

Summer 2018

Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy

Vicki C. Jackson

Harvard Law School, vjackson@law.harvard.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Constitutional Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Jackson, Vicki C. (2018) "Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy," *Indiana Law Journal*: Vol. 93 : Iss. 3 , Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol93/iss3/7>

This Lecture is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy

VICKI C. JACKSON*

In recent years, legislatures and their members have increasingly asserted standing to sue other branches of government, in controversies involving state legislators or legislatures as party litigants and in controversies involving members of or parts of the U.S. Congress. These cases present challenging questions for the federal Article III courts, whose jurisdiction has been interpreted to be bounded by “justiciability” doctrines, including that the party invoking federal court jurisdiction must have standing to do so.

This Essay will focus on congressional standing, discussing case law involving claims by state legislatures or legislators to the extent they are relevant.¹ It will examine congressional standing—including standing of individual Members of Congress, standing of parts of Congress, and standing for the whole body—within the context of U.S. commitments to democratic constitutionalism, offering a framework for analysis that is intended more to suggest ways of thinking about congressional standing than to prescribe a set of answers.

I. DEMOCRATIC CONSTITUTIONALISM AND STANDING

In most theories of democratic constitutionalism, major issues of policy are to be determined by legislatures; executive and administrative branches may fill out policy details in implementing such laws. Courts typically are not given authority to govern—their authority is to assure that the other branches govern in accordance with law. This is especially so in the United States, where the federal courts play a

* Thurgood Marshall Professor of Constitutional Law, Harvard Law School. With thanks to Judith Resnik, Mark Tushnet, Dick Fallon, Marty Lederman, Gillian Metzger, Tara Grove, Richard Primus, Dawn Johnson, Lauren Robel, Donna Nagy, Victor Quintanilla, Wendy Perdue, Jack Preis, Robert Taylor, and others for helpful comments and discussions, to the Indiana University Maurer School of Law faculty for affording me the opportunity to present the Smith Lecture on April 3, 2017, and to the University of Richmond Law School for the opportunity to present this work in a faculty workshop in April 2017. I also want to thank Gabriella Blum, Glenn Cohen, Louis Kaplow, Michael Klarman, John Manning, Holger Spamann, Laurence Tribe, Adrian Vermeule, Mark Wu, Daniel Francis, and other members of the Harvard Law School community who provided helpful comments in connection with my presenting a version of this essay at a faculty workshop over the summer of 2017. I am grateful for the helpful research assistance provided by Caroline Cox, Eleanor Davis, and Kamika Shaw, all Harvard JD expected 2018, and Harry Larson, Harvard JD expected 2019. I served as Court-appointed pro bono amica curiae in *United States v. Windsor*, 133 S. Ct. 2675 (2013), to argue against the Court’s jurisdiction on two grounds, one of which was that a congressional committee lacked standing to defend the constitutionality of the federal statute challenged in that case.

1. Some aspects of the standing of state and federal legislators will overlap. But suits by Members of Congress also raise distinctive separation of powers concerns not present in suits by state legislators. *See infra* text accompanying notes 30, 39, 50–75.

significant role in reviewing the legality of government action but, in James Madison's words, may exercise jurisdiction only in matters of a "Judiciary Nature."²

This limitation on the jurisdiction of the U.S. federal courts has been defined through a series of "justiciability" doctrines, including standing. Unlike the "constitutional courts" of Europe, federal courts do not exercise jurisdiction over "generalized grievances"; under current standing law, Article III courts cannot adjudicate claims unless the party invoking their jurisdiction has "standing" to do so.³ In order to have standing, a party must allege an "injury," arising from "invasion of a legally protected interest which is [] concrete and particularized,"⁴ in a dispute "traditionally thought to be capable of resolution through the judicial process."⁵

Despite its theoretical preeminence in governance, Congress has fallen on hard times (as have legislatures around the world). In standardized surveys of confidence in major institutions, Congress has fallen to astonishing lows in comparison to both the presidency and the Supreme Court—indeed, in comparison with virtually every other institution asked about.⁶ Scholars of the Congress, like Thomas Mann and Norman Ornstein, began warning of a "broken branch" in their 2006 book, and six years later wrote *It's Even Worse than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*.⁷ In recent years we have seen repeated defaults in governance by Congress—threatening not to allow payment of the national debt, provoking repeated government shutdowns, and blocking consideration of nominees.⁸

As Congress's functionality has declined, efforts by congressional actors to litigate issues in federal courts have presented federal courts many opportunities to consider legislative standing. In 1997 the Supreme Court, in *Raines v. Byrd*,⁹ rejected standing for several Members of Congress challenging the constitutionality of the

2. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed. 1966).

3. *Allen v. Wright*, 468 U.S. 737, 750–51 (1984).

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

5. *Allen v. Wright*, 468 U.S. at 752 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

6. *Confidence in Institutions*, GALLUP, <http://www.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/DR7A-RMM7>] (finding that as of 2016 only 9% of survey respondents, when asked, had either a "great deal" or "quite a lot" of confidence in Congress; this was much lower than all other institutions studied, including the presidency (36%) and the Supreme Court (36%)). The 2017 data from administration of the same survey is similar: 12% having a "great deal" or "quite a lot" of confidence in Congress, compared with 32% for the presidency and 40% for the Supreme Court. *Id.*

7. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012) [hereinafter MANN & ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS*]; THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

8. See MANN & ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS*, *supra* note 7; Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991 (2014)

9. 521 U.S. 811, 829 (1997).

Line Item Veto Act, an Act later invalidated in *Clinton v. City of New York*.¹⁰ Notwithstanding the clear effort in *Raines v. Byrd* to tighten standing requirements, Members of Congress continue to invoke the jurisdiction of the federal courts in a wide range of disputes with the Executive Branch. In *United States v. Windsor* (2013) (in which I was the Court-appointed amicus curiae asked to argue against the Court's jurisdiction), the House of Representatives Bipartisan Legal Advisory Group asserted standing to intervene and appeal to defend the constitutionality of the federal Defense of Marriage Act.¹¹ One Justice, in dissent, accepted standing of the congressional advisory group;¹² three others, also in dissent, rejected it;¹³ and the majority did not reach the question.¹⁴

Significantly revised understandings of injury for standing purposes developed in order to accommodate new claims by environmental organizations and their members for environmental and even aesthetic injuries.¹⁵ Thus, newly asserted forms of injury were recognized as such for standing purposes. But unlike the twentieth century recognition of environmental harm as a judicially cognizable interest, often promoted by public interest organizations that emerged in the twentieth century, Congress as an institution has been around since the Founding, as have the interests of its members in the due enforcement of the laws. What is novel here is not the institution nor the claim of an interest in how the laws are enforced (historically addressed through legislative oversight), but rather the tendency for Members of Congress to come into court over public disputes with other government offices rather than using other avenues of relief outside the courts to try to prevail in their positions.

One recent example is the action by the House of Representatives at issue in *U.S. House of Representatives v. Burwell*,¹⁶ challenging the implementation of the Affordable Care Act as inconsistent with the Appropriation Clause and constitutional provisions conferring the legislative power on Congress. Another fairly recent example is *Crawford v. U.S. Department of the Treasury*,¹⁷ in which Senator Ron Paul, among other plaintiffs, challenged certain intergovernmental agreements as treaties requiring Senate approval.

Such cases, part of a broader trend of governments, including legislative bodies or their members, resorting to the courts,¹⁸ might be seen as a healthy development,

10. 524 U.S. 417, 449 (1998).

11. See 133 S. Ct. 2675, 2684 (2013).

12. See *id.* at 2712 (Alito, J., dissenting).

13. See *id.* at 2699–2705 (Scalia, J., dissenting).

14. See *id.* at 2688.

15. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

16. 185 F. Supp. 3d 165 (D.D.C. 2016).

17. No. 3:15-cv-250, 2015 WL 5697552 (S.D. Ohio Sept. 29, 2015).

18. See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015); *Massachusetts v. EPA*, 549 U.S. 497, 518–21 (2007). For cases in the lower courts, see, for example, *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1216–19 (10th Cir. 2017); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–17 (10th Cir. 2016); *Texas v. United States*, 809 F.3d 134, 162 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct.

consistent with developments in other countries towards resort to the courts for resolution of a wider range of constitutional disputes. It might be thought to benefit the rule of law by providing more certainty and clarity to disputed constitutional questions and by increasing the measures to secure executive compliance with law. It might also reflect the enhanced stature of the courts; or instead, the ease of using the courts to take a public position that will be politically beneficial.¹⁹ Or it might be taken as a sensible reaction to the growing power of the Executive Branch, with resort to the courts to provide a rule of law check on abuse in executive and administrative departments.

On the other hand, the trend might be viewed as an unhealthy symptom of, and contributor to, a declining faith in democratic politics, a willingness to use courts in lieu of constitutionally available political processes, and thereby further to empower courts that are, relative to constitutional courts elsewhere, untethered in any systematic way to the unfolding political contexts in which democratic constitutionalism lives. Legislative standing might be thought to detract from the capacities of the political processes to resolve important questions, if the courts routinely come to the rescue over political disagreements. And the perceived legitimacy of the courts might over the long run suffer, especially if their decisions come to be seen as no more than tools in political battles.

Thus, the positive values of judicial resolution in enhancing the clarity of the law and restraining executive abuse must be weighed against the risks that the courts may choose wrong answers that do not help governance or that overall democratic functioning will be impaired by increasing dependence on the courts to resolve disputes. This Essay is an effort to analyze and weigh these values and risks in several distinctive contexts involving claims of congressional standing.

II. CONSTITUTIONAL INTERPRETATION AND STANDING

Standing is a question of constitutional law in the United States. Constitutional interpretation in the Supreme Court typically draws on several sources: text and original understandings; precedent and interpretation over time, including history outside of the courts; values and purposes of the constitutional provisions involved; and the consequences of alternative interpretations.²⁰ How do these different sources bear on different kinds of legislative standing questions?

Text: Article III's language of "cases" and "controversies" is not self-explicating. History and precedent, as discussed below, should play an important role in their understanding. But the powers of other branches are more specific and are quite varied; the scope of those powers and what power is at issue should, as Professor

906 (2016).

19. On credit-claiming postures of elected officials, see DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 61–62 (2d ed. 2014).

20. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987); Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIAC L. REV. 599, 599–601 (2008); Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 7, 17–45 (Jeffrey Goldsworthy ed., 2006).

Tara Grove has argued, matter in understanding questions of standing.²¹

For example, the Court has stated that under the Take Care Clause, it is the Executive Branch that has the responsibility for carrying out the laws, including through litigation;²² legislative standing premised on broad claims that the President is violating the Take Care Clause might thus be thought inconsistent with this allocation of authority. However, where a *state* legislature's (or legislators') votes have been "completely nullified" in the Court's view, standing has on rare occasion been upheld, where the injury asserted is to a constitutionally specified power to ratify proposed amendments under Article V or to set "Times, Places and Manner" of congressional elections as provided in Article I, Section 4.²³ As these areas suggest, standing analysis may thus vary depending on the particular substantive claim under distinct constitutional (or statutory) provisions.

Precedent and History: Issues of legislative standing may arise both in suits brought by individual members in their own right and by a house or an entire legislative body. Although precedent may play an important role in the development of constitutional law,²⁴ relatively few Supreme Court cases involve legislative standing, and of these, even fewer address the standing of Congress or its members. There is surely no longstanding history of Congress or its houses bringing suit against other parts of the federal government or officers acting on its behalf.²⁵ Indeed, the first case of which I am aware in which the Court suggested that Congress or its houses would have standing as such was decided in 1983: *INS v. Chadha*²⁶ is frequently cited for the proposition that Congress has standing to defend the constitutionality of laws not defended by the Executive Branch. Despite dictum characterizing Congress as the appropriate party to defend the constitutionality of a statute when the Executive Branch does not do so, I will argue below that the case may be better understood as resting on Congress's authority to defend its own asserted statutory prerogative to vote a "one-house veto" on agency action.²⁷

The Court's most recent decision concerning the standing of members of Congress was in 1997. In *Raines v. Byrd*, the standing of individual members of Congress to bring suit to contest the constitutionality of the Line Item Veto Act was rejected.²⁸ The Court found that the legislators (who had voted against the Act) lacked the necessary personal stake in the outcome.²⁹ Responding to the claim that

21. See generally Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014).

22. See *Buckley v. Valeo*, 424 U.S. 1, 135–41 (1976) (per curiam).

23. See, e.g., *Ariz. State Legislature*, 135 S. Ct. at 2652; *Coleman v. Miller*, 307 U.S. 433, 438–41 (1939). For further discussion of *Coleman*, see *infra* note 48 and *infra* notes 30–31, 33, 39, 101 and accompanying text.

24. See generally DAVID STRAUSS, *THE LIVING CONSTITUTION* (2010).

25. See *Chenoweth v. Clinton*, 181 F.3d 112, 113–14 (D.C. Cir. 1998) ("Historically, political disputes between Members of the Legislative and the Executive Branches were resolved without resort to the courts.").

26. 462 U.S. 919 (1983).

27. See *infra* text accompanying notes 112–133.

28. See 521 U.S. 811, 829 (1997).

29. See *id.* at 818–20 (discussing the "personal" stake requirement).

the Act diminished the effect of their votes for future legislation, the Court drew a distinction between such claims and those of *state* legislators in the 1939 decision in *Coleman v. Miller*.³⁰ In *Coleman*, the votes of half the members of the Kansas Senate against ratifying a proposed amendment to the U.S. Constitution would, on their theory that the lieutenant governor was not allowed to vote, have been “virtually held for naught,”³¹ or, as described by *Raines v. Byrd*, “completely nullified,” by giving effect to the lieutenant governor’s tie-breaking vote in support of ratification.³² *Coleman*, the *Raines* Court wrote, “stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”³³ *Raines*’ treatment of *Coleman* suggests that cases addressing the requirements for state legislator standing would also be applied, as minimal criteria, to claims of standing by Members of Congress.

Drawing on the history of constitutional collisions between Congress and Presidents over time, *Raines v. Byrd* concluded that congressional attempts to litigate

30. See *id.* at 821–24 (discussing *Coleman v. Miller*, 307 U.S. 433 (1939)). *Raines v. Byrd* also suggested a distinction between claims personal to a particular legislator (“a prerogative of personal power”) and claims relating to the institutional “seat” of the legislator (as “trustee” for constituents), 521 U.S. at 821, a distinction subject to critique as a basis for determining injury for standing purposes. See, e.g., Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 HARV. L. REV. 1741, 1746–47 (1999). Had the Court meant to rest only on this distinction, however, it would have been unnecessary to distinguish *Coleman*. I therefore read *Raines* as resting on a more complex and nuanced set of factors.

31. *Coleman v. Miller*, 307 U.S. at 438.

32. *Raines v. Byrd*, 521 U.S. at 823.

33. *Id.* at 823 (citation omitted). Justice Scalia’s dissent in *Arizona State Legislature v. Arizona Independent District Commission*, 135 S. Ct. 2652 (2015), went further in its attempt to discredit *Coleman* as “a peculiar case that may well stand for nothing”:

[There were] two votes to affirm on the merits, two to reverse on the merits (without discussing standing) and four to dismiss for lack of standing. Justice Stanley Reed, who was on the Court and apparently participated in the case, is not mentioned in any of the opinions recorded in the United States Reports. So, in order to find *Coleman* a binding precedent on standing, rather than a 4–to–4 standoff, one must assume that Justice Reed voted with Hughes. There is some reason to make that assumption: The four Justices rejecting standing went on to discuss the merits, because “the ruling of the Court just announced removes from the case the question of petitioners’ standing to sue.” 307 U.S. at 456 (Black, J., concurring). But then again, if nine Justices participated, how could it be that on one of the two issues in the case the Court was “equally divided and therefore . . . expresse[d] no opinion”? *Id.* at 447. A pretty shaky foundation for a significant precedential ruling. . . . And even under the most generous assumptions, since the Court’s judgment on the issue it resolved rested on the ground that that issue presented a political question—which is itself a rejection of jurisdiction, *Zivotofsky v. Clinton*, 566 U.S. 189 (2012)—*Coleman*’s discussion of the additional jurisdictional issue of standing was quite superfluous and arguably nothing but dictum. The peculiar decision in *Coleman* should be charitably ignored.

Id. at 2696–97 (Scalia, J., dissenting).

the dispute were contrary to historical experience. The Court's opinion discussed at length the Tenure in Office Act, whose constitutionality was at issue in the impeachment proceedings of President Andrew Johnson in a disagreement between the political branches that continued for more than another half century before it was resolved in a lawsuit brought by a person claiming to have been unlawfully removed from office.³⁴ Moreover, even though the Line Item Veto Act had specifically authorized suits by individual Members of Congress to challenge its constitutionality, the Court noted that the plaintiffs had not been authorized by their houses to bring the lawsuit.³⁵ And further, as the Court also noted, in this case Congress had other remedies to vindicate its interests—including repeal of the Act or exempting appropriations bills from its reach.³⁶ Finally, it noted, nothing foreclosed a challenge to the Act by someone who suffered judicially cognizable injury under it.³⁷ In light of the multiple factors considered, it is thus uncertain how broadly or narrowly to read *Raines* with respect to standing by congressional actors.³⁸

34. See generally *Raines v. Byrd*, 521 U.S. at 826–28; *Myers v. United States*, 272 U.S. 52 (1926).

35. *Raines v. Byrd*, 521 U.S. at 829. While noting this factor, the Court did not elaborate on its implications.

