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Jonathan Remy Nash
Emory University School of Law

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A FUNCTIONAL THEORY OF CONGRESSIONAL STANDING

Jonathan Remy Nash*

The Supreme Court has offered scarce and inconsistent guidance on congressional standing—that is, when houses of Congress or members of Congress have Article III standing. The Court’s most recent foray into congressional standing has prompted lower courts to infuse analysis with separation-of-powers concerns in order to erect a high standard for congressional standing. It has also invited the Department of Justice to argue that Congress lacks standing to enforce subpoenas against executive branch actors.

Injury to congressional litigants should be defined by reference to Congress’s constitutional functions. Those functions include gathering relevant information, casting votes, and (even when no vote is ever cast) exercising bargaining power over the scope of legislation. Accordingly, congressional standing can extend not only to cases of actual vote nullification (as extant Supreme Court precedent suggests), but also to cases in which (1) congressional plaintiffs validly seek information from the executive branch, and (2) the limited circumstance in which the executive branch has acted so as to threaten permanent and substantial diminution in congressional bargaining power—provided that enough legislators join the suit to lay claim to the relevant institutional bargaining power.

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* Professor of Law and David J. Bederman Research Professor (2014–2015), Emory University School of Law. I am grateful to Eric Claeys, Michael Collins, Heather Elliott, Tara Leigh Grove, Aziz Huq, Gillian Metzger, Ashley Moraguez, Lori Nash, Rafael Pardo, and Alexander Volokh for helpful comments on prior drafts. Jameson Bilsborrow provided excellent research assistance.

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INTRODUCTION

The House of Representatives' recent decision to authorize filing a lawsuit against President Barack Obama and his administration¹ with respect to the President's implementation of the Patient Protection and Affordable Care Act²—and the filing of a suit a few months later³—has focused attention on the House's standing to bring such a lawsuit in federal court.⁴ Commentators—including many who are sympathetic to the arguments that the lawsuit advanced on the merits—have questioned whether the House can claim proper federal court standing.⁵

The controversy over the possibility of the House suing President Obama is not the only recent example of congressional standing emerging from the theoretical shadows. Under both President George W. Bush and President Obama, the Department of Justice invoked the Supreme Court's

1. See H.R. 676, 113th Cong. (2014).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010).

3. See U.S. House of Reps. v. Burwell, No. 14-1967(RMC), 2015 WL 5294762 (D.D.C. Sept. 9, 2015) (recognizing standing of the House of Representatives to raise claim challenging the executive branch's actions with respect to the Affordable Care Act). Members of Congress joined a second suit challenging President Obama's executive action with respect to immigration in 2015. See Mike Lillis, *113 Republicans Back Lawsuit Against Obama's Immigration Actions*, THE HILL (May 11, 2015, 5:23 PM), <http://thehill.com/homenews/house/241668-113-republicans-back-lawsuit-against-obamas-immigration-actions>; see also Karoun Demirjian & Kelsey Snell, *House Conservatives May End Up in Court to Kill Iran Deal*, WASH. POST. (Sept. 10, 2015), http://www.washingtonpost.com/news/powerpost/wp/2015/09/10/house-conservatives-may-end-up-in-court-to-kill-iran-deal/?wpmm=1&wpi_src=nl_evening (describing how some House members were considering, upon the failure of Congress to stop the Obama administration's nuclear deal with Iran, resort to a lawsuit to keep the President from enforcing the agreement on the ground that relevant documentation was withheld from Congress).

4. See, e.g., Sam Baker, *Will Boehner's Obamacare Lawsuit Work? Legal Experts Question Whether the House Has Standing to Sue the President*, NAT'L J. (July 14, 2014), <http://www.nationaljournal.com/health-care/will-boehner-s-obamacare-lawsuit-work-20140714>.

5. See, e.g., Stephanie Condon, *John Boehner's Obamacare Lawsuit Isn't Really About Obamacare*, CBS NEWS (July 16, 2014, 5:58 AM), <http://www.cbsnews.com/news/john-boehners-obamacare-lawsuit-isnt-really-about-obamacare/> (noting that while Professor Jonathan Turley “and some other legal scholars say the executive branch has assumed so much power, a lawsuit is necessary to recalibrate the balance between the three branches of government,” Turley still states that, “[i]t is the threshold question of standing that is the most difficult step for a lawsuit of this kind”).

decision in *Raines v. Byrd*⁶—the Court’s last direct foray into congressional standing—to support the argument that a House committee investigating the executive branch lacked standing to raise a judicial challenge to claims of executive privilege.⁷ And, when the executive branch declined to defend the constitutionality of the Defense of Marriage Act⁸ (“DOMA”) in *United States v. Windsor*,⁹ the House of Representatives argued that its “Bipartisan Legal Advisory Group”—which articulates the House’s legal arguments in courts¹⁰—had standing as an intervenor to defend the law in the executive’s

6. 521 U.S. 811 (1997).

7. See *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 12–13 (D.D.C. 2013) (noting that, “while th[e government’s] position was adamantly advanced, there was a notable absence of support for it set forth in the defendant’s pleadings, and oral argument revealed that the executive’s contention rests almost entirely on one case: *Raines v. Byrd*”); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 66 (D.D.C. 2008) (“[T]he Committee’s injury is ‘governmental’ rather than ‘personal,’ the argument goes. . . . That, the Executive says, is the upshot of the Supreme Court’s decision in *Raines*, which jettisoned the concept of so-called ‘legislative’ standing.” (quoting *Raines*, 521 U.S. at 820, 829)).

The congressional investigations out of which these cases grew—one by a Democratic House of a Republican administration and the other by a Republican House of a Democratic administration—both focused on politically charged issues. The investigation that prompted the *Miers* decision involved allegations that the President had improperly dismissed several U.S. Attorneys. See 558 F. Supp. 2d at 57–58. For discussion of the underlying legal dispute, see Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1086–89 (2009). And the underlying congressional investigation in *Holder* involved the “Fast and Furious” program, pursuant to which the Bureau of Alcohol Tobacco and Firearms “knowingly allowed firearms purchased illegally in the United States to be unlawfully transferred to third-parties and transported into Mexico,” with the goal of “enabl[ing] ATF to follow the flow of the firearms to the Mexican drug cartels that purchased them.” 979 F. Supp. 2d at 5.

District courts in both cases rejected the Department of Justice’s arguments. See *id.* at 13–14 (noting that “[a] reading of the entire [*Raines*] opinion reveals that the problem that prompted the dismissal was not the fact that legislators were suing the executive; it was that the plaintiffs had suffered no concrete, personal harm, and they were simply complaining that the Act would result in some ‘abstract dilution’ of the power of Congress as a whole” (quoting *Raines*, 521 U.S. at 826), and also distinguishing *Raines* since in *Holder*, the institution supported the lawsuit); *Miers*, 558 F. Supp. 2d at 67–70 (distinguishing *Raines* on the ground that there, unlike the case at bar, the House as an institution did not support the lawsuit, and concluding that *Raines* did not undercut preexisting circuit precedent that the House had standing to enforce a subpoena since in *Raines* “the injury was conceived of only in abstract, future terms,” but in *Miers* the harm resulting from leaving a validly issued House subpoena unenforced was “evident”).

The *Miers* case did not proceed beyond the district court on the standing issue. The D.C. Circuit granted a motion for stay pending appeal, but an agreement was reached resolving the case before an appeal could be heard. See Chafetz, *supra*, at 1092–93.

The *Holder* case continues within the jurisdiction of the district court as of this writing. See Order, *Holder*, No. 12-1332 (ABJ) (Aug. 20, 2014) (ordering the Justice Department to prepare a log of privilege claims in anticipation of in camera review).

8. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C), *invalidated in part by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

9. 133 S. Ct. 2675 (2013).

10. See Reply Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the United States House of Representatives at i n.*, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 267026 (“The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least

stead (a claim the Supreme Court left undecided in that case).¹¹ Indeed, at least one commentator has suggested that the Court should recognize Congress's standing in general to defend laws against constitutional challenge when the executive branch has declined to do so.¹²

These disputes over the ability of a house of Congress to file suit form part of a larger debate over "congressional standing" to participate in litigation before the federal courts. Congressional standing also encompasses whether a house of Congress can act as a defendant in a lawsuit—for example, defending a challenge to a law's constitutionality when the executive branch has conceded the challenge—and suits brought by individual federal legislators and blocs of legislators.

In fact, the Supreme Court's guidance on congressional standing has been both scarce and inconsistent. The Supreme Court has directly confronted congressional standing in only two cases, accepting it in *Powell v. McCormack*,¹³ and more recently rejecting it in *Raines v. Byrd*,¹⁴ in which the Court suggested more broadly—but in dicta—that congressional standing may be quite constrained.¹⁵ In a case from this past June, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,¹⁶ the Court endorsed the standing of a state legislature in a way that could be read to support congressional standing,¹⁷ but cited the language from *Raines* to specifically state that its holding did not extend to the question of congressional standing.¹⁸

The lower courts have had greater experience with, and generally have been more open to, claims of congressional standing. The U.S. Court of Appeals for the District of Columbia Circuit—which has, not surprisingly, seen the bulk of congressional standing cases—has favored assertions of congressional standing, to the vocal displeasure of then-D.C. Circuit Judges

the early 1980s . . ."). At the time, the BLAG consisted of Speaker of the House Boehner, Majority Leader Cantor, Majority Whip McCarthy, Democratic Leader Pelosi, and Democratic Whip Hoyer. *Id.*

11. The Court concluded—despite the executive branch's failure to defend DOMA—that "the United States retains a stake sufficient to support Article III jurisdiction" by virtue of its failure to have paid the plaintiff the refund of taxes she was due if DOMA was unconstitutional. *Windsor*, 133 S. Ct. at 2686. To be sure, the executive branch's agreement with the plaintiff over the governing law meant that an adversity between the parties was absent, but adversity, the Court explained, was merely a prudential aspect of standing, not a constitutional one. *Id.* at 2686–87. And the BLAG's willingness to defend DOMA zealously removed that concern. *Id.* at 2687–88. In the end, then, the Court did "not [have to] decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority." *Id.* at 2688.

12. See Brianna J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 Nw. U. L. Rev. 1201, 1247–50 (2012).

13. 395 U.S. 486 (1969); see *infra* text accompanying notes 56–60.

14. 521 U.S. 811 (1997).

15. See *infra* notes 61–85 and accompanying text.

16. 135 S. Ct. 2652 (2015).

17. See *infra* Section I.B.

18. *Ariz. State Legislature*, 135 S. Ct. at 2665 n.12.

Bork and Scalia.¹⁹ Still, the D.C. Circuit has relied on “equitable discretion” to allow itself, and the district court below it, to pick and choose the congressional standing cases to hear.²⁰ Neither the lower courts nor scholarly commentators, however, have provided an overarching theory to justify this approach.

This Article offers what Supreme Court cases, lower court cases, and commentary have failed to provide—a coherent theory of congressional standing. In particular, the Article argues that the Constitution supports a robust, but limited, role for congressional standing. The theory links standing to the primary functions of Congress: voting and information gathering. In particular, the theory seeks to define cognizable “injuries”—the central hurdle that plaintiffs face in establishing standing—in terms of congressional functions.²¹

A functional theory of congressional standing would recognize standing in limited circumstances, such as when a majority of a house of Congress (or enough legislators to effect a particular outcome) challenged executive action that systematically and substantially diminished the majority’s bargaining power.²² At the same time, because standing would be limited to those cases, it would not throw open the federal courthouse doors to legislators dissatisfied with particular political outcomes.²³ Prudential standing limitations could be harnessed further to ensure that political disputes are not relitigated in the courts.²⁴

This functional approach to congressional standing is logical and productive for several reasons. First, a functional approach more fully appreciates the breadth to which the power to vote—not just the actual casting of votes—is a crucial congressional function. The power to vote can shape the law even when no vote is ever taken.²⁵ The functional approach also acknowledges Congress’s important information-gathering functions.

Second, a functional approach vindicates the separation-of-powers values that underlie constitutional standing by limiting standing to cases in which there is an actual injury to congressional function.²⁶ At the same time, it does so without allowing those values to hijack the essential standing analysis, as the approach some courts take today does.

Third, a functional approach also enhances congressional (and presidential) accountability. Ensuring that Congress has the capacity to vindicate its ability to engage in its functions reduces the risk that the public will

19. See *infra* note 131 and accompanying text.

20. See *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981); see also *infra* notes 135–138 and accompanying text.

21. See *infra* Section III.B.

22. See *infra* Section III.B.

23. See *infra* text accompanying notes 183–186.

24. See *infra* Sections IV.B.1, IV.D.

25. See *infra* note 168 and accompanying text.

26. As I explain below, this is more the case if separation of powers is seen through a functionalist, as opposed to a formalist, lens. See *infra* text accompanying notes 169–171.

erroneously assign credit (and blame) to branches of government to which it is not due.²⁷

Fourth, a functional approach to congressional standing vindicates not only Congress, but also indirectly the interests of the states. Professor Herbert Wechsler famously argued that the constitutional structure of the federal government preserves states' interests.²⁸ That is perhaps nowhere more true than in the structure of the U.S. Senate, in which members are elected on a state-by-state basis, and each state elects two senators regardless of population.²⁹ If congressional functions further state interests, then an unnecessarily narrow view of congressional standing that fails to incorporate core congressional functions—such as the view the Supreme Court adopted—also fails to adequately protect state interests.³⁰

This Article proceeds as follows. Part I surveys the landscape of congressional standing, as expounded by both the Supreme Court and the lower federal courts. It reveals how, especially recently, courts have mainly extolled separation of powers as a basis for denying standing, while ignoring the various functions that the Constitution assigns to Congress in assessing injury in fact.

Part II then considers some of these functions in greater detail. These functions include some, like collecting votes, that the Constitution expressly contemplates, and others, like the gathering of information, in which Congress has long engaged and that the Court has recognized as foundational.

Part III defends the functional approach to congressional standing. It shows that a functional approach is broadly consistent with existing standing doctrine and vindicates separation-of-powers concerns. It also identifies and evaluates the benefits of a functional approach to congressional standing, discussing in particular how the functional approach enhances democratic accountability and can aid states in asserting their sovereign interests.

