislators may be given standing where their

B. Suits by Individual Legislators

The Supreme Court has ruled on the standing of individual legislators to raise institutional injury[165] in two cases: *Coleman v. Miller*[166] and *Raines v. Byrd*.[167] Taken alone and at face value, the Court's opinion in *Coleman* might support wide latitude for legislators to assert harm to the effectiveness of their votes.[168] The absence of direct reliance on *Coleman* in general, and the *Coleman* decision's constricted interpretation in *Raines*[169] in particular, however, strongly indicates that the Court regards *Coleman*'s circumstances as exceedingly unusual, if not sui generis.

In *Coleman*, an unusual combination of opinions amounted to the Court's acknowledgement of standing by a group of Kansas state legislators seeking to overturn the legislature's ratification of a proposed amendment to the United States Constitution.[170] The Kansas Senate had deadlocked on the amendment, and the Lieutenant Governor cast a tie-breaking vote for ratification.[171] According to the plaintiffs, the Lieutenant Governor lacked authority under Article V of the Constitution to cast the decisive vote in favor of the amendment.[172] The Court held that the senators opposing ratification had standing because the Lieutenant Governor's participation prevented what would have otherwise been the effect of their votes, viz., defeat of the amendment in Kansas.[173] In that sense, the senators had a "plain, direct[,] and adequate interest in maintaining the effectiveness of

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congressional counterparts would not, however, this precedent would presumably not be controlling in the federal context. *See infra* notes 284–99 and accompanying text.

165. Standing based on a concrete harm particular to a specific member of Congress presents a less controversial claim. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969) (holding individual elected to House of Representatives was allowed to bring suit challenging his exclusion from House); *see also infra* notes 183–87 and accompanying text.

166. 307 U.S. 433 (1939).

167. 521 U.S. 811(1997).

168. For a discussion of *Coleman*, see *infra* notes 170–77 and accompanying text.

169. *See infra* notes 189–95 and accompanying text.

170. Chief Justice Hughes's opinion explicitly recognizing state senators' standing expressed the views of only three Justices but was reported as "the opinion of the Court." *Coleman*, 307 U.S. at 435. The other two votes needed to form a majority on the question of standing could be deduced from two Justices dissenting on the merits. *Id.* at 470 (opinion of Butler, J.). Their analysis of the merits amounted to tacit agreement with the Hughes bloc in favor of standing. *See Raines*, 521 U.S. at 822 n.5.

171. *Coleman*, 307 U.S. at 435–36.

172. *Id.* at 437–38.

173. *Id.* at 438.

their votes."[174] Underscoring the potential breadth of this declaration, Justice Frankfurter and three other Justices contended that the senators lacked standing to sue.[175] As Justice Frankfurter asked rhetorically: "What is it that [these legislators] complain of, which could not be complained of here by all their fellow citizens?"[176] More pointedly, he also asserted that, under the same reasoning relied upon to sustain the senators' standing, "a member of the Congress who had voted against the passage of a bill because moved by constitutional scruples [could] urge before this Court our duty to consider his arguments of unconstitutionality."[177]

Nearly six decades later in *Raines*, however, the Court confirmed that *Coleman* contained no such expansive ramifications.[178] There, the Court rejected a suit by six members of Congress challenging the Line Item Veto Act (the Act) as unconstitutional.[179] The Act authorized the President, after signing a bill into law, to "cancel" specific spending and tax benefit provisions.[180] At the same time, the Act provided that "[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action . . . on the ground that any provision of this part violates the Constitution."[181] Invoking this provision, the plaintiffs argued that the Act injured them because the President's power of cancellation altered the "legal and practical effect" of their votes on future spending and tax bills, divested them of their constitutional role in repealing legislation, and upset the constitutional balance of powers.[182]

Before explaining why *Coleman* did not support the plaintiffs' standing, the Court first distinguished the other decision in which it had allowed a member of Congress to sue: *Powell v. McCormack*.[183] In *Powell*, the Court

174. *Id.*

175. *Id*. at 460–70 (Frankfurter, J., concurring). These four Justices did, however, agree with the three Justices represented by Chief Justice Hughes's opinion—though for somewhat different reasons—that the plaintiffs' claim presented a nonjusticiable political question. *See id.* at 457–60 (Black, J., concurring).

176. *Id.* at 464 (Frankfurter, J., concurring).

177. *Id*. at 465.

178. *See generally* Raines v. Byrd, 521 U.S. 811 (1997).

179. *See id.* at 813–14 (quoting 26 U.S.C. § 692(a) (2012)).

180. *Id*. at 814–15. Congress could override a cancellation by a "disapproval bill" approved by a two-thirds vote in each house. *Id.* at 815.

181. *Id.* at 815–16.

182. *Id.* at 816 (quoting Complaint ¶ 14a, Raines v. Byrd, 521 U.S. 811 (1997) (No. 96-1671)).

183. 395 U.S. 486 (1969).

permitted Representative Powell to contest his exclusion from the House—and his attendant loss of salary—in federal court.[184] In finding that precedent inapplicable, the *Raines* Court contrasted the distinctiveness of Powell's claim with the generic injury asserted by the challengers to the Act.[185] Unlike Powell, the plaintiffs had not been "singled out for specially unfavorable treatment"; rather, the institutional injury that they alleged was shared equally by all members of Congress.[186] And unlike Powell's loss of his seat and salary, the reduction of political power that the legislators complained of did not constitute the loss of a private, individual right.[187]

Having deemed *Powell* unhelpful to the plaintiffs' standing in *Raines*, the Court gave more extended treatment to the precedential relevance of *Coleman*.[188] As with *Powell*, the Court drastically confined *Coleman*'s reach in the course of distinguishing that case from *Raines*.[189] Here, the Court was confronted with its statement in *Coleman* that the Kansas state senators' standing rested on their "plain, direct[,] and adequate interest in maintaining the effectiveness of their votes."[190] Denying that the *Raines* legislators were similarly affected, the Court indicated that these words could only be understood in their specific context.[191] Viewed in that light, *Coleman* embodied no more[192] than the principle that a group of legislators could sue on the ground that their votes had been completely nullified if their votes would have been sufficient to reverse a bill's enactment or defeat.[193] This principle did not encompass the *Raines* plaintiffs, whose

184. *Id.* at 496, 512–14. The Court went on to hold that the denial of Powell's seat violated the Constitution. *See id.* at 550 ("[S]ince . . . Powell . . . was duly elected . . . and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him.").

185. 521 U.S. at 820–21.

186. *Id.* at 821.

187. *See id.*

188. *See id.* at 822–23.

189. *See* Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. 447, 490–91 (2008) (noting *Raines*'s "extremely narrow reading" of *Coleman*).

190. *Raines*, 521 U.S. at 821–22 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).

191. *See id.* at 822–23.

192. The Court declined to consider whether *Coleman*'s significance was further limited by other features of the case. For example, the *Raines* defendants argued that the Court's ruling on merits in *Coleman* did not apply to a comparable suit by members of Congress, where separation-of-powers concerns would be implicated. *Id.* at 824 n.8.

193. *Id.* at 823.

votes against the Act had failed to prevent its enactment.[194] Accordingly, there was a "vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."[195]

Unable to rely on either precedent for legislator standing, the *Raines* plaintiffs failed to establish a "personal, particularized, concrete, and otherwise judicially cognizable" injury.[196] While this determination might have sufficed to explain the decision, the Court also pointed to concerns about the exercise of judicial power.[197] Reviewing a number of "analogous confrontations between one or both Houses of Congress and the Executive Branch," the Court found it telling that none of these clashes prompted a suit "on the basis of claimed injury to official authority or power."[198] That history was congruent with federal courts' "more restricted role" that fostered popular acceptance of judicial review—protecting "constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action"—rather than exerting "amorphous general supervision of the operations of government."[199]

Moreover, the Court reserved judgment regarding whether certain circumstances present in the case would have produced a different outcome in their absence.[200] First, the Court "attach[ed] some importance" to the fact that the plaintiffs "ha[d] not been authorized to represent their respective Houses of Congress in this action."[201] Second, the Court's holding left members of Congress with legislative recourse because they could insulate specific appropriations bills from the Act or simply repeal the statute itself.[202] Finally, the Court highlighted the possibility of a suit challenging the Act by plaintiffs suffering a judicially cognizable injury from its

194. *Id.*at 823–24.

195. *Id.* at 826.

196. *Id.* at 820, 830 ("[T]hese individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.").

197. *Id*. at 828–29.

198. *Id.* at 826–28 (discussing details of conflicts between branches).

199. *Id.* at 828–29 (quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

200. *Id.* at 829–30.