36. *Id.* at 829; cf. *Daughtrey v. Carter*, 584 F.2d 1050, 1058 n.32 (D.C. Cir. 1978) (stating, in denying standing to congressional plaintiffs challenging alleged failure to enforce immigration laws, that although the existence of other remedies is not relevant to standing, the parties might have a remedy through the legislative process).

37. *Raines v. Byrd*, 521 U.S. at 829.

38. The D.C. Circuit has had a series of important decisions on legislative standing, several of which are discussed in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). *Chenoweth* read *Raines* as a major curtailment of the possibility of congressional standing, requiring a showing of “complete nullification” in order to sustain congressional standing, and thus casting doubt on the reasoning in earlier D.C. Circuit decisions. *Id.* at 117. Judge Tatel, while agreeing that under *Raines* congressional plaintiffs lacked standing in *Chenoweth* to challenge the validity of various executive orders designed to protect rivers, wrote separately to say that the *Chenoweth* majority read *Raines* too broadly. I quote at length from his opinion, as it also provides a brief summary of prior standing cases in the circuit:

[U]nlike appellants, the legislators in *Kennedy* and *Moore* challenged alleged constitutional defects in the way specific pieces of legislation were passed or defeated. See *Moore*, 733 F.2d at 951–53 (revenue-raising bill allegedly originated in the Senate, not the House); *Kennedy*, 511 F.2d at 434–36 (allegedly unconstitutional presidential pocket veto of legislation passed by Congress). Contrary to appellants' claim that they have been “denied the ‘right[] to participate and vote on legislation in a manner defined by the Constitution,’” Appellant's Br. at 16 (quoting *Moore*, 733 F.2d at 951), they can point to no defect in any “discrete aspect of the process by which a bill becomes law (the actual vote on the legislation) [or] those post-enactment events denying the bill's status as law,” *Harrington v. Bush*, 553 F.2d 190, 211 (D.C. Cir. 1977). This case is therefore indistinguishable from and controlled by *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984). There, as here, a Member of Congress challenged the legality of an executive order, claiming that it was promulgated without congressional or constitutional authorization. See *id.* at 1381–82. We held that the Member lacked standing because he raised only “a generalized grievance about the conduct of government, not a claim

Indeed, whether the “complete nullification” theory would support congressional standing at all is itself unclear; the Court’s most recent decision upholding the standing of a *state* legislature on this basis specifically cautioned that “a suit between Congress and the President would raise separation-of-powers concerns absent here.”³⁹ In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁴⁰ the Court found that the State Legislature had standing to challenge a ballot initiative requiring that districting be done by an independent commission. This ballot initiative, the Legislature alleged, completely stripped it of its asserted right under the U.S. Constitution to do districting directly. If the Arizona Legislature were correct on the merits of its constitutional claim, then the action complained of would have completely nullified their right to vote, bringing it within the standing rule of *Coleman v. Miller*.⁴¹

As this brief survey suggests, legislative standing has been upheld thus far only in quite limited circumstances; little support exists in precedent or history for the Congress, as a legislative body, to sue the Executive Branch as a general matter over constitutional issues.

founded on injury to the legislator by distortion of the process by which a bill becomes law.” *Id.* at 1382 (quoting *Moore*, 733 F.2d at 952); *see also Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978) (rejecting the argument that legislators have standing to challenge executive nonenforcement of an act as a usurpation of the legislative right to enact repealing legislation); *Harrington*, 553 F.2d at 211 (rejecting the argument that a legislator has standing to challenge allegedly illegal CIA activities as an impairment of his prospective votes on related legislation).

Chenoweth, 181 F.3d at 117–18 (Tatel, J., concurring). For cases in other circuits, *see*, for example, *Hansen v. Nat’l Comm’n on the Observance of Int’l Women’s Year*, 628 F.2d 533, 534 (9th Cir. 1980) (“The injury alleged by appellant is an injury which he suffers along with all other citizens of the United States. He has not presented any facts which show he has sustained or is imminently in danger of sustaining an actual personal injury.”); *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975) (rejecting legislator standing to challenge expenditures for combat in other countries in alleged violation of law); *see also Baird v. Norton*, 266 F.3d 408, 411–12 (6th Cir. 2001) (rejecting state legislators’ challenge to approval by Secretary of Interior of gaming compacts between the state and Indian tribe; finding claim of injury due to use of concurrent resolution voting procedure in the legislature (majority of those present) rather than a more rigorous procedure (majority of all legislators) was only a generalized grievance, and also rejecting theory of “complete nullification” because only two legislators were party plaintiffs and their votes alone would not have been sufficient to defeat the measure).

39. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 n.12 (2015); *see also Raines v. Byrd*, 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 other two branches of the Federal Government was unconstitutional.”); *id.* at 824 n.8 (noting that it did not need to decide whether *Coleman* was distinguishable in additional ways, including that it did not pose the separation of powers concerns that congressional standing does); *id.* at 832 n.3 (Souter, J., concurring in the judgment) (noting that *Coleman* may be distinguishable because the action by state senators did not pose federal separation of powers concerns).

40. 135 S. Ct. 2652.

41. *See id.* at 2665–66.

But, it must be acknowledged, this approach is not a necessary feature of courts engaged in constitutional review. Reasonably well-functioning systems of constitutional democracy, as in France or Germany, authorize parts of the legislature to challenge the constitutionality of statutes or, in the case of Germany, to resolve jurisdictional disputes between two organs of the federal government, before the constitutional court.⁴² In such countries there is typically a specific constitutional provision contemplating or authorizing such suits. There is no such provision in the U.S. Constitution. U.S. history and precedent both regard the jurisdiction of the federal courts as more narrow. Indeed, even where Congress has conferred standing on private parties, the Court has found limits on its ability to do so, as in *Lujan v. Defenders of Wildlife*.⁴³

Values: Constitutional values exist on both sides of many questions of standing. A fundamental value in U.S. constitutionalism is the rule of law: “The government of the United States has been emphatically termed a government of laws, and not of men.”⁴⁴ Yet the values of representative democracy are also central to U.S. constitutionalism; these values contemplate self-governance by the people through their elected representatives. There are many ways in which these values can be reconciled, including through forms of deference by courts to the decisions of elected branches. But justiciability limits, including standing, have been viewed as playing a role in limiting the occasions of judicial intervention to situations where there has been a specific injury to particular persons.⁴⁵

Purpose and Consequence: Constitutional adjudication frequently invokes both the general purposes of constitutional provisions or doctrines and a concern for the consequences of alternative interpretation. Standing requirements are sometimes justified as ensuring that the parties most directly affected should be those who litigate,⁴⁶ a requirement that is also sometimes linked to the idea that courts

42. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 547–83 (3d ed. 2014). There are systems that permit individuals who have only an ideological interest in a matter to challenge a set of allegedly unconstitutional conditions, as in India. *Id.* at 747–64.

43. 504 U.S. 555, 562 (1992).

44. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

45. See *supra* text accompanying note 29 (referring to the concrete injury requirement). Thus, in *Marbury*, the Court emphasized the importance of an individual claim of injury: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” 5 U.S. (1 Cranch) at 163.

46. See, e.g., Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (1979). For an argument in favor of congressional standing in separation of powers disputes on the grounds that Members of Congress know more and are better situated concretely to explicate the interest at stake, see Note, *supra* note 30, at 1754. Members of Congress, however, may also have stronger incentives to litigate for partisan political purposes, regardless of the longer term institutional interests of their organ of government. Cf. *Kucinich v. Obama*, 821 F. Supp. 2d 110, 115 n.4 (D.D.C. 2011) (“While there may conceivably be some political benefit in suing the President and the Secretary of Defense, in light of shrinking judicial budgets, scarce judicial resources, and a heavy caseload, the Court finds it frustrating to expend time and effort adjudicating the relitigation of settled questions of law.”).

adjudicate best when they see the concrete implications of challenged action in particular cases affecting particular persons. Standing is one of several “justiciability” doctrines found implicit in the case or controversy requirements of Article III. Three sets of purposes are commonly identified for these justiciability limits more generally: first, lack of judicial competence or concerns for how courts are best able to adjudicate; second, exclusive competence in another branch; and third, avoiding harms to courts and political branches from courts adjudicating too wide a span of sensitive public law disputes involving conflict between the courts and other branches of government.

Lack of Judicial Competence: The concrete injury requirement, the Court has said, helps preserve the separation of powers because courts lack the competence to resolve constitutional issues abstractly,⁴⁷ or are more likely to do a good job if they are adjudicating legal issues in concrete context. This argument may be tied to a broader concept of how courts should decide cases⁴⁸—with attention to particular facts, with a kind of decisional humility that allows a set of decisions on a variety of facts to accumulate incrementally. But the Court has frequently decided constitutional questions in close to abstract settings, for example, when it adjudicates facial challenges to newly enacted laws, before they are enforced against particular persons.⁴⁹ While the idea of judicial modesty that lies behind the competence claim has appeal, it is not always applied.

Exclusive Competence Elsewhere: A second set of reasons underlying justiciability limits is that other branches have exclusive competence over a question. An example: A challenge by a federal judge removed from office by impeachment and conviction to the procedures used by the Senate in conducting his trial was found nonjusticiable because of the Senate’s exclusive competence over the trial of impeachments.⁵⁰ Concerns for the competence of other branches sometimes surface in standing cases: in *Allen v. Wright*,⁵¹ the Court implied that where there is no disagreement about the controlling legal norm, but only about its execution, standing should be more strictly applied to avoid judicial entanglement in the work of the Executive Branch.⁵²

47. See *Lujan v. Defs. of Wildlife*, 504 U.S. at 576–77.

48. Cf. *FEC v. Akins*, 524 U.S. 11, 24 (1998) (“The abstract nature of the harm—for example, injury to the interest in seeing that the law is obeyed—deprives the case of the concrete specificity that characterized those controversies which were ‘the traditional concern of the courts at Westminster,’ *Coleman*, 307 U.S. at 460 (Frankfurter, J., dissenting); and which today prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion.”).

49. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

50. See *Nixon v. United States*, 506 U.S. 224, 237–38 (1993).

51. 468 U.S. 737 (1984).

52. See *id.* at 759–60 (discussing separation of powers in context of concerns about plaintiffs “challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations”). In *Wright*, the IRS did not argue that it had no obligation to avoid giving tax exemptions to racist schools, but rather claimed that its enforcement method was adequate to the goal; plaintiffs disagreed. See *id.* at 744–45 (“Respondents allege that, despite the IRS policy of denying tax-exempt status to racially discriminatory private schools and despite the IRS guidelines and procedures for implementing that policy, some of the tax-exempt racially segregated private schools created

Reducing Occasions for Judicial Review and Confrontations with Political Branches: A third set of reasons for the justiciability requirements is that they reduce the number of occasions where the Court must confront the political branches of the federal government.⁵³ Why is this desirable? What are the potential harms of such confrontations? And are those harms exacerbated when the confrontations involve head-on collisions in litigation directly between Congress or parts thereof and the Executive Branch?

One kind of concern is that, despite traditions of obedience to the Court's judgments, the Court has to be careful, as a matter of judicial statesmanship, in not over-drawing the reservoir of diffuse support for its institutional role;⁵⁴ issuing rulings that are ignored or defied, it is thought, may impair the court's effectiveness more generally. Political scientists sometimes speak of constitutional courts operating within a zone of tolerance of those who hold political power.⁵⁵ If political branches cease accepting the Court's judgments because they exceed their tolerances or those of a majority of the public, then the rule of law will suffer a major blow. The history of intergovernmental litigation in the United States has involved some moments of genuine uncertainty over compliance.⁵⁶

Another kind of risk is that the Court might receive too much respect, on too many issues, to the detriment of democratic decision making and wise policy making. We

or expanded in desegregating districts in fact have racially discriminatory policies.”); *see also Lujan v. Defs. of Wildlife*, 504 U.S. at 577 (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3. It would enable the courts, with the permission of Congress, ‘to assume a position of authority over the governmental acts of another and co-equal department,’ and to become “‘virtually continuing monitors of the wisdom and soundness of Executive action.’””) (citations omitted).

53. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552–53 (2016) (Thomas, J., concurring) (“[S]tanding doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action. *See Schlesinger, supra*, at 222. And by limiting Congress’ ability to delegate law enforcement authority to private plaintiffs and the courts, standing doctrine preserves executive discretion.”).

54. On diffuse support, *see, for example, Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Walter F. Murphy & Joseph Tanenhaus, *Explaining Diffuse Support for the United States Supreme Court: An Assessment of Four Models*, 49 NOTRE DAME L. REV. 1037 (1974).

55. For the discussion of the idea of “tolerance” intervals, *see Lee Epstein, Jack Knight & Olga Shvetsova, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC’Y REV. 117 (2001).

56. *E.g., United States v. Nixon*, 418 U.S. 683, 714 (1974) (ordering the President to turn over what turned out to be incriminating tapes in an action brought by a specially appointed federal public prosecutor and the President); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 286–87 (5th ed. 2003) (noting the challenges of enforcing judgments in litigation involving states, and referring to one of several Supreme Court decisions involving the struggle over many years and iterations of litigation to enforce the Court’s judgment that West Virginia pay a debt owed to Virginia).

might think of this as a risk of *judicial supersupremacy*.⁵⁷ The Justices of the U.S. Supreme Court are, we may assume, very smart lawyers, but they are only nine in number, and they are not necessarily practiced in the art of actual governance. Moreover, U.S. Article III judges, including the Supreme Court Justices, serve terms that are indefinite, unlike the justices of well-known constitutional courts who serve time-limited terms (e.g., in Germany or South Africa, with twelve-year terms), and unlike the justices of other well-known high courts that decide constitutional questions who serve until a stated retirement age (e.g., Australia, age seventy, or Canada, age seventy-five). The absence of regular replacement through mandatory retirement or term limits compounds the challenges for a court deciding important constitutional questions.⁵⁸

The risks of incorrect decisions may be particularly high with respect to separation of powers issues. Recent scholarly work suggests that the effect of a particular separation of powers issue on the overall distribution of governing powers is very difficult to determine;⁵⁹ other scholarly work on the appropriations process suggests that since 1789 it has been subject to a complex set of customs not revealed simply by reading the statutes.⁶⁰ Such work may imply that courts' competence to get correct answers in these areas of interbranch relations is at its weakest in resolving these issues.

A third kind of risk from repeated adjudication of disputes between the two elected branches, especially when those two branches or members thereof are the contesting parties in a litigation,⁶¹ is that Congress may be encouraged in its current

57. Cf. Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2455 (1998) (discussing other federal courts' doctrines reflecting the Court's own "supersupremacy").

58. See JACKSON & TUSHNET, *supra* note 42, at 538–40 (showing that justices in Germany and South Africa also face mandatory retirement, which may shorten the term in office); see also Vicki C. Jackson, *Honoring Dan Meltzer—Congressional Standing and the Institutional Framework of Article III: A Comparative Perspective*, 91 NOTRE DAME L. REV. 1783, 1800–04 (2016) (exploring structural differences, including in terms served and regularity of replacement, the justices' prior experience in government, and ease of constitutional amendment, between the U.S. Supreme Court and other constitutional courts).

59. See Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016); see also Nicholas O. Stephanopoulos, *Discounting Accountability*, http://www.law.nyu.edu/sites/default/files/upload_documents/16_10_10%20Nicholas%20Stephanopoulos_Discounting%20Accountability.pdf [<https://perma.cc/T4W6-2YJX>] (unpublished manuscript) (arguing that the Court's assumptions about what constitutional interpretations will increase electoral accountability may be mistaken or unproven); cf. Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1674 (2014) (arguing against judicial enforcement of constitutional rules claimed to prohibit innovations agreed on between Congress and the President because of "skeptical[ism] that courts will identify accurately instances in which institutional bargains go too far").

60. See LUCIUS WILMERDING, JR., *THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES* (Archon Books 1971) (1943).

61. Cf. *Raines v. Byrd*, 521 U.S. 811, 833–34 (1997) (Souter, J., concurring in the judgment) (indicating that graver separation of powers concerns for the role of courts are posed

disinclination to take the responsibility of governance seriously. As Professor James Bradley Thayer argued long ago, too much judicial oversight can lead to a sapping of a sense of constitutional and political responsibility in the elected branches.⁶² His article, written in 1893, suggested that legislators might act less responsibly if they believe that the Court will stand at the ready to correct their excesses and failures of due consideration.