Part IV relies on the functional analysis in Part II to derive the contours of congressional standing. It elucidates the possibilities for congressional standing based on information, voting power, and bargaining power. With respect to congressional standing based on an alleged shift in bargaining power from the legislative branch to the executive, Part IV highlights one factor—the scope of the shift in bargaining power—that will greatly influence whether there is congressional standing, and another factor—the extent to which the shift in power is the result of unilateral executive action—that will have an effect, albeit a lesser effect, on whether there is congressional standing. These factors allow us to rank the settings in which congressional standing is least to most likely to exist: (1) when the shift in power is minor

27. See *infra* text accompanying note 182.

28. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also *infra* text accompanying notes 191–195.

29. See *infra* text accompanying notes 192, 195.

30. See *infra* text accompanying note 196.

and pursuant to a congressional delegation—for example, Congress delegating minor discretionary powers to an executive agency; (2) when the shift in power is minor but the executive branch acts unilaterally—for example, an executive agency undertaking an internal reorganization; (3) when the shift in power is major and pursuant to a congressional delegation—for example, the congressional enactment of the Line Item Veto Act;³¹ and (4) when the shift in power is major and the executive branch acts unilaterally—perhaps, for example, Congress alleging that unilateral executive action effectively amends a statute without congressional authorization.

I. THE EXISTING DOCTRINAL STATE OF CONGRESSIONAL STANDING

In this Part, I present the current state of congressional standing. It is often said that the federal government need not establish compliance with the standard Article III standing requirements (at least in some circumstances).³² In reality, however, it is only executive branch actors who have presumptive standing;³³ legislators and legislative bodies must establish standing³⁴ under Article III.³⁵

31. As I discuss in detail below, the Supreme Court in *Raines v. Byrd*, 521 U.S. 811 (1997), found individual members of Congress lacked standing to challenge the Line Item Veto Act. See *infra* text accompanying notes 64–71. As I further discuss below, however, the case can, and should, be read to turn on the absence of the endorsement of the suit by either house of Congress. *Raines* specifically left open the possibility that standing might have been proper if a house of Congress had endorsed the suit. See *infra* text accompanying note 78.

32. E.g., Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 303 (2011) (“No . . . injury in fact is required when the government undertakes a criminal prosecution, . . . and prosecutors may pursue generalized grievances on behalf of the public.”); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006) (“In [enforcement] suits by the government, courts characteristically make no inquiry into injury.”).

33. See *Tachiona v. United States*, 386 F.3d 205, 210–14 (2d Cir. 2004) (finding that executive branch as nonparty intervenor had standing to appeal a default judgment entered against a foreign private political party based on traditional standing analysis and the conclusion that the executive branch had suffered a cognizable injury by virtue of the district court’s decision); Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1319–32 (2014) (arguing that Article II sets requirements for standing with which the executive branch must comply *in addition* to the standard Article III requirements for standing).

34. Thus, in *Coleman v. Miller*, 307 U.S. 433 (1939), the main opinions did not dispute whether the plaintiff state legislators were obligated to establish standing at all, but rather whether they had in fact established it. Compare *id.* at 446 (“[I]n the instant case . . . at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.”), with *id.* at 464 (opinion of Frankfurter, J.) (“In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court. What is their distinctive claim to be here, not possessed by every Kansan? What is it that they complain of, which could not be complained of here by all their fellow citizens?”).

A separate question is whether a congressional party needs to satisfy the same standard as, or a higher standard than, the typical litigant. Compare, e.g., *Harrington v. Bush*, 553 F.2d

In Section I.A, I offer a brief overview of standing in general. Next, in Section I.B, I canvass the Supreme Court's take on congressional standing (based on very few flirtations with it). I conclude with a critique of the Supreme Court's approach. Finally, in Section I.C, I survey the lower courts' approaches, which have varied from far more welcoming to (in the aftermath of *Raines*) quite rigid. Section I.C concludes with a critique of the lower courts' takes on congressional standing in interbranch disputes.

A. Overview of Traditional Standing Jurisprudence

Standing limits the ability of plaintiffs to bring lawsuits in the federal courts. Standing consists of two components. Its core, "constitutional standing," emanates from Article III of the Constitution. In addition, other doctrines—some constitutional and some subconstitutional (or prudential)³⁶—further empower federal courts to decline to recognize the standing of certain plaintiffs to bring lawsuits against certain defendants in some circumstances.

The Supreme Court has explained that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers."³⁷ The Court has noted that, due to standing doctrine's roots in notions of separation of powers and limited judicial power, the Court's "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."³⁸

190, 204 (D.C. Cir. 1977) ("The *most basic point* to consider is that *there are no special standards for determining Congressional standing questions.*"), with, e.g., *Goldwater v. Carter*, 617 F.2d 697, 710 (D.C. Cir. 1979) (Wright, C.J., concurring) ("[C]ourts could logically afford legislators even *less* consideration on standing than they afford other citizens, since the legislator's position gives him special access to the political process through which general constitutional grievances should find redress."), *vacated on other grounds*, 444 U.S. 996 (1979). I address this question below. See *infra* text accompanying notes 98–108.

35. For the argument that Article I sets requirements for standing with which Congress must comply (and similarly that Article II sets requirements for standing with which the executive branch must comply) *in addition* to the standard Article III requirements for standing, see Grove, *supra* note 33, at 1314, and see also *id.* at 1353–65 (arguing that Article I furnishes no basis for Congress to enforce or defend federal laws).

36. Unlike Article III standing, prudential standing is not grounded in the Constitution; doctrines of prudential standing are generated by the courts, and Congress remains free to revise and override them. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975).

37. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

38. *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997); see also *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541–42 (1986) ("Th[e] obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented. In such cases we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts."); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("Proper regard for the complex nature of our constitutional structure" means that a federal court should not "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.").

The Court has made clear that constitutional standing requires three showings by a plaintiff: (1) “injury in fact,” (2) a causal link between that injury and the conduct complained of, and (3) redressability.³⁹ The “injury in fact” prong demands that the plaintiff show that he or she has suffered “an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) ‘actual or imminent, not conjectural or hypothetical.’ ”⁴⁰ Causation requires the plaintiff to establish that the injury is the result of the action on the part of the defendant that is subject to challenge, and not the result of independent action by a third party.⁴¹ Finally, the “redressability” prong requires a plaintiff to show that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’ ”⁴²

From the plaintiff’s perspective, the “injury in fact” prong “drives the standing analysis.”⁴³ The plaintiff’s ability to pursue the lawsuit at all hinges on whether the plaintiff can show that he or she has suffered an “injury in fact.”⁴⁴

39. *E.g.*, Jonathan Remy Nash, *Standing’s Expected Value*, 111 MICH. L. REV. 1283, 1304 (2013).

40. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (footnote omitted) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

41. *Id.* at 560–61.

42. *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

43. Nash, *supra* note 39, at 1304. On the other hand, the “causation” and “redressability” prongs can be seen to ask whether the defendant (or defendants) has standing to defend the lawsuit. *See, e.g.*, Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1557 (2012); Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1261–62 (2013).

44. Modern standing doctrine developed, from private law foundations, alongside the expansion of the administrative state. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1438–51 (1988). *But see* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009) (arguing that congressional freedom to define standing by establishing causes of action dates to the eighteenth century); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (arguing that eighteenth and nineteenth-century jurisprudence is not inconsistent with modern standing doctrine). Still, private common-law conceptions remained dominant as the nascent administrative state ascended, with the result that the availability of judicial review often turned on whether there was perceived to have been an intrusion on common-law rights and interests. *See* Sunstein, *supra*, at 1438. Over time, however, Congress expanded the scope of administrative structures and, as it did so, the number of people affected by regulation increased. *See id.* at 1438–41. By the third quarter of the twentieth century, federal courts had responded to this shift, *see id.* at 1441–44 (explaining the shift and the reasons for it), by determining whether there was standing by looking to the Administrative Procedure Act, 5 U.S.C. § 702 (2012) (which itself codified some earlier judicial conceptions of standing, *see* Sunstein, *supra*, at 1440). Under this approach, courts looked to see whether a plaintiff had suffered a “legal wrong” or was “adversely affected or aggrieved by agency action.” 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

In other words, the courts looked to the law to see how it defined a protected interest, and then upheld standing when a legal injury had occurred. In a 1970 decision, however, the Supreme Court abandoned this framework, *see Ass’n of Data Processing Serv. Orgs. v. Camp*,

Other doctrines complement the core of Article III standing and create barriers to standing. Among these complementary doctrines is one that is quite relevant to the topic at hand: the “political-question doctrine.” That doctrine renders “[a] controversy . . . nonjusticiable . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’”⁴⁵ Thus, under current doctrine,⁴⁶ the courts will determine whether the Constitution vests one of the political branches with authority to resolve the issue and, if so, defer to that branch’s determination. Arguments invoking the political-question doctrine often arise in interbranch disputes.

B. *The Supreme Court’s (Limited) Forays into Congressional Standing*

The Supreme Court has squarely addressed legislative standing—that is, the standing of federal or state legislatures and legislators, of which congressional standing is a subset—on only four occasions.⁴⁷ Although the two

397 U.S. 150 (1970), and replaced the “legal interest test with a factual inquiry into the existence of harm,” Sunstein, *supra*, at 1445 (citing *Data Processing*, 397 U.S. at 153). The new framework thus to some degree accommodated the public law model of litigation. At the same time, however, the shift from a focus on legal to factual injury can be seen as a “respon[se] to a belief that the private-law model no longer worked in public-law cases.” *Id.* at 1446; see William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL’Y F. 247, 271–82 (2001) (arguing in favor of judicial deference to legislative definitions of harm and standing); cf. Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183 (arguing that the rule of civil procedure in cases other than class actions assumes a setting of private litigation rather than litigation of aggregate rights).

Indeed, time would prove that the rejection of the private law model was not complete. The final decades of the twentieth century saw Court decisions that reaffirmed standing doctrine’s reliance on traditional notions of common-law harm, in particular, ensconcing the requirement of a traditional injury that is actual or imminent. See, e.g., *Lujan*, 504 U.S. at 560–67; *Allen v. Wright*, 468 U.S. 737, 750–53 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 37–42 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614, 614–19 (1973). Some have argued that the view that the common law should remain the paradigm for judicial intervention underlies this approach. See, e.g., Sunstein, *supra*, at 1451–59. As such, if an injury does not correspond well to an injury at common law, courts may be reluctant to recognize standing.

At the end of the day, it seems that such a view of injury affords Congress too little leeway in structuring rights of action under federal law. Nothing in Article III restricts Congress to fashioning private rights of action in the nature of common-law rights. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988); Nash, *supra* note 39, at 1312. Indeed, the courts’ shift away from a common-law paradigm implicitly recognizes this point.

45. *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

46. For the argument that current political-question doctrine is quite different from its historical understanding, see Tara Leigh Grove, *The Long History of the Political Question Doctrine*, 90 N.Y.U. L. REV. (forthcoming 2015).

47. The Court has ducked the issue on various grounds—including that other parties enjoyed standing, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (since private plaintiffs had standing, “[w]e . . . need not consider the standing issue as to . . . [m]embers of Congress”),

older cases seemed more open to legislative standing, the Court's decision that now holds sway is a 1997 case that suggested a much narrower view. The reasoning of a 2015 decision upholding the standing of a state legislature would seem applicable to congressional standing, but the Court expressly stated there that its reasoning did not "touch or concern" the question of congressional standing.⁴⁸

The 1939 case *Coleman v. Miller* addressed the standing of Kansas state legislators to challenge the role of the state lieutenant governor in ratifying a proposed amendment to the U.S. Constitution.⁴⁹ The forty-person Kansas Senate divided over ratification 20–20, when the lieutenant governor—acting in his capacity as the Senate's presiding officer—cast the tiebreaking vote in favor of ratification.⁵⁰ After a majority of the state House voted in favor of the amendment, twenty-one members of the Senate—including the twenty members who had voted against the measure—and a few members of the House filed suit against the Kansas secretary of state seeking an injunction against certifying the ratification of the amendment.⁵¹ The state supreme court denied the plaintiffs relief, and the U.S. Supreme Court granted review.⁵²

The Supreme Court affirmed the plaintiff legislators' standing.⁵³ First, the Court noted that the state court below had recognized the plaintiffs'

and that the issue before the Court was moot, not yet ripe, or subject to the political-question doctrine and therefore not justiciable, even assuming that constitutional standing existed, *e.g.*, *Burke v. Barnes*, 479 U.S. 361, 364 n.* (1987) (mootness); *Goldwater v. Carter*, 444 U.S. 996, 997–98 (1979) (Powell, J., concurring) (ripeness); *id.* at 1002 (Rehnquist, J., concurring) (political-question doctrine).

48. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015).

49. 307 U.S. 433 (1939). The draft amendment, promulgated by Congress in 1924, was known as the Child Labor Amendment. *Coleman*, 307 U.S. at 435. It would have empowered Congress "to limit, regulate, and prohibit the labor of persons under eighteen years of age." H.R.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924).

50. *Coleman*, 307 U.S. at 436.

51. *Id.* The lawsuit included officers of both houses of the legislature as defendants. *Id.*

52. *Id.* at 434.

53. The vote upholding standing was a close one:

Chief Justice Hughes wrote an opinion styled "the opinion of the Court." Four Justices concurred in the judgment, partially on the ground that the legislators lacked standing. Two Justices dissented on the merits. Thus, even though there were only two Justices who joined Chief Justice Hughes' opinion on the merits, it is apparent that the two dissenting Justices joined his opinion as to the standing discussion. Otherwise, Justice Frankfurter's opinion denying standing would have been the controlling opinion.

Raines v. Byrd, 521 U.S. 811, 822 n.5 (1997) (citations omitted) (quoting *Coleman*, 307 U.S. at 435). *But see* R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 4 (1986) ("Neither Chief Justice Hughes nor Justice Frankfurter mustered a majority of the Court in support of their respective opinions."); John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits* 7 & n.28 (Va. Pub. L. & Res. Series Paper No. 2014-73, SSRN draft 2539135, 2014), <http://ssrn.com/abstract=2539135> ("[T]he seven Justices who voted to affirm did so on the grounds that the validity of ratification was a political question to be decided by Congress. . . . Those seven Justices thus did not address the

standing.⁵⁴ Second, the Court emphasized that the controversy was exceptional; it was not the typical political dispute. The Court explained: “This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution, and the twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution.”⁵⁵

The 1969 case *Powell v. McCormack* concerned a decision by the U.S. House of Representatives to “exclude” Adam Clayton Powell, Jr., based on allegations of corruption, from a congressional seat to which he was duly elected.⁵⁶ Powell and some of his constituents filed suit in federal court against certain House members and officers.⁵⁷ Although the Court did not invoke the modern three-prong test for constitutional standing, it held both that (1) the Declaratory Judgment Act made it possible for the federal courts to fashion appropriate and effective relief,⁵⁸ and (2) the political-question doctrine did not preclude judicial intervention.⁵⁹ It found the House’s failure to pay Powell’s salary for a congressional session a sufficient basis for standing.⁶⁰

The 1987 case *Raines v. Byrd*⁶¹ is the Court’s most recent foray into the question of congressional standing. Unlike in *Coleman* or *Powell*, the Court in *Raines* found that there was no standing.⁶² Perhaps even more importantly, the *Raines* Court saw fit to suggest that the holdings in *Coleman* and *Powell* should be read narrowly.⁶³

validity of the Kansas ratification under Article V.”). Compare *Ariz. State Legislature*, 135 S. Ct. at 2665 n.13 (maintaining that the decision in *Coleman* was rendered by a majority of Justices), with *id.* at 2696–97 (Scalia, J., dissenting) (arguing that the *Coleman* Court may have split 4–4 on the question of standing).