201. *Id.* at 829. The Court further noted that "both Houses actively oppose" the suit. *Id.*

202. *Id.*

operation.[203]

As to the first of these circumstances, the indeterminate "importance" assigned to the plaintiffs' lack of institutional backing[204] does not amount to endorsement of legislator suits authorized by one or both Houses. Indeed, the Court's vagueness on this point reflects a larger refusal in *Raines* to articulate an affirmative doctrine of legislator standing.[205] The Court seemed eager to resolve this suit on standing grounds without committing itself to a position that would license legislator standing in future cases.[206] On the one hand, the Court reached out to rule that these members of Congress had suffered no cognizable injury.[207] The Court forewent the more straightforward argument that even if the very passage of the Act inflicted injury, that injury was caused by legislators who enacted the law, rather than by the President.[208] Instead, the Court resorted to strained logic to frame the issue as a question of injury.[209] For example, the Court did not explain how the ability to seek legislative remedies or the existence of other parties who might bring suit was relevant to the determination of whether these plaintiffs had suffered personal injury.[210] Similarly, by indicating a special reluctance to find standing where it could lead to invalidating a coordinate branch's act,[211] the Court reinforced, without clarifying, the notion of a variable

203. *Id.* The Court ruled on such a suit a year later. *See infra* note 245 and accompanying text.

204. *See infra* note 232 and accompanying text.

205. Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 255 (2001) ("[T]he [*Raines*] Court decided the case on exceptionally narrow grounds and left many questions unanswered."); Leading Case, *Constitutional Structure: Separation of Powers—Congressional Standing*, 111 HARV. L. REV. 217, 218 (1997) [hereinafter *Constitutional Structure*] ("[T]he law of legislative standing after *Raines* is a doctrine fraught with . . . uncertain boundaries.").

206. Arend & Lotrionte, *supra* note 205, at 255.

207. *Raines*, 521 U.S. at 835.

208. *See Constitutional Structure*, *supra* note 205, at 226–27. *But see* Alexander, *supra* note 92, at 677–79 (arguing that the President's unquestionable intention to exercise line-item veto soon qualified as "certainly impending" injury (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))).

209. *Raines*, 521 U.S. at 818.

210. *See* Note, *Standing in the Way of Separation of Powers: The Consequences of* Raines v. Byrd, 112 HARV. L. REV. 1741, 1745 (1999) [hereinafter *Standing in the Way*]. Other aspects of the *Raines* opinion are arguably in tension with the opinion's reliance on the plaintiff's lack of personal injury. *See id.* at 1744–45; *see also Constitutional Structure*, *supra* note 205, at 218 (criticizing *Raines* opinion for "analytical inconsistency").

211. *See Raines*, 521 U.S. at 819–20 ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the

calculation of injury.[212] As a final example, the Court's reliance on the absence of "claimed injury" by Congress or Executive in "analogous confrontations"[213] is curious. The fact that the legislative and executive branches did not bring suit in certain previous disagreements over their prerogatives would seem to have scant bearing on the Court's determination whether the *Raines* plaintiffs incurred an injury under Article III.[214] Moreover, the Court's principal illustrations involve the possibility of executive standing[215]—by no means an exact counterpart to the legislative standing asserted in *Raines*.[216]

Raines, then, nominally but equivocally left the door ajar for members of Congress to sue the Executive for breaching or shirking its constitutional obligations. After passing on opportunities to take up the question of legislator standing for nearly six decades,[217] the Court finally chose to do so in an instance where standing was denied.[218] More importantly, the nature of its decision may well amount to the practical equivalent of foreclosing such standing indefinitely. Though the Court did identify three features—appropriate injury, congressional authorization, and utter lack of legislative recourse—that might sustain legislator standing,[219] this hardly assures recognition of standing in a future case where these features arguably exist. Not only did the Court pointedly decline to commit itself to acknowledging standing under these conditions,[220] the conditions themselves offer faint prospect of being realized. Other than upholding *Coleman*—a singular situation and a decision that the Court intimated might be distinguished since it involved state governance[221]—the Court declined to spell out

other two branches of the Federal Government was unconstitutional.").

212. *Id*. at 829.

213. *Id.* at 826.

214. By similar reasoning, one might argue that Presidents' prior acquiescence in congressional vetoes—however grudging, such as in INS v. Chadha, 462 U.S. 919, 942 n.13 (1983)—undercut the Court's invalidation of such vetoes, *id.* at 959.

215. *See Raines*, 521 U.S. at 826–28.

216. *See generally* Grove, *supra* note 61, at 1319–53, 1366–72 (discussing executive standing).

217. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986); Goldwater v. Carter, 444 U.S. 996 (1979). These cases are discussed *infra* at Part III.C.

218. *See Raines*, 521 U.S. at 811.

219. *See supra* notes 200–03 and accompanying text.

220. *See Raines*, 521 U.S. at 829–30 ("Whether the case would be different if any of these circumstances were different we need not now decide.").

221. *See supra* notes 189–95 and accompanying text. This interpretation is bolstered by the Court's opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135

circumstances where congresspersons could demonstrate a "personal, particularized, concrete, and otherwise judicially cognizable" injury on which to base a suit against the Executive.[222] Congressional authorization is easier to envision both conceptually and practically, especially in light of recent developments.[223] However, it seems improbable that Congress's imprimatur alone would suffice without the requisite, and thus far elusive, injury. Moreover, since the Court did not assign relative weights to these features under its hypothetical criteria,[224] success would become even more daunting if the Court insisted that all legislative channels be blocked before entertaining such a suit. After all, Congress's sweeping authority holds out the possibility that there will practically always be a measure it could pursue to counter the Executive's objectionable conduct.[225]

Construing *Raines* as tacitly imposing a virtual blanket ban on legislator standing finds support in both precedent and the tenor of the Court's opinion. In a pair of earlier decisions, *United States v. Richardson*[226] and *Schlesinger v. Reservists Committee to Stop the War*,[227] the Court professed itself untroubled that denial of standing to the plaintiffs in those cases might effectively bar challenges by anyone to the practice at issue.[228] In both cases, the Court indicated that the plaintiffs could better—and exclusively—seek redress through the political process.[229] Though *Raines* presented a different context[230] and the Court was not so blunt there, its eagerness to

S. Ct. 2652 (2015). *See infra* notes 326–34 and accompanying text.

222. *Raines*, 521 U.S. at 820.

223. Michael D. Shear, *G.O.P. Turns to the Courts to Aid Agenda*, N.Y. TIMES (Jan. 3, 2015), http://www.nytimes.com/2015/01/04/us/politics/gop-turns-to-the-courts-to-aid-agenda.html (describing plans by leaders of the Republican-controlled Congress to challenge President Obama's agenda).

224. *See Raines*, 521 U.S. at 829–30.

225. *See id*. at 829 (explaining that Congress has non-judicial remedies at its disposal such as repealing or "exempting appropriations bills from its reach").

226. 418 U.S. 166 (1974).

227. 418 U.S. 208 (1974).

228. *See id.* at 227 ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."); *Richardson*, 418 U.S. at 179 (rejecting as ground for standing that "if respondent is not permitted to litigate this issue, no one can do so").

229. *See Schlesinger*, 418 U.S. at 227 ("Our system of government leaves many crucial decisions to the political processes."); *Richardson*, 418 U.S. at 179 ("In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").

230. In *Richardson*, a taxpayer brought suit to compel the publication of an accounting of the receipts and expenditures of the Central Intelligence Agency as allegedly required by Article I,

divert this interbranch dispute to the political process is unmistakable.[231] The Court's desire for detachment from such disputes helps to explain, for example, its extended discussion of the Tenure of Office Act (TCA).[232] Though the trigger to impeachment of one president[233] and the target of repeal by two others,[234] the TCA was not subjected to challenge in court by any of them.[235] Two presidents sought to have the TCA withdrawn through political rather than judicial channels, which meant that it had not "occurred" to them to explore the latter route.[236] Thus the *Raines* Court seized upon the presumed mindset of these presidents to bolster its position that the legislative plaintiffs before it lacked standing to draw the Court into their dispute with the Executive.

Moreover, the Court's dismissive reference to the plaintiffs' assertion of institutional, rather than personal, injury does not establish institutional injury as a basis for Congress to authorize suits against the Executive.[237] It is true that, strictly speaking, the Court did only deem the plaintiffs inappropriate parties to allege the "abstract dilution of institutional legislative power."[238] Also, as previously noted, the Court cryptically announced that the plaintiffs' lack of authorization was of "some importance."[239] Still, the opinion's omission of an unqualified declaration that this authorization could be decisive seems more than a reluctance to issue dicta.[240] Rather, the Court's reference to the plaintiffs' alleged institutional injury as "wholly abstract and widely dispersed"[241] is reminiscent of *Richardson* and *Schlesinger*. There as well, the Court found

Section 9, Clause 7 of the Constitution. *Richardson*, 418 U.S. at 167–69. In *Schlesinger*, members of the Armed Forces Reserves sought to strip members of Congress of their reserve membership as a violation of Article I, Section 6, Clause 2 of the Constitution. *See Schlesinger*, 418 U.S. at 210–11.