Some observers may argue that the breakdown of congressional norms (such as respect for the opposition, or commitment to regular legislative process in lawmaking) and the rise of legislative gridlock provide reasons for the courts to be *more* active, to view more cases as justiciable. How does a breakdown in the legislative process relate to justiciability and more specifically to standing? A leading defense of the Court's decisions in the two *Bush v. Gore* cases⁶³ is that chaos would have ensued without the Court's intervention.⁶⁴ This defense necessarily turns on the idea that the procedures of the Twelfth Amendment for congressional resolution of disputed votes, arguably applicable to all contests over electoral votes for President,⁶⁵ were no longer controlling or practicable.⁶⁶ I am not convinced that this was correct, nor am I convinced by similar arguments for recognizing congressional standing as a response to legislative dysfunctionality.

It is a fundamental obligation of elected democratic governments to govern.⁶⁷ While the complex filters of the legislative process were deliberately designed to

in litigation brought by Members of Congress against the Executive Branch than in a suit by other affected persons).

62. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

63. See *Bush v. Gore (Bush II)*, 531 U.S. 98, 111 (2000) (ending state-ordered recount based on the Equal Protection Clause); *Bush v. Palm Beach Co. Canvassing Bd. (Bush I)*, 531 U.S. 70 (2000) (vacating state court decision that had required a recount and remanding for clarification).

64. See, e.g., Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 49–53 (2001).

65. See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 278–79 (2002) (“[T]he text of the Constitution vests authority with the state legislatures to select electors and with Congress to count the votes and to select the President in the event that no candidate commands a majority”; “[T]he text of Article II, Section 1 itself appears to give Congress the ability to determine whether a state judiciary has overstepped its bounds and improperly interfered with the state legislature’s authority under Article II to determine the manner in which electors are chosen.”); see generally *id.* at 277–95. Professor Barkow does not argue that the Equal Protection claim, which was the basis for the *Bush II* per curiam opinion, was foreclosed by the political question doctrine. *Id.* at 276 n.212.

66. *Id.* at 275 (finding surprising the Court’s failure even to consider the political question doctrine in *Bush I*, notwithstanding parties’ failure to raise it, and treating the decline of the political question doctrine as reflective of a troubling tendency of the Court to believe itself the only branch capable of resolving constitutional controversies).

67. See, e.g., Mark E. Warren & Jane Mansbridge with André Bächtiger et al., *Deliberative Negotiation*, in POLITICAL NEGOTIATION: A HANDBOOK 141 (Jane Mansbridge & Cathie Jo Martin eds., 2015); Gillian Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV L. REV. 1, 85–87 (2017) (implying that the Constitution requires “effective governance”); see also N.W. BARBER, THE

serve as a check on unwise or unconstitutional action, they were not intended as a block to governance; indeed, the Framers were concerned to create a more functional, more effective national government than had existed under the Articles of Confederation. As Justice Robert Jackson once wrote about “[t]he actual art of governing under our Constitution,” it “cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”⁶⁸

Arguments for expanded legislative standing based on the breakdown of congressional processes may instead be indicative of reasons for caution in entertaining novel theories of legislative standing.⁶⁹ To elaborate: a court that devotes much of its decisional authority to head-on conflict between the two elected branches risks angering each in ways that over the long run may weaken support for the value of judicial independence.⁷⁰ This occurred in the first Russian Constitutional Court,⁷¹ although, given how well established our federal courts are, that danger (if it exists) is one for the long run, not the short run.

Moreover, a major problem in the Congress—and in U.S. society—has been a loss of commitment to the value of compromise.⁷² This loss of commitment to compromise as a basic tool in representative democracy contributes substantially to various pathologies in the national political process. Knowing that the Court will step in to resolve disputes may be more likely to diminish than to enhance the willingness of the legislative branch to engage in compromise. The ability to forge and enforce compromises is an essential aspect of any democratic government in a complex society. To the extent that the Court entertains jurisdiction to decide cases—even cases raising real constitutional questions—that are essentially disputes between the political branches, where no individual or entity outside those branches claims injury, it may encourage irresponsibility and ideological posturing in the political branches, rather than encouraging a spirit of compromise and working-it-out-ness.

To be sure, there are countervailing arguments. Perhaps we are at a pass where judicial intervention has become essential to clarify the ground rules of the national

PRINCIPLES OF CONSTITUTIONALISM (forthcoming Aug. 2018) (arguing, in a chapter on separation of powers, that the separation of powers in a state should ordinarily be structured to promote cooperation between its different parts and that legislatures are needed for a state to function successfully by testing expert opinion, setting broad policy and exercising oversight of plans for implementing policy).

68. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). I am not related in any way to Justice Jackson.

69. *Cf.* JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) (arguing that the federal judiciary should not adjudicate disputes over constitutional powers as between Congress and the President, but should instead leave such issues to the political process).

70. *See supra* note 61 (citing Souter concurrence in *Raines* for the point that direct interbranch conflict poses more of a threat to the role of courts than privately initiated suits).

71. *See* JACKSON & TUSHNET, *supra* note 42, at 792–804.

72. *See* Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1765–67 (2016).

political process in the midst of current disputes for the guidance of members of the different branches.⁷³ But to so conclude would mark a serious departure from existing understandings, with risks to both courts and politics. The question of standing in any particular dispute brought by members of one branch against another, this Essay suggests, should be approached with an attitude of caution, mindful of both the rule-of-law values served in settling the issue but also of the potential risks in looking to courts to provide such settlement. And, despite the many virtues of single factor or rule-based theories, this Essay argues rather for a more nuanced approach based on multiple factors, acknowledging both the importance of precedent and the complexity of the factors that should be considered in resolving questions of justiciability in the context of interbranch litigation.

Traditionally, what independent Article III courts have been most needed for has been the protection of individuals from injury arising out of violations of rights or structural parts of the Constitution.⁷⁴ It is the rights and interests of persons or entities outside of the political power centers of government that even well-functioning majoritarian systems are likely at times to abuse or overlook. And it is for the protection of those rights and interests that the Court should be most willing to press political tolerances and spend its reservoirs of diffuse support. Indeed, individual standing could, and perhaps should, be broadened to the end of making judicial review more available where such individual rights and interests are at stake. As I have elsewhere argued, some of the Court's decisions denying individual standing to challenge government action have been wrong and harmful, a form of self-restraint that advances neither democratic self-government nor the respect for rights that a well-functioning constitutional democracy requires.⁷⁵ But resolving constitutional conflicts of a partisan character between members of different branches, which those

73. Cf. Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 134–41, 144–48 (2014) (arguing for expanding standing in cases involving pure public law disputes, generally involving separation of powers issues, under a constitutional rule).

74. See *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (“The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.”). Individuals’ rights and interests are protected not only by explicit rights provisions but also by more structural elements of the Constitution. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

75. See, e.g., Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 133 (2014). Even under existing doctrine, cases like *Richardson* could well come out differently were Congress to enact legislation to implement the Constitution’s Statement and Accounts Clause and authorize individuals to sue to obtain information that they claim is required to be made public. See *FEC v. Akins*, 524 U.S. 11 (1998); see also *infra* note 218 (noting *Lyons* and *Spokeo* as cases where the Court was too narrow in defining individual standing).

other branches are capable of resolving themselves and for which each has major tools of power at their disposal, bears a higher set of risks to the constitutional system.

In this light, I now analyze several different kinds of claims that might be brought by congressional plaintiffs, having in mind the benefits of not expanding congressional standing too broadly while preserving the capacity of courts to help secure constitutional rule of law.

III. LEGISLATIVE STANDING IN PARTICULAR SETTINGS

The concerns raised above do not apply themselves to particular categories of claims for legislative standing. The following sections seek to do so, without necessarily resolving close questions. Although reasonable arguments for substantially expanding congressional standing exist, I urge a more cautious approach to expanding congressional standing beyond existing parameters.

The Court's formal doctrine for establishing standing has solidified around three elements said to be derived from the Constitution: there must be a concrete injury (not a generalized grievance), caused by or traceable to the conduct complained of, and redressable by the judicial relief sought.⁷⁶ In some cases, particular Members of Congress can assert a *personal* injury of the kind clearly presenting a sufficiently concrete and particularized injury for purposes of "standing," as discussed in Part III.A below. But most of the time the kinds of cases in which congressional actors invoke the Article III courts' jurisdiction involve claims of *institutional* injuries. In cases involving the institutional interests of Members or parts of Congress, these three constitutional components will not by themselves prove especially useful in distinguishing among cases in which congressional parties invoke federal courts' jurisdiction. More general separation of powers concerns, relying on the ability of the other branches to resolve their disputes through political mechanisms, come into play.

To begin with, a perfectly reasonable argument could be made for recognizing legislative standing quite broadly. There is no conceptual difficulty in identifying distinctive injuries for legislators, in their capacity as legislators, in cases involving the constitutionality of federal laws or executive branch action: there *is* something special about being an elected member of the legislative branch that, it can be argued, distinguishes their claims of injury from those of the general public.⁷⁷ Indeed, federal

76. *E.g.*, *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Allen v. Wright*, 468 U.S. 737, 750 (1984). Although the ban on "generalized grievances" has sometimes been identified as a "prudential" (rather than "constitutional") factor, it has been used to help define the (constitutional) concrete injury requirement. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.").

77. Moreover, there is a close relationship between how constitutional injury is defined and the elements of redressability and causation; injuries to Members of Congress defined by virtue of their special status in government could be crafted in such a way as to secure these other elements. In Rep. Elizabeth Holtzman's case (discussed *infra* note 78), for example, if her injury were the loss of opportunity to vote on whether the war should continue, the

courts in the early 1970s sometimes accepted such claims of standing—in at least one case, by a single Member of Congress who was challenging the constitutionality of the spread of the war in Vietnam into bombing of targets in Cambodia.⁷⁸ Where such an institutional injury is alleged, moreover, the claim is likely to meet causation and redressability requirements, since the injury would be caused by the assertedly unlawful conduct complained of and would be redressed by a judicial declaration of invalidity, which the government would presumably honor.⁷⁹ But the Court has been skeptical of such claims of institutional injury, for reasons not unrelated to the concerns for democracy and the federal courts' role therein raised above.

In *Raines v. Byrd*,⁸⁰ the Court distinguished between “personal” claims of injury, such as those suffered by the plaintiff in *Powell v McCormack*,⁸¹ who alleged that

President's failure to seek such a vote could be treated as the cause of the injury, and a judicial declaration of rights indicating that she and other Members must vote to authorize hostilities could be viewed as likely to redress the injury.

78. See *Holtzman v. Richardson*, 361 F. Supp. 544, 549 (E.D.N.Y. 1973) (“*Plaintiff qua Congresswoman does not merely suffer in some indefinite way in common with people generally. She is a member of a specific and narrowly defined group—the House of Representatives. As a Congresswoman, plaintiff is called upon to appropriate funds for military operations, raise an army, and declare war. Additionally, plaintiff has a continuing responsibility to insure the checks and balances of our democracy through the use of impeachment. When a plaintiff is a member of a narrowly defined group, which has been more directly affected by the conduct in question than has the general population, the test for standing should be met.*”) (emphasis added). The Court of Appeals reversed, on justiciability grounds. It found her claim barred by the political question doctrine, but did not exclude the possible justiciability of other war-related claims involving “clear abuse amounting to bad faith.” See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1308–09, 1311–12 (2d Cir. 1973). It quoted from Judge Wyzanski's opinion in *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973):

Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.

Holtzman v. Schlesinger, 484 F.2d at 1311–12. The Court of Appeals also rejected Holtzman's standing (over Judge Oakes' dissent): it found that she was not denied the right to vote or debate; if her vote was ineffective, it was due to the contrary votes of her colleagues. See *id.* at 1315. And her argument that a determination of illegality would be useful in any impeachment proceedings, the court said, would require the federal courts to give an essentially advisory opinion, prohibited by Article III. See *id.* (I was a legislative intern in Rep. Holtzman's office for part of the summer of 1973.)

79. *But cf.* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569–70 (1992) (Scalia, J., for a plurality) (suggesting that redressability would be defeated by the possibility that a federal agency not a party to the litigation would not consider itself bound by a final judgment on an issue of federal law).

80. 521 U.S. 811, 820–21 (1997).

81. 395 U.S. 486 (1969).

Congress had wrongfully refused to seat him notwithstanding his election, and “institutional” claims of injury to Members of Congress, which are considerably more difficult to make out. As noted earlier, the Court in *Raines* rejected the standing of several Members of Congress to challenge the Line Item Veto Act, which, they claimed, had the effect of unconstitutionally diminishing the power of their votes in Congress; the mere enactment of the statute, the Court said, did not of itself effect such a diminishment,⁸² and Congress had it within its grasp to rectify any use made by Presidents of the purported authority to cancel spending programs.⁸³ In light of *Raines*, respect for precedent suggests that a narrower definition of injury would need to be used in defining congressional standing than one premised on the special status of Members of Congress as lawmakers or public representatives.⁸⁴

The Court’s standing case law has been widely described and frequently critiqued for inconsistency. As noted above, it would not be difficult to construct arguments for expansive congressional standing. But all else being equal, theories of standing that comport with the main thrust of prior cases are to be preferred to those that strike out entirely anew, in light of what Dworkin called “fit,”⁸⁵ and that others might see as a kind of Burkean incrementalism.⁸⁶ In light of such concerns for “fit” and concerns not to undermine congressional capacities for using political mechanisms to resolve disputes, a narrower compass of legislative standing should be drawn. With this in mind, I propose below several factors to guide thinking about legislative standing (beyond the arguably special injury suffered by Members of Congress through asserted failures of federal officers to carry out or comply with the law and in addition to the distinction between “personal” and “institutional” injury).

First, how have claims similar to the one at issue been dealt with in the past? History cannot be dispositive, of course;⁸⁷ standing itself was, according to many scholars, only invented in the mid-twentieth century, and its parameters have shown considerable flexibility in responding to and allowing new types of claims, for example, of environmental harm. But a pattern of handling particular disputes through political processes, as was discussed in *Raines*, is not irrelevant.

82. *Raines v. Byrd*, 521 U.S. at 824–26.

83. *Id.*

84. Justice Souter, joined by Justice Ginsburg, concurred only in the judgment, finding the issue of standing more “debatable” than did the majority, but concluding that general separation of powers concerns supported finding the case nonjusticiable, as an interbranch and intrabranched dispute intervention in which “would risk damaging the public confidence that is vital to the functioning of the Judicial Branch by embroiling the federal courts in a power contest nearly at the height of its political tension.” *Id.* at 830, 833 (Souter, J., concurring in the judgment) (citation omitted).

85. See RONALD M. DWORKIN, *LAW’S EMPIRE* 67–68 (1986).

86. See, e.g., STRAUSS, *supra* note 24; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

87. Cf. Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538 (1998) (“[P]roperly to understand when particular remedies are constitutionally required, one must distill somewhat broader remedial principles from our constitutional text, structure, and tradition than can be drawn either from history or from a particular constitutional clause.”).

Second, is the claimed injury one that could be redressed by means available to Congress, without resort to the courts, through oversight processes, control of appropriations, or even by impeachment? In *Raines v. Byrd*, the Court emphasized the many mechanisms that exist under the Constitution for Congress and its Members to express disagreement with the Executive⁸⁸: Congress may hold oversight hearings, or withhold consideration of nominees, or impose constraints on the use of appropriated funds.⁸⁹ As others have noted, impeachment may also be available to redress some forms of alleged Executive wrongdoing.⁹⁰ The availability of effective political tools secured by the Constitution's allocations of powers may bear on whether the claim should be viewed as justiciable.⁹¹

Third, are there likely to be individuals or entities outside of Congress that would suffer concrete injury and could thus raise the challenge without putting the Court directly into the position of having to reject either Congress's or the Executive Branch's positions as party litigants? Even when a federal statute is challenged by private persons, separation of powers concerns may inform the Court's adjudication of the constitutionality of the action of another branch.⁹² But where the parties to the litigation are themselves parts of the two other branches, the constitutional stakes are inevitably heightened, and the risks to the courts that much greater.⁹³ To be sure, the Court has not always been hospitable to the proposition—in cases brought by citizens or taxpayers—that the absence of other parties with standing should count in any way

88. See *Raines v. Byrd*, 521 U.S. at 819–20, 826–29.

89. See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993).

90. See *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (noting that Congress can use powers, like impeachment, if it disagrees with Executive enforcement decisions). Some suggest that impeachment is always available as a tool in disputes between Congress and the President and thus that reliance on its availability as an alternative remedy would always defeat congressional standing to challenge executive action. See, e.g., Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 363 (2015). But history suggests that enough Members of Congress to make a difference would take seriously the substantive constitutional limitations on impeachment. See U.S. CONST. art. II, § 4 (limiting impeachment and removal from office to “Treason, Bribery, and other high Crimes and Misdemeanors”); see also Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO L.J. 2193, 2219–20 (1998) (arguing that impeachable acts are not simply whatever will motivate a partisan vote but involve serious misconduct in breach of the public trust).