54. *Coleman*, 307 U.S. at 437–38.

55. *Id.* at 441. Professor John Harrison argues that the Court’s decision in *Coleman* is best read as recognizing legislative standing to call for the production of “a proper record of legislative action” that the plaintiffs allege would have shown the impropriety of the lieutenant governor’s purportedly tiebreaking vote. Harrison, *supra* note 53, at 6–7, 12–14 (quoting *Coleman*, 307 U.S. at 437); see *id.* at 7 (quoting *Coleman*, 307 U.S. at 438) (“That was the context in which Chief Justice Hughes said that the plaintiffs complained that their votes had been ‘held for naught.’”).

56. 395 U.S. 486, 489–90 (1969).

57. *Powell*, 395 U.S. at 493.

58. See *id.* at 517–18.

59. *Id.* at 549.

60. *Id.* at 493–94, 499–500.

61. 521 U.S. 811 (1997).

62. *Raines*, 521 U.S. at 821–22, 830.

63. *Id.* at 821–26.

Raines involved a constitutional challenge to the Line Item Veto Act by members of Congress.⁶⁴ That Act authorized the President “to ‘cancel’ certain spending and tax benefit measures” that were components of a bill he had signed into law.⁶⁵ Plaintiffs—members of the Senate and House who voted against the Act—sued two executive branch officials,⁶⁶ arguing that the Act unconstitutionally diluted their voting rights and altered the balance of power between the legislative and executive branches.⁶⁷

The *Raines* Court found that the plaintiffs did not have standing.⁶⁸ In so concluding, the Court read both *Powell* and *Coleman*—two cases in which the Court had recognized legislative standing—narrowly.⁶⁹ The Court read *Powell* as applying only when the claimed injury was personal to the plaintiffs themselves,⁷⁰ and it read *Coleman* as reaching, at most, claims of actual vote nullification, that is, settings in which an affirmative legislative vote is not given effect.⁷¹

The *Raines* Court highlighted three ways in which the alleged injury suffered by the plaintiffs there was not attached to the particular plaintiffs and thus not personal (unlike the injury suffered by *Powell*). First, the *Raines* Court observed that any injury suffered by the plaintiffs was also suffered by all the other members of Congress.⁷² Second, the Court elucidated that any injury was not temporally attached to the particular plaintiffs in *Raines*; rather, if a plaintiff retired from office, the injury, and the claim,

64. *Id.* at 814.

65. *Id.* (quoting Line Item Veto Act, Pub. L. No. 104-130, § 2(a), 110 Stat. 1200, 1200 (1996) (codified at 2 U.S.C. § 691(a)), *invalidated by* *Clinton v. New York*, 524 U.S. 417 (1998)). Specifically, the Line Item Veto Act provided:

[T]he President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit; if the President—
 (A) determines that such cancellation will—(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest; and
 (B) notifies the Congress of such cancellation by transmitting a special message . . . within five calendar days (excluding Sundays) after the enactment of the law [to which the cancellation applies].

2 U.S.C. § 691(a) (some indentations omitted).

66. The executive branch officials were the Secretary of the Treasury and the Director of the Office of Management and Budget. *Raines*, 521 U.S. at 814.

67. *See id.* at 816.

68. *Id.* at 830.

69. *Id.* at 821–26.

70. *Id.* at 820–21, 829.

71. *Id.* at 821–26.

72. *Id.* at 821 (“[The plaintiffs’] claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally.”).

would pass to his or her successor.⁷³ Third, the Court suggested that, to the extent the legislators had suffered a diminishment in power, that power really belonged to the legislators' constituents—and hence any injury was really suffered by them.⁷⁴

The *Raines* Court identified *Coleman* as “[t]he one case in which we have upheld standing for legislators . . . claiming an institutional injury.”⁷⁵ While noting that the alleged injury suffered by the plaintiffs in *Raines* was also institutional, *Coleman* was still of no avail. *Coleman*, the *Raines* Court explained, “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.”⁷⁶ In contrast, the votes of the plaintiffs in *Raines* “were given full effect”;⁷⁷ the plaintiffs “simply lost th[e] vote.”⁷⁸ The Court further contrasted the alleged vote nullification in *Coleman* with the Line Item Veto Act, which had “no effect” on the legislative process.⁷⁹ Going forward, “a majority of Senators and Congressmen [could] pass or reject appropriations bills,”⁸⁰ and could “vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act.”⁸¹

While this reading of *Coleman* provided a narrow reed on which members of Congress might rely for standing, the Court in a footnote suggested an openness to even narrower readings that would make *Coleman* unavailable in suits brought in federal court,⁸² and in suits brought by federal (as opposed to state) legislators.⁸³ On the other hand, the Court suggested that *Coleman*-like institutional standing could obtain—perhaps even on facts like

73. *Id.* (“If one of the [plaintiff] Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead.”).

74. *See id.* (“The claimed injury thus runs (in a sense) with the Member’s seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.”).

75. *Id.*

76. *Id.* at 823 (citation omitted).

77. *Id.* at 824.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.* at 824 n.8 (noting, without addressing, the argument that “*Coleman* has no applicability to a similar suit brought in federal court, since that decision depended on the fact that the Kansas Supreme Court ‘treated’ the senators’ interest in their votes ‘as a basis for entertaining and deciding the federal questions’” (quoting *Coleman v. Miller*, 307 U.S. 443, 446 (1939))).

83. *See id.* at 824–25 (noting, without addressing, the argument that “*Coleman* has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman*, and since any federalism concerns were eliminated by the Kansas Supreme Court’s decision to take jurisdiction over the case”).

those in *Raines*—when (unlike in *Raines* itself) a house of Congress supported (or at least did not oppose) such a lawsuit.⁸⁴ Finally, without commenting on whether these facts were relevant to its holding, the Court observed that its conclusion “neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).”⁸⁵

In its 2015 decision *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court returned to the issue of legislative standing.⁸⁶ There, the Arizona state legislature challenged redistricting maps for congressional and state legislative elections generated by an independent state commission; the legislature argued that the delegation of redistricting authority in the commission by statewide referendum violated the Constitution’s Elections Clause and federal statutory law.⁸⁷ The Court held that the reasoning of *Coleman* provided a basis for standing: the effect of the referendum would “ ‘completely nullif[y]’ any vote by the Legislature, now or ‘in the future,’ purporting to adopt a redistricting plan.”⁸⁸ The *Arizona State Legislature* Court distinguished *Raines*, explaining that, whereas standing was absent in *Raines* when “six *individual Members* of Congress” brought suit,⁸⁹ in the case now at bar, “[t]he Arizona Legislature . . . is an institutional plaintiff asserting an institutional injury, and it commenced [its] action after authorizing votes in both of its chambers.”⁹⁰

The Court took pains to explain that its recognition of legislative standing, and its validation of institutional imprimatur as a basis for distinguishing *Raines*, did not lead inexorably to the conclusion that Congress, as an institution, would have standing to sue the President. Rather, the Court quoted the critical dicta from *Raines* that many have read to limit congressional standing in explaining,

The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona’s initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court’s standing analysis, we have noted, has been “especially rigorous

84. *See id.* at 829 (“We attach some importance to the fact that [the legislators] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.”). Accepting the *Raines* Court’s dichotomy between personal and institutional injuries, this consideration seems not to apply to settings of *Powell*-like personal injury since there, the alleged injury will generally have been imposed by the house of Congress itself.

85. *Id.* The Court explained: “Whether the case would be different if any of these circumstances were different we need not now decide.” *Id.* at 829–30.

86. 135 S. Ct. 2652, 2663–66 (2015).

87. *Ariz. State Legislature*, 135 S. Ct. at 2658–59 (first citing U.S. CONST. art. I, § 4, cl. 1; then citing 2 U.S.C. § 2a(c) (2012)).

88. *Id.* at 2665 (quoting *Raines*, 521 U.S. at 823–24).

89. *Id.* at 2664.

90. *Id.*

when reaching the merits of the dispute would force [the Court] to decide whether an action by one of the other two branches of the Federal Government was unconstitutional.”⁹¹

* * *

The *Raines* opinion is problematic in several ways. Consider first the Court’s distinction between “personal” injuries—such as the injury alleged in the *Powell* case—and injuries that do not “single[] out” particular members of Congress “for specially unfavorable treatment.”⁹² While the *Raines* Court correctly reaffirmed the existence of standing in a case like *Powell*, its attempt to juxtapose *Powell* as a case of personal injury with *Raines* as a case of generalized injury is ambiguous, misleading, and stands in tension with other portions of the *Raines* opinion. To begin, the Court’s juxtaposition casts unnecessary doubt on the availability of standing when multiple members of Congress share the injury. To the extent that the Court was trying to draw on the accepted distinction in standing jurisprudence between personalized injuries (that support standing) and generalized grievances (that as a rule do not⁹³), the analogy is strained.⁹⁴ While citizen standing and taxpayer standing are generally unavailing on the ground that the injury is too impersonal and generalized,⁹⁵ there is no rule that a member of a class of similarly situated persons or entities (short of all citizens or taxpayers) can only sue if he or she suffers an injury distinct from others in the class. Thus, one voter in a racially gerrymandered district can challenge the district lines, even though other voters in the same district presumably could make identical allegations.⁹⁶ Moreover, the notion that an injury shared by multiple members of Congress is *less likely* to support standing seems to contradict the *Raines* Court’s assertion elsewhere that a lawsuit endorsed by an entire house of Congress would be *more likely* to have adequate standing.⁹⁷ After all, that a house of Congress has endorsed a lawsuit suggests that (at least) a majority of members share the alleged injury. Thus, the *Raines* opinion suggested both that the claim of a lone member of Congress is more likely to

91. *Id.* at 2665 n.12 (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)).

92. *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

93. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 755–56 (1984) (rejecting an “abstract stigmatic injury . . . [that] would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating”).

94. *See* Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 HARV. L. REV. 1741, 1747–49 (1999).

95. *But see* *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayer has standing to challenge a law that authorizes the federal government to spend money allegedly in violation of the Establishment Clause). *Flast*, however, has proven to be the exception to the rule. *See* *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 608–09 (2007) (Alito, J.) (plurality opinion) (holding *Flast* to its facts and concluding that there is no taxpayer standing to challenge spending by the executive branch on Establishment Clause grounds); *id.* at 618 (Scalia, J., concurring) (urging that *Flast* should be overruled).

96. *E.g.*, *United States v. Hays*, 515 U.S. 737, 744–45 (1995).

97. *See* *Raines*, 521 U.S. at 821, 829–30; *supra* note 84 and accompanying text.

have standing than a claim shared by multiple members, but also (contradictorily) that a claim shared by multiple members is more likely to have standing than a claim shared by fewer members.

A second problem with the *Raines* opinion is that it can be taken to suggest—albeit without clear justification—that standing requirements should be applied more stringently in cases raising interbranch disputes.⁹⁸ For one thing, the Court referred to the separation-of-powers underpinnings of Article III standing doctrine without specifying if that invocation bore special meaning because of the interbranch nature of the conflict before it.⁹⁹ The Court noted that “our 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.”¹⁰⁰ Also consonant with this targeted understanding of separation-of-powers concerns is the *Raines* Court’s discussion of the historical dearth of litigation over interbranch power disputes as a ground for rejecting standing in *Raines* itself.¹⁰¹ Indeed, a leading treatise on federal litigation practice sees *Raines* as “standing informed—and indeed virtually controlled—by political-question concerns.”¹⁰² Some lower courts have taken the *Raines* Court’s statement in just that way¹⁰³—as the Supreme Court seemed to in the *Arizona State Legislature* case¹⁰⁴—and the Justice Department has relied (to date unsuccessfully) on *Raines* to defend against

98. See, e.g., David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 220 (2001). Even prior to *Raines*, some commentators saw Supreme Court and D.C. Circuit precedent as having created a “separate doctrine of ‘congressional standing.’” Dessem, *supra* note 53, at 1–13; Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 71 (1992).

For discussion of the evolution of distinct standards for standing in various settings, and critique of the practice, see generally Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015).

99. *Raines*, 521 U.S. at 819–20; cf. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465–501 (2008) (detailing how the Court’s standing cases vindicate various formulations and aspects of the separation of powers).

100. *Raines*, 521 U.S. at 819–20. The Court proceeded to add:

In the light of this overriding and time-honored concern 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. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

Id. at 820 (footnote omitted).

101. See *id.* at 826–28.

102. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.11.2 (3d ed. 2008).

103. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 20–21 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (“*Raines* . . . require[s] us to merge our separation of powers and standing analyses.”). I discuss *Chenoweth* and *Campbell* below. See *infra* notes 141–142 and accompanying text.

104. See *supra* notes 86–91 and accompanying text.

enforcement of congressional subpoena power directed against the executive branch.¹⁰⁵

Yet the conclusion that separation-of-powers concerns are, by virtue of *Raines*, higher for interbranch disputes is far from clear. The Court's statement, that its standing inquiry is "especially rigorous" when facing an interbranch dispute, on its face refers broadly to cases in which the federal courts are asked to adjudicate the constitutionality of actions taken by one of the political branches.¹⁰⁶ Nothing in the statement refers specifically to cases involving a dispute *between* the two political branches. Indeed, the two cases the *Raines* Court cited in support of that proposition—*Bender v. Williamsport Area School District*¹⁰⁷ and *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*¹⁰⁸—involved not conflicts between the branches, but simply the question of whether acts of Congress were constitutional.