231. *See Standing in the Way*, *supra* note 210, at 1750 ("[T]he majority [in *Raines*] was making a[n] . . . argument against 'a system of judicial refereeship' in denying congressional standing.").

232. *See* Raines v. Byrd, 521 U.S. 811, 826–29 (1997).

233. *See id.* at 826.

234. *Id.* at 827.

235. *Id.* at 826.

236. *Id.* at 827.

237. *See id*. at 829.

238. *Id.* at 826, 829 ("[The plaintiffs'] attempt to litigate this dispute at this time and *in this form* is contrary to historical experience." (emphasis added)).

239. *Id.* at 829.

240. Indeed, the Court's entire noncommittal discussion of factors that are possibly relevant to legislator standing may be viewed as dicta. *See supra* notes 200–03 and accompanying text.

241. *Raines*, 521 U.S. at 829.

the asserted injury too abstract and diffuse to support standing.[242] Of course, it is possible to draw a distinction between the individual taxpayer and citizen in those cases and a congressperson acting as agent for a unique institution of government.[243] Again, though, the *Raines* Court passed up ample opportunity to base its decision on such a distinction.

In that sense, *Raines* resembles *Windsor*'s reliance on injury to a private plaintiff and a controversial theory of executive standing to avoid deciding on congressional standing to appeal.[244] In *Raines*, the Court could both deny standing to the plaintiff legislators and decline to state whether congressional authorization would make a difference in the confidence that an actual cancellation would produce a sufficiently injured plaintiff. Indeed, such plaintiffs appeared a year later in *Clinton v. City of New York*,[245] where the Court struck down the Line Item Veto Act.[246] The prospect of an alternative plaintiff may be less promising in the case of "pure" nonimplementation of a federal law; the Court's resistance to holding that private parties can trace their injury to non-enforcement of laws[247] suggests a particular problem in showing causation. Still, the Court's analytical flexibility in refraining from ruling on Congress's standing suggests that a permissive theory of causation may be more palatable than directly confronting congressional standing.

Further, a construction of *Raines* as hostile to legislator standing can be found in the D.C. Circuit's reversal of its permissive approach[248] in the aftermath of *Raines*.[249] The court explicitly acknowledged this impact in

242. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974) ("The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract."); United States v. Richardson, 418 U.S. 166, 176 (1974) ("[Richardson] has not alleged that . . . he is in danger of suffering any particular concrete injury as a result of the operation of this statute.").

243. The injury alleged in *Schlesinger* and *Richardson* is a harm to the public as a result of wrongful government action, whereas the injury alleged in *Raines* is a harm to a government agent's participation in government. *Compare Schlesinger*, 418 U.S. at 212, and *Richardson*, 418 U.S. at 179–71, *with Raines*, 521 U.S. at 825–27.

244. *See supra* notes 145–52 and accompanying text.

245. 524 U.S. 417 (1998).

246. *Id.* at 418.

247. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973).

248. *See supra* Part II.B.2.

249. *See, e.g.*, Campbell v. Clinton, 52 F. Supp. 2d 34, 40 (D.D.C. 1999) ("Virtually all of this Circuit's prior jurisprudence on legislative standing now may be ignored, and the separation of powers considerations previously evaluated under the rubric of ripeness or equitable or remedial

Chenoweth v. Clinton.[250] In *Chenoweth*, members of Congress alleged that the President's executive order for the protection of rivers violated the Constitution and federal law.[251] They asserted standing on the basis of "the deprivation of their right as Members of the Congress to vote on (or, more precisely, against)" the initiative created by the order.[252] As the D.C. Circuit conceded, this theory would have succeeded under past rulings of that court.[253] The Supreme Court's ruling in *Raines*, however, had rendered the D.C. Circuit's prior rationale "untenable."[254] Similarly, in *Campbell v. Clinton*,[255] the court offered a sweeping characterization of *Raines*'s reach: "The question whether congressmen have standing in federal court to challenge the lawfulness of actions of the executive was answered, at least in large part, in [*Raines*]."[256] Based on its understanding of this broadly negative answer, the D.C. Circuit rejected a suit by members of Congress seeking a declaration that the President had committed constitutional and statutory violations by ordering American airstrikes against Yugoslavia without congressional consent.[257] As in *Raines*, the plaintiffs' votes had not been completely nullified because legislative channels for achieving their end remained open to them.[258] There, Congress could enact a law prohibiting American forces to join NATO's campaign against Yugoslavia, cut off funds for American participation, or even impeach the President.[259] Moreover, the *Campbell* court minimized *Coleman*'s significance by viewing it as "the very narrow possible *Coleman* exception to *Raines*."[260] In *Coleman*, the court speculated, the Kansas legislators may have had no legislative outlet because final ratification of the proposed constitutional

discretion now are subsumed in the standing analysis."), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

250. 181 F.3d 112, 117 (D.C. Cir. 1999).

251. *Id*. at 112.

252. *Id*. at 113.

253. *See id.* at 115 (citing Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984); and Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)). However, it was also "identical to the injury the Court in *Raines* deprecated" and therefore rendered insufficient to confer standing. *Id.*

254. *Id.*

255. 203 F.3d 19 (D.C. Cir. 2000).

256. *Id.* at 20.

257. *Id.* at 19–20.

258. *Id.* at 22–23.

259. *Id.* at 23.

260. *Id.*

amendment may have been irrevocable.[261] That construction of *Coleman* followed the court's ruling a year earlier that *Raines*'s rationale for denying standing was confined neither to federal legislators nor to interbranch disputes.[262]

C. Tiptoeing Around Legislator Standing: Goldwater *and* Bowsher

While *Raines* denied standing to the legislators without promulgating a general set of principles,[263] the Court in two other decisions conspicuously avoided the topic altogether. In *Goldwater v. Carter*[264] and *Bowsher v. Synar*,[265] the Court declined to follow the lower courts' reliance on congressional standing to resolve the suits.[266] Both decisions preceded *Raines*, but displayed the *Raines* Court's unwillingness to define a set of circumstances under which a member of Congress could sue the Executive.[267]

Goldwater, while inconclusive in its lack of a majority voice, exhibits the Justices' decided unwillingness to discuss—much less recognize—standing by individual members of Congress. There, the Supreme Court did not expressly reject the D.C. Circuit's determination that the plaintiff congresspersons had standing to bring suit; the Court ignored it while dismissing the suit on other grounds.[268] The D.C. Circuit had permitted a group of senators to challenge the President's unilateral termination of a treaty with the Republic of China.[269] The court then proceeded to reject the challenge and affirm the President's authority to abrogate the treaty without

261. *See id.* at 22–23.

262. Alaska Legislative Council v. Babbit, 181 F.3d 1333 (D.C. Cir. 1999) (rejecting standing by state legislators to challenge federal management program).

263. Raines v. Byrd, 521 U.S. 811, 829–30 (1997).

264. 444 U.S. 996 (1979).

265. 478 U.S. 714 (1986).

266. *See id*. at 721; *Goldwater*, 444 U.S. at 1001.

267. *See Bowsher*, 478 U.S. at 721 (declining to consider congressional standing); *Goldwater*, 444 U.S. at 1006 (Blackmun, J., dissenting) (suggesting the Court should not vacate and remand the case "to pass on . . . the issues of standing").

268. *Goldwater*, 444 U.S. at 996.

269. Goldwater v. Carter, 617 F.2d 697, 701–02 (D.C. Cir 1979) (en banc) (per curiam) ("By excluding the Senate from the treaty termination process, the President has deprived each individual Senator of his alleged right to cast a vote that will have binding effect on whether the Treaty can be terminated."), *vacated*, 444 U.S. 996 (1979).

obtaining the consent of two-thirds of the Senate.[270] On appeal, the Supreme Court's decision vacating the circuit court's judgment and ordering dismissal of the complaint produced a fractured set of opinions, none of which addressed standing.[271] Acceptance of standing was implicit in Justice Brennan's dissent in favor of affirming the D.C. Circuit,[272] but the remaining Justices did not intimate a view on the issue.[273] In fact, Justice Rehnquist's opinion for a four-Justice plurality ignored the problem of standing and found that the dispute presented a political question.[274] Justice Powell, while indicating that the Court could entertain a suit challenging the President's power of termination where Congress had taken "appropriate formal action,"[275] favored dismissing the complaint on ripeness grounds without discussing the standing of individual legislators.[276]

In *Bowsher*, by contrast, the Court acknowledged the question of standing by congressional plaintiffs only to deem its resolution unnecessary to the case's outcome.[277] The case involved a challenge to provisions of a federal law popularly known as the Gramm-Rudman-Hollings Act.[278] Under the Gramm-Rudman-Hollings Act, the Comptroller General played a central role in calculating reductions to the federal budget that would take place under certain circumstances.[279] The district court permitted a dozen members of Congress to challenge the constitutionality of the Gramm-Rudman-Hollings Act under the doctrine of "congressional standing."[280] In addition, the lower court had also recognized standing by a public sector

270. *Id.* at 705.