91. See *supra* text accompanying note 36.

92. See, e.g., *Allen v. Wright*, 468 U.S. 737, 759–61 (1984).

93. See *supra* note 84; *Raines v. Byrd*, 521 U.S. at 833–34 (Souter, J. concurring in the judgment) (noting that although “a suit challenging the constitutionality of this Act brought by a party from outside the Federal Government would also involve the Court in resolving the dispute over the allocation of power between the political branches, it would expose the Judicial Branch to a lesser risk” than a suit brought by Members of Congress against the Executive Branch, because “[d]eciding a suit to vindicate an interest outside the Government raises no specter of judicial readiness to enlist on one side of a political tug-of-war, since ‘the propriety of such action by a federal court has been recognized since *Marbury v. Madison*, 1 Cranch 137 (1803)’”); see also Nash, *supra* note 90, at 388 (arguing that likelihood of private party standing on a claim would be prudential reason to deny standing to a congressional plaintiff).

towards recognizing the plaintiffs' standing.⁹⁴ However, in *Raines* the Court noted that its decision did not "foreclose[] . . . constitutional challenge" by another plaintiff as a factor that supported its conclusion that the congressional plaintiffs lacked standing.⁹⁵ The Court's language—that its decision did not "foreclose" adjudication of the constitutional validity of the statute with a proper party plaintiff—suggests that the rule-of-law function played by judicial resolution of the issue could someday be achieved.

Fourth, has the Congress as a whole through legislation, or the appropriate house or committee by resolution, properly authorized the litigation?⁹⁶ The Court has noted the presence or absence of authorization to sue as bearing on legislative standing, in both cases involving state legislators and Members of Congress.⁹⁷ In *Raines*, the Court specifically noted and thus presumably attached significance to the fact that plaintiffs had "not been authorized to represent their respective Houses,"⁹⁸ even though the legislation in question had authorized any member of the Congress to bring an action challenging the constitutionality of the Act.⁹⁹ Authorization for individual Members of Congress to sue was not enough to overcome what the Court viewed as an absence of the kind of concrete, specific institutional injury needed to sustain standing. Moreover, the Court has not hesitated to find that the standing of congressional committees to bring actions was defeated where the resolution on which the committee relied did not sufficiently clearly authorize it to bring suit.¹⁰⁰

94. See, e.g., *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."). The Court rejected standing by citizens, or taxpayers, to challenge Members of Congress retaining their membership in the Armed Forces Reserve as a violation of Article I, section 6, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." It is also possible that the issue would be deemed a "political question" committed to each house to decide whether to expel a member.

95. *Raines v. Byrd*, 521 U.S. at 829; see also *id.* at 834 (Souter, J., concurring in the judgment).

96. Cf., e.g., Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1647–52 (1977) (distinguishing suits brought by individual Members of Congress for alleged institutional injuries from suits brought by the entire Congress).

97. In addition to *Raines*, discussed below, see *Ariz. Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (refusing to accept the conclusion of the state court concerning the authority of referendum proponents to defend the constitutionality of a law enacted by referendum, because those proponents were not state officials subject to the control of the state in the ordinary course); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests.") (citing *Karcher v. May*, 484 U.S. 72, 82 (1987)); *Karcher v. May*, 484 U.S. at 82 (indicating that a state may designate the speaker of its legislature to defend the constitutionality of a law that the executive branch of the state will not defend).

98. *Raines v. Byrd*, 521 U.S. at 829; see also *id.* at n.10.

99. *Id.* at 815–16.

100. See *Reed v. Cty. Comm'rs of Del. Cty.*, 277 U.S. 376 (1928) (finding that the Senate resolutions relied upon were inadequate to authorize Senate committee members to resort to litigation to obtain certain records concerning a contested election). Although the Constitution

Relatedly, to the extent that the claim involves an alleged denial of the right of Members of Congress to vote, it may be relevant whether enough Members of Congress, from the appropriate chamber(s), have joined in the litigation to suggest that a vote might change the status quo,¹⁰¹ indicating that the dispute has the kind of immediacy of real consequences sometimes captured by prudential elements of justiciability law.¹⁰² As a logical matter, if the injury is to a right to vote, that injury is cured by the opportunity to vote regardless of the outcome; but in the more pragmatic approach sometimes taken by courts to issues of standing, courts may be more inclined to intervene in ongoing political disputes if judicial intervention may really make a difference in more than an abstract way.

Finally, as Professor Fallon has recently said, “whether a plaintiff has suffered a judicially cognizable injury—and, if so, whether the relief sought is sufficiently likely to redress it to support standing—frequently turns on the provision of law under which a plaintiff seeks relief.”¹⁰³ Here, I suggest that it will matter whether the claim itself is one that has a sufficient specificity that it can be distinguished from claims that would allow congressional standing with respect to any public dispute. As will be discussed below, Legislative Vesting Clause or Take Care Clause claims, or claims based on asserted violations of appropriations legislation, arguably lack—except perhaps in very narrow circumstances—the specificity that would enable courts to confine legislative standing to narrow, discrete areas.

Each of these factors is not necessarily relevant to every claim of legislator or legislative standing, and some of the factors may overlap. But together they can work to afford courts needed analytical tools in an area that is difficult because the

gives each house of Congress the authority to make its own rules, where the rights of those outside a house are placed at stake in litigation, the interpretation of those rules—including what they authorize—becomes a matter for judicial determination. *See United States v. Smith*, 286 U.S. 6, 33 (1932).

101. *Cf. Raines v. Byrd*, 521 U.S. at 823 (characterizing *Coleman v. Miller* as depending, inter alia, on the presence as party litigants of “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act”); Nash, *supra* note 90, at 376–77 (suggesting that requiring formal authorization by a house is inconsistent with vindicating constitutional congressional interest under special supermajority constitutional voting rules); Note, *supra* note 30, at 1756–57 (criticizing *Raines*’ possible requirement of a house resolution authorizing litigation as applied, for example, to supermajority voting rules for adopting treaties).

102. One other issue is worth noting here: it is possible that, in light of *INS v. Chadha*, 462 U.S. 919 (1983), both houses of Congress would need to join in litigation, the purpose and effect of which was to change the legal status or obligations of persons outside the Congress. *See Tara Leigh Grove & Neal Devins, Congress’s (Limited) Power To Represent Itself in Court*, 99 CORNELL L. REV. 571, 603–14 (2014) (arguing that the presumption of bicameralism would preclude a single house from asserting a grievance with respect to failure to carry out, enforce, or defend an enacted law); Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction at 15–17, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307) (arguing that a single house acting alone may lack authority to assert an injury belonging to Congress as a whole).

103. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1071 (2015); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 232–47 (1988).

distinctive status of being an elected member of the legislature might plausibly support very broad claims of standing. Bearing these factors in mind, how, then, should claims of standing in various areas be analyzed? I begin with what seem to be relatively easy cases.

A. Standing to Contest Entitlement to an Office

An individual legislator's standing to contest entitlement to his or her office appears well settled. It was not even mentioned as a disputed issue in *Powell v. McCormack* (1969), where the Court found justiciable Adam Clayton Powell's suit challenging the House of Representatives refusal to seat him.¹⁰⁴ Had Powell lacked standing, it is inconceivable that the Court would not have discussed that issue, in a case where vigorous arguments about justiciability, revolving around the "political question" doctrine, were discussed at length. In principle, questions of a legislator's entitlement to take his or her seat involves an individual right that also coincides with the democratic rights of those who, it is asserted, elected the legislator. And it is clear that the legislator denied his or her seat has a special and quite concrete injury that is not widely shared. Moreover, these claims involve an intrabranched contest within Congress, not involving the President; in hearing such disputes courts are thus taking on only one of the two political branches. Legislators' standing to contest their exclusion from office thus stands on firm foundations of precedent, constitutional purposes, and concern for consequences.¹⁰⁵

B. Actions to Enforce Subpoenas

The power of each house of Congress to conduct investigations, including issuance of subpoenas, has been established since at least the early part of the twentieth century as ancillary to Congress's lawmaking functions.¹⁰⁶ Although

104. 395 U.S. 486 (1969). The Court found the question justiciable, rejecting the argument that it was nonjusticiable, for reasons primarily focused on the political question doctrine. *See id.* at 516–49. It concluded that Powell had been unconstitutionally excluded, because the only grounds on which a member could be excluded were failure to meet the standing qualifications provided by the Constitution—age, citizenship, and residency. *See id.* at 489, 550.

105. Other claims relating to the apportionment of seats, as in the conduct of the U.S. Census, might stand on similar ground, although the connection is somewhat more attenuated; the Supreme Court did not reach the question of congressional standing in its decision on census methodology, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 328–30 (1999), though the standing of the House was upheld in the three-judge court below. *See U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998) (upholding standing on informational injury grounds and on grounds that the current House had a concrete and strong interest in its own future composition and in preventing political manipulation). I do not address in this Essay other kinds of claims by some Members of Congress that internal rules or decisions have inequitably reduced their voting power. *See, e.g., Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983). Like the issue in *Powell*, such claims involve intrabranched, rather than interbranch, conflict; in such conflicts, some political methods of redress (e.g., oversight hearings, funding bans), available in interbranch disputes, would be unavailable.

106. *See, e.g., McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also Anderson v. Dunn*,

Congress has other means to enforce its subpoenas—including imprisoning subpoenaed witnesses who must then seek release through habeas corpus¹⁰⁷—recognizing the standing of committees or houses of Congress to seek judicial assistance in enforcing subpoenas is supported by a fairly long historical pedigree, dating back at least to the 1920s, when the Senate adopted its 1928 Standing Order authorizing Senate committees to bring civil actions to, inter alia, enforce subpoenas.¹⁰⁸

19 U.S. (6 Wheat.) 204, 225–29 (1821); cf. *Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (per curiam) (noting Congress’s investigatory powers).

107. See, e.g., *Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 619–20 (1929); *McGrain v. Daugherty*, 273 U.S. at 160, 174 (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”); see also TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34114, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH (2014) [hereinafter GARVEY & DOLAN, A SKETCH]. According to Garvey and Dolan, three mechanisms exist for vindication of this subpoena power: “inherent contempt power,” as was used in the nineteenth century, under which the house that subpoenaed a witness could bring contempt charges against the witness, hold an abbreviated trial, and imprison for contempt until the subpoena was complied with; referral of the case to the U.S. Attorney for a criminal contempt prosecution that was, unlike civil contempt, not curable by compliance; or bringing a civil enforcement proceeding in a court to compel the witness to produce. *Id.* at 1. *Kilbourn v. Thompson*, 103 U.S. 168, 181–90 (1881), suggested that punishment for contempt was a judicial function, beyond the power of Congress, but found it unnecessary to so hold, resting instead on the proposition that “no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire,” which jurisdiction was lacking, *id.* at 190. *Kilbourn* was interpreted in *McGrain* as resting on the lack of jurisdiction over the subject matter of the inquiry. *McGrain v. Daugherty*, 273 U.S. at 170–71. The *McGrain* Court upheld the authority of the Senate to require witnesses to attend legislative hearings and to hold the witness in contempt. See *id.* at 180 (finding the witness to have wrongfully refused to appear and to have been lawfully “attached,” and concluding that the district court “erred in discharging him from custody”).

108. See S. JOURNAL, 70th Cong., 1st Sess. 572 (1928) (reflecting approval of S. RES. 262, 70th Cong. (1928)); see also GARVEY & DOLAN, A SKETCH, *supra* note 107, at 11 n.78. Since 1978, the Senate has had explicit statutory authority to bring civil enforcement actions in courts, of which several have been pursued. According to another research paper by Garvey and Dolan, on at least six occasions between 1979 and 1995 the Senate authorized litigation to enforce a subpoena. See TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 25 (2014) [hereinafter GARVEY & DOLAN, LAW, HISTORY, PRACTICE, AND PROCEDURE].

On the House side, there do not appear to be either standing orders or statutory authority, although the standing of the House or its committees to sue to enforce subpoenas, of both private entities and the Executive Branch, has been upheld in the lower courts. See *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 64–65 (D.D.C. 2008); *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 20 (D.D.C. 2013). A later decision in the *Holder* case is pending appeal. *Comm. on Oversight and Gov’t Reform, U.S.*

The standing of legislative bodies to enforce congressional subpoenas through judicial action poses relatively small risks to the overall separation of powers scheme, although other justiciability (or other constitutional) barriers to enforcing such subpoenas against executive branch officials may exist.¹⁰⁹ Moreover, recognizing congressional standing here has the benefit of providing an independent judicial forum in which the persons who receive such subpoenas, even if they are government officials, can advance and protect their own asserted rights not to testify or produce information.¹¹⁰ It is thus consistent with the role of the federal courts to protect individual rights from abusive government conduct.

C. Claims Relating to Special Prerogatives to Vote in Congress

This next group of cases is more difficult. They involve contexts in which congressional actors might claim that their votes were “completely nullified,” drawing on the Supreme Court’s case law involving state legislatures,¹¹¹ or that they have been denied any opportunity to vote on a matter on which their vote is required. With limited exceptions, discussed first below, they lack historic precedent for the justiciability of their claims; other relevant factors may vary across contexts.

House of Representatives v. Lynch, 156 F. Supp. 3d 101 (2016); see GARVEY & DOLAN, LAW, HISTORY, PRACTICE, AND PROCEDURE, *supra* at 30, 35–37 (noting U.S. Department of Justice’s justiciability objections to efforts by Congress to enforce subpoenas against Executive Branch officers); cf. *Miers*, 558 F. Supp. 2d 53. The district court in *Miers* had denied the government’s motion to dismiss the action to compel the President’s White House Counsel to provide evidence, *id.* at 65–78 (rejecting argument that the House committee lacked standing), *id.* at 78–99 (rejecting other grounds for dismissal); it was, according to Irv Nathan, the first time the House had successfully sued the Executive Branch to enforce subpoenas of testimony that the White House was trying to protect. See Irvin B. Nathan, Opinion, *A Dangerous Obamacare Lawsuit*, WASH. POST (Oct. 4, 2015), https://www.washingtonpost.com/opinions/appeal-house-v-burwell/2015/10/04/d8ecc2d6-693f-11e5-9ef3-fde182507eac_story.html?utm_term=.f9229965eb75 [<https://perma.cc/F6YV-4Z6N>].

109. See GARVEY & DOLAN, A SKETCH, *supra* note 107, at 13–15, 14 n.94.

110. On the possibility of Congress using its “long dormant inherent contempt power” or making a referral to the Justice Department for criminal prosecution, or instead using civil enforcement actions, see GARVEY & DOLAN, LAW, HISTORY, PRACTICE, AND PROCEDURE, *supra* note 108, at 1–2. On the importance of the courts’ role in protecting individual rights in resolving justiciability questions, see *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). *But cf.* *United States v. Munoz-Flores*, 495 U.S. 385, 393–94 (1990) (rejecting the argument that it is more important for the Court to adjudicate claimed violations of individual rights provisions than of structural provisions, and finding justiciable a challenge to a statute claimed to have been enacted in violation of the Origination Clause). In *Munoz-Flores*, however, it is important to note that it was an individual challenging the validity of a statute under which he was prosecuted, asserting his liberty interest in not being prosecuted under an invalid statute. See *id.* at 394.

111. See *supra* text accompanying notes 30–33, 39–41 (discussing *Coleman v. Miller* and *Arizona Legislature v. Arizona Districting Commission*); see also *infra* notes 135, 186 (discussing Supreme Court and D.C. Circuit Court of Appeals case law on legislator standing).

1. *INS v. Chadha*: Standing to Defend Statutes' Constitutionality or to Give Effect to a Congressional Vote?

Consider *INS v. Chadha*,¹¹² involving the constitutionality of a statutory legislative veto provision at the federal level. Congress enacted legislation providing that the Attorney General could suspend deportation for certain otherwise deportable aliens, provided that the Attorney General notify Congress of such suspensions and further provided that either house of Congress could, by resolution of that house, countermand the Attorney General's decision and return the alien to deportable status. The House of Representatives so voted for six individuals, including Chadha.¹¹³ On Chadha's appeal from an INS decision implementing that vote, the Court of Appeals for the Ninth Circuit found the legislative veto unconstitutional.¹¹⁴ The U.S. government agreed, but took an appeal; both houses of Congress had intervened and also filed notices of appeal.¹¹⁵

The Supreme Court rejected justiciability challenges, concluding first "that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take" that the government was a proper party to take the appeal.¹¹⁶ It discussed the presence of the two houses of Congress to show that the controversy was presented in sufficiently adverse form. The Court ended this discussion by stating "[w]e 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."¹¹⁷ To the extent the Court meant to refer to a party proper, as opposed to an amicus curiae, this statement was incorrect. The Court cited two cases in support; one of the two cited cases was completely inapposite, and the other involved a house of Congress arguing as an amicus.¹¹⁸

Although this dictum is cited in support of the proposition that Congress has standing to defend the constitutionality of a statute when the Justice Department declines to defend it,¹¹⁹ the circumstances of *Chadha* were far narrower than this dictum suggests. The substantive issue involved Congress's defense of a statutory voting prerogative of one of its houses, acting alone, to prevent a deportation.¹²⁰ If

112. 462 U.S. 919 (1983).