The Court's reliance on the historical dearth of interbranch litigation is also problematic. The Court inferred from the historical absence of interbranch litigation a shared belief over time that standing to bring such suits was not available.¹⁰⁹ Yet other factors reasonably explain the phenomenon. For one thing, the dearth of interbranch litigation could have been a function of a (relative) dearth of interbranch conflict, and the increase in such litigation a function of increased assertions of power by one branch to the alleged detriment of another.¹¹⁰

Moreover, a decision not to resort to judicial resolution of a conflict may be a function not of the shared belief over time that the courts lack the power to resolve the dispute, but rather a belief that the political costs of a lawsuit outweigh the benefits. Political costs may be associated with the very notion of invoking a court's jurisdiction to resolve an interbranch conflict. Professor Josh Chafetz argues that subjecting the determination of a branch's relative power to judicial review imprudently would concede that

105. See *supra* notes 6–7 and accompanying text.

106. *Raines*, 521 U.S. at 819–20.

107. 475 U.S. 534, 536–38, 542 (1986).

108. 454 U.S. 464, 468–69, 473–74 (1982).

109. The flaw in this reasoning is similar to flaws that courts and commentators point out in relying on an absence of a particular statement or sentiment in legislative history. See, e.g., *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (noting, in the context of rejecting such a legislative history argument, that, "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark"). I am grateful to Alexander Volokh for this point.

110. Cf. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2604 (2014) (Scalia, J., concurring in the judgment) (noting the increased assertion of executive power, in the form of reliance on recess appointments, during recent presidential administrations in response to a single Attorney General's legal opinion); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2322 n.21 (2006) (describing how several years of severely divided government has led to "a massive increase in executive power").

that branch's power is subservient to the judiciary (another branch of government).¹¹¹ This reluctance to submit to a judicial referee may be especially heightened for the President, and may explain why the Court could identify far more historic opportunities (not taken) for the President to sue Congress than for Congress to sue the President. The absence of congressional lawsuits may also be explained by Professor Aziz Huq's argument that one might reasonably expect federal judges to be predisposed toward the interests of the President, owing to both the President's appointment power and the judiciary's reliance on the executive to enforce its judgments.¹¹²

Also, a branch may find it costly to actually move forward with a lawsuit against a coordinate branch.¹¹³ Indeed, it took months after the House authorized filing a lawsuit against President Obama and his administration for the suit to be filed.¹¹⁴ The House had substantial problems retaining counsel,¹¹⁵ and political opponents of the House leadership used the machinations over the lawsuit as an argument (rightly or wrongly) that the suit would merely be a precursor to full-fledged impeachment proceedings, thus painting the House leadership as extreme.¹¹⁶

Moreover, whatever obstacles an individual lawmaker pondering a lawsuit faces, the difficulties surely multiply once lawmakers try to assemble a larger bloc of plaintiffs or institutional imprimatur—that is, the official approval of the congressional house in which they sit—to proceed. Convincing one legislator that the benefits of suit outweigh the costs may be difficult, but it will probably be more difficult still to convince more legislators of the same. Thus, if legislators historically had the impression that a suit against

111. See Chafetz, *supra* note 7, at 1152–53.

112. Professor Aziz Huq argues that federal judges will be inclined toward the President's interests both (1) because of the President's appointment powers, and (2) because the federal judiciary relies on the executive branch for enforcement of its orders. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 146 COLUM. L. REV. 1595, 1678–79 (2014).

113. Political costs for an individual legislator will be much lower. Indeed, an individual legislator might think that the gains he or she would gain from the “position taking” inherent in a lawsuit outweigh the costs. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 61–62 (2d ed. 1974) (describing the incentive of members of Congress to “position take”). I am grateful to Aziz Huq for this point. This intuition is consistent with the fact that, while there has been a dearth of lawsuits by Congress or houses of Congress against the executive branch, there have been lawsuits filed by smaller collections of individual lawmakers.

114. Indeed, had the House waited another six weeks, it is arguable that the authority to file suit would have expired along with the Congress that generated it. See *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (“[O]n January 3, 2009[,] . . . the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire.”).

115. Jacob Gershman, *Boehner v. Obama Lawsuit in Limbo After Another Law Firm Drops Out*, WALL ST. J.: LAW BLOG (Oct. 30, 2014, 11:47 AM), <http://blogs.wsj.com/law/2014/10/30/boehner-v-obama-lawsuit-in-limbo-after-another-law-firm-drops-out/>.

116. See, e.g., Alan Fram, *House Approves Lawsuit Against Obama, The Rundown*, PBS NEWSHOUR (July 30, 2014, 6:46 PM), <http://www.pbs.org/newshour/rundown/house-approves-lawsuit-obama/> (“In their latest appeal, House Democrats emailed a fundraising solicitation . . . saying, ‘Republicans have said this lawsuit has “opened the door” to impeachment.’”).

the President would more likely be successful if it were joined by numerous legislators—a point borne out by dicta (at the least) in *Raines* that the standing inquiry might have come out differently had the lawsuit there received institutional imprimatur¹¹⁷—then a historical absence of interbranch litigation becomes even easier to understand.

A third problem with the *Raines* opinion is that it erroneously, if implicitly, assumes that the only constitutional function of Congress is voting. As I discuss below, that ignores the important congressional role in gathering information in order to legislate effectively—a function that the Court itself has previously recognized.¹¹⁸ Moreover, even the Court's discussion of voting itself is stingy: the Court suggests that the casting of actual votes is the totality of congressional function, ignoring that the requirement that a vote in Congress be taken creates an important power in Congress, even if no actual vote is ever taken.¹¹⁹ Put another way, congressional prerogative to conduct votes is itself a congressional power.

C. *The Lower Courts and Congressional Standing*

For their part, the lower courts have sometimes been more receptive to, but have also greatly struggled with, issues of congressional standing. The issue has arisen (not surprisingly) most frequently before the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit has identified different bases for and limitations on congressional standing over time, varying its approach under common-law reasoning and as it has perceived Supreme Court precedent to require it.¹²⁰

Congressional standing first became a pressing issue before the court in the 1970s. Early on, the D.C. Circuit suggested that a member of Congress had standing to obtain a legal determination that would (if successful) “bear upon” the plaintiff's “duties” as a legislator.¹²¹ The court abandoned this basis for standing soon thereafter, however, citing a spate of Supreme Court decisions in the 1970s that refined the law of standing and rendered the “bear upon” standard legally obsolete.¹²²

117. See *supra* note 84 and accompanying text.

118. See *infra* notes 156–158 and accompanying text.

119. See *infra* notes 156–159 and accompanying text.

120. For a detailed survey of the D.C. Circuit case law, see Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209 (2001).

121. *Mitchell v. Laird*, 498 F.2d 611, 614 (D.C. Cir. 1973) (“If we, for the moment, assume that defendants’ actions in continuing the hostilities in Indo-China were or are beyond the authority conferred upon them by the Constitution, a declaration to that effect would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs’ quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation. In our view, these considerations are sufficient to give plaintiffs a standing to make their complaint.”).

122. See *Harrington v. Bush*, 553 F.2d 190, 207–09 (D.C. Cir. 1977).

In the meantime, the D.C. Circuit endorsed a narrower version of congressional standing. In 1974, the court in *Kennedy v. Sampson*¹²³ relied on *Coleman* to conclude that (1) the Senate had standing to allege that action by the President impaired its lawmaking function,¹²⁴ and (2) an individual senator enjoyed derivative standing based on the alleged resulting impairment of the effectiveness of his vote.¹²⁵

By 1981, the court confronted the confusion sewn by its existing approach to congressional standing—and, in particular, the notion that congressional plaintiffs ought to face no more hurdles than other plaintiffs—and the conflicting notion that “this court will not confer standing on a congressional plaintiff unless he is suffering an injury that his colleagues cannot redress.”¹²⁶ Deciding that separation-of-powers concerns were “best addressed independently” of the congressional standing issue,¹²⁷ the court of appeals decided to instead deploy the possibility of abstention under the court’s equitable discretion.¹²⁸ The court engrafted the abstention doctrine onto the existing standard for standing. Thus, even when standing would otherwise inhere, “[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator’s action.”¹²⁹

Panels of the court sometimes questioned the appropriateness of equitable discretion.¹³⁰ Additionally, Antonin Scalia and Robert Bork—then both judges on the court—leveled strong criticism against the practice of abstention based on equitable discretion, and more generally the court’s openness to the standing of members of Congress to raise challenges to executive

123. 511 F.2d 430 (D.C. Cir. 1974).

124. See *Kennedy*, 511 F.2d at 434. Indeed, the executive branch defendants conceded this point. *Id.* at 435.

125. See *id.* at 436 (noting that the plaintiff’s claim “is derivative, but . . . is nonetheless substantial”); *accord* *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (finding that individual Senators had standing to challenge the President’s decision to terminate a treaty without a vote of the Senate, reasoning that “[t]he President has thus [allegedly] nullified the right that each appellee Senator claims under the Constitution to be able to block the termination of this treaty by voting, in conjunction with one-third of his colleagues, against it”), *vacated on other grounds*, 444 U.S. 996 (1979).

126. See *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 877 (D.C. Cir. 1981) (“We believe that these two contradictory principles create unnecessary confusion when applied to suits brought by congressional plaintiffs.”).

127. *Id.* at 879.

128. *Id.* at 881. When a court abstains, it has the power to hear the case but chooses not to exercise that power. Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 525 (2012).

129. *Riegle*, 656 F.2d at 881.

130. E.g., *Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir. 1988) (concerns about the doctrine of equitable discretion “continue to trouble us”); *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561, 565 n.4 (D.C. Cir. 1987) (expressing doubt as to continuing viability of doctrine).

power at all.¹³¹ Nonetheless, the essential approach—asking whether a congressional plaintiff suffered an impairment of duties, and then, if so, whether the court nevertheless should exercise its equitable discretion and abstain—essentially persisted until the Supreme Court handed down its 1987 decision in *Raines*.

In the wake of *Raines*, the D.C. Circuit hedged as to whether its prior approach to congressional standing survived. In the 1999 case *Chenoweth v. Clinton*, members of Congress challenged the President's ability to set up a program by executive order (without a direct statutory basis).¹³² The court dismissed the action. The court specifically noted that “[a]pplying [pre-*Raines* circuit precedent], this court presumably would have found th[e] injury sufficient to satisfy the standing requirement; after *Raines*, however, we cannot.”¹³³ Yet, at the same time, the court went to the trouble of explaining that some portion of the circuit's pre-*Raines* precedent “may remain good law,” but that even under that remaining precedent the plaintiffs could not proceed with their case.¹³⁴ According to the panel, equitable discretion would have required the court to dismiss the case “[b]ecause the parties' dispute is . . . fully susceptible to political resolution.”¹³⁵ And, while narrower circuit precedent on standing—specifically the *Kennedy* case—

131. *Moore v. U.S. House of Reps.*, 733 F.2d 946, 957, 962 (D.C. Cir. 1984) (Scalia, J., concurring) (“[A] purely intragovernmental dispute . . . has no place in the law courts.”); *Barnes v. Kline*, 759 F.2d 21, 41, 61 (D.C. Cir. 1984) (Bork, J., dissenting) (“We ought to renounce outright the whole notion of congressional standing [where the dispute is between the Congress and the President].”), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

132. 181 F.3d 112, 112–13 (D.C. Cir. 1999) (discussing President Clinton's creation of the American Heritage Rivers Initiative by executive order after Congress failed to enact it legislatively).

133. *Chenoweth*, 181 F.3d at 116. Specifically, the plaintiffs in *Chenoweth* relied on the court of appeals's decision in *Moore v. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984). There, the court upheld the standing of the House of Representatives to challenge the origination of a revenue bill in the Senate, although it then proceeded to dismiss the case in its equitable discretion. *Id.* at 948. On the standing point, the court explained that the injury alleged in *Raines* “was only a minor variation on the injury asserted in *Moore*, where the beneficiary of the alleged change in the constitutional order was the Senate rather than the President. More to the point, it is exactly the position taken by the Representatives here.” *Chenoweth*, 181 F.3d at 116.

134. *Chenoweth*, 181 F.3d at 116–17.

135. *Id.* The court elucidated:

Whatever *Moore* gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion. It is uncontested that the Congress could terminate the AHRI were a sufficient number in each House so inclined. Because the parties' dispute is therefore fully susceptible to political resolution, we would, applying *Moore*, dismiss the complaint to avoid “meddl[ing] in the internal affairs of the legislative branch.” Applying *Raines*, we would reach the same conclusion. *Raines*, therefore, may not overrule *Moore* so much as require us to merge our separation of powers and standing analyses. In citing *Moore*, of course, the Representatives are not asking us to do that; instead, they would have us simply ignore half of that opinion.

Id. (alteration in original) (citation omitted) (quoting *Moore*, 733 F.2d at 956).

might fall within *Raines*'s vote-nullification basis for standing,¹³⁶ the plaintiffs

do not allege that the necessary majorities in the Congress voted to block the [executive branch program in question]. Unlike the plaintiffs in *Kennedy* and *Coleman*, therefore, they cannot claim their votes were effectively nullified by the machinations of the Executive. Consequently, even if *Kennedy* is still viable after *Raines*, it cannot bear the weight the Representatives would place on it.¹³⁷

Subsequent cases have taken *Raines* even further. In the 2000 case *Campbell v. Clinton*, the D.C. Circuit rejected allegations of vote nullification arising out of votes on conducting air strikes in the former Yugoslavia.¹³⁸ There, Congress had “voted down a declaration of war 427 to 2 and an ‘authorization’ of the air strikes [by a tie vote of] 213 to 213, but it also [had] voted against requiring the President to immediately end U.S. participation in the NATO operation and voted to fund that involvement.”¹³⁹ Plaintiffs, members of the House, “by specifically defeating the War Powers Resolution authorization by a tie vote and by defeating a declaration of war, sought to fit within the *Coleman* [vote nullification] exception to the *Raines* rule.”¹⁴⁰ The court of appeals rejected this argument, reaffirming that, since the plaintiffs had recourse to political relief, judicial relief would be unavailable (whether under *Raines* or under pre-*Raines* circuit precedent).¹⁴¹ The court noted that Congress remained free to pass a law forbidding the use of U.S. forces in Yugoslavia, to cut funding for undertaking, or to resort to impeachment “should a President act in disregard of Congress’ authority on these matters.”¹⁴²

* * *

Perhaps the greatest challenge for the lower courts—and the issue that has been subject to the most flux over the years—has been how to incorporate separation-of-powers concerns into the standing inquiry. The shifting approaches taken by the D.C. Circuit over the years reflect the difficulty this has posed. The D.C. Circuit’s position in the early 1970s flouted the Supreme Court’s then-evolving test for standing¹⁴³ by not calling for a congressional plaintiff to establish an injury in fact, and therefore also ignored

136. *Id.* (“As for *Kennedy*, it may survive as a peculiar application of the narrow rule announced in *Coleman v. Miller*.” (citation omitted)).