271. *Goldwater*, 444 U.S. at 996–97.

272. *See id.* at 1006–07 (Brennan, J., dissenting).

273. *See infra* notes 274–76 and accompanying text.

274. *See Goldwater*, 444 U.S. at 1002–06 (Rehnquist, J., concurring). Standing is generally considered the threshold question in constitutional claims. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975). *But see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 n.5 (1974) ("[There is a] lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability.").

275. *Goldwater*, 444 U.S. at 1002 (Powell, J., concurring).

276. *See id.* at 997–1002. Justice Blackmun, joined by Justice White, would have had the Court defer ruling on standing, ripeness, or the issue's justiciability until these matters could be given more extensive consideration. *See id.* at 1006 (Blackmun, J., dissenting in part). Justice Marshall concurred in the result without opinion. *Id.* at 996 (Marshall, J., concurring in the judgment).

277. Bowsher v. Synar, 478 U.S. 714, 721 (1986).

278. *Id*. at 717–19.

279. *Id*. at 717–18.

280. *Id.* at 719.

union whose members had lost scheduled benefits through the operation of the Gramm-Rudman-Hollings Act's automatic spending reductions.[281] Finding the union members' injury sufficient to establish standing, the Supreme Court declared that it "need not consider the standing issue as to the Union or Members of Congress."[282]

D. The Special Case of Suits Authorized by State Law

The Supreme Court's resistance to standing by members of Congress to represent the federal government in federal court has not extended to legislative standing by state legislators under state law.[283] Indeed, the Court has recognized that consideration of federal issues by state courts is not bound by Article III constraints.[284] Thus, if authorized by state law, state legislators may challenge a decision holding a state statute unconstitutional.[285] Moreover, a decision in favor of the plaintiff creates harm to the defendant that qualifies as a sufficient Article III injury for access to federal court.[286] In principle, then, properly authorized state legislators who are dissatisfied with executive nondefense of a challenged statute[287] may ultimately seek resolution in federal court. In practice, however, the Court has construed the conditions for such standing narrowly—perhaps fearful that an expansive notion of standing by state legislators might undermine the bulwark it has erected against their federal counterparts. Moreover, while the Court recently allowed a state legislature to challenge a ballot initiative that allegedly stripped the legislature of a constitutional power, it did so in a manner that discouraged extension of the holding to legislative standing at the federal level.[288]

The Court's cautious approach toward standing by state legislators is

281. *Id.*

282. *Id.* at 721.

283. *See generally infra* notes 284–332 (describing the Supreme Court's recognition of legislative standing to sue under state law).

284. ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1988) ("[S]tate courts are not bound by the limitations of . . . rules of federal justiciability even when they address issues of federal law.").

285. Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997).

286. *Kadish*, 490 U.S. at 618.

287. *See generally* Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213 (2014) (examining nature and exercise of nondefense power by state executives).

288. *See infra* notes 289–94 and accompanying text.

illustrated by its decision in *Karcher v. May*.[289] In *Karcher*, New Jersey's governor and attorney general declined to defend the constitutionality of a state statute challenged in court.[290] At that point, the speaker of the New Jersey General Assembly and the president of the State Senate secured permission to intervene as defendants on behalf of the legislature.[291] Acting in this capacity, they defended the statute in the district court and court of appeals, though the plaintiffs prevailed on the merits.[292] The Supreme Court dismissed the appeal because the legislators were "not parties to [the] case in the capacities under which they [sought] to appeal."[293] The Court, however, did not categorically discredit the concept of state legislators bringing suit to defend the constitutionality of a statute attacked in federal court.[294] On the contrary, the Court acknowledged the propriety of the defendants' participation in the suit in the courts below, for New Jersey's legislature "had authority under state law to represent the State's interests" during those phases of the litigation.[295] Thus, the Court affirmed the authority of a state legislature to designate members of that body to assert the legislature's interest in preserving its laws. By the time *Karcher* arrived at the Supreme Court, however, the defendants had lost their positions as presiding officers and therefore their authority to represent the New Jersey Legislature.[296] Since the legislature had been the real party-intervenor,[297] the refusal by the defendants' successors to pursue the appeal effectively terminated the suit.[298] Thus, even when affirming in principle state legislatures' authority to fill the breach left by executive nondefense of a statute, the Court employed reasoning that barred the actual suit before it from proceeding.[299]

The limited scope of *Karcher*'s holding was made vivid by the Court's decision in *Hollingsworth v. Perry*.[300] There, California voters had passed a

289. 484 U.S. 72 (1987).
290. *Id.* at 74–75.
291. *Id.* at 75.
292. *Id.* at 75–76.
293. *Id.* at 83.
294. *Id*. at 74.
295. *Id.* at 82.
296. *Id.* at 81.
297. *See id.* (distinguishing between "the incumbent legislature, [acting] on behalf of the State, and . . . the particular legislative body that enacted the . . . law").
298. *See id.* at 77–78.
299. *Id.*
300. 133 S. Ct. 2652 (2013).

ballot initiative amending the state's constitution to confine legal marriage to opposite-sex couples.[301] A group of same-sex couples unable to obtain marriage licenses brought suit in federal court asserting that the initiative—known as Proposition 8—violated their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[302] While California's governor and other officials were named as defendants, these officials declined to defend the law in court, even as they continued to enforce it.[303] Accordingly, the district court permitted the initiative's official proponents to intervene to defend the proposition.[304] Their intervention proved futile, however, with the court ruling Proposition 8 unconstitutional.[305] It was at this point that the issue of standing first arose. The defendant officials—enjoined from enforcing the law—chose not to appeal the decision, leaving the question of whether Proposition 8's supporters could do so in their stead.[306] In response to a certified question from the Ninth Circuit, the California Supreme Court declared that state law granted standing to an initiative's proponents under these circumstances.[307] The Ninth Circuit accepted this determination as a basis for standing under federal law, proceeded to the merits, and affirmed the district court's invalidation of Proposition 8.[308]

On appeal, the Supreme Court denied the initiative proponents' standing to appeal both to the Court and the Ninth Circuit.[309] While a justiciable controversy existed between same-sex couples and state officials before the district court, that controversy dissolved once the court struck down Proposition 8 and officials declined to appeal the judgment.[310] For the most

301. *Id.* at 2659.
302. *Id.* at 2660.
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* ("[T]he [California Supreme Court] concluded that '[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest . . . when the public officials who ordinarily defend the measure . . . decline to do so.'" (quoting Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011))).
308. *See id.* at 2660–61.
309. *Id*. at 2659.
310. *Id.* at 2661–62. "Article III demands that an 'actual controversy' persist throughout all stages of litigation" and the controversy in *Hollingsworth* was resolved "[a]fter the District Court declared Proposition 8 unconstitutional." *Id.* (citing Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013)).

part, the Court's opinion reflected familiar themes of standing. At the outset of its analysis, the Court emphasized standing's roots in the separation of powers,[311] citing *Raines*'s caution against the temptation to leapfrog standing's requirements in order to reach the merits.[312] Because the district court's order had not compelled or forbidden the petitioners to do anything, they lacked the "direct stake in the outcome of their appeal" necessary for standing.[313] While the petitioners played a distinctive role in the enactment of Proposition 8, they played no special role—and therefore had no "personal stake"—in ensuring its enforcement.[314] However intense the petitioners' opposition to the invalidation of Proposition 8, their dissatisfaction amounted to the kind of "generalized grievance" long deemed insufficient to create standing.[315] California had opened its courts to such a grievance but that did not alter federal law excluding such claims.[316] Further, in addition to lacking personal standing, the petitioners could not assert representational standing on behalf of the state.[317] They could not invoke California's interest in the validity of its law because of the Court's general bar against litigants asserting the rights and interests of third parties.[318] Even where the Court had carved out limited exceptions to this rule, the Court insists that those litigants—unlike the *Hollingsworth* petitioners—suffer their own legally cognizable injury.[319]

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311. *Id*. at 2661 ("The doctrine of standing . . . 'serves to prevent the judicial process from being used to usurp the powers of the political branches.'" (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013))).

312. *See id.* (citing Raines v. Byrd, 521 U.S. 811, 820 (1997)). *But see* Heather Elliot, *Further Standing Lessons*, 89 IND. L.J. SUPPLEMENT 17, 35–36 (2014) ("[B]oth *Windsor* and [*Hollingsworth*] show the hopelessness of trying to use standing doctrine to resolve separation of powers debates.").

313. *Hollingsworth*, 133 S. Ct. at 2662.

314. *Id.* at 2662–63.

315. *Id.* at 2662.

316. *Id.* at 2666.