113. *Id.* at 926–27.

114. *See id.* at 928.

115. *See id.* at 930 & n.5.

116. *Id.* at 930.

117. *Id.* at 940.

118. The Court cited only two cases in support. The first, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), has nothing to do with the issue. In *United States v. Lovett*, 328 U.S. 303 (1946), Congress appeared as an amicus, defending the constitutionality of a statute that both the Executive and the plaintiffs agreed was unconstitutional. *See id.* at 304, 306. For discussion, see Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction, *supra* note 102, at 8–15; Grove, *supra* note 21, at 1360–61.

119. *See, e.g.*, Brief on Jurisdiction for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 16, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

120. *See Chadha*, 462 U.S. at 923–28.

the one-house “veto” cancelling the suspension of Chadha’s deportation was treated as invalid, the vote of the House would arguably be “completely nullified,” in accord with the Court’s case law on legislative standing of state legislatures.¹²¹ Indeed, as Justice Scalia noted in his *Windsor* dissent, in *Chadha* “the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers.”¹²²

Some scholars and jurists have argued that Congress *should* have standing to defend the constitutionality of statutes not defended by the Executive Branch.¹²³ Although the Court’s dictum in *Chadha* could be read to support this proposition (and the Court has indicated its support for allowing state legislative leaders standing to defend the constitutionality of state laws when state law authorizes them to do so),¹²⁴ Professor Tara Grove has argued that at the federal level the Take Care clause vests litigation authority to defend or not to defend the constitutionality of federal law only in the Executive Branch.¹²⁵ Moreover, she points out the *presence* within

121. See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665–66 (2015); *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

122. *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting).

123. E.g., Brienne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1247–50 (2012); Abner Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But Not-Defend Problem*, 81 FORDHAM L. REV. 577, 582–98 (2012); Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012) (arguing more generally that Congress should participate as a party in more litigation, statutory and constitutional); see also *Windsor*, 133 S. Ct. at 2712–14 (Alito, J., dissenting) (arguing that the Bipartisan Legal Advisory Group of the House of Representatives had standing to defend the constitutionality of DOMA).

124. See *Karcher v. May*, 484 U.S. 72 (1987). In this case, involving the constitutionality of a moment of silence law, state law authorized the leaders of the state assembly and the upper house of the state legislature to represent the state in litigation. *Id.* at 81–82. In this context, the Court explained in *Arizonans for Official English v. Arizona*, “[w]e have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State’s interests.” 520 U.S. 43, 65 (1997). In *Karcher*, the appeal was dismissed because former heads were no longer in office, but the judgment below was not vacated because the state legislature could have but chose not to appeal. *Karcher*, 484 U.S. at 81–83. In *Arizonans for Official English*, the Court did not decide any issue of legislative standing, finding the case moot, though it expressed “grave doubts” that the organizers of the initiative to place the provisions of the challenged law on a referendum ballot had standing to defend the constitutionality of the enacted law. 520 U.S. at 66.

125. See Grove, *supra* note 21, at 1312, 1353–61 (arguing that although the “Take Care” clause confers authority on the President to enforce and defend federal laws, Article I confers no such power on Congress and thus Congress and its subparts lack standing to do so); see also Grove & Devins, *supra* note 102, at 624 (noting Supreme Court decisions holding that “[t]he structure of the Constitution does not permit Congress to execute the laws”) (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)). For an argument that the Constitution does not create a cause of action for legislators to challenge the way laws are being implemented, see John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & POL. 103 (2015) (arguing that the Constitution creates an interest for legislators in the validity of enactments, not in how they are implemented, because the “legislative power” is a power to create, but not to execute, laws).

the executive branch and the *absence* within Congress of procedures to provide consistency on litigation positions, which may be of great importance to the individuals whose interests are at stake.¹²⁶ Congressional participation *as an amicus*, she argues, is the method historically used, one that does not pose the threat of Congress's litigation decisions affecting individual rights.¹²⁷ As she and Neal Devins point out, allowing Congress or parts thereof to have intervenor status enables them to pick and choose what cases to appeal, a form of "prosecutorial discretion" at least arguably committed to the Executive Branch and posing genuine risks of inconsistency in the treatment of individuals.¹²⁸

These arguments against any broad approach to congressional standing to defend the constitutionality of statutes are supported by numerous Supreme Court decisions on the separation of powers, the thrust of which is that Congress cannot directly control the execution of the laws it enacts but is limited to efforts to influence the Executive Branch through oversight or to change the law through new substantive or appropriations statutes.¹²⁹ Bringing a lawsuit or appealing from a judgment that the

126. Grove, *supra* note 21, at 1328. If the argument were accepted that Congress should have standing to defend the unconstitutionality of a law not being defended or enforced by the Executive, such a lawsuit might raise other Article III problems. Where the Executive *is* enforcing, but not defending, the statute, the Executive presumably would be bound by the judgment, and courts can secure an adequate defense of the statute's constitutionality through amicus participation. Where the Executive is *not* enforcing the law, the legislature could not simply intervene in an ongoing lawsuit but would need to initiate one against the Executive. But actions to compel the government to enforce the law against third parties are difficult even for private parties to establish standing to bring. *See Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (suggesting that the executive branch—even of state government—cannot be compelled to bring a prosecution against a third party). *But cf., e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007) (upholding jurisdiction to compel agency to act on the basis that it had made mistake of law in concluding it did not need to promulgate regulations). Moreover, having Congress or a house of Congress on one side of the litigation as a party litigant might present unusual challenges to the ability of a court to enforce its litigation-related orders or to grant relief on counterclaims. *Cf. Spallone v. United States*, 493 U.S. 265 (1990) (imposing limitations on lower courts' power to sanction individual members of a city council for the city's noncompliance with a consent decree); U.S. CONST. art. I, § 6 (providing Members of Congress certain immunities from judicial process for their legislative activities). Similar problems would arise in actions such as those to enforce a subpoena, but as the range of issues broadens, so too do the range of remedial complications and counterclaims that might be raised by a defendant.

127. *See* Grove, *supra* note 21, at 1362.

128. Grove & Devins, *supra* note 102, at 626–27.

129. *See, e.g., Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 269–70 (1991); *Bowsher v. Synar*, 478 U.S. at 732; *INS v. Chadha*, 462 U.S. 919, 954 (1983); *Buckley v. Valeo*, 424 U.S. 1, 126–27 (1976) (*per curiam*) (holding that Congress may engage in investigation but not in rulemaking or directly appointing persons to execute the laws, including to litigate about them). For a Court of Appeals decision rejecting the Senate's standing, under a federal statute authorizing the Senate to intervene to defend the constitutionality of federal statutes, see *Newdow v. U.S. Cong.*, 313 F.3d 495, 498 (9th Cir. 2002) (distinguishing *Chadha* and other cases of congressional intervention as being "of a character that directly (particularly) implicated the authority of Congress within our scheme of government, and the scope and reach of its ability to allocate power among the three

Executive Branch has decided not to appeal would seem to be matters directly involving the execution of the laws and, however desirable such interventions might be in litigation among the branches of the state governments, would run up against a relatively thick set of judicial precedents insisting on a separation of those functions at the national level.¹³⁰

Chadha could be understood more narrowly to involve standing to assert a specific legislative prerogative to vote under a federal statute. The presence of such a specific, concrete interest would provide a usable limiting principle to distinguish *Chadha* from other cases, where congressional actors may seek to intervene to defend the constitutionality of a federal statute, as in *Windsor*.¹³¹ And *Coleman v. Miller*,¹³² a case coming out of the state courts, and its progeny would support a narrow “complete nullification” basis for congressional standing, although—as the Court recently noted in the *Arizona Legislature* case—separation of powers concerns exist with Congress invoking federal courts jurisdiction to challenge executive action that do not arise when state legislatures sue state officials.¹³³

Even under such a limiting “complete nullification” principle, there are several classes of cases plausibly involving allegations that congressional actors were deprived of a right to vote or that a vote already taken by or in Congress has been “completely nullified,”¹³⁴ including issues about pocket vetoes, treaties, wars, confirmations, and foreign emoluments.¹³⁵ Each has distinctive histories, purposes, and contexts, as discussed further below.

branches”). Other aspects of the case, including the standing of the father who challenged the constitutionality of the Pledge of Allegiance’s reference to God, and the federal courts’ jurisdiction to issue injunctive relief directed against either the President or the Congress, were addressed in other opinions. See *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002), *amended on reh’g by* 328 F.3d 466, 484–90 (9th Cir. 2003), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (finding that the father-plaintiff lacked prudential standing).

130. *But see* *United States v. Windsor*, 133 S. Ct. 2675, 2714 (2013) (Alito, J., dissenting) (arguing that a House committee had standing to intervene to defend the constitutionality of a federal statute being enforced but not defended by the Executive Branch). Justice Scalia, joined by two others, disagreed. See *id.* at 2703–05 (Scalia, J., dissenting). The majority did not reach the question.

131. See above note * (describing the author’s prior involvement as Court-appointed amica curiae in *Windsor*).

132. 307 U.S. 433 (1939).

133. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2664–66, 2265 n.12 (2015).

134. See *id.* at 2665–66; see also *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

135. Private persons have been allowed to raise Origination Clause claims—that is, claims that a statute adversely affecting them was a revenue for raising taxes that should have, but did not, originate in the House. See *United States v. Munoz-Flores*, 495 U.S. 385 (1990). In a pre-*Raines v. Byrd* decision, the D.C. Circuit held that nineteen members of the House had standing to raise an Origination Clause claim against the constitutionality of a tax law. See *Moore v. U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984) (finding that plaintiffs “allege[d] a specific injury in fact to a cognizable legal interest: the deprivation of an opportunity to debate and vote on the origination of TEFRA in the House” before it was considered in the Senate, observing that “[d]eprivation of a constitutionally mandated process

2. On Pocket Vetoes

In *Kennedy v. Sampson*,¹³⁶ the D.C. Circuit in 1974 upheld the standing of Senator Kennedy, filing on his own and without authorization from the Senate, to challenge the President's claim that he had vetoed a bill enacted by Congress; in Senator Kennedy's view, the purported pocket veto was ineffective. Whether the President can "pocket veto" a bill depends on whether Congress was in session to receive the veto message; only if it is not does the President's failure to sign a bill within ten days of its being presented to him effectively veto the law. In this case, the President took the position that he had successfully pocket vetoed a law; Senator Kennedy argued that Congress had arranged to receive veto messages and that the bill had accordingly become law without the President's signature on the tenth day after presentation.¹³⁷ The D.C. Circuit at the time concluded that the Senator had standing because his allegations, if correct on the merits, nullified his vote in support of the bill and injured him as a legislator.¹³⁸

After *Raines v. Byrd* cast some doubt on theories of individual legislator standing, the D.C. Circuit in *Chenoweth v. Clinton*¹³⁹ suggested that legislative standing in a case like *Kennedy v. Sampson* to challenge whether a law had been vetoed might still be sustained on a complete nullification theory: "Because it was the President's veto—not a lack of legislative support—that prevented the bill from becoming law . . . those in the majority could plausibly describe the President's action as a complete nullification of their votes."¹⁴⁰ Uncertainty exists, however, in light of *Raines*'s suggestion that in cases of institutional injury, an action might need to be authorized by and on behalf of an entire house,¹⁴¹ and perhaps especially if the challenge is one that might also be brought by a private person who could try to claim injury from

of enacting law may inflict a more specific injury on a member of Congress than would be presented by a generalized complaint that a legislator's effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum"). Nonetheless the *Moore* court refused to adjudicate the complaint on separation-of-powers informed equitable grounds because the plaintiffs could obtain relief by persuading other Members of Congress to their views and because private persons would have standing to challenge. *Id.* at 954–56. *Chenoweth*, decided after *Raines*, implies that *Moore*'s reasoning on standing was too broad. See *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999).

136. 511 F.2d 430 (D.C. Cir. 1974). In *The Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville & Lake Indian Tribes or Bands of the State of Washington v. United States (The Pocket Veto Case)*, 279 U.S. 655 (1929), although Congress and the President took a different view of whether the President had successfully "pocket vetoed" the law in question, neither part of Congress appeared as a party; "Representative Hatton Sumners appeared as amicus curiae only on behalf of the House Judiciary Committee." Grove & Devins, *supra* note 102, at 588.

137. See *Kennedy*, 511 F.2d at 432.

138. See *id.*, at 433–35 (rejecting argument that only the Congress as a whole, or one of its houses, had standing, because the Senator's interest, while "derivative" of his membership in the body, is nonetheless substantial).

139. 181 F.3d 112 (D.C. Cir. 1999).

140. *Id.* at 117.

141. See *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

nonenforcement of the law.¹⁴² However, unlike the issue in *Raines v. Byrd*, where the question of harm to legislator authority was contingent, and unlike issues that can be raised under the Take Care, Legislative Vesting, or Appropriations Clauses (discussed below), challenges to an executive claim of having vetoed a law, or of a law not having obtained sufficient votes to be inscribed as a public law of the United States, are far more discrete and confined. Standing in cases like Senator Kennedy's challenge thus remains possible, but uncertain; were a house of Congress to authorize litigation in such a context—where the President and Congress disagree over the effect of a congressional vote in favor of a proposed law—the case for legislative standing would be stronger. With respect to concerns raised earlier about expansive approaches to congressional standings, such situations will be rare, not common. And where there is uncertainty over whether something is enacted law, rule of law considerations might favor—rather than disfavor—rapid resolution of the controversy, a factor that might support legislative standing.

3. Treaties

In *Goldwater v. Carter*,¹⁴³ eight Senators challenged the President's authority unilaterally to terminate a treaty without some form of congressional consent. The Supreme Court did not resolve whether the Senators had standing to raise the claim: four members thought the issue was a nonjusticiable political question, and a fifth believed that the controversy was not yet ripe because the Senate had not taken a final position in opposition to the President.¹⁴⁴ The claim of injury was conceptualized as a procedural right to vote before the action is taken, and if the substantive claim were correct then arguably there was such a procedural injury.¹⁴⁵

142. *Cf. id.* (noting that the decision does not foreclose a “constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)”). Some nonenforcement claims are more difficult to establish standing for. *See infra* note 207.

143. 444 U.S. 996 (1979). The case was brought by eight Senators, along with sixteen Members of the House and a former Senator. *Goldwater v. Carter*, 481 F. Supp. 949, 950 (D.D.C. 1979), *rev'd*, 617 F.2d 697 (1979), *vacated*, 444 U.S. 996.

144. *See Goldwater v. Carter*, 444 U.S. at 997 (Powell, J., concurring in the judgment) (arguing that the complaint should be dismissed as not ripe for judicial review); *id.* at 1002 (Rehnquist, J., concurring in the judgment and joined by three other Justices) (arguing that the case is nonjusticiable because it presents a political question).

145. A procedural claim of a right to vote might, in theory, be accepted as a form of concrete injury—caused by a failure to vote and redressable by an opportunity to vote, regardless of outcome. But the reasoning of the D.C. Circuit, interpreting the Supreme Court's decision in *Raines v. Byrd*, suggests that standing would be lacking on such a procedural theory without some reason to believe that either the Senate as a whole, or at least enough individual senators to prevent the unmaking of the treaty, were joined or represented as plaintiffs. *See supra* text accompanying note 33; *see also infra* note 186. (It is uncertain whether, in *Goldwater*, if (for example) a two-thirds Senate vote were required to terminate a treaty, thirty-four Senators would have had standing (or if a majority vote were required and one assumes a filibuster rule, whatever minority was required to overcome a filibuster would have had standing).) In an arguably analogous case involving the claim that Congress had the right to condition the President's termination of an employee on Senate consent, *Myers v. United States*, 272 U.S. 52 (1926), a Member of the Senate was appointed only “as a friend of the

But under *Raines v. Byrd* the Court might well insist on something more than individual members acting separately—perhaps on a group large enough to be likely to be able to block approval (if approval were substantively required). Only if the group were large enough to block (which the group of eight Senator plaintiffs was not), but not large enough to enact prohibitory legislation, might there be a situation with no other form of redress available,¹⁴⁶ especially if the treaty did not confer the kind of individual benefits that would give rise to standing by those outside the government. Although these factors would support standing for the Senate itself (or conceivably for a large enough group of Senators who could defeat a vote), a claim of injury because no vote at all was held might be viewed as a step removed from the kind of nullification involved in *Coleman v. Miller*, *Chadha*, or the lower court pocket veto cases—though not unlike the claim in *Arizona Legislature v. Arizona Independent Districting Commission*.