137. *Id.* at 117.

138. 203 F.3d 19, 23 (D.C. Cir. 2000).

139. *Campbell*, 203 F.3d at 20.

140. *Id.* at 22.

141. *See id.* at 21–23.

142. *Id.* at 23.

143. *See* Heather Elliott, *The Structure of Standing at 25: Introduction to the Symposium*, 65 ALA. L. REV. 269, 269 (2013) (“The injury-in-fact requirement had emerged by the early

standing's separation-of-powers underpinnings.¹⁴⁴ The D.C. Circuit soon constricted congressional standing in light of separation-of-powers concerns.¹⁴⁵

But when more recent Supreme Court precedent suggested that the D.C. Circuit approach was insufficiently mindful of separation of powers, the D.C. Circuit opted not to further constrain the scope of congressional standing. Rather, the court chose to deploy equitable discretion¹⁴⁶ to allow for the dismissal of cases (despite the existence of standing under the circuit's governing standard) based on *one particular* separation-of-powers concern. Specifically, equitable discretion would be invoked when legislators, through the access to the political process they enjoy by virtue of their status as legislators, could reasonably remedy the alleged injury. This innovation validated to some degree the notion that legislators should enjoy less access to the courts than average citizens.¹⁴⁷

Raines forced the D.C. Circuit again to reexamine its test for congressional standing. The court in *Chenoweth* read *Raines* to “require us to merge our separation of powers and standing analyses.”¹⁴⁸ In other words, going forward, the D.C. Circuit would include what had been the focus of equitable discretion—whether the legislative plaintiffs had political means to rectify their alleged injury at their disposal—as part of the core standing inquiry. In so doing, the court of appeals read *Raines* to call for a more stringent standing inquiry in cases of interbranch dispute. Indeed, other lower courts similarly have read *Raines* to call for a more rigorous standing inquiry in cases involving a dispute between branches of the federal government.¹⁴⁹

The D.C. Circuit narrowed congressional standing further still in *Campbell*. There, the court suggested that impeachment was a viable option for members of Congress to use as an avenue to remedy their injury,¹⁵⁰ or, in

1970s, as had aspects of the traceability and redressability requirements, but the Court did not state the test as a tripartite requirement until the 1980s.” (footnotes omitted)).

144. See *supra* notes 121–129 and accompanying text.

145. See *supra* notes 132–134 and accompanying text.

146. See *supra* notes 135–139 and accompanying text.

147. See *supra* text accompanying note 135.

148. *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999).

149. See, e.g., *Kerr v. Hickenlooper*, 744 F.3d 1156, 1168 (10th Cir. 2014) (“[B]ecause the present suit deals with the relationship between a state legislature and its citizenry, we are not presented with the separation-of-powers concerns that were present in *Raines*.”). But see *Baird v. Norton*, 266 F.3d 408, 412–13 (6th Cir. 2001) (noting, in dismissing lawsuit on standing grounds brought by lone state representative and lone federal representative, that, had the lawsuit been joined by other state representatives “whose total votes (and non-votes) would have been sufficient to defeat the necessary legislation, then this group of lawmakers . . . would have had standing as legislators based on vote nullification”).

150. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); see also *supra* text accompanying note 142.

other words, that the availability of impeachment might render plaintiff legislators' claims nonjusticiable.¹⁵¹ Since impeachment is technically always available (even if it politically almost never is), such a rule (at least if taken to an extreme) would render standing virtually unavailable for any claims by federal legislators.

At the end of the day, it is not clear that the particular separation-of-powers concern introduced initially via equitable discretion—and now “merged into” the D.C. Circuit’s actual standing analysis—even belongs as part of the standing inquiry. The issue of whether plaintiff legislators have an avenue to political relief for their injury seems more a part of the political-question doctrine than standing.¹⁵² Yet the political-question doctrine is quite distinct from core Article III standing.¹⁵³ Indeed, the political-question doctrine may render a case nonjusticiable for which standing otherwise exists under Article III.¹⁵⁴ That being the case, it seems that the D.C. Circuit errs in folding political question concerns into the core Article III standing inquiry.

II. THE FUNCTIONS OF CONGRESS

In this Part, I explore the various functions of Congress and its members. It is surely true that the foundational action that a member of Congress can take is to vote on pending legislation. But it is also true that casting votes is not the sum total of what Congress does. Undertaking legislation requires Congress to not only cast votes, but also to craft bills and conduct negotiations over their structure and content—both internally and externally with the executive branch. Moreover, in order to legislate effectively—and to gauge the need for new legislation and the effectiveness of existing legislation—it falls within Congress’s purview to gather information. Indeed, the Supreme Court has long recognized the importance of Congress as a gatherer of information.¹⁵⁵ Beyond that, confining one’s understanding of Congress’s role to actual voting masks the power that inures to Congress by virtue of the requirement that votes be taken in the first place. That power—which we refer to as “process bargaining power”—may manifest itself even when no vote is actually taken.

First, the restriction in *Raines* of institutional injury to cases that implicate voting (let alone the narrow context of actual vote nullification) erroneously presupposes that Congress’s only institutional role is to collect votes, and therefore that injury occurs only when voting is impaired. Consider the

151. See *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 88 (2014) (statement of Elizabeth Price Foley, Professor of Law, Florida International University, College of Law) (“[T]he *Campbell* majority believed that *any* legislative remedy—even impeachment—would foreclose legislator standing.”).

152. See *id.* at 23–25.

153. See *supra* text accompanying notes 39–46.

154. See *supra* note 47.

155. See *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

well-accepted constitutional role of Congress in conducting hearings. While the Constitution does not expressly identify this as a core congressional function,¹⁵⁶ the Court nonetheless has readily recognized that “[i]n actual legislative practice power to secure needed information by . . . means [of compelling testimony of witnesses before investigative committees] has long been treated as an attribute of the power to legislate.”¹⁵⁷ Indeed, “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”¹⁵⁸

Congress’s power to hold hearings and gather information is effectively a subset of its oversight power.¹⁵⁹ The practice dates back to the early days of the Republic.¹⁶⁰ More recent decades have seen it soundly ensconced in statutory law.¹⁶¹ Like the general power to hold hearings, overseeing the

156. *Id.* (“[T]here is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisably and effectively.”).

157. *Id.* The *McGrain* Court further elucidated that this power was recognized “in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.” *Id.*

158. *Id.* at 174.

159. See Craig Martin, *Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 *BROOK. L. REV.* 611, 681 (2011) (“In addition to passing legislation, the legislature in virtually all liberal democracies, whether parliamentary or presidential in structure, performs the core functions of representation, oversight, and control over government expenditure.”).

160. William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 *U. ILL. L. REV.* 781, 785–88 (documenting early experience); see also Gerald Gamm & Kenneth Shepsle, *Emergence of Legislative Institutions: Standing Committees in the House and Senate, 1810–1825*, 14 *LEGIS. STUD. Q.* 39, 43–57 (1989) (discussing how standing committees arose early in the Republic, helping Congress to obtain and process the large amounts of information it needed to enact legislation). See generally KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 105–50 (1991) (arguing that obtaining and organizing information, and not political parties and affiliations, motivate the creation and staffing of committees in Congress); CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975) (collecting episodes and documents from the country’s first 200 years).

161. See, e.g., GPRA Modernization Act of 2010, Pub. L. No. 111-352, § 2, 124 Stat. 3866, 3867 (2011) (codified as amended at 5 U.S.C. § 306(d)) (mandating that when developing or adjusting a strategic plan, agencies consult with Congress at least once every two years); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 118, 84 Stat. 1140, 1156 (codified as amended at 2 U.S.C. § 190d(a) (2012)) (authorizing House and Senate standing committees to “review and study, on a continuing basis, the application, administration, and execution” of laws in that committee’s subject area).

Congress also conducts information gathering through the auspices of the Government Accountability Office (GAO). Established in 1921, the GAO (originally called the General Accounting Office) is a government agency independent of the executive branch. See 31 U.S.C. § 702(a) (2012) & *hist. n.*; *The History of GAO - GAO’s Start*, U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/history/> (last visited Aug. 27, 2015). It is headed by the U.S. Comptroller General, who is appointed—from a list of at least three names generated by a bipartisan panel—by the President with the advice and consent of the Senate for a fifteen-year term. 31 U.S.C. §§ 702(b), 703(a)–(b) (2012). Statutes authorize the Comptroller General to report on, monitor, and audit executive agencies. *Id.* §§ 712, 713(a); *id.* § 717(b)(2)–(3).

executive improves Congress's ability to legislate effectively.¹⁶² It thus is not uncommon to see Congress enact legislation that directs the executive branch to provide information to Congress on some regular basis,¹⁶³ or to hold hearings at which executive branch officials testify or hearings in response to which the executive branch provides information—sometimes subject to congressional subpoenas.¹⁶⁴

Second, while the Court's framework in *Raines* did acknowledge voting as a central congressional function, its understanding of the importance of voting was far too limited. The Court recognized, properly, that Congress votes for bills which, on the President's signature (or an override of the President's veto), become law; and that a congressional vote against a bill prevents that bill from becoming law. At the same time, the Court failed to recognize how Congress's role in the constitutional lawmaking scheme is itself a pivotal congressional function.

The Constitution assigns Congress specific roles in the lawmaking process. Most prominent are the requirements for a bill to become a law: bicameralism (both houses of Congress vote for the bill) and presentment (the approved bill must be sent to the President for either signature or veto). The

For an overview of the law governing legislative oversight proceedings, see generally MORTON ROSENBERG, *INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY* (2003).

162. *E.g.*, Marshall, *supra* note 160, at 781 ("Congressional investigations of the President . . . inform Congress so that it may take appropriate legislative action."); *id.* at 782–83 ("[C]ongressional investigations provide access to the information that is necessary for Congress to fulfill its own duties. The executive branch . . . is the 'the repository of the country's most important information for public policy formulation,' and Congress's dependence upon the Executive to provide that information will only increase as social and economic issues become ever more complex." (quoting Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 739 (2002))).

To be sure, oversight reviews of the executive branch also may offer benefits that hearings in general may not: They "inform the public so that it may be aware of the workings of government," *id.* at 781–82, and "provide a check against corruption or abuse of power in the executive branch," *id.* at 782.

163. *See, e.g.*, 3 U.S.C. § 108(b) (2012) ("The President shall transmit a report to each House of the Congress for each fiscal year beginning on or after the effective date of this subsection which sets forth the purposes for which expenditures were made under this section for such fiscal year and the amount expended for each such purpose.").

164. *See, e.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

Conflict between the legislature and executive branch may erupt over a congressional subpoena even where the executive branch is not the target of the subpoena. In *United States v. American Telephone & Telegraph Co.*, 567 F.2d 121, 123 (D.C. Cir. 1977), a committee of the House of Representatives conducting an investigation subpoenaed documents from AT&T. Concerned that production of the documents would endanger national security, the executive branch sought an injunction precluding AT&T from complying with the subpoena. *Id.* at 122–24. The House of Representatives intervened; the actual conflict, then, was between the House and the executive branch. *Id.* The D.C. Circuit held that the interbranch nature of the dispute was justiciable. *Id.* at 126–27 ("The simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution.").

Supreme Court has explained that the “clear[] . . . prescription for legislative action” in the Constitution means that federal legislative power must be “exercised in accord with a single, finely wrought and exhaustively considered, procedure.”¹⁶⁵

While bicameralism is the norm for federal legislative function, some constitutional provisions for the exercise of legislative power do not involve bicameralism. For example, Senate approval alone is required for appointment of federal judges and officers.¹⁶⁶ Other provisions do not require presentment—for example, approval of a constitutional amendment entails approval by two-thirds of each house of Congress but no presidential involvement.¹⁶⁷ Still, the fact remains that these requirements, like the requirements for making a bill into a law, provide a “single” path for reaching the result in question. And each of these single paths provides for a particular, and mandatory, legislative role.

That Congress has a mandatory role in a path to a particular result clearly makes it important how Congress (or the relevant house of Congress, as the case may be) votes on a proposal properly before it. What is less obvious is that that mandatory role affects the process *even when no vote is taken*. That a particular congressional vote is a prerequisite under a path to a particular result means that the *other actors* empowered along that path should, if they act rationally, take into account the need for that vote in structuring their own strategies. The ability of a group of legislators to allow or prevent a result, based on how it votes, affords that group “process bargaining power.” That power may affect the proposal that comes before the house of Congress for a vote *before any vote is actually taken*. The mere threat of a vote casts a shadow that affects the very structure of the legal

165. *INS v. Chadha*, 462 U.S. 919, 951, 952–55, 959 (1983) (invoking the point in the course of invalidating legislation that attempted to create a “legislative veto” under which one house of Congress was authorized to invalidate a decision by the executive branch not to deport an alien); *see also* *Clinton v. City of New York*, 524 U.S. 417, 421, 439–40 (1998) (invoking the point in the context of invalidating the Line Item Veto Act).

166. U.S. CONST. art. II, § 2, cl. 2. Other examples include the Senate’s prerogative to approve (by a vote of two-thirds, and without a vote by the House) of treaties proposed by the President, *id.*; the House’s power (without the Senate) to initiate impeachments, *id.* art. I, § 2, cl. 5; and the Senate’s power (by a vote of two-thirds, and without the House) to try impeachments, *id.* art. I, § 3, cl. 6. For discussion, *see Chadha*, 462 U.S. at 955–56, 956 n.21 (noting that one also might choose to include as an exception to bicameralism and presentment each House’s prerogative to set its own rules to “determin[e] specified internal matters,” but also noting that “this ‘exception’ only empowers Congress to bind itself” (citing U.S. CONST. art. I, § 7, cls. 2, 3, § 5, cl. 2)).