317. *Id.* at 2663–64.

318. *Id.* at 2663.

319. *Id.* (citing Powers v. Ohio, 499 U.S. 400, 410 (1991)). The Court analogized the circumstances in *Hollingsworth* to those in *Diamond v. Charles*, 476 U.S. 54 (1986). *See Hollingsworth*, 133 S. Ct. at 2663–64. An opponent of abortion, Diamond was not permitted to appeal the Seventh Circuit's invalidation of Illinois's abortion law after the state elected to end its defense of the law. *Id*.

A question left open by *Hollingsworth* is whether proponents have standing as appellees when a district court has upheld a ballot initiative and state officials withdraw from the case on appeal by the initiative's challengers. In two cases where proponents had been permitted to intervene as

Perhaps most tellingly, the *Hollingsworth* majority's and dissenters' conflicting understandings of *Karcher* underscored the Court's resistance to using initiatives to circumvent restrictions on legislator standing. For the majority, the point of *Karcher* was that only state officials designated by law as agents to represent the state in federal court could serve in this capacity.[320] Under this logic, *Karcher* merely stood for the unremarkable proposition that a state may designate the legislature as the state's representative in federal litigation under some circumstances—such as the executive's unwillingness to represent the state.[321] Thus, the *Hollingsworth* petitioners, as private parties, could not appeal Proposition 8's invalidation to the Court, just as the petitioners in *Karcher* lost their ability to represent New Jersey once they no longer held office there.[322] According to Justice Kennedy, writing for the dissenters, the Court had missed both the meaning of *Karcher* and the purpose of initiatives.[323] *Karcher*, argued Justice Kennedy, did not require states to hew to the formal strictures of the Restatement of Agency; rather, where state law authorized parties to represent the state, the Court was obligated to respect the state's decision about its own governance.[324] In the eyes of the dissenters, the Court had subverted the function of initiatives—bypassing public officials through direct governance—by keeping an initiative's proponents from defending the initiative when those same officials would not.[325]

The Court's decision last term in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[326] appears to confirm both the narrower view of *Karcher* that prevailed in *Hollingsworth* and the gulf that exists between state and federal legislative standing. In *Arizona State*

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defendants at trial, the Ninth Circuit held that initiative proponents may participate on appeal without independently meeting standing requirements. *See* Vivid Entm't v. Fielding, 774 F.3d 566 (9th Cir. 2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Karl Manheim, John S. Caragozian & Donald Warner, *Fixing* Hollingsworth*: Standing in Initiative Cases*, 48 LOYOLA L. REV. (forthcoming 2015).

320. *See Hollingsworth*, 133 S. Ct. at 2664–65 ("Karcher and Orechio were permitted to proceed only because they were . . . acting in an official capacity." (citing Karcher v. May, 484 U.S. 72, 78–79 (1987))).

321. *See id.* at 2664.

322. *Id.* at 2665.

323. *Id.* at 2672, 2675 (Kennedy, J., dissenting).

324. *See id.* at 2668–72.

325. *See id.* at 2668. *See generally* Manheim et al., *supra* note 319 (criticizing *Hollingsworth* as improperly undermining direct democracy's capacity to check government abuses).

326. 135 S. Ct. 2652 (2015).

Legislature, the Court rejected a challenge by Arizona's legislature to a ballot initiative transferring authority to redistrict congressional districts to an independent commission.[327] Though dismissing the claim, the Court recognized the legislature's standing to bring it.[328] Since the ballot initiative would "completely nullif[y]" any vote by the legislature to enact its own redistricting plan,[329] the dispute over the legislature's asserted prerogative met standing's touchstone of a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[330] The Court went out of its way, however, to caution against extrapolating its decision to assumptions about the authority of Congress to sue the President.[331] It pointed out that the case did not "touch or concern" the question of Congress's standing to sue the President and that such a suit would implicate separation-of-powers concerns absent from the case.[332] Echoing *Raines*, the Court reiterated that standing scrutiny is "especially rigorous" when a suit calls on the Court to determine the constitutionality of an act by a coordinate branch of government.[333] Moreover, the state initiative power had no counterpart in federal government to which the Court's reasoning could be applied.[334]

IV. ELUDING CONGRESSIONAL STANDING: THE RELEVANCE OF STANDING, POLITICAL QUESTIONS, AND SEPARATION OF POWERS

Neither the handful of Court decisions involving legislative standing nor the Court's broader standing jurisprudence has established an unambiguous doctrine of standing by Congress or its members. Still, the Court's persistent avoidance of opportunities to rest holdings on such standing is consistent with themes pervading standing doctrine. Similarly, the doctrine

327. *Id.* The legislature contended that this arrangement usurped its power under the Constitution's Elections Clause. *Id.* at 2658–59; *see* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places[,] and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .").

328. *Arizona State Legislature*, 135 S. Ct. at 2659.

329. *Id.* at 2665 (quoting Raines v. Byrd, 521 U.S. 811, 823 (1997)).

330. *Id.* at 2665–66 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 472 (1982)).

331. *See id*. at 2695.

332. *Id.* at 2665 n.12.

333. *Id.* (quoting *Raines*, 521 U.S. at 819).

334. *Id.*

of political questions—though not directly applicable to this issue—sheds light on the Court's resistance to congressional standing. In both areas, the Court has diverted constitutional claims to the political process. In addition, apart from specific structural arguments against congressional standing,[335] general principles and pronouncements on the separation of powers also help to explain the Court's continued unwillingness to sanction congressional suits to effect executive action.

A. Resistance to Congressional Standing: A Reflection of Standing Motifs

At a basic level, it is not surprising that the Court has rebuffed suits brought by members of Congress against the Executive. After all, the standing doctrine itself is rooted largely in the effort to minimize judicial collisions with other branches of government.[336] Thus, the Court has gone so far as to erect prudential standing barriers to supplement Article III's requirements.[337] As the Court has acknowledged, one of standing's principal functions is to ensure that constitutional adjudications take place only when necessary.[338] Attempted congressional suits to enforce or defend federal laws where the Executive has not done so are obvious candidates for applying this philosophy. By barring such suits at the threshold, the Court avoids not only confrontation with a coordinate branch but also inserting itself into a clash between the two political branches of government.

Standing doctrine has also displayed the Court's particular wariness of intruding into the execution of the law. In a series of cases, for example, the Court denied standing to plaintiffs seeking injunctions to curb certain alleged objectionable practices by a city's law enforcement authority.[339] In *Allen v. Wright*,[340] the Court dismissed a suit by parents of black public school children who sought more rigorous federal enforcement of the bar to tax-exempt status for racially discriminatory private schools.[341] To grant standing to plaintiffs such as these, the Court asserted, would place federal

335. *See supra* notes 67–70 and accompanying text.
336. *See supra* notes 21–29 and accompanying text.
337. *See supra* notes 48–54 and accompanying text.
338. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).
339. *Accord* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974); *see* Los Angeles v. Lyons, 461 U.S. 95 (1983).
340. 468 U.S. 737 (1984).
341. *Id.* at 752–53.

courts in the role of "virtually continuing monitors of the wisdom and soundness of Executive action."[342] Since the Executive, rather than the judiciary, is charged with "the duty to 'take Care that the Laws be faithfully executed,'"[343] courts should deny standing where suits seek a "restructuring of the apparatus established by the Executive Branch to fulfill its legal duties."[344] The Court's stated unwillingness to entertain such cases would seem to augur poorly for congressional suits to compel the Executive to alter its mode of implementing laws dealing with matters such as health care[345] and immigration.[346]

This aversion to overseeing executive operations also bears a connection to the standing doctrine's concern that the requested relief will actually redress the plaintiff's injury. In *Lujan v. Defenders of Wildlife*,[347] environmental groups sought an order compelling the Secretary of the Interior to require that other agencies confer with him under the Endangered Species Act with respect to federally funded projects abroad.[348] After finding that the individual members on whom the suit focused had failed to assert a sufficiently imminent injury,[349] Justice Scalia's opinion (written for a four-Justice plurality) determined that the respondents had failed to demonstrate the redressability needed for standing.[350] Since redress of the environmental injuries they asserted hinged on actions of entities over which the Secretary lacked control, there was no assurance that an order directed to the Secretary would avert those harms.[351] Similarly, it is difficult to envision a ruling that would ensure that the Executive enforced a law in a manner satisfactory to congressional plaintiffs. Precise metrics do not exist for

342. *Id.* at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

343. *Id.* at 761 (quoting U.S. CONST. art. II, § 3).

344. *Id.*; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (denying congressional power to create standing under federal statute where law's application would "transfer from the President to the courts the Chief Executive's . . . duty[] to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)).

345. *See supra* note 3 and accompanying text.

346. *See* Alexandra Jaffe, *Boehner Defends House GOP Immigration Lawsuit*, CNN (Jan. 29, 2015, 8:30 AM), http://www.cnn.com/2015/01/28/politics/boehner-obama-immigration-lawsuit/.