Another kind of claim, unsuccessfully advanced recently by Senator Ron Paul in *Crawford v. U.S. Department of Treasury*,¹⁴⁷ is that an intergovernmental agreement was really a treaty, requiring the concurrence of the Senate. *Crawford* was an action to enjoin enforcement of the Foreign Account Tax Compliance Act, which requires various measures to get more information about foreign banking by U.S. citizens to the IRS.¹⁴⁸ Senator Paul's claim for standing was rejected by the district court, which reasoned that under *Raines v. Byrd*, the asserted institutional injury to the Senate's institutional interests was not sufficient for standing, at least where Senator Paul was litigating without authorization from the Senate as a body.¹⁴⁹

Given the availability of other ways to challenge action based on executive agreements claimed to have needed Senate approval before they could function as law, the possibility of private party standing, and the sheer number of executive agreements that are reached, individual legislator standing should generally be rejected. Even if the Senate were to authorize litigation, the risks of erroneous, intrusive, or ill-timed judicial decisions seem much higher in this area in which much will depend on executive practice in reaching agreements with foreign nations.¹⁵⁰ Finally, permitting legislative standing on these issues will not necessarily involve only a relatively rare and discrete question about the legal significance of an

Court," *id.* at 176, to argue in support of the constitutionality of a federal statute that the Executive Branch argued was unconstitutional. But the Senate did not participate as a party, nor was such participation necessary for the Court to decide the issue in the case brought by Myers, who clearly suffered an Article III injury.

146. See *supra* note 101; *cf. supra* note 135 (describing *Moore's* refusal to adjudicate).

147. No. 3:15-cv-250, 2015 WL 5697552 (S.D. Ohio Sept. 29, 2015).

148. *Id.*

149. See *id.* at *6.

150. It has been suggested that the interests of foreign nations in knowing the legal status of their agreements with the United States, and the uncertainties that may surround the domestic legality of particular executive agreements, might support expanded congressional standing. Given the President's authority to seek legal opinions from his cabinet, as well as the possibility of nongovernmental entities having standing, those interests would not ordinarily provide a sufficient reason to jettison the cautionary approach urged in this Essay.

acknowledged congressional vote; there were reportedly 5491 executive agreements executed from 1990 to 2012 alone.¹⁵¹

4. Confirmations and Recess Appointments

Professor Jamal Greene has recently suggested that standing requirements should be relaxed to allow Congress or its houses to bring actions to challenge Executive Branch positions, like those at issue in *NLRB v. Noel Canning*,¹⁵² involving clear constitutional rules whose application would later be justiciable in some form.¹⁵³ Professor Greene argues that it is costly to allow uncertainty over the validity of an appointment to linger until raised by a private party and adjudicated, with ensuing disruption as other judgments of the same body might be at issue.¹⁵⁴ A claim by Senators that the President acted in violation of the recess appointment provisions might be framed as one involving injury to the Senate's right to vote on appointments.

Justiciability doctrines, to be sure, can cause delay in resolving a constitutional issue, requiring courts to wait until an individual is adversely affected. Such delay is sometimes thought to have the benefit of allowing distance from the passions of the moment (partisan or otherwise), as well as an accumulation of experience before the finality of constitutional adjudication. Indeed, the Court in *Raines v. Byrd* said, given "time-honored concern[s] about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency."¹⁵⁵ On the other hand, delay in responding to obvious unconstitutionality wreaks its own form of stress on constitutional democracies.

In *Myers v. United States*,¹⁵⁶ the issue was the constitutionality of a statutory provision requiring the Senate's consent to removal of an executive branch officer. The officer was removed, and challenged the President's act of removal as inconsistent with the statute, thereby raising the constitutional issue. A member of the Senate was heard "as a friend of the Court,"¹⁵⁷ but did not participate as a party.

In *United States v. Smith*,¹⁵⁸ some eight years later, the Attorney General authorized the bringing of an action in the name of the United States at the behest of the Senate, to raise an asserted power of the Senate to withdraw confirmation of an executive branch officer who had already received his commission. The Senate had initially confirmed the nominee and then, on receipt of additional information, had

151. See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1210 (2018) (Table 1); see also MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 3 (2010) (indicating some 16,500 executive agreements were concluded by the United States between 1939 and 2009).

152. 134 S. Ct. 2550 (2014).

153. Greene, *supra* note 73, at 142–52.

154. See *id.*

155. *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (footnotes omitted).

156. 272 U.S. 52 (1926).

157. *Id.* at 176.

158. 286 U.S. 6, 29–30 (1932).

voted to withdraw the confirmation.¹⁵⁹ The Senate's argument that it had power to do so was rejected. Whether this should be regarded as an instance of congressional standing is uncertain, as the action was brought in the name of the United States and only with the permission of the Attorney General.¹⁶⁰ And in any event, it involved a completed vote, the effect of which was arguably "completely nullified" by the President's refusal to withdraw the nomination or terminate the officer, who had already received his commission, emphasizing what a narrow proposition the case stands for if it is read as a congressional standing case.

Precedent, thus, suggests that claims about whether officers have been duly appointed or removed come within the Article III courts' jurisdiction when they are raised by the affected individual, as in *Myers*; when the authority of the officer is challenged by persons adversely affected by the officer's action, as in *Noel Canning*; or possibly when both the executive and legislative branches agree to submit the issue through something in the nature of a *quo warranto* proceeding to test the legality of an office holder's appointment, as in *Smith*.

Another kind of case would involve a claim that a seemingly duly appointed officeholder was nonetheless barred from office for some constitutional or statutory reason. In *Ex parte Levitt*,¹⁶¹ a citizen and member of the Supreme Court bar challenged the validity of former Senator Hugo Black's Supreme Court appointment, on the grounds, inter alia, that he had been in the Senate when retirement benefits for federal judges were increased and was thus barred by Article I, Section 6.¹⁶² The Court denied standing, on the grounds that the plaintiff had shown no direct injury specific to him and that a generalized grievance held in common with all citizens was insufficient.

Private litigants may have standing to challenge the validity of the appointment of a judge hearing their case, as in *Noel Canning*.¹⁶³ (If the office is one for which such private claim of injury could not or would not likely arise, then the case for senatorial standing would be stronger, and would be strengthened if the Senate as a whole adopted a resolution authorizing such litigation.) Claims about recess appointments, in particular, might be regarded as so limited a potential group as not

159. *Id.* at 28–30.

160. *See id.* at 26 (describing the case as a "petition, in the name of the United States, for a writ of *quo warranto* . . . filed in the Supreme Court of the District of Columbia, on relation of the district attorney, in deference to the desire of the United States Senate to have presented for judicial decision the question whether George Otis Smith holds lawfully the office of member and chairman of the Federal Power Commission").

161. 302 U.S. 633 (1937) (per curiam). *Levitt* is described in *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 219 (1973):

The petition asserted that the appointment and confirmation of the Justice in August 1937 was unlawful because the Act of March 1, 1937, permitting Justices to retire at full salary after a period of specified service, thereby increased the emoluments of the office and that the statute was enacted while the challenged Justice was a Senator.

162. *See* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . the Emoluments whereof shall have been increased during such time . . .").

163. *See also, e.g.,* *Ryder v. United States*, 515 U.S. 177 (1995); *Freytag v. Comm'r*, 501 U.S. 868 (1991).

to pose major risks to either the role of the courts or intergovernmental relations between the political branches if standing were expanded. On the other hand, such claims—like those that an executive agreement was really a treaty requiring Senate confirmation—involve congressional voting that has not yet occurred, arguably representing a somewhat weaker claim of institutional injury and in many instances, presenting an issue that a privately injured litigant could raise.

5. War

As to war powers, repeated efforts to invoke Article III jurisdiction to enjoin hostilities have failed, on various justiciability related grounds.¹⁶⁴ As courts have said, Congress has other remedies—including enacting laws concerning appropriations for war or specific prohibitions on having troops in particular places; the exercise of judicial power, some courts have concluded, is unnecessary.¹⁶⁵ Yet as other constitutional courts have recognized, the political realities are that once troops are in hostilities, it is virtually impossible for a democratic legislature not to support them; once troops are committed, the moment for exercising any constitutional requirement for legislative approval in advance has in some sense been mooted by facts on the ground. For this reason, the German Constitutional Court has required advance legislative approval of decisions to commit troops outside of Germany in circumstances in which hostilities are likely.¹⁶⁶

Given the close relationship between issues of war making and potential injury to an individual's right not to be deprived of life without due process of law, as applied to individual soldiers, there might be reasons sounding in commitment to individual rights to entertain such suits when brought by military personnel challenging their deployment as inconsistent with constitutional requirements for authorization of such action.¹⁶⁷ On the other hand, there may be other barriers of justiciability or prudence

164. *See, e.g.*, *Doe v. Bush*, 323 F.3d 133, 135 (1st Cir. 2003) (ripeness); *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000) (standing); *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975) (political question); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (political question); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (standing and political question); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (ripeness).

165. *See, e.g.*, *Kucinich v. Obama*, 821 F. Supp. 2d 110, 120 (D.D.C. 2011); *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000); *cf. Doe v. Bush*, 323 F.3d 133, 139 (1st Cir. 2003) (noting that Congress might still take some action in response to later developments in analyzing why claim was not ripe).

166. *See JACKSON & TUSHNET, supra* note 42, at 841–53 (excerpting the AWACS II case, Judgment of the Second Senate, 7 May 2008, 2 BvE 1/03). But it operates in a system that specifically authorizes minority groups in the legislature to bring such claims to the constitutional court.

167. As noted in text below, courts may have other reasons to find—especially once troops are engaged—that adjudicating the issue of prior consent, or granting a remedy with immediate effect, is a “political question” beyond judicial competence, in part because a court simply may not feel it has the space to hold an ongoing action involving hostilities outside the United States to be unconstitutional. *Cf. Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting as a factor in treating issue as a nonjusticiable “political question” whether there was 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”).

to such individual soldier actions: permitting suits by individual members of the Armed Services against their Commander-in-Chief might be thought incompatible with the Commander-in-Chief powers or to have too high a risk of involving courts in areas outside their expertise or to have too great a risk of multiple and conflicting judgments. And the relatively higher profile issues of a full-scale “war” may be such as to render political remedies—including elections, if not legislative restraint through the appropriation power—a more plausible “check” on Executive Branch action inconsistent with Congress’s power to declare war than exists with the number of the other issues discussed in this Part III.C. Even if individual soldier actions are barred from suit, it would not necessarily follow that individual Members of Congress should have standing; a stronger case for standing would exist if one house itself authorizes the specific challenge, given the magnitude of the question and the need—if the constitutional challenge were sustained—for both houses to “declare War.”

6. Foreign Emoluments

Article I, Section 9, Clause 8 of the Constitution provides, in part, that “no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” This infrequently considered provision was designed to respond to the then-common practice by European monarchs of showering favored emissaries with expensive gifts, a practice that could create awkward situations for those wishing neither to offend a foreign sovereign nor appear (or become) corrupted.¹⁶⁸ A famous example was when French King Louis XVI provided Benjamin Franklin a jewel-laden snuff box; Franklin reported it to the Continental Congress, which gave him permission to keep the gift.¹⁶⁹ The Foreign Emoluments Clause provides a prophylactic form of protection, going beyond the common law bans on bribery.¹⁷⁰

That some challenges might be deemed nonjusticiable political questions does not necessarily mean that all such challenges—for example, ones brought prior to significant troop movements—would do so.

168. See ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* 1–3, 24 (2014).

169. *Id.* at 25–26.

170. See, e.g., *id.* at 28 (emphasizing that the Foreign Emoluments Clause by its terms excludes gifts “of any kind whatever” and “forbids presents—not bribes”); see also LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 18–19 (2011); NORMAN L. EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* 6–7 (2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf [<https://perma.cc/82GC-SPCW>]. The most recent opinion of the Justice Department’s Office of Legal Counsel on the issue treats the Foreign Emoluments Clause as applicable to the President. See *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. (Dec. 7, 2009), 2009 WL 6365082, at *4; see also 5 U.S.C. § 7342(a)(1)(E) (2012) (applying to President and Vice President prohibition on accepting foreign gifts except under circumstances specified in the statute); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 40–48 (2012) (arguing that the Foreign Emoluments Clause extends to elected

The provision is not an absolute bar but makes the constitutionality of accepting such gifts depend entirely on Congress's approval. It is a default rule, anticipatory in character,¹⁷¹ not dependent on a corrupt intent by either the giver or acceptor.¹⁷²

Acceptance of an unauthorized emolument creates a public harm that as to private parties is likely to be generalized rather than concrete.¹⁷³ Under U.S. case law an interest in seeing that the law, statutory or constitutional, is complied with is, by itself, insufficient to afford standing.¹⁷⁴ Indeed, in *United States v. Richardson*,¹⁷⁵ the Court rejected taxpayer standing to challenge an asserted failure to comply with the Constitution's command, in Article I, Section 9, Clause 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," arising from the secrecy of some details of the CIA's budget; it even suggested that if there was no foreseeable private litigant with concrete injury, this would suggest that the issue was a nonjusticiable political question.¹⁷⁶

office). *Contra* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 185–95 (2012). For discussion of their disagreement, see Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 645–49 (2017).

171. See EISEN ET AL., *supra* note 170, at 7.

172. See *supra* note 170; cf. 5 U.S.C. § 7342 (providing terms on which Congress consents to acceptance of gifts from foreign governments by federal officers or employees including the President and not including any explicit mens rea requirement).

173. A private group of restaurant owners joined one of the pending lawsuits against President Trump based on the Emoluments Clause, arguing competitive injury to their restaurants arising from the desire of foreign governments and businesses to curry favor with the Trump Administration by using his competing hotels and other services. The district court granted the government's motion to dismiss their claim (along with that of a public interest organization) for lack of standing. *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 17 Civ. 458 (GBD), 2017 WL 6524851 (S.D.N.Y. Dec. 21, 2017). The district court found a failure adequately to allege that any receipt of emoluments caused any competitive injury or that any such injury would be redressable, due to the intervening effects of numerous third party acts, *id.* at 13–14, and because competitive injuries do not fall within the zone of interest of the Emoluments Clause, *id.* at 15–17. The zone of interests arguments, if accepted by other courts, would pose a considerable barrier to standing for other private parties.

174. For pending efforts to assert Emoluments Clause claims by nonfederal government entities, see *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 1:17-cv-00458-GBD (S.D.N.Y. Jan. 23, 2017); *District of Columbia v. Trump*, No. 8:17-cv-01596-PJM (D. Md. June 12, 2017). The federal district court recently held that the private party plaintiffs lacked standing. See *Citizens for Responsibility & Ethics in Wash.*, 2017 WL 6524851.

175. 418 U.S. 166 (1974).

176. *Id.* 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."). In another case, rejecting taxpayer and citizen standing to challenge the Reserve Officer membership of Members of Congress as a violation of the incompatibility clause of Article I, Section 6, clause 2, the Court expounded at length on the idea that standing cannot be predicated on undifferentiated injuries to all members of the public:

[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or

However, with respect to Members of Congress, there could be an additional injury if an officer of the United States has accepted an emolument without its consent—an injury to their prerogative to vote on whether it is permissible for an officer to accept the particular emolument.¹⁷⁷ That is, Members of Congress could assert a violation, or “nullification,” of their constitutional authority to decide whether to consent to the acceptance of foreign emoluments.¹⁷⁸ Unlike the claims of legislators in *Raines v. Byrd*, who had the opportunity to vote on the legislation they challenged, but lost, and whose claims of future injury were conjectural and subject to multiple political remedies, Emoluments Clause claims may allege that no vote was taken, no consent given, to the receipt of a specific foreign emolument.

That the Emoluments Clause requires consent to legalize receipt of a gift, moreover, may mean that there are fewer political mechanisms available to Members of Congress to resolve dispute over the matter. The clause does not involve substantive legislation or appropriations, and thus new legislation may not provide a solution; viewing new legislation as a remedy is, moreover, arguably, inconsistent with where the Constitution places the burden of inertia. As to impeachment, a prominent speaker in the Virginia Ratifying Convention referred to its violation as

threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.

Schlesinger v. Reservists Comm. to End the War, 418 U.S. 208, 220–21 (1973).

177. For a currently pending case based on legislator standing, see *Blumenthal v. Trump*, No. 1:17-cv-01154 (D.D.C. June 14, 2017).