167. U.S. CONST. art. V; *see also Chadha*, 462 U.S. at 955 n.21 (“An exception from the Presentment Clauses was ratified in *Hollingsworth v. Virginia*, 3 Dall. 378 (1798). There the Court held Presidential approval was unnecessary for a proposed constitutional amendment . . .”). An amendment can also proceed without any congressional approval on promulgation by a constitutional convention. The President has no role in this process either. U.S. CONST. art. V.

proposal that comes before Congress in the first place.¹⁶⁸ Put another way, if congressional passage were optional, the casting of votes would mean little as a core function; thus, the necessity of casting votes becomes a core function in and of itself. Congress exerts power even when a bill is voted down, or indeed even when no vote is ever taken.

Having now elucidated the various functions of Congress within the U.S. constitutional system, I turn in Part III to extracting valid bases for congressional standing from these functions.

III. DEFENDING THE FUNCTIONAL APPROACH TO CONGRESSIONAL STANDING

In the next Part, I describe various functional bases for congressional standing. But before I do that, I undertake here to defend a functional approach to congressional standing in the first place. I first defend the normative underpinnings of a functional approach. Then, I highlight the benefits that a functional approach to congressional standing offers.

168. Political science Professor Charles Cameron makes the point in the context of the President's power to veto legislation passed by Congress. CHARLES M. CAMERON, *VETO BARGAINING* 9–10 (2000). He asks, “[h]ow can a weapon that is hardly ever used shape the content of important legislation under frequently occurring circumstances?” *Id.* at 9. His response in pertinent part is that “Congress will anticipate vetoes and modify the content of legislation to head them off. The veto power will have shaped the content of legislation without actually being used.” *Id.*

To offer a relatively simple example involving only a single chamber of Congress, the President appoints federal officers and judges with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. Empirically, the Senate rejects only a small portion of the President's nominees. *E.g.*, Glen S. Krutz et al., *From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871, 874 (1998) (of 1,464 presidential nominations in dataset, only seventy-one—less than 5 percent—failed).

Yet theory predicts that “presidents must anticipate the preferences of the Senate in order to get their nominees confirmed.” David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & SC. ORG. 438, 439 (2004); *see also* Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1071–78 (1999) (noting, depending on the relevant ideological placement of the President's preferred position, the Senate majority's preferred position, and the current ideological median on the Supreme Court, that the President may, in filling a Supreme Court vacancy, be (1) able to move the Court median to his or her own preferred position, (2) able to move the Court median in the direction of his or her preferred position but subject to moderation by the Senate's ideology, or (3) unable to move the Court median at all).

Empirical evidence bears out the theoretical prediction that Senate power to confirm nominations affects the people the President chooses to nominate even if the Senate rarely rejects nominees. *See, e.g.*, Anthony Bertelli & Christian R. Grose, *The Lengthened Shadow of Another Institution? Ideal Point Estimates for the Executive Branch and Congress*, 55 AM. J. POL. SCI. 766, 771–72 (2011) (“The bulk of . . . cabinets [initially appointed by Presidents Clinton and George W. Bush] fell between the president and key congressional actors in ideological terms.”); Moraski & Shipan, *supra*, at 1078–92 (finding empirical evidence that the relative bargaining power of the President and Senate majority affected the ideology of nominees to the Supreme Court); Nixon, *supra*, at 451–54 (presenting evidence that the President considers the ideology of the Senate when nominating former members of Congress for positions that require Senate approval, but not when nominating them for positions that do not require Senate approval).

A. *The Normative Underpinnings of the Functional Approach to Congressional Standing*

There are three normative assumptions on which a functional approach to congressional standing implicitly rests. First, standing turns on whether a plaintiff has suffered an injury. Since the Constitution created Congress and its members, it is logical that an imposition on Congress's constitutionally designed function constitutes an injury.

Second, as intuition suggests, a functional approach to congressional standing is much more at home with a functionalist, rather than a formalist, understanding of separation of powers.¹⁶⁹ A formalist approach to standing argues in favor of having standing restrict judicial power to cases that to some degree at least meet the paradigm of common-law adjudication.¹⁷⁰ As I noted above (and as I and others have argued), Article III does not call for so narrow a view of standing.¹⁷¹ In contrast, a functional approach to congressional standing is consistent with a functionalist understanding of separation of powers. It allows for the vindication of the political branches' core functions in the courts.

Third, a functional approach to congressional standing rests on the notion that the various functions that the Constitution assigns to the branches of the federal government are, out of separation-of-powers and structural concerns, worthy of protection. It is for this reason that interference with a branch's core function might be seen as an "injury in fact" for standing purposes.

Some disagree with the idea that separation of powers requires that particular branches' claims to particular functions be vindicated. Perhaps most prominently, Dean Elizabeth Magill argues that separation of powers requires only that government power be diffuse across the branches, not that particular branches enjoy particular checks over other branches.¹⁷²

There are a few responses to this argument. One is that, doctrinally, the Court has not subscribed to this view.¹⁷³ That being the case, even if one might believe that one should not in theory find injury when a branch finds

169. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488–89 (1987) (contrasting "a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries)" and "a functional approach that stresses core function and relationship, and permits a good deal of flexibility when those attributes are not threatened"). See generally Linda D. Jellum, "Which Is to Be Master," *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 860–78 (2009).

170. See *supra* note 44 and accompanying text.

171. See *supra* note 44 and accompanying text.

172. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 654 (2001) (arguing that "the amount and character of . . . diffusion of state power should be more than sufficient to put to rest concerns about dangerous concentrations of power").

173. See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983).

interference with one of its core functions, the Constitution—at least as it has been interpreted—does indicate that there has been an injury.

A second response is that experience has proven Magill's thesis—that an inherent diffusion of power among the branches suffices to quell concerns over dangerous concentrations of power—to be in error or at least overstated. Professor Neal Katyal describes how severely divided government in recent years (and in particular the years since Magill advanced her thesis) have led to “a massive increase in executive power.”¹⁷⁴

A third response is that considerable political science literature suggests that changes to a branch's particular function and the division of power among the branches will have an effect—indeed, often a fairly predictable effect—on outcomes.¹⁷⁵ Thus, generic diffusion of powers does not ensure that the government will function according to the constitutional design; outcomes are endogenous to the particular allocation of powers among the branches. A functional approach to congressional standing recognizes this and allows the legislature to vindicate its ability to shape outcomes.

B. *The Benefits of the Functional Approach to Congressional Standing*

The previous Section discussed the normative underpinnings of the functional approach to congressional standing. In this Section, I highlight the benefits the judicial system, and our federal system of government, gain by turning to a functional approach in defining standing.

First, as discussed above, a functional approach to congressional standing views Congress's functions realistically.¹⁷⁶ In contrast, the *Raines* opinion was unnecessarily stingy in its understanding of congressional function.¹⁷⁷

Second, a functional approach to congressional standing is broadly consistent with existing standing doctrine. It relies on the traditional tripartite test for standing, and defines injury, appropriately, by reference to the functions that Congress is constitutionally invited to undertake.¹⁷⁸ To be sure, a functional approach is not entirely consistent with certain statements of dicta in the *Raines* opinion, and certain implications one can draw from them. It is, however, consistent with the essential holding in *Raines*: a small number of members of Congress ought not to have standing to challenge the delegation of power effected by majority vote of both houses.¹⁷⁹

Third, true to Supreme Court precedent—including *Raines*—the functional approach preserves and validates separation-of-powers values.¹⁸⁰

174. Katyal, *supra* note 110, at 2322 n.21 (“Time has not been kind to [Dean Magill's] claim.”).

175. See sources cited *supra* note 168.

176. See *supra* Section III.A.

177. See *supra* text accompanying notes 156–158.

178. See *supra* Part III.

179. See *supra* text accompanying notes 70–71.

180. To be fair, it adheres to those values more as they are understood through the lens (perhaps not surprisingly) of the functionalist theory, not the formalist theory, of separation of powers, in that a formalist approach to standing calls for the judiciary to involve itself in

Adopting a functional approach is not the only way to vindicate separation-of-powers values. For example, the D.C. Circuit's pre-*Raines* precedent set out to do so. But it did so atheoretically and haphazardly, through the use of equitable discretion;¹⁸¹ separation of powers was an afterthought. In contrast, the functional approach offers a solid theoretical grounding to protect separation-of-powers values.

Fourth, a functional approach validates a related value that is of great importance in our republican federal system: the ability of constituents to associate government actions with the elected officials responsible for those actions in order to foster electoral accountability. Changes in bargaining power between the branches may leave constituents with the misimpression that a branch is responsible for a legal regime that is not (at least entirely) of its crafting.¹⁸²

Fifth, a functional approach to congressional standing would not empower the legislature or executive branch to gain inordinate control over the federal courts' dockets. Professor Maxwell Stearns has identified as a benefit of standing doctrine that it protects against savvy litigants manipulating the courts' dockets to develop precedent selectively.¹⁸³ Yet this concern is unfounded. For one thing, the functional approach leaves robust constitutional

cases that take the form of common-law adjudication. See *supra* notes 169–171 and accompanying text.

181. See *supra* text accompanying notes 126–128.

182. Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (plurality opinion) ("Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."); New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

There are many criticisms of judicial decisionmaking with an eye toward sustaining political accountability. For the argument that officials of different governmental units might be able to explain to voters exactly where responsibility for a government action or program lies (or at least that courts systematically undervalue this possibility), see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1061–64 (1995), and Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1781 (2006). For the argument that accountability may not truly result when judicial intervention is extensive, see Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2112 (2005). For the argument that there are downsides to accountability, see, for example, Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185 (2014).

183. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1323 n.48 (1995) ("[C]ommentators have failed to identify the reason behind the general presumption against [ideological] litigation [that standing represents], namely that a contrary rule would enable ideological litigants to manipulate the critically important path of case presentation."); see also Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 66–105 (2010) [hereinafter Pushaw, *Accidental Plaintiffs*] (arguing that standing is best understood to limit court access to plaintiffs who have been injured because of chance events beyond their control); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 348–404 (1995) (marshalling historical evidence and case law to support point that standing doctrines prevent manipulation).

limitations on standing in place; the mere existence of a statute that purportedly authorizes a lawsuit is not sufficient to guarantee access to the courts.¹⁸⁴ For another, other than actions to compel the production of information,¹⁸⁵ actions by legislators against the executive would require the endorsement of a sizable number of legislative plaintiffs (if not official institutional imprimatur); thus, floodgates of litigation on the whim of a single legislator (or a few of them) would hardly be thrown open. And the notion of cases filed by single legislators to compel the production of information under a duly enacted statute hardly raises the specter of controlling dockets to produce valuable precedent. Further, as I have explained above, constructing larger coalitions of legislators who agree to proceed via lawsuit (as opposed to relying on more traditional political avenues) is likely to be difficult (and, even with a vote to proceed, a lawsuit nevertheless may face obstacles in moving forward).¹⁸⁶

Relatedly, the Supreme Court has long interpreted the Constitution as prohibiting federal courts from issuing advisory opinions to the political branches of the government,¹⁸⁷ and one might be concerned that too robust a doctrine of congressional standing might enable the political branches to wrest advisory opinions out of the judiciary. But if congressional standing requires the assent of a sizable number of lawmakers, obtaining an advisory opinion would call for the complicity of a large number of lawmakers.¹⁸⁸ Indeed, if lawmakers sought a *quick* advisory opinion on a bill that purported to shift power to the executive, then standing would require the joinder, and therefore the complicity, of a majority of lawmakers in a house—including at least some who themselves had voted for the bill, which might make the advisory nature of the request easier for a court to spot.¹⁸⁹ More

184. For example, the Line Item Veto Act addressed in *Raines* included a provision that on its face purported to allow individual members of Congress to file suit challenging the implementation of the Act. See *Raines v. Byrd*, 521 U.S. 811, 815–16 (1997). Despite this provision, the Court in *Raines* rejected standing on Article III grounds, and my proposal would reach the same result. *But see* Note, *supra* note 94, at 1758 (“[E]ven if it might be proper for the Court to consider separation of powers in determining whether to grant standing, the fact that the legislature specifically condoned congressional standing in this instance should have outweighed the Court’s reluctance to intervene.”).

185. See *infra* Section IV.A.

186. See *supra* notes 114–117 and accompanying text.

187. See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993).

188. Professor Pushaw argues that standing should be, and in practice generally is, limited to “‘accidental’ plaintiffs,” i.e., those whose federal rights are violated “fortuitously—that is, involuntarily as a result of a chance occurrence beyond [their] control, rather than as part of a calculated effort to manufacture a lawsuit.” Robert J. Pushaw, Jr., *Fortuity and the Article III “Case”*: A Critique of *Fletcher’s* The Structure of Standing, 65 ALA. L. REV. 289, 325 (2013) [hereinafter Pushaw, *Fortuity*]; see also *infra* note 238. Only if lawmakers intentionally enact a bill to test its constitutionality are they “part of a calculated effort to manufacture a lawsuit.” *Id.*

189. While not impossible, one might question why a legislator who voted in favor of a bill would soon thereafter challenge that very bill as effecting an unconstitutionally large shift of power to the executive.

generally, in the ordinary course, there is no more reason to think that Congress and the President would invent an interbranch conflict than to expect executive agencies to fabricate an intrabran­ch dispute, and yet the Court has been open to recognizing standing to adjudicate disputes between executive agencies.¹⁹⁰

Finally, a functional approach to congressional standing protects the political interests of states as well. In response to suggestions that the federal system insufficiently protects the interests of states (especially in the wake of popular election of senators), Professor Wechsler argues that the structure of federal elective offices continues to give the states effective voice.¹⁹¹ Each state elects two senators (regardless of population),¹⁹² each House member's constituency lies entirely within a state's boundaries,¹⁹³ and the President is elected by electors who also are elected on a state-by-state basis.¹⁹⁴ Since the President is the only federal official elected nationwide—and indeed with a constituency that crosses any state boundary—the bulk of state political protection is provided by Congress (and perhaps especially by the Senate).¹⁹⁵ It follows that an overly stingy view of congressional standing—such as that propounded by the *Raines* majority—undercuts the interests of the states. Especially given the Court's recognition that states are due "special solicitude" in the standing analysis when states themselves are the plaintiffs,¹⁹⁶ it is quite odd for another part of standing jurisprudence to reduce the interests of the states.

190. See *Mead*, *supra* note 43, at 1231–58 (detailing the history of such suits). For commentary supportive of broad standing for intrabran­ch disputes, see Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 898 (1991) ("[I]f an intragovernmental dispute has actually reached the courts, that very fact indicates that there is concrete adversity sufficient to satisfy article III and that the President is not in fact in control and capable of resolving the dispute"), and Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317, 324–52 (1990) (finding no constitutional barrier to EPA suits against other federal agencies). For a critique of the current approach to standing in intrabran­ch disputes that nevertheless approve of standing in some settings, see *Mead*, *supra* note 43, at 1258–78 (calling for standing when the plaintiff agency pursues a nonsovereign interest).