347. 504 U.S. 555.

348. *Id.* at 559. The existing regulation required consultation only with respect to actions taken in the United States or on the high seas. *Id.* at 558–59.

349. *See id.* at 562–64.

350. *See id.* at 568–71.

351. *See id.* at 571.

assessing the adequacy of such efforts, and the Court might well rear back from issuing a potentially messy, if not futile, decree. The judiciary's lack of competence to supervise military training was a significant factor in the Court's holding that a suit seeking such relief presented a political question.[352] Similar considerations of manageability could inform its ruling on legislator standing to force the Executive to do its job.

Another concern that runs through standing doctrine is apprehension of opening the floodgates to limitless litigation. This fear has been most pronounced in the context of standing based on citizenship of taxpayer status. In *Schlesinger v. Reservists Committee to Stop the War*,[353] the Court cited the runaway implications of allowing standing on this basis: "The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."[354] In *Wright*, the Court raised the specter that acceptance of the plaintiffs' claimed stigmatic injury would enable members of any racial group to bring suit alleging discriminatory grants of tax exemption anywhere.[355] Moreover, the risk posed was of vastly greater magnitude than this single possibility. Recognition of such "abstract stigmatic injury," warned the Court, would convert federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders."[356] On the question of congressional standing to sue the Executive, executive nondefense of challenged laws would presumably be rare.[357] On the other hand, congressional authority to bring suit over the Executive's putative failure to enforce the law would seemingly know no bounds. In criminal law alone, prosecutorial discretion is a daily phenomenon.[358] Indeed, the Court in *Linda R.S. v. Richard D.*[359] denied standing to a plaintiff challenging the exercise of such discretion.[360] In the civil realm as well, the

352. *See* Gilligan v. Morgan, 413 U.S. 1, 10–11 (1973).

353. 418 U.S. 208 (1974).

354. *Id.* at 227.

355. Allen v. Wright, 468 U.S. 737, 755–56 (1984).

356. *Id.* at 756 (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973)).

357. *See* Grove, *supra* note 61, at 1368–69.

358. *See* Wayte v. United States, 470 U.S. 598, 607–08 (1985); JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 1.09 (4th ed. 2012) (describing prosecutorial discretion as "unbridled").

359. 410 U.S. 614 (1973).

360. *Id.* at 619.

executive branch must constantly exercise judgment as to the selection, pace, and manner of implementing federal programs.[361] Thus, a Congress hostile to the President could have endless opportunities to charge the President with dereliction of the duty to faithfully execute the law.[362] In addition to the burden placed on the Court by the sheer number of such suits, these suits could enmesh the Court in questions of policy ill-suited to judicial analysis. Faced with this daunting prospect, the Court could preclude these suits altogether through the barrier of standing.

Finally, while denial of standing in principle is confined to the unsuitability of specific parties as litigants, it has sometimes performed the same function as the political question doctrine; viz., to effectively preclude ever reaching the merits, turning the matter over to the political process.[363] The Court virtually conflated the two doctrines when it rejected the plaintiffs' standing in *Schlesinger*: "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[364] In *Warth v. Seldin*,[365] the Court—in rejecting all challengers to a zoning ordinance[366]—advised the plaintiffs that "citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process."[367] Framing the proposition in more general terms, the Court explained that prudential limitations on standing were needed to ensure that courts did not "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions."[368] In other cases, too, the Court

361. *See, e.g.*, Lujan v. Defs. Of Wildlife, 504 U.S. 555, 604 (1992) (noting that "Congress legislates in shades of gray . . . to allow maximum Executive discretion").

362. *Cf.* Note, *Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 972 (1983) ("[A]fter [failing to effectively veto], the Executive could not presume that any federal statute was unconstitutional.").

363. *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1214 (2002). The political question doctrine is discussed *infra* at Part IV.B.

364. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) (citing United States v. Richardson, 418 U.S. 166, 179 (1974)).

365. 422 U.S. 490 (1975).

366. *See id*. at 520 (Brennan, J., dissenting) ("[T]he opinion . . . tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional . . . .").

367. *Id.* at 508 n.18 (majority opinion).

368. *Id.* at 500.

has expressed concern about resolving such questions while denying standing in a way that did not invite other plaintiffs to repeat the challenge.[369]

The Court, of course, has not declared the issue of congressional standing to sue the Executive a political question; indeed, it hardly seems fathomable that the Court would. Determinations of standing fall squarely within judicial competence, and the Court's denial of standing in *Raines* assumed the Court's ability to rule on the issue.[370] Still, the cumulative effect of repeated denials of congressional standing and avoidance of opportunities to address the broader issue may operate as the functional equivalent of permanently preventing the assertion of such standing. Ironically, application of the doctrine of standing itself might bar the question of congressional standing from final judicial resolution.

B. Echoes of the Political Question Doctrine

In addition to operating as a kind of de facto political question barrier, the Court's treatment of congressional standing carries overtones of the political question doctrine itself. In a sense this is not surprising, for standing shares with political questions the animating goal of limiting the occasions for judicial intrusion into the decision making by the elected branches of government.[371] Where an issue is deemed to present a political

369. *E.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 472 (1982) (The requirement of a judicially redressable injury "tends to assure that the legal questions presented to the court will [not] be resolved . . . in the rarified atmosphere of a debating society"); *accord* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976) ("[A]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III."); *Richardson*, 418 U.S. at 179 ("Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right [of a citizen] to assert his views in the political forum or at the polls."); *Schlesinger*, 418 U.S. at 217; *see also Richardson*, 418 U.S. at 192 (Powell, J., concurring) (warning against expending Court's limited resources on resolving "public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens").

370. Raines v. Byrd, 521 U.S. 811, 830 (1997).

371. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political questions, and the like—relate in part . . . to an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."). Perhaps not coincidentally, the Court's doctrine in both areas has received widespread criticism for asserted lack of consistency. *Compare* Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1674 (2007) ("[D]ue to the amorphous and shifting

question, the Court has concluded that the issue should be resolved under our constitutional system by the political branches of government.[372] Thus, like standing, the political question doctrine is considered primarily a function of the separation of powers.[373] This organizing principle was given effect in the Court's classic formulation of indicia of political questions in *Baker v. Carr*:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[374]

Given their common roots in separation of powers, it is not surprising that both the political question and standing doctrines express frank avowals of the Court's desire to refrain from issuing constitutional rulings when possible. This philosophy has been made operative in these and other devices by the Court to actively avoid unnecessary pronouncements on constitutional issues.[375] In the field of legislator standing, this common

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nature of the injury-in-fact requirement, courts can use it as a cover for rejecting cases on grounds of politics, ideology, or personal convenience."), *and* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1175 (2002) ("*Baker*'s six factors cannot meaningfully distinguish 'political' questions from justiciable 'legal' ones."), *and* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566 (1966) ("The [political question] cases cannot be satisfactorily explained in terms of a consistent interpretation of the constitutional grants of power."), *and* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1327 (1995) (referring to "the near-universal criticism that standing has generated"), *with supra* note 57 (citing additional criticism).

372. *See* Powell v. McCormack, 395 U.S. 486, 518–19 (1969); TRIBE, *supra* note 92, at 367 ("[T]here are certain constitutional questions which are *inherently* nonjusticiable.").

373. Baker v. Carr, 369 U.S. 186, 217 (1962); *see* Luther v. Borden, 48 U.S. 1, 47 (1849) (refusing to consider allegations of a violation of Guarantee Clause and asserting Court's duty "not to involve itself in discussions which properly belong to other forums").

374. *Baker*, 369 U.S. at 217.

375. *See generally* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J.,

concern caused the Court in *Raines* to treat the standing and political question doctrines as overlapping rather than discrete.[376] There, the Court imported notions drawn from political question jurisprudence when it described its standing inquiry as "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[377] Apparently, the Court's preoccupation with the separation of powers implications of congressional suits prompted it to abandon its independent standing test in favor of a blended doctrine of sliding-scale scrutiny.[378]

The Court's approach in *Raines* also illustrates how denial of standing can perform political question's function of diverting plaintiffs to the legislative arena. As previously noted, the Court has sometimes explicitly instructed plaintiffs denied standing that their cause would be better pursued through the political process.[379] In rejecting standing in *Raines*, the Court attached significance to the fact that members of Congress disgruntled with the Line Item Veto Act had means through the legislative process to prevent the Act's operation.[380] A political question, of course, by definition requires the plaintiffs pursue their aim through the political process. This shared emphasis on legislative alternatives to adjudication further blurs the distinction between standing and political questions.