178. For arguments in favor of legislative standing to raise the Emoluments Clause issue, see Matthew Hall, *Who Has Standing To Sue the President over Allegedly Unconstitutional Emoluments?*, 95 WASH. U. L. REV. 757, 767–74 (2017); Brianne J. Gorod, *Congressional Standing Is Not an All-or-Nothing Proposition*, TAKE CARE (June 19, 2017), <https://takecareblog.com/blog/congressional-standing-is-not-an-all-or-nothing-proposition> [https://perma.cc/CDA3-KSK6]; G. Michael Parsons, *Raines Check: Legislator Standing and the Separation of Powers*, TAKE CARE (July 10, 2017), <https://takecareblog.com/blog/raines-check-legislator-standing-and-the-separation-of-powers> [https://perma.cc/PN6Y-MCPC]; Richard Primus, *Two Thoughts on the Government's Motion to Dismiss in the CREW Emoluments Case*, BALKINAZATION (June 9, 2017), <https://balkin.blogspot.com/2017/06/two-thoughts-on-governments-motion-to.html> [https://perma.cc/56NU-RFHC]; Eric Segall, *Members of Congress Have Standing in the Emoluments Suit*, TAKE CARE (June 24, 2017), <https://takecareblog.com/blog/members-of-congress-have-standing-in-the-emoluments-suit> [https://perma.cc/M3GU-VNHP]. For differing views, see Tom Hamburger & Karen Tumulty, *Congressional Democrats To File Emoluments Lawsuit Against Trump*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/politics/congressional-democrats-to-file-emoluments-lawsuit-against-trump/2017/06/13/270e60e6-506d-11e7-be25-3a519335381c_story.html [https://perma.cc/DKV9-XNEF] (quoting Professor Grewal as suggesting that individual legislators would lack standing but that Congress as a body could sue).

amounting to an impeachable offense.¹⁷⁹ But the prophylactic character of the Clause, as well as the civil character of the statute Congress enacted regulating foreign gifts,¹⁸⁰ might be argued to exclude its violation from offenses warranting impeachment.¹⁸¹ Even if the Impeachment Clause is construed to authorize impeachment and removal for actions that are not technically crimes,¹⁸² including

179. See EISEN ET AL., *supra* note 170, at 9 (noting that Edmund Jennings Randolph spoke of the possibility of the President being removed from office by impeachment for violation of this provision at the Virginia Ratifying Convention); CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN'S GUIDE* 58–59 (2017) (to similar effect); STAFF OF H.R. COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., *CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT* 13–15 (Comm. Print 1974) (to similar effect); see also O'Sullivan, *supra* note 90, at 2236 & n.178 (suggesting that impeachment could be a remedy for violation of conflict of interest provisions, including the Foreign Emoluments Clause).

180. See 5 U.S.C. § 7342(h) (2012) (providing civil penalties for violation of the statute's prohibition on receipt of foreign gifts).

181. See, e.g., IRVING BRANT, *IMPEACHMENT: TRIALS AND ERRORS* 81–82 (1972) (concluding that “[t]he Constitution did not make honest error impeachable”); PETER CHARLES HOFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805*, at 118 (1984) (arguing that a “corrupt motive” is needed). But whether a wrongful motive is required, whether the conduct must violate a criminal statute, and whether, at least with respect to the President, it must involve an abuse of public office that is great or repeated, are hotly contested. See, e.g., STAFF OF H.R. COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., *CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT* 13–15, 21, 23–25, 27 (concluding that at the time of the Founding, the phrase “other high crimes and misdemeanors” was understood to “reach[] offenses against the government, and especially abuses of constitutional duties,” and was not limited to formal criminal conduct); ELIZABETH B. BAZAN, *CONG. RESEARCH SERV.*, 98-186, *IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE* 26, 30 (2010); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 89–91 (1973); ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES* 13, 321–22 (1992); SUNSTEIN, *supra* note 179, at 36, 48 (arguing that the phrase in English law referred to serious offenses even if not technically crimes and that it was intended to apply to “abuses of official power”); Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 *GEO. WASH. L. REV.* 603, 617 (1999) (referring to the three articles of impeachment voted by the House Committee against President Nixon to suggest that impeachable offenses need not be crimes but do need to have a connection to the official's office and constitute an injury to the constitutional order). My sense is that the better view is that impeachable offenses are not limited to violation of criminal statutes but embrace conduct that is an abuse of office. In addition to sources cited, see 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 764 (1851) (impeachment was not limited to specific criminal offenses but “has a more enlarged operation, and reaches, what are aptly termed, political offenses, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office”); see also *THE FEDERALIST* NO. 65 (Alexander Hamilton) (stating that “[t]he subjects of [a well-constituted impeachment court] are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. . . . [and] are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself.”) (emphasis omitted).

182. Two of the three articles of impeachment voted by the House of Representatives Judiciary Committee against President Richard Nixon asserted misconduct that did not clearly charge a crime, but one of them clearly sounded in a wrongful abuse of office. The first count

presidential breaches of the Emoluments Clause, impeachment is a legally uncertain remedy for such a breach.

Even if an alleged violation of the Emoluments Clause arising from receipt of a gift without consent were understood to create a concrete, “complete nullification” type of injury, it is doubtful that standing should be recognized for a single member of Congress.¹⁸³ Unlike the situation in *Kennedy v. Sampson*, where a bill was voted upon and Senator Kennedy was among those voting in favor, where no vote at all has occurred the concreteness and particularity of any given member’s claim is somewhat attenuated. The Court’s hesitation to fully embrace procedural theories of standing—or the degree to which its willingness to accept such procedural theories depends highly on context—suggests that in fraught separation of powers contexts, it would be particularly hesitant to entertain a suit absent concrete reason to believe the judicial intervention would matter. However, if a house of Congress were itself to bring the claim, or conceivably if the plaintiff group included enough members to block or create real doubt that an affirmative vote in one house could occur, such factors might help support standing.

This standing issue is difficult. Some of the factors I have identified as relevant—the availability of private persons who could claim specific injury; or the presence of obvious political remedies given by the Constitution to the Congress—are at best uncertain, and alleged violations of this constitutional rule may be of real importance: Maintaining an Executive Branch free of potentially corrupting foreign government influences might be a predicate for both traditional judicial deference to presidential findings and a range of implied executive prerogatives the Court has found the Constitution to provide.¹⁸⁴ Identifying a “foreign gift,” while not free from

alleged an obstruction of justice, a crime; the second count alleged a failure to take care that the laws were faithfully executed and taking action in violation of the constitutional rights of citizens, a clear abuse of office; and the third count alleged a willful failure to produce documents in response to a subpoena. See GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 407 (6th ed. 2009).

183. Recall, as indicated at the outset, that it would not be logically inconceivable to treat a single member of the legislature as having a specific injury caused by the alleged denial of a right to vote on the issue; and if this were sufficient to state a claim of injury, it would be remediable by holding a vote. But as stated there, the traditional elements of standing for private parties are less helpful in distinguishing among different claims for standing for Members of Congress. In *Kennedy v. Sampson*, a single Senator’s standing to challenge a pocket veto was upheld; but, as noted above, Senator Kennedy was part of the majority that had already voted a bill out of Congress, providing a specificity to his claim that the Congress’s vote had been completely nullified. In other pre-*Raines* cases the D.C. Circuit had upheld standing for a small number of Members of Congress, but in *Moore v. U.S. House of Representatives*, for example, the Origination Clause challenge to enacted legislation was held nonjusticiable on equitable separation of powers grounds because relief could be sought from other Members of Congress, see *supra* note 135, and in *Goldwater v. Carter*, the Court of Appeals had adjudicated on the merits a claim that a treaty could not be unilaterally terminated by the President, but the Supreme Court found the claim nonjusticiable. See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

184. See, e.g., *Jama v. Immigration and Customs Enf’t*, 543 U.S. 335, 348 (2005) (noting the Court’s “customary policy of deference to the President in matters of foreign affairs”);

ambiguity, is both less difficult and the need to do so would likely be more rare than, for example, distinguishing executive agreements from treaties;¹⁸⁵ the relative rarity of the issue arising would mean that if standing were accepted here it would not necessarily imply a significant broadening of the courts' jurisdiction over potential interbranch controversies. The specificity of the issue and the critical role of congressional consent in fulfilling the Constitution's mandate, together with the uncertainty about the effectiveness of political remedies, taken together might support congressional standing by a large enough plaintiff group.¹⁸⁶ Although these are factors that might favor congressional standing, Congress would have other

Loving v. United States, 517 U.S. 748, 768 (1996) (noting the "respect owed the President as Commander in Chief"); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (finding implied absolute immunity from civil damages for actions by the President in office); United States v. Belmont, 301 U.S. 324 (1937) (inferring from the President's power to receive Ambassadors the exclusive power to recognize foreign nations and incidental powers related thereto); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (inferring substantial presidential discretion in foreign affairs).

185. See *supra* text accompanying notes 147–151.

186. It is unclear whether the challenging group would need to be both houses or one house of Congress, or a group whose votes "would have been sufficient to defeat" consent, *Raines v. Byrd*, 521 U.S. 811, 823 (1997), or whether even a smaller group of congressional members might be found to have standing—the latter on the theory that part of the Emoluments Clause's anti-corruption mechanism was to require Members of Congress to vote, thereby making individual Members accountable. It is also unclear whether an effort to obtain consent would need to have been made and failed in the Congress, before a court would consider the issue concretely enough exhausted in the political branches to make it prudent to adjudicate or ripe for adjudication. Cf. *Goldwater v. Carter*, 444 U.S. at 996–97 (Powell, J., concurring) (finding the treaty termination issue not yet ripe); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Ginsburg, J., concurring) (finding war powers issue not yet ripe); see also *Harrison*, *supra* note 125, at 129 (arguing that "*Raines* implies that a particular vote is ineffective, completely nullified, and deprived of all validity, when a bill that had enough votes to pass and 'would have become law' is 'deemed defeated' and 'does not go into effect,' or when a bill with enough votes to be defeated 'goes into effect'"). The number of legislators bringing an action might also bear on the D.C. Circuit's older "circumscribed equitable discretion" doctrine, where, if the challenging Member of Congress could obtain relief through action of his or her fellow legislators, courts would decline to hear the case regardless of whether the requirements for standing are met. See *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999) (explaining that this doctrine had been previously invoked to dismiss a claim where a Member of Congress could "obtain substantial relief from his fellow legislators," *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (1981), but suggesting that, post-*Raines*, this factor goes to standing itself). Later case law seems to treat the possible availability of a legislative remedy as bearing on the presence of cognizable injury through "complete nullification" of the legislator's voting power. See *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (treating the possibility that congressional plaintiffs could obtain a legislative remedy, including prohibitory legislation, appropriation cut off, or even impeachment, as going to whether there was the kind of injury—nullification of their votes in the future—needed for standing). Where, however, the Constitution affirmatively requires congressional consent to make lawful certain acts, making the act of voting necessary to legalize certain conduct, it is arguable that a requirement of having sought or being able to win a vote should have no place.

political remedies—holding hearings, for example, or threatening not to appropriate funds for programs the President cares about—that, even if not directly related to the allegedly unlawful conduct, might be effective in encouraging compliance.¹⁸⁷ The standing issue here, thus, remains a close one.

D. Appropriations, Legislative Vesting, and Take Care Clause

By contrast to claims based on a complete deprivation of the right of Members of Congress to vote on narrow and specific issues, claims under the Appropriations, Legislative Vesting, and Take Care Clauses have greater potential for expanding interbranch litigation. An Appropriations Clause claim argues that some part of the government is expending or committing funds of the United States without an appropriations law, in violation of the provisions of Article I, Section 9, Clause 7, which states that “no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” A Legislative Vesting Clause claim argues that executive action amounts to lawmaking in violation of Article I, Section 1, which vests “All legislative Powers herein granted” in the Congress. Take Care Clause claims allege that the President is in violation of obligations under Article II, Section 3, stating that the President “shall take Care that the Laws be faithfully executed.”

The Appropriations Clause is not limited to executive officials, so in theory action by judicial or legislative officers may create Appropriations Clause violations; to the extent that statutory law limits drawing of funds to Treasury officials,¹⁸⁸ they may play an intermediary role for other government officials. Appropriations Clause objections may overlap with Legislative Vesting or Take Care Clause claims: to the extent that a statute is claimed either not to appropriate funds or affirmatively to prohibit expenditure of funds in a certain way, challengers might argue that the Executive Branch has failed to “take care” that a law enacted by Congress has been faithfully executed or that the Executive Branch action is in derogation of the exclusive vesting of the “legislative” power in Congress. But Legislative Vesting or Take Care Clause claims can have an even greater breadth, encompassing in theory virtually any interpretive disagreement between Congress and the Executive Branch.

Both sets of issues arise in a pending case in the D.C. Circuit, involving challenges to how the Affordable Care Act (ACA) was being administered. In *U.S. House of Representatives v. Burwell*,¹⁸⁹ the district court rejected claims of standing based on the Legislative Vesting Clause (on reasoning that would apply by implication to the

187. For example, Congress has legislated in some detail on the circumstances in which it has consented to receipt of gifts from foreign governments. See 5 U.S.C. § 7342 (2012) (establishing conditions under which Congress consents to an employee of the United States, including the President, Vice President, and Members of Congress, accepting gifts from foreign donors, including a dollar amount under which retention of the gift is permitted, exempting defined “decorations” from the ban, and requiring reporting and turning over to the United States of gifts above a set amount in value, among others).

188. See *Duties & Functions of the U.S. Department of the Treasury*, U.S. DEP’T TREASURY, <https://www.treasury.gov/about/role-of-treasury/Pages/default.aspx> [https://perma.cc/T5AQ-SKE8] (last updated Jan. 4, 2018) (noting that the Department is responsible for “paying all bills of the U.S.”).

189. 130 F. Supp. 3d 53 (D.D.C. 2015).

Take Care Clause),¹⁹⁰ but upheld congressional standing to allege a violation of the Appropriations Clause of Article I, Section 9. The House argued that in making payments the ACA required to be paid to insurers for “cost-sharing offsets,” the Administration violated the Appropriations Clause because there was no appropriation to support the payment.¹⁹¹ The Administration responded that a permanent appropriation in § 1324, which both sides agreed covered payment for “premium tax credits,” also covered the cost-sharing offsets, in light of the “structure and design” of “intertwined subsidies;”¹⁹² this position was also supported by the House Democratic leadership in its amicus brief supporting Burwell, in light of statutory language that the cost-sharing offsets “shall” be paid.¹⁹³

The district court distinguished constitutional claims that monies were spent without an appropriation from claims that the Administration was misinterpreting and misapplying the statute; it dismissed counts alleging that the expenditures were in violation of § 1324 as a “statutory” question on which the House lacked standing.¹⁹⁴ But it upheld standing on the claimed violations of the Appropriations Clause,¹⁹⁵ a theory that appears to turn on the meaning of this same statutory provision. Where an administration agrees that an appropriation is required, but argues that the statute provides for it, the constitutional question turns entirely on issues of statutory interpretation. This illustrates the expansive possibilities if standing on Appropriations Clause claims is upheld.

While the district court found “injury in fact” because Congress is the only body authorized to enact laws authorizing expenditures,¹⁹⁶ this is true for all lawmaking

190. When the Speaker of the House sought approval of a resolution to bring the action in *U.S. House of Representatives v. Burwell*, he invoked the Take Care Clause. See ALISSA M. DOLAN, CONG. RESEARCH SERV., R44450, *HOUSE OF REPRESENTATIVES V. BURWELL AND CONGRESSIONAL STANDING TO SUE 1* (2016) (“In his public comments prior to introduction of H.Res. 676, Speaker John Boehner stated that the purpose of the suit would be to compel the President to follow his oath of office and comply with his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”). The complaint itself, however, couched the challenge in terms of the legislative power being vested only in Congress, to be exercised through the bicameralism and presentment requirements. In this context, at least, the Legislative Vesting and Take Care Clause claims seem like mirror image ways of making the same basic claim. Cf. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015) (describing Take Care Clause challenge to Executive Branch’s program of Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA)), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

191. See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d at 70–71.

192. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 175–81 (D.D.C. 2016), *appeal held in abeyance by* 676 F. Appx. 1 (D.C. Cir. 2016) (mem.).

193. 42 U.S.C. § 18071(c)(3)(A) (2012), *discussed in* Brief *Amici Curiae* of Members of Congress in Support of Defendants-Appellants at 5, *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (No. 16-5202) (placing weight on the statute’s use of the word “shall” in describing government obligations to make the contested payments).

194. See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d at 75–76.

195. See *id.* at 74.

196. *Id.* at 71. The district court also suggested that the Appropriations Clause was a “specific” kind of injury, one based on a “prohibition.” *Id.* at 79. But the Appropriations Clause is far less specific than many grants of authority to Congress, and its passive voice prohibition

authority. The district court reasoned that the “constitutional structure would collapse, and the role of the House would be meaningless, if the Executive could circumvent the appropriations process and spend funds however it pleases.”¹⁹⁷ That may be correct, but no one argued that the President could spend without an appropriation.¹⁹⁸

Where there is a good faith interpretive dispute about the scope of an appropriation, the availability and adequacy of legislative countermeasures—discussed in *Raines v. Byrd*—is clear, indeed, more so on appropriations than almost any other subject of legislation. Congress pays a great deal of attention to such issues in its legislative process; it frequently enacts affirmative prohibitions on spending (but did not do so in the ACA provisions at issue in this case). Disagreements over expenditures and their authority go back to the Founding; they exist across historical periods; and they have been consistently addressed politically, either through oversight or new legislation. (Indeed, as early as the 1790s there were acknowledgments in Congress that what the text of an appropriation law might be thought to require is different from the interpretive practice or custom¹⁹⁹—a tricky thing for a court to penetrate accurately, especially during a time of heightened hyperpolarization.)

is far more general. On the other hand, violations of this clause involving expenditures not authorized by law are unlikely to create concrete injuries for individuals (except to the extent that expenditures from a limited fund established for one purpose diminishes funds available for others). To the extent congressional standing were to be recognized for violations of this clause, it would be important to develop some internal limit, for example, where there is no arguable basis for the claim of statutory authority. See *infra* text accompanying notes 198, 206.

197. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d at 71.

198. In *Allen v. Wright*, the Court described the challengers’ claim that methods established by the IRS to prevent granting tax exemptions to racially discriminatory schools were ineffective towards that goal and thus invalid. 468 U.S. 737, 740–45 (1984). In denying standing, the Court incorporated separation of powers concerns in its analysis. See *id.* at 760–61. These concerns, the Court wrote, “counsel[] against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties,” *id.* at 761, thereby suggesting that while the IRS retained some discretion over how to enforce the law, it did not dispute its legal duty to do so. See also *Wright v. Regan*, 656 F.2d 820, 844 (D.C. Cir. 1981) (Tamm, J., dissenting) (“What the plaintiffs actually challenge here is the adequacy of agency enforcement procedures . . .”), *rev’d sub nom.* *Allen v. Wright*, 468 U.S. 737.

199. See WILMERDING, *supra* note 60, at 28–29 (describing how in the 1790s, Treasury interpretations of spending authorities were uniform notwithstanding changes in statutory wording); *id.* at 48 (quoting a Federalist member of Congress in 1801 explaining that a practice of using money for one subject within a department for another was the custom, which was “illegal; but its being the custom palliates it”); *id.* at 78 (noting that in 1816 the practice of ignoring limitations in appropriations laws had “reached so high a pitch” it attracted Calhoun’s attention); *id.* at 92 (noting an objection around 1820 to criticizing a department for ignoring a limit because all departments did). Wilmerding concluded that an 1874 law changed practice, *id.* at 130, but did not eliminate problems created by the practice of underappropriation, in the expectation that departments would exceed budgets and make up the rest with deficiency bills, *id.* at 141.

In *Raines v. Byrd* the Court also noted that the suit was not being brought by the houses of Congress as an institutional matter, although the statute authorized individual actions.²⁰⁰ Here, the litigation was authorized by the House, but it was not authorized by a statute (enacted through the bicameral process); nor did both houses of Congress appear together, as in *Chadha*. While it may be less likely that an individual would have standing to challenge expenditures than it was likely (in *Raines v. Byrd*) that a private party would challenge non-expenditures, the Congress has ample political measures that can be invoked, including new substantive and appropriations legislation. Moreover, it could put courts in a very difficult position if one house of Congress had standing to challenge Executive Branch action and the other house had standing to defend Executive Branch action²⁰¹—a possible result should one-house legislative standing be recognized outside of cases where the Constitution authorizes one house to act alone.²⁰² These reasons together—the expansive nature of the theory, the variance from historical practice, the availability of legislative countermeasures, the absence of any prohibition on the disputed spending, the absence of statutory authorization for suit, and the presence of only one

200. See *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

201. This is not a fanciful possibility. In *United States v. Lovett*, 328 U.S. 303 (1946), the Senate had opposed the provision, sought and defended by the House, to strip three specific civil servants of their jobs. See *id.* at 312–13 (reporting also the President’s statement, in signing the bill, that “The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.”). The House participated as amicus in the litigation, the Senate did not. In both *Dickerson* and *Windsor*, Democratic Members of Congress filed amicus briefs taking positions opposite those taken by the Bipartisan Legal Advisory Group of the House (a group entirely controlled by the majority party). See *Grove & Devins, supra* note 102, at 618–19; cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16–17 (2004) (noting the difference in views of the mother, who was the custodial parent, and the father, with respect to their daughter hearing the Pledge of Allegiance in school as a factor supporting the conclusion that the father lacked prudential standing to assert the claim based on his relationship with the child). (If a house has standing to challenge, or to defend, executive action as inconsistent, or consistent, with a statute, and if the Executive Branch’s action is struck down in the trial court but the Executive Branch decides not to appeal, the house defending the Executive Branch action could nonetheless take an appeal, creating the potential for significant intrusion on the Executive Branch’s “take care” responsibilities to control litigation for the government.)

202. For discussion of whether participating as a party in litigation involving enforcement laws would enable parts of Congress to do what they otherwise could not do except through the bicameral and presentment process under *INS v. Chadha*, 462 U.S. 919, 952, 955–56 (1983) (holding that when Congress or a part thereof takes action that has “the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch,” its action must ordinarily be achieved through the processes of bicameral enactment and presentment to the President required by Article I Section 7, unless the procedure is explicitly authorized, e.g., treaty approval by the Senate), see *Grove & Devins, supra* note 102, at 627; see also *Grove, supra* note 21, at 1350–51, 1363–64 (providing normative reasons, sounding in part in liberty interests, against legislative standing to challenge Executive Branch litigation positions).

house—should probably have led to a different result on the standing of the House to bring the action.²⁰³

Take Care and Legislative Vesting Clause claims for congressional standing are especially worrisome. Any disagreement over how a statute is administered can be reframed as a violation of the President’s Take Care Clause responsibilities (and correspondingly, an attenuated deprivation of Congress’s right to vote to enact legislation). As the district court wrote, “[t]he argument proves too much”;²⁰⁴ to allow standing on such claims would involve a large expansion of judicial authority to resolve partisan disagreements over statutory interpretation.²⁰⁵ As with Appropriations Clause claims, there may be a judicially manageable distinction capable of being drawn between a presidential administration asserting an interpretive position about the meaning of a statute, on the one hand, and claiming that no statutory authority is required, on the other; or between an interpretive position asserted in good faith and one beyond the bounds of reasonable interpretive possibilities.²⁰⁶ But recognition of

203. See *supra* text accompanying notes 85–103.

204. “The argument proves too much. If it were accepted, every instance of an extra-statutory action by an Executive officer might constitute a cognizable constitutional violation, redressable by Congress through a lawsuit. Such a conclusion would contradict decades of administrative law and [constitutional] precedent” *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 75 (D.D.C. 2015).

205. Indeed, the Court has recently noted the impact of partisan affiliation with legal judgments made by the Congress. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2674 (2015) (“THE CHIEF JUSTICE, in dissent, maintains that, under the Elections Clause, the state legislature can trump any initiative-introduced constitutional provision regulating federal elections. He extracts support for this position from *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866). There, Michigan voters had amended the State Constitution to require votes to be cast within a resident’s township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in other locations. One candidate would win if the State Constitution’s requirement controlled; his opponent would prevail under the Michigan Legislature’s prescription. The House Elections Committee, in a divided vote, ruled that, under the Elections Clause, the Michigan Legislature had the paramount power. As the minority report in *Baldwin* pointed out, however, the Supreme Court of Michigan had reached the opposite conclusion, holding, as courts generally do, that state legislation in direct conflict with the State’s constitution is void. *Baldwin*, H.R. Misc. Doc. No. 152, at 50. The *Baldwin* majority’s ruling, furthermore, appears in tension with the Election Committee’s unanimous decision in *Shiel* just five years earlier. . . . Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision. In short, *Baldwin* is not a disposition that should attract this Court’s reliance.”) (citations omitted) (emphasis added).

206. Public decision makers, including courts, are called on in other settings to make judgments about whether arguments are made in good faith or go beyond the bounds of reasonableness. See, e.g., FED. R. CIV. P. 11(b) (requiring that attorneys sign court filings to certify that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for

legislative standing to challenge actions under the Legislative Vesting, Take Care, or Appropriations Clauses should be viewed with the greatest of caution, because of the expansive potential they have to substantially expand interbranch litigation and judicial intervention in fraught disputes between coequal branches of government.²⁰⁷

IV. COURTS, DEMOCRACY, STANDING, AND POLITICAL PATHOLOGIES

I conclude by revisiting my earlier concerns about whether expanding congressional standing may pose risks both to courts and to democracy.

First, entertaining such actions increases the occasions of direct confrontation with other branches and invites courts to make decisions on sensitive separation of powers issues on which they have little comparative advantage and limited ability to enforce their judgments. The risks of courts getting structural issues wrong is high, as is the likelihood over the long run of the courts engendering hostility from one or more political branches in ways that could interfere with the exercise of the courts' central role in protecting individual rights.²⁰⁸ Even once highly effective courts may find themselves in fraught circumstances, as experience elsewhere suggests.

Second, increased legislative standing poses potential risks for effective representative government. Here I draw on the work of political scientist Aurelain Craiutu

establishing new law”) (emphasis added); *cf.* *Nixon v. United States*, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring in the judgment) (agreeing that the challenge to the Senate’s use of a committee to hear evidence in impeachment trial was nonjusticiable, but suggesting that the result might be different were the Senate to use a coin flip); *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (holding that ordinarily agency discretion to enforce is not subject to challenge under the Administrative Procedure Act, but noting that it was not reaching a “situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities”) (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc); *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973) (Wyzanski, J.) (noting that courts should not condemn Presidential action in area of broad discretion “*except in a case of clear abuse amounting to bad faith*”) (emphasis added); David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 255 (1998) (suggesting that the impeachment trial of federal judge Samuel Chase established that Congress could not “elevate a legitimate difference of opinion into a high crime or misdemeanor”).

207. Interestingly, the Court has been especially reluctant to recognize private parties’ standing to compel government to enforce the law against third parties. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (“[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Lujan*, 504 U.S. at 562); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (finding nonjusticiable challenge, by mother of child born out-of-wedlock, to prosecutor’s discriminatory policy of not enforcing child support obligations of fathers of out-of-wedlock children). But it is surely more consistent with the way the constitutional system has operated to allow private parties to bring such actions than to expand existing boundaries of congressional standing. *See also infra* note 218 and accompanying text.

208. *See supra* note 74 and accompanying text.

on moderation. In his recent book, he argues that moderation is “an essential ingredient in the functioning of all open societies because it acts as a buffer against extremism and promotes a civil form of politics indispensable to the smooth running of democratic institutions.”²⁰⁹ Moderation can be exercised by persons of the left or of the right; it requires a certain epistemic humility, an awareness that those with whom one disagrees may have something of value to contribute.²¹⁰

Moderation is linked, he argues, to a willingness to compromise.²¹¹ And in a heterogeneous democracy, compromise is often needed to allow governance to happen. For Craiutu, no democratic “regime can properly function without compromise, bargaining, and moderation”; indeed, he says, “the proper functioning of our representative system and institutions depends to a great extent on political moderation.”²¹² Rather, “a democratic world is a chronically imperfect one . . . which can survive only if the main political actors do not act as if their positions and ideas were absolute and universally valid.”²¹³ Craiutu is not alone in emphasizing the importance of moderation as an essential aspiration of law. For Karol Soltan, moderation is an aspect of civic life essential to combat human destructiveness,²¹⁴ and is a project of law that “cannot be sustained without support from outside the courts.”²¹⁵

209. AURELIAN CRAIUTU, *FACES OF MODERATION: THE ART OF BALANCE IN AN AGE OF EXTREMES* 5 (2017).

210. *Id.* at 10, 239, 241.

211. *See, e.g., id.* at 25–33.

212. *Id.* at 17. It takes courage to be moderate, he argues, to pursue the “art of balance,” between often good but competing principles based on understanding that most public issues involve tradeoffs between “two partially true points of view.” *Id.*; *see also* Karol Edward Soltan, *Constitutional Patriotism and Militant Moderation*, 6 INT’L J. CONST. L. 96, 99–101 (2008) (arguing for “militant moderation”). Soltan argues that moderation is a better political theory for constitutionalism than is liberalism; for him, moderation requires a commitment to “moral pluralism,” an attention to balancing important values, and a commitment to the need to justify action with good reasons. *Id.* at 100.

213. CRAIUTU, *supra* note 209, at 243.

214. *See* Karol Edward Soltan, *The Project of Law, Moderation, and the Global Constitution*, 25 MD. J. INT’L L. 230, 237 (2010) [hereinafter Soltan, *The Project of Law*] (“[L]aw cannot be seen as the application of one logically coherent theory. So law does not maximize wealth. And law is not fully captured . . . by, say, a Rawlsian theory of justice or a Dworkinian principle of equality. Balancing and proportionality are at the heart of the rule of law, including balancing between principles and rules.”) (footnotes omitted). For Soltan, “the project of law [is that of] serving moderation through courts.” *Id.* (emphasis omitted). His concept of moderation is based on impartial rationality, pluralism, and opposition to destructiveness. *See also* Karol Edward Soltan, *The Missing Alternative*, 47 TULSA L. REV. 185, 187 (2011) (“Moderation as a generic form of politics can be seen as centered on three principles. First, it centers on opposition to forces of destruction, their power and effects. Second, it manifests an appreciation of complexity, of ‘unity in diversity,’ of polycentricity and pluralism, of various forms of attractive balance. And, finally, it supports forms of rationalism that take human fallibility seriously.”).

215. Soltan, *The Project of Law*, *supra* note 214, at 242.

In an age of hyperpolarization, opening up more avenues of litigation for Members of Congress is unlikely to improve prospects for moderation and compromise in the political arena.²¹⁶ Courts declare winners and losers, based on legal principles; legislatures should be the forum of good political compromise. To expand the capacity of congressional actors to litigate political disputes with the Executive Branch is not only a departure from existing practice but risks being fundamentally corrosive of whatever hopes exist for regaining a sense of moderation, compromise, and respect for one's opposition in Congress.

Perhaps these hopes of returning to a congressional process with more place for moderation and compromise will be fruitless. If so, perhaps resort to courts will come to seem more necessary and the potential risks of greater resort to courts correspondingly lower, vis-à-vis a polarized, frozen, and unworkable status quo. But if courts are to become more basic institutions of governance, it might be necessary to rethink who is appointed, how, and for how long.

There are, to be sure, jurisdictions that separate less fiercely the domain of law and politics. Constitutional courts in France and Germany, which can hear cases brought by dissenting legislators, are typically staffed by a bench that includes members with considerable political experience; appointments are typically for eight- to twelve-year nonrenewable terms, usually staggered.²¹⁷ This structure provides regular political inputs to those courts. But the U.S. separation of powers system works on different assumptions—that indefinite, “life” tenure better protects judicial independence from politics and thus better secures protection of individuals against majoritarian forces. Expanding the Court's jurisdiction to hear disputes between Congress and the Executive, without major changes in the appointment structure of the federal judiciary, would likely result in greater tensions between the democratic and the constitutionalist aspects of the U.S. system.

CONCLUSION

The purposes of democratic constitutionalism would thus be well served by recalling that not all interbranch disputes—even constitutional disputes—need to be resolved in the courts. Waiting to resolve an issue may sometimes be the better choice, in a society that values both democracy and constitutionalism. For it is most important that the courts be available and have legitimacy to protect against excesses of majoritarian processes that injure individuals.

At the same time, understanding the important role of courts in providing a forum of principle for resolution of individual claims of injury and in enforcing the rule of law would favor, as I discuss elsewhere, a more generous conception of injury for

216. The prospect of litigation by the losing side might be thought to provide incentives for the stronger side to moderate its impositions on the weaker, as Daniel Francis has suggested to me. But the hyperpolarization of the present moment means that interbranch claims may often be invoked in distinctively partisan disputes, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006), where such litigation seems unlikely to have such a moderating effect and more likely to reinforce “winner-take-all” attitudes prioritizing immediate partisan success over policy advancement.

217. See JACKSON & TUSHNET, *supra* note 42, at 538–40 (reproducing a chart showing the structures, terms, and appointing authorities of constitutional courts).

purposes of claims by individuals of violation of constitutional and statutory rights than the Court has been willing to entertain in a number of areas.²¹⁸ Bright line preclusive rules categorically denying standing for broad ranges of plaintiffs or claims are neither necessary nor desirable, given the ease with which standing assertions can be evaluated as a threshold matter and the role, as Professor Fallon has put it, “not just [of] the provision of the Constitution under which a plaintiff brings suit, but also . . . the nature of the governmental action or policy that a plaintiff seeks to challenge.”²¹⁹ There may well be a need for flexibility in response to extraordinary instances of bad faith or overt lawlessness in evaluating institutional claims of injury from one part of the government against another,²²⁰ where other mechanisms (of private suit, or political remedies) are likely to be unavailing. Ordinarily, though, it is the better part of wisdom for courts to presume the good faith of other branches and to continue to structure standing law on the assumption that most controversies between the branches are best addressed through political mechanisms.

218. See Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. L.J. 127 (2014) (criticizing decisions denying standing in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Clapper v. Amnesty International*, 568 U.S. 398 (2013)); Judith Resnik, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1890–99 (2016) (criticizing the decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

219. Fallon, *supra* note 103, at 1077.

220. For thoughtful discussion of both the tendency to make claims of bad faith in American culture and the corresponding reluctance of the courts to ascribe bad faith to the institutions of governance, see David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).