191. See Wechsler, *supra* note 28, at 546–60.

192. U.S. CONST. art. I, § 3, cl. 1. See generally Wechsler, *supra* note 28, at 546–48 (discussing the robust role of the Senate in protecting states' interests).

193. U.S. CONST. art. I, § 2. See generally Wechsler, *supra* note 28, at 551–52 (discussing the ramifications of having House districts lie entirely within states).

194. U.S. CONST. art. II, § 1. See generally Wechsler, *supra* note 28, at 552–56 (discussing the importance of having state-by-state voting of electors).

195. See Wechsler, *supra* note 28, at 558 ("It is in light of th[e] inherent tendency [of the government to preserve the domain of the states], reflected most importantly in Congress, that the governmental power distribution clauses of the Constitution gain their largest meaning as an instrument for the protection of the states. Those clauses, as is well known, have served far more to qualify or stop intrusive legislative measures in the Congress than to invalidate enacted legislation in the Supreme Court.")

196. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) ("[I]n protecting its quasi-sovereign interests, [a state] is entitled to special solicitude in our standing analysis.")

To be fair, congressional standing might not pave the way to results that Congress, or members of Congress, would prefer. Professor Huq suggests that courts' decisionmaking expertise is likely to be at low ebb in deciding interbranch disputes,¹⁹⁷ and further that federal judges may tend to be predisposed—owing both to the President's appointment powers and the reliance of the federal judiciary on the executive branch to attain enforcement of its orders—to ruling in favor of the President.¹⁹⁸ And Professor Chafetz argues that Congress risks weakening itself by resorting to judicial remedy, since it thus both concedes that it cannot obtain relief on its own and renders itself subservient to the judicial branch.¹⁹⁹

To the extent these points are valid, they are policy arguments against Congress (or members thereof) taking advantage of congressional standing and seeking help from the courts.²⁰⁰ They are not, however, reasons not to recognize congressional standing in the first place. Standing opens courthouse doors; it does not promise the relief that the plaintiff seeks on the merits.²⁰¹

IV. DEFINING THE CONTOURS OF CONGRESSIONAL STANDING

In this Part, I rely on the functions of Congress elucidated in Part II to extract functional bases for congressional standing. A functional theory of congressional standing would recognize standing in limited circumstances, such as when a majority of a house of Congress (or enough legislators to effect a particular outcome) challenged executive action that systematically and substantially diminished the majority's bargaining power. In this Part, I explore and give definition to the contours of congressional standing. In Sections IV.A and IV.B, I draw on the discussion in Part II to derive appropriate functional-based settings for congressional standing. In Section IV.A, I consider information-based congressional standing, and then, in Section IV.B, I turn to voting-based congressional standing. In Section IV.C, I explore several nonfunctional bases for congressional standing. Finally, in Section IV.D, I complete the discussion by observing how other limitations on standing—in particular, the political-question doctrine—would still apply under the standards for congressional standing that I set out.

A. *Information-Based Standing*

As detailed above, Congress's power to gather information in furtherance of its legislative agenda and activities is well established. It is a core

197. See Huq, *supra* note 112, at 1676.

198. See *id.* at 1678–79.

199. See *infra* note 206.

200. See *infra* note 206.

201. See Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 498 (2008) (“[T]he question of standing generally arises before the merits and generally does not prejudice any ultimate determination on the merits . . .”).

constitutional function.²⁰² The power to conduct investigations empowers Congress to “exercise its legislative function advisedly and effectively.”²⁰³ Thus, an impediment to Congress’s investigatory power and processes injures Congress’s ability to legislate effectively. Accordingly, it is clear that Congress suffers an injury when its investigative efforts are stymied.

While *Raines* could be read to question even the standing of Congress (or a duly authorized congressional committee) to subpoena private witnesses, it has—quite properly—never been invoked for that purpose. Courts have invoked *Raines*, on the other hand, to question the standing of a committee to compel the provision of testimony and information from executive branch actors.²⁰⁴ The reliance on *Raines* is more “at home” in the context of congressional standing to enforce a subpoena against the executive branch because *Raines* itself involved a conflict between members of Congress and the executive branch, and the *Raines* opinion highlights the relevance of that setting at certain points.²⁰⁵

Still, in the end, the notion that *Raines* somehow draws into question constitutional standing when a congressional committee enforces a subpoena against an executive branch actor, but not otherwise, is implausible.²⁰⁶ There is simply no reason to assess the injury suffered by the house of Congress any differently in the two settings. To the extent that one accepts an

202. See *supra* text accompanying notes 159–164.

203. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

204. See *supra* note 7 and accompanying text.

205. See *supra* notes 98–105 and accompanying text.

206. See Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 13–14 (D.D.C. 2013); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 67–70 (D.D.C. 2008), *appeal dismissed*, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009); RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 320–26 (1974) (arguing that courts should recognize standing when Congress seeks to enforce a subpoena against the executive branch, at least when suit is statutorily authorized); Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 574–75, 597–603 (2014) (discussing historical examples of the congressional subpoena power over the executive); see also Una Lee, Note, *Reinterpreting Raines: Legislator Standing to Enforce Congressional Subpoenas*, 98 GEO. L.J. 1165, 1184–92 (2010) (agreeing with the result, but not the reasoning, of *Miers*); cf. Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 616–31 (1991) (arguing that Congress ought not have the power to bring criminal contempt proceedings against the executive branch to enforce subpoenas against claims of executive privilege, but further suggesting that courts should enforce that limitation based on prudential and equitable concerns rather than Article III standing).

Professor Chafetz argues to the contrary that in *Miers* “all three branches . . . have acted improperly . . . so as to diminish Congress’s constitutional powers.” Chafetz, *supra* note 7, at 1093. Chafetz’s overarching point, however, can be taken as a policy argument—that Congress erred in selecting to seek judicial relief instead of simply relying on its own powers in the conflict with the executive branch. See *id.* at 1152–55 (“[T]he problem in *Miers* is that every actor *except Congress* is being institutionally supremacist.”). Seen in this light, it is not surprising that Chafetz notes that the three branches that have acted to diminish Congress’s powers “includ[e] . . . perhaps most significantly, Congress itself.” *Id.* at 1093; see also *id.* at 1155 (“The court, in sweeping aside the results of [attempts at negotiation between the legislative and executive branches], . . . projected an air of legitimacy at the expense of Congress. And Congress not only let the court do it; it *asked* the court to do it.”).

injury when a congressional investigation is impeded, one must reach the same conclusion when the target of the investigation lies in the executive branch. And, as discussed above, the *Raines* Court highlighting separation-of-powers in the standing inquiry was not meant to suggest that Congress can never challenge the executive. Indeed, it does not seem even to mean (as some lower courts have taken it²⁰⁷) that standing is more rigorous when there is an interbranch dispute.²⁰⁸

Standing should similarly be clear when Congress has called for divulgence of information not by subpoena but by statutory directive, and has authorized members of Congress to bring suit to enforce the statute. The Supreme Court has recognized the standing of individual citizens to pursue information when statutorily authorized.²⁰⁹ Further, it seems clear that an informational injury to a house of Congress, or its members, will be even more particularized than a similar injury to an ordinary citizen: if an ordinary citizen's right to vote can support an informational injury, then surely the same must be true for a member of Congress whose job it is to cast votes (in addition to drafting appropriate legislation and holding hearings).

Standing under such a statutory authorization should extend to members of Congress who constitute less than a majority of the house to which they belong—including individual members. An individual member of Congress will be unable to secure a subpoena on behalf of the house or a committee thereof. Thus, in the absence of a statutory disclosure mandate and authorization to pursue relief, a member of Congress lacks standing to compel disclosure from the executive, even though the member asserts her subjective belief that the information in question would enhance her legislative effectiveness.²¹⁰ When Congress has directed disclosure and authorized suit, however, it has effectively validated the notion that the information enhances legislative effectiveness, and thus validated an individual member's standing to pursue disclosure of that information.

B. *Voting-Based Standing*

1. *Vote Nullification*

We turn next to the voting side of the ledger. Suits by Congress (or members of Congress) that ground standing on injury to voting rights will

207. See *supra* note 149 and accompanying text.

208. See *supra* text accompanying notes 117–118.

209. See *FEC v. Akins*, 524 U.S. 11, 24–25 (1998) (“We conclude that . . . the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”); see also Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613, 637–53 (1999) (providing theoretical support for the conclusion of the Court in *Akins*).

210. See *Harrington v. Bush*, 553 F.2d 190, 212–13 (D.C. Cir. 1977) (rejecting standing based on congressman's “subjective” belief that information would improve his legislative effectiveness).

almost always name some executive branch actor or actors as the defendant and allege some sort of interference in legislative voting power by the executive branch—really a shift in the balance of power from the legislature.²¹¹

Raines affirmed that actual vote nullification generates an injury and thus can be a valid basis for standing.²¹² *Raines* contemplated that standing grounded in allegations of vote nullification will not exist when pursued by an individual lawmaker or a small group of lawmakers. Rather, standing turns on whether the action is joined by “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act.”²¹³ In other words, at a minimum, a suit should be joined by enough legislators that they could together defeat or enact the bill at issue in that chamber.²¹⁴ This avoids the unseemly possibility of having legislators who definitively lost the political battle relitigate the issue in a judicial forum.²¹⁵

Elsewhere, *Raines* suggests that a claim of standing is further bolstered when the entire house of Congress endorses the lawsuit.²¹⁶ But a moment’s reflection confirms that actual institutional imprimatur—that is, the effective endorsement of a suit by a majority of a congressional house—ought not to be required for standing to exist. After all, there are some matters for which the Constitution requires a supermajority,²¹⁷ and it would make little

211. It also is possible for one house of Congress (or members thereof) to sue the other house for shifting the intrabranch legislative balance of power (consider that the legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983), was problematic both because it increased Congress’s power at the expense of the President’s, *id.* at 944–48, and because it violated the constitutional requirement of bicameralism, *id.* at 948–51), or for a member of a house to allege that his or her own voting rights have been improperly curtailed, *see, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 814 (1997) (describing suit brought by members of Congress against the Secretary of the Treasury and the Director of the Office of Management and Budget); *Powell v. McCormack*, 395 U.S. 486 (1969).

212. I assume that the *Raines* Court’s suggestion that *Coleman* might not apply to federal legislators suing in federal court was mere dicta. *Raines*, 521 U.S. at 823. Certainly, from a functional standpoint vote nullification gives rise to an injury. *See id.* at 824 n.8.

213. *Id.* at 823.

214. I note a facial inconsistency between the idea that a larger group of legislators should have standing to sue when an individual legislator would not, and the argument I have advanced elsewhere—based on the “expected value” of an injury—that a lone member of a group should have standing to sue if the entire group would have standing. *See Nash, supra* note 39, at 1307. In the end, the difference here is that the individual legislator’s injury is not some fraction of the entire house’s injury; rather the house (or a large enough group of legislators) will have an institutional injury that the individual member cannot muster.

215. *See Raines*, 521 U.S. at 824 (“[Plaintiffs] have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote.”); *see also Huq, supra* note 112, at 1677.

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

217. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

sense to expect (let alone require²¹⁸) institutional imprimatur when, for example, forty Senators who voted against ratification of a treaty challenged the President's decision to nevertheless implement the treaty.²¹⁹

Can there be congressional injury beyond the setting of pure vote nullification (as described by the Court in *Raines*)?²²⁰ As I have discussed, it is a cabined view indeed that Congress's legislative role is limited to the actual casting and counting of votes. It follows that the potential for congressional injury ought to extend beyond the limited scope that *Raines* suggests—to settings in which the relative power of Congress is reduced vis-à-vis the

218. If institutional imprimatur from a majority of members of the relevant house were required to support a lawsuit joined by the “nay” voters in a failed supermajority vote, then a bare majority of house members who voted in favor of an action that failed to obtain a supermajority vote could withhold institutional imprimatur and thus deprive the prevailing “nay” voting bloc of standing.

219. See Note, *supra* note 94, at 1756–57; cf. *Goldwater v. Carter*, 444 U.S. 996 (1979) (challenge to presidential termination of ratified treaty without Senate consent, albeit brought by a small number of legislators).

My framework for standing produces outcomes similar to, but not coextensive with, the views of Professor Lawrence Dessem. Dessem would generally not allow standing for individual legislators, see Dessem, *supra* note 53, at 13–26, and finds institutional endorsement to be critical for successful standing, see *id.* at 26–30. I generally agree that individual legislators ought not to have standing, but find an exception when Congress provides a statutory basis for standing to pursue information from the executive branch. I also agree that institutional approval for suit will generally be required for standing, but also recognize that there are settings in which less than majority approval might suffice.

220. The work of Professor Tara Leigh Grove suggests that the answer to this question should be “no,” although on reflection one might think that the work does not reach this particular question. Together with Professor Neal Devins, Grove has argued that Congress has standing to enforce subpoenas, see Grove & Devins, *supra* note 206 (a point with which I agree, see *supra* note 206 and accompanying text), but does not have standing to enforce or defend statutes, see *id.* (a point with which I also agree, see *supra* Section IV.A). Along the way, Grove and Devins suggest that the congressional power to enforce subpoenas arises because of specific constitutional text that authorizes each chamber of Congress to “establish and enforce rules governing its internal proceedings.” Grove & Devins, *supra* note 206, at 577. This suggests that the authorization to enforce subpoenas is a limited exception to the otherwise absolute rule denying Congress the power (and concomitantly judicial standing) to enforce laws.

In subsequent, separate work, Grove further argues that the political branches should be held to standards for standing that exceed Article III: for the executive to have standing, Article II must provide a basis, and for Congress to have standing, Article I must provide a basis. See Grove, *Standing Outside of Article III*, *supra* note 33, at 1314. Grove then relies on her work with Devins to conclude that Congress lacks standing to defend federal statutes from constitutional attack. See *id.* at 1353–65.

In the end, it seems that these commentators are concerned with Congress's standing to represent the United States in court. There, I agree that that power extends to enforcing subpoenas and not defending laws against general attack. But when Congress asserts a loss of its bargaining power under the Constitution—or, for that matter, even vote nullification—it is not representing the interests of “the United States,” but rather asserting its own injury, much as any other litigant would. Even if one accepts Grove's suggestion that Congress needs to satisfy Article I to establish standing to represent the United States, it seems inappropriate to apply such a requirement when Congress appears instead on its own behalf.

executive branch,²²¹ or in which the relative power of one house of Congress to another is reduced.