A further parallel between the political question and standing doctrines is that their ostensibly limited application can cloak a more conclusive reality. As earlier noted, a formal determination that a specific plaintiff lacks standing in the suit before the Court can effectively foreclose a challenge by any other party.[381] Similarly, the Court's rejection of a suit as presenting a political question can be—as a practical matter—tantamount to upholding the challenged action. In *Goldwater v. Carter*,[382] for example, the Court dismissed the suit brought by plaintiff senators challenging the

concurring) (setting forth rules applied by the Court to "avoid[] passing upon a large part of all the constitutional questions pressed upon it for decision").

376. *See* Raines v. Byrd, 521 U.S. 811, 817–20 (1997).

377. *Id*. at 819–20.

378. *See id*.

379. *See supra* notes 363–69 and accompanying text.

380. *Raines*, 521 U.S. at 829.

381. *See supra* notes 228–29 and accompanying text.

382. 444 U.S. 996 (1979).

President's unilateral abrogation of a treaty, which the plurality deemed a political question.[383] The actual and more decisive outcome, however, was to leave the President's decision intact.[384] Similarly, in *Nixon v. United States*,[385] a federal judge unsuccessfully sought to show that the procedure employed by the Senate at his impeachment trial did not meet the Constitution's standard for "'try[ing]' impeachments."[386] The Court dismissed the suit on the ground that the Senate alone had authority to determine what constitutes a proper trial.[387] As a formal matter, then, the Court merely held that it was incapable of ruling on the merits of this issue.[388] Little meaningful difference exists, however, between that holding and an outright decision sustaining the Senate's action.[389]

Moreover, pervading both doctrines—and affording them much flexibility—is a pronounced strain of pragmatism. While the principle of standing is grounded in Article III, the Court's erection of prudential barriers[390] demonstrates that the standing doctrine is derived from more than pure constitutional compulsion. The political question doctrine, articulated in *Baker v. Carr*,[391] is even more overtly rooted in practical considerations. Though finding "a textually demonstrable constitutional commitment" to another branch[392] may represent straightforward constitutional construction, other indicia reflect less detached assessments, such as aversion to displaying a "lack of [due] respect" for a coordinate branch of government, perception of a need for "unquestioning adherence" to a political decision, and fear of "embarrassment from multifarious pronouncements" on an issue.[393] Also, in some instances, a political question determination rests heavily on the view that the judiciary lacks the capacity of a coordinate

383. *See supra* notes 269–76 and accompanying text.

384. *See* Chemerinsky, *supra* note 88, at 875 ("[G]iven congressional inaction, the effect was to uphold the President's rescission of the Taiwan treaty.").

385. 506 U.S. 224 (1993).

386. *Id.* at 228 (quoting U.S. CONST. art. I, § 3, cl. 6).

387. *See id.* at 237–38.

388. *Id*. at 226.

389. *See generally* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that dismissal of a suit on political question grounds is tantamount to a ruling on the merits).

390. *See supra* notes 48–54 and accompanying text.

391. 369 U.S. 186 (1962).

392. *Id*. at 217.

393. *Id.*

political branch to address an issue.[394] Thus, it is understandable that Erwin Chemerinsky has gone so far as to call application of the political question doctrine "entirely prudential."[395] The Court's ongoing refusal to base decisions on congressional standing, then, might be seen as an exercise in the shared pragmatism of these two doctrines. Unwilling either to categorically reject such standing or to acknowledge its validity in a concrete way, the Court has nimbly avoided both of these problematic courses.

C. Separation of Powers and the Uncertain Application of Formalism and Functionalism

It is a commonplace that the Court has fluctuated between formalist and functional approaches to the Constitution's separation of powers.[396] Under a formalist model, the Court rigorously enforces the textual boundaries separating the three branches of the federal government.[397] In a functional analysis, the Court finds limited guidance in the Constitution's formal architecture and seeks more broadly to maintain the intended equilibrium among these branches.[398] The Court itself has acknowledged that no single methodology or philosophy governs the allocation of powers among the three branches. While the Constitution "sought to divide the delegated powers of the new Federal Government into three defined categories,"[399] it also "by no means contemplates total separation of each of these three essential branches of Government."[400] As Justice Jackson famously

394. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . ."); Coleman v. Miller, 307 U.S. 433 (1939) ("[T]he question of a reasonable time [for the pendency of a proposed constitutional amendment] . . . involve[s] . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice.").

395. Chemerinsky, *supra* note 88, at 900.

396. *See* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 5 (1994).

397. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

398. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–43 (2011).

399. INS v. Chadha, 462 U.S. 919, 951 (1983).

400. Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections in 2

described this balance, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity," thus "diffus[ing] power the better to secure liberty" while expecting that "practice will integrate the dispersed powers into a workable government."[401]

From this perspective, the scholarly debate over congressional standing to enforce or defend federal statutes has pitted formalists categorically opposing such standing[402] against functionalists who view Congress's ability to bring suit in certain circumstances as a necessary mechanism to prevent executive arrogation of power.[403] The former would adhere to what they regard as the unambiguous lines drawn by the Constitution;[404] the latter are guided by their perception of the equilibrium contemplated by the constitutional scheme.[405] In a sense, however, the Court's actual treatment of assertions of congressional standing to date has produced an unusual hybrid. The aggregate of its rulings are consistent with a formalist insistence on barring legislative usurpation executive prerogative, but this result has flowed from a series of ad hoc decisions marked by decidedly un-formalist pragmatism and ambiguity. A comparison with Court holdings reasonably characterized as formalist or functionalist underscores the "zone of twilight"[406] now occupied by congressional standing.

The formalist understanding of separation of powers may be said to have its modern roots in the Supreme Court's ruling in *Youngstown Sheet & Tube v Sawyer*,[407] but is perhaps best epitomized by its later decisions in *INS v. Chadha*[408] and *Bowsher v. Synar*.[409] *Youngstown*'s outcome rested on a straightforward distinction between legislative and executive power under the Constitution.[410] There, President Truman had directed the Secretary of

U.S.C, 18 U.S.C., 28 U.S.C., 36 U.S.C., and 48 U.S.C.), *as recognized in* McConnell v. Fed. Election Comm'n, 124 S. Ct. 619 (2003).

401. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

402. *See supra* notes 66–82 and accompanying text.

403. *See supra* notes 83–97 and accompanying text.

404. *See infra* notes 405–23 and accompanying text.

405. *See infra* notes 425–45 and accompanying text.

406. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (describing circumstance in which President and Congress may have concurrent or uncertain share of authority).

407. 343 U.S. 579.

408. 462 U.S. 919 (1983).

409. 478 U.S. 714, 721 (1986).

410. *See Youngstown*, 343 U.S. at 587–88.

Commerce to assume control of most of the nation's steel mills to ensure production for the nation's effort in the Korean War.[411] Justice Black's majority opinion denied that the seizure was justified as an exercise of the President's power as Commander in Chief of the Armed Forces.[412] Instead, the President had encroached on Congress's exclusive authority to enact laws aimed at keeping labor disputes from disrupting production.[413]

Over three decades after *Youngstown*, the Court in *Chadha* took pains to affirm that the Constitution's demarcation of boundaries between branches would not yield to practical arguments for modifying them.[414] *Chadha*'s ruling invalidated the legislative veto whereby a house of Congress could overturn executive implementation of certain kinds of laws.[415] To achieve such results, Congress must alter the existing legislative scheme through statutes enacted via bicameralism and presentment to the President.[416] For purposes of its analysis, the Court was willing to assume that the one-house veto at issue in *Chadha*[417] was a useful political device.[418] Nevertheless, the Court had no commission to set aside the "single, finely wrought and exhaustively considered, procedure"[419] for enacting legislation prescribed by the Constitution. The "cumbersomeness and delays" that often attend compliance with the Constitution's commands did not justify ignoring them.[420] Rather, the Court was obligated to uphold the Constitution's "carefully defined limits on the power of each Branch."[421]

In a kind-of-sequel to *Chadha*, the Court three years later in *Bowsher* again barred Congress from adopting means of circumventing the Constitution's procedures for exercising distinctive powers.[422] Here, the Court struck down a statutory provision assigning the Comptroller General a

411. *See id*. at 582–83.
412. *Id.* at 587.
413. *Id.* 587–88.
414. *See* INS v. Chadha, 462 U.S. 919, 946–47 (1983).
415. *Id.* at 951.
416. *See id.* at 952–55.
417. The provision had authorized either house of Congress by majority vote to reverse a decision by the Executive to allow a particular deportable alien to remain in the United States. *See id.* at 926.
418. *See id.* at 945.
419. *Id.* at 951.
420. *Id.* at 959.
421. *Id.* at 957–58.
422. Bowsher v. Synar, 478 U.S. 714 (1986).

substantial role in carrying out a fiscal law.[423] Because the Comptroller General could be removed by Congress through joint resolution, the Court characterized him as a legislative official.[424] In this instance, however, the Comptroller General was performing an executive task contrary to the Constitution's withholding of "an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[425] Only through impeachment and conviction could Congress remove an official charged with the execution of law.[426] Similar to *Chadha*, the *Bowsher* Court reasoned that while the system of divided powers at times engenders "conflicts, confusion, and discordance," Congress could not tamper with the structure designed by the Framers to provide checks on governmental power.[427]

Running alongside the formalist line of decisions has been a doctrinal strain in which the Court looks for guidance to the larger equilibrium of power among the three branches, rather than focus on bright lines between them. In this functional vein, the Court has openly weighed executive prerogative against competing needs of other departments. Both cases involving President Nixon—*United States v. Nixon*[428] and *Nixon v. Administrator of General Services*[429]—show the Court operating in this practical manner. Perhaps no better illustration of functional considerations superseding formal strictures exists, however, than the progression of the Court's treatment of presidential authority to remove executive officials.

Both *Nixon* rulings arose out of the scandal that ultimately resulted in President Nixon's resignation.[430] In *Nixon I*, the Court upheld a district

423. *See generally id*. at 717–19 (describing operation of statute).

424. *See id.* at 727–30.

425. *Id.* at 722.

426. *Id.* at 722–23.

427. *Id.*; *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 479–80 (2010) ("[T]he 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,' for '[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" (quoting *Bowsher*, 478 U.S. at 736) (striking down provision of law under which President was restricted in his ability to remove members of the Securities and Exchange Commission, which in turn was restricted in its ability to remove members of federal entity that determined policy and enforced laws)).

428. 418 U.S. 683 (1974) [hereinafter *Nixon I*].

429. 433 U.S. 425 (1977) [hereinafter *Nixon II*].

430. *See generally* KEITH W. OLSON, WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA (2003).

court's subpoena directing the President to provide recordings and documents bearing on conversations with aides and advisors in connection with a prosecution for obstruction of justice.[431] The Court's opinion contained both a functional rationale for recognizing an implied executive privilege protecting the confidentiality of presidential communications and a functional rationale for limiting it.[432] On the one hand, the Court observed that a President and his assistants could not perform their duties without the freedom of frank expression that an assurance of confidentiality supplies.[433] On the other hand, an absolute executive privilege would interfere with the judiciary's ability to discharge its own duty to do justice in criminal prosecutions.[434] Three years later, the Court in *Nixon II* drew on similar logic in dismissing the former President's challenge to a law that authorized the General Services Administrator to take custody of President Nixon's official papers and records.[435] Again, the Court was willing to acknowledge the presence of a privilege, rejecting the formalist position that only an incumbent President could assert a claim of this nature.[436] At the same time, the Court's "pragmatic, flexible approach"[437] focused on "the extent to which [the disputed law] prevents the Executive Branch from accomplishing its constitutionally assigned functions."[438] Applying this functional inquiry, the Court concluded that the government had shown "adequate justifications . . . for this limited intrusion into executive confidentiality."[439]

With respect to congressional restraints on presidential power to dismiss executive officials, only gradually did functional considerations supplant the Court's original formalist position. In a trilogy of cases, the Court's stance evolved from an ostensibly flat prohibition on such restraints to a pragmatic modification of the ban to a naked balancing test. In *Myers v. United States*,[440] the Court struck down a federal statute allowing the President to

431. *Nixon I*, 418 U.S. at 713.
432. *See infra* notes 434–45 and accompanying text.
433. *See Nixon I*, 418 U.S. at 708.
434. *See id.* at 707.
435. *Nixon II*, 433 U.S. 425, 429 (1977) (describing provisions of the Presidential Recordings and Materials Preservation Act).
436. *See id.* at 439.
437. *Id.* at 442.
438. *Id.* at 443.
439. *Id.* at 452.
440. 272 U.S. 52 (1926), *modified by* Morrison v. Olson, 487 U.S. 654 (2010).

remove certain federal postmasters only "by and with the advice and consent of the Senate."[441] The Constitution, held the Court, denied Congress "the power to remove [executive officials] or the right to participate in the exercise of that power."[442] Less than a decade later, the Court qualified presidential power of removal by explaining in *Humphrey's Executor v. United States*,[443] that *Myers*'s reach extended only to "purely executive officers."[444] Congress was entitled to create agencies that exercise quasi-legislative or quasi-judicial powers and perform their duties "free from executive control."[445] To effectuate their independence, officers of such bodies—such as the Federal Trade Commission—could be appointed for fixed terms and subject to presidential removal only for cause.[446]

Even this ostensibly firm boundary, however, was diluted in *Morrison v. Olson*[447] when the Court approved a statutorily created and judicially appointed independent counsel who could be removed by the Attorney General for cause.[448] In what might be labeled an anti-formalist opinion, the Court reconsidered the distinction it had drawn between purely executive officers and those who perform quasi-legislative or quasi-judicial functions.[449] Rather than hinge presidential removal power on "rigid categories," the Court would ascertain whether Congress had "interfere[d] with the President's exercise of the executive power" and his constitutionally appointed duty to "'take care that the laws be faithfully executed' under Article II."[450] Predictably,[451] this approach produced a series of judgment calls in favor of the law's validity.

"[W]e simply do not see," the Court opined, "how the President's need to control the exercise of [the independent counsel's] discretion is so central

441. *See id.* at 107.
442. *Id.* at 161.
443. 295 U.S. 602 (1935).
444. *Id.* at 627–28.
445. *Id.* at 628.
446. *Id.* at 629. *But see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495–96 (2010) (limiting for-cause restriction on presidential removal power to one layer of insulation).
447. 487 U.S. 654 (1988).
448. *See id.* at 685–93.
449. *See id.*
450. *Id.* at 689–90.
451. *See id.* at 734 (Scalia, J., dissenting) ("[Under the Court's ad hoc approach,] [t]he law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be.").

to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[452] Nor did the Court "think" that the statute's limitation on the President's execution of the law "sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation" to faithfully carry out laws,[453] "'impermissibly undermine[s]' the powers of the Executive Branch,"[454] or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[455]

As indicated above, the Court's treatment of congressional standing to date is not easily cabined within either the formalist or functionalist mold. While the Court's rulings have not empowered Congress to cross the boundary established in cases like *Chadha* and *Bowsher*, they have pragmatically avoided a decisive resolution of legislative power to bring suit over executive nondefense or non-enforcement. This course is consistent with both formalism's mandate of clean lines of separation and functionalism's prerogative to adjust to unanticipated or even unimagined realities to preserve the equilibrium envisioned by the Constitution. That balance was reflected by the Court's emphasis in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[456] that, in granting the state legislature standing there, it was reserving the question of Congress's more problematic authority to bring suit against the President.[457]

It may even be that the Court is displaying its grasp of a lesson that can be gleaned from the trilogy of presidential removal cases: avoidance of sweeping pronouncements on the immunity of one branch from intrusion by another. In *Humphrey's Executor* and then in *Morrison*, the Court found itself retreating from previous categorical language governing Congress's authority to limit the President's removal power. In this case, that does not mean the Court is awaiting the right opportunity to expressly recognize congressional standing to challenge the Executive's nondefense or non-enforcement of laws. Quite the contrary, as this Article argues, the Court's rulings indicate a desire to avert consideration of the question indefinitely.

452. *Id.* at 691–92 (majority opinion).
453. *Id.* at 693.
454. *Id.* at 695.
455. *Id.* (quoting *Nixon II*, 433 U.S. 425, 443 (1977)).
456. 135 S. Ct. 2652 (2015).
457. *See supra* notes 331–34 and accompanying text.

Rather, the Court appears to have proceeded on the assumption that such standing would be untenable, but hedged its bets against the possibility that a circumstance making it acceptable might someday arise.

V. CONCLUSION

A report of the Court's treatment of congressional standing to challenge the Executive's nondefense or non-enforcement of the law lacks the elegance and coherence of a prescriptive theory. Still, an understanding of the Court's actual handiwork in this area is not without significance. In essence, the Court has devised ways to refrain from giving concrete recognition to such standing in each instance where it has had opportunity to confirm it. Thus, the Court has avoided recognizing legislative standing but has left the door very slightly ajar in the event that an unanticipated case arises. In an apparent gesture of institutional modesty and caution, the Court has at least tacitly acknowledged that it is uncertain whether it has thought of every contingency.

From this perspective, proponents of legislative standing have misconceived the state of the doctrine of congressional standing. Rather than comprising a muddle, the Court's rulings reflect the reality that virtually all claims of congressional standing will likely be denied. As a practical matter, the frequent availability of private plaintiffs to bring claims rejected as congressional suits and the existence of legislative recourse to address the disputed executive policy can enable the Court to continue to withhold congressional standing serially, rather than categorically. Thus, suits like those brought or threatened against the Obama administration are highly unlikely to succeed. And more broadly, the scholarly proponents of congressional standing bear a heavier burden to reconcile their views with the Court's than they often seem to realize.

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