Note that this understanding provides logical support for challenges to alleged vote nullification over longer time horizons. Consider that, under the *Raines* Court's stingy definition of vote nullification, a challenge that the President has nullified a duly enacted law would seem to require the very legislators who voted for the bill to join the suit, and that might be technically impossible if the alleged nullification occurred in the next (or a later) Congress and enough legislators who had voted for the bill had retired or left office. Note, moreover, that this would remain the case *even if the legislators who took their seats would have voted for the original bill*. (More generally, a member of Congress who voted for a bill that failed might still be injured by, and join a lawsuit to contest, the President's action in nevertheless implementing the failed bill as law; the member might have supported the content of the bill as a matter of policy yet be concerned about the dilution of congressional power the President's implementation of an unenacted bill might effect.) For the same reasons that underlie *Raines's* reaffirmance of *Coleman*, there similarly should be standing to recognize challenges to vote nullification over time.

2. Standing Based on Process-Bargaining Power Reduction

We turn now to settings in which congressional votes are not nullified, yet (in line with the discussion above in Part II) executive action is alleged to reduce the legislature's process-bargaining power.²²² As above in the vote-

221. Cf. *Clinton v. New York*, 524 U.S. 417, 449–50 (1998) (Kennedy, J., concurring) (“To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution’s structure requires a stability which transcends the convenience of the moment The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

222. Professor John Harrison argues that an executive branch failure to comply with, or implement, a law validly produced by Congress should give rise to no cognizable injury on the part of Congress (or any subset thereof). See Harrison, *supra* note 53. He explains that, “when Congress acts within its [constitutional] grants, the result is valid and binding law.” *Id.* at 6. But “compliance and implementation are distinct from validity.” *Id.* Indeed, Harrison, argues, “a private person can be said to violate a statute, and an executive officer can be said not to have carried it out properly, only because validity is independent of compliance and implementation.” *Id.* On this basis, he concludes that “failure of implementation by the executive does not impair the legislative power.” *Id.* Harrison elucidates: “If the legislative power is diminished when executive officials do not carry the law out, it is just as much diminished when private people violate it. Yet the Constitution does not allow federal legislators or houses of Congress to participate in enforcing private obligations.” *Id.* at 8–9.

Though not without weight, Harrison’s argument is ultimately unconvincing. Harrison assumes that the relevant harm to Congress when the executive branch does not implement or enforce a statute is the actual lack of implementation or enforcement. As I have explained, however, the relevant harm should be conceived instead as an interference with Congress’s core functions. Viewed in that light, the distinction between private violation of a statute and executive nonenforcement becomes clear: the private violation does not threaten Congress’s

nullification context, a prerequisite to congressional standing based on a reduction in legislative bargaining power should be that (at a minimum) the complaint is joined by enough legislators in at least one chamber of Congress that they could exercise the power alleged to be reduced. For example, a claim that the executive branch improperly withdrew from a duly ratified treaty without obtaining Senate assent should be joined, at a minimum, by enough Senators to have blocked the executive action were there a vote—that is, by one-third of Senators.²²³

Beyond that, the interaction of two factors—the scope of the threat to legislative bargaining power going forward, and the extent to which the executive action is unilateral—allows us to consider four paradigmatic settings for exercises of executive power that affect the bargaining power of Congress. They are set out graphically in Table 1.

TABLE 1.
DIFFERENT SETTINGS OF POWER SHIFTS FROM CONGRESS
TO THE EXECUTIVE

		Scope of shift in power	
		<u>Narrow shift in power</u>	<u>Broad shift in power</u>
Extent to which the executive action is unilateral	<u>Congress delegated power</u>	A: no standing	B: probably standing
	<u>Executive acted unilaterally</u>	C: probably no standing	D: standing

In setting A, Congress has formally delegated power to the executive branch, and the shift in power is relatively narrow. Here, one might think of an agency interpreting a statute under a delegated power but (it is alleged) overreaching in its interpretation. The power shift does not suggest a threat

functions and accordingly cannot provide standing for a lawsuit; in contrast, executive inaction (or, as the case may be) action might, and accordingly might be actionable.

I note that, while Harrison affords the *Coleman* case a narrow reading, *see id.* at 7, the reading he *does* give to *Coleman* accords with a functional approach to congressional standing. Professor Harrison argues that the Court’s decision in *Coleman* is best read as recognizing legislative standing to call for the production of “a proper record of legislative action.” *Id.* at 6 (quoting *Coleman v. Miller*, 307 U.S. 433, 437 (1939)). But that record was necessary to support the plaintiffs’ argument that “their votes had in fact defeated ratification by creating a tie that the Lieutenant Governor had no power to break.” *Id.* at 8 n.31. Putting that in the language of this Article, the Kansas state legislators sought the record to validate their argument that their core legislative functions had been undermined by the lieutenant governor’s action. *See id.* at 26 (“As Chief Justice Hughes pointed out in *Coleman*, the Court’s cases allow public officials as such to litigate on the basis of their official powers and responsibilities.”).

223. *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979).

to congressional power in the future: in addition to remaining free to withdraw the delegated power or to override the executive action, Congress still enjoys the right to vote on future delegations of power.²²⁴

In setting B, Congress has formally delegated power to the executive branch, and the shift in power is relatively broad. Here, one might think of the Line Item Veto Act, under which Congress tried to delegate a foundational increase in power to the executive.²²⁵ Such a shift poses much more of a threat (compared to setting A) to congressional power in the future: while Congress still remains free to withdraw the delegated power or to override particular executive actions under that power, the shift in power (while it persists) removes the initial prerogative to vote from Congress (with controlling effect) on particular issues that it had the power to vote on before.

In settings C and D, Congress has not formally delegated power to the executive branch; rather, the executive branch has acted unilaterally. In setting C, the shift in power is relatively narrow. Here, one might think of the President issuing an executive order in an area typically within the purview of the executive branch (that is, subject to regulation without express congressional authorization), such as executive branch organization.²²⁶ The power shift does not suggest a threat to congressional power in the future, insofar as the area was already one in which congressional input was not required. At the same time, the unilateral nature of the executive action makes the setting more problematic than setting A. Also falling within the

224. Another type of legislative–executive interaction that falls within this setting is what Professors David Barron and Todd Rakoff refer to as “little waiver.” David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 *COLUM. L. REV.* 265, 276–77 (2013). Barron and Rakoff consider Congress to have granted an agency a power of waiver when it confers on the agency “[t]he power to waive a *statutory* requirement.” *Id.* at 272. In turn, a *little* waiver is “the power to merely ‘modify’ or ‘tinker’ with a statute through the lifting of limited aspects of a requirement contained within it in order to handle an unusual application.” *Id.* at 277. Little waiver as thus defined is explicitly limited in scope, since it is “not . . . a power that is conferred in the expectation that the heart of the statutory framework . . . will be subject to administrative veto.” *Id.*

Since (1) little waiver thus contemplates an affirmative delegation of authority by Congress but at the same time (2) its exercise effects only a “little” shift in interbranch power, little waiver falls within the ambit of setting A.

225. See *supra* notes 64–65 and accompanying text.

Another legislative–executive interaction that would fall under setting B occurs when the legislature attempts to delegate authority to an agency that is so broad that it comes close to running afoul of—if it does not actually run afoul of—the nondelegation principle. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935); see also Barron & Rakoff, *supra* note 224, at 268 (“[T]he Line Item Veto Act . . . [is] big waiver’s very own *Schechter Poultry* . . .”).

226. See, e.g., *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) (dismissing congressional challenge to President Clinton’s power to set up the American Heritage Rivers Initiative by executive order). For further discussion, see *supra* notes 131–137 and accompanying text. But see PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905–1996*, at 18–20 (2d ed., rev. 1998) (describing the nineteenth-century view that executive reorganization was a legislative prerogative); Barry D. Karl, *Executive Reorganization and Presidential Power*, 1977 *SUP. CT. REV.* 1 (detailing congressional involvement in executive reorganizations).

ambit of setting C would be a signing statement by the President that expresses the executive branch's interpretation of a bill that the President signs into law,²²⁷ as well as an executive branch decision not to defend a statute on the ground that it is, in the executive branch's view, not constitutional.²²⁸

In setting D, the relatively broad shift in power accompanies the unilateral executive action. Here, one might think of the President issuing an executive order in an area typically *not* within his purview, for example, unilaterally amending a duly enacted statute.²²⁹ This setting is the most problematic of the four.

227. See, e.g., PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 201 (2002) ("Presidential signing statements . . . are announcements made by the president, usually prepared by the Justice Department, that . . . provide the president's interpretation of the language of the law, announce constitutional limits on the implementation of some of its provisions, or indicate directions to executive branch officials as to how to administer the new law in an acceptable manner."). While the statements are unilateral executive action, they generally do not pose a broad threat to congressional power, especially since they are based on good-faith beliefs on the part of the executive. As such, they ought not generally to give rise to congressional standing to challenge them. See Jason A. Derr, Comment, Raines, Raines, *Go Away: How Presidential Signing Statements and Senate Bill 3731 Should Lead to a New Doctrine of Legislative Standing*, 56 *CATH. U. L. REV.* 1237 (2007) (arguing against the viability of a bill that would have granted Congress institutional standing to challenge the legality of presidential signing statements). But see Ryan McManus, Note, *Sitting in Congress and Standing in Court: How Presidential Signing Statements Open the Door to Legislator Lawsuits*, 48 *B.C. L. REV.* 739 (2007) (arguing that, in general, signing statements do not effect vote nullification and therefore do not give rise to standing, but also arguing that signing statements that limit the flow of information to Congress should give rise to standing); James A. Turner, Comment, *The Post-Medellín Case for Legislative Standing*, 59 *AM. U. L. REV.* 731 (2010) (arguing that members of the Senate should have standing to challenge an executive determination that a duly ratified treaty is non-self-executing).

228. For example, the Court in *Windsor* approved of the executive branch's decision not to defend the constitutionality of the Defense of Marriage Act. *United States v. Windsor*, 133 S. Ct. 2675 (2013). The Court emphasized that "it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court." *Id.* at 2688. The Court also explained that "there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal," *id.* at 2689, and that "this case is not routine," *id.* Thus, it seems that the executive branch's occasional decision not to defend a statute based on a good-faith belief in the statute's unconstitutionality does not pose a threat of a significant shift in power away from the legislature. Thus, even though it is unilateral executive action, it ought not in general to give rise to congressional standing. Indeed, it would seem that executive action not to defend a statute on constitutional grounds should *not* give Congress standing to defend the statute against challenge by a private party. Grove & Devins, *supra* note 206, at 593–97, 623–30; see Grove, *supra* note 33, at 1353–65 (so concluding both normatively and because Article I provides additional standing requirement yet conveys no such power on Congress). *Contra* Gorod, *supra* note 12, at 1247–50. Again, however, the *Windsor* Court suggests that it might be more problematic—and therefore standing conceivably could inhere—were the executive to engage in the practice more broadly. See Bradford C. Mank, *Does United States v. Windsor (the DOMA Case) Open the Door to Congressional Standing Rights?*, 76 *U. PITT. L. REV.* 1, 60–62 (2014) (suggesting that *Windsor* leaves the door open to Congress's standing to defend the constitutionality of a federal statute when the executive branch does not do so).

229. This might rise to the level of actual vote nullification.

A more nuanced approach sees the two variables we have identified as continuous. Congressional involvement in the power delegation could range from full complicity to no involvement, without being dichotomous. For example, the executive branch enjoys discretion as to when to exercise its statutory enforcement powers; this arises because Congress legislates against a backdrop of executive prosecutorial discretion.²³⁰

Similarly, the nature of the power shift could range from minimal to broad. For example, while *Schechter Poultry* establishes an outer limit to Congress's freedom to delegate, subsequent case law has made clear that that limit is hardly constraining.²³¹ Translating the flimsiness of the nondelegation doctrine to the current setting, Congress can convey hefty power on the executive branch without effecting a fundamental threat to congressional bargaining power.²³²

230. For example, one might consider the executive branch's generally accepted discretion to exercise its enforcement powers as midway between legislative delegation and unilateral executive action. *See, e.g.,* *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982))). Discretionary enforcement power is not delegated expressly, yet it is also assumed that "Congress legislates against a background assumption of prosecutorial discretion." *Abuelhawa v. United States*, 556 U.S. 816, 823 n.3 (2009). Indeed, Professor Rachel Barkow describes how Congress affirmatively takes into account prosecutors' discretion to engage in plea bargaining by deliberately enacting criminal statutes with "inflated or mandatory punishments." Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 880 (2009).

That said, courts and commentators recognize that judicial relief remains available when prosecutorial discretion exceeds statutory and constitutional boundaries. *See, e.g.,* *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[A] prosecutor's discretion is 'subject to constitutional constraints.'" (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979))); *Nader v. Saxbe*, 497 F.2d 676, 679 n.19 (D.C. Cir. 1974) ("[T]he exercise of prosecutorial discretion . . . is subject to statutory and constitutional limits enforceable through judicial review."); *cf. Zachary S. Price, Enforcement Discretion and Executive Duty*, 67 *VAND. L. REV.* 671, 748–49 (2014) ("First, executive officials should not presume unbounded discretion to decline enforcement of statutes when the statutory context does not suggest that Congress anticipated such discretion. . . . Second, even in areas like criminal law, where substantial nonenforcement of statutes is inevitable, executive officials should understand their task as a matter of priority setting within the parameters of statutory policy, not one of crafting policy-based exceptions to statutory coverage."); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 *U. CHI. L. REV.* 653, 670 (1985) (noting in the context of agency inaction that "there is a distinction between exercising . . . discretion and refusing to carry out obligations that Congress has imposed on the executive"). It may be that, similarly, congressional standing could be available when the executive action constitutes prosecutorial decisions that consistently can be seen to undermine congressional statutes, and thus to pose a broader threat to congressional power.

231. *See, e.g.,* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 *GA. L. REV.* 117, 143–46 (2011) (detailing the decline of the nondelegation doctrine); Gary Lawson, *Delegation and Original Meaning*, 88 *VA. L. REV.* 327, 329 (2002) (noting that by 1989 the Supreme Court had declared the nondelegation doctrine effectively a "dead letter").

232. The same presumably would be true of what Barron and Rakoff term "big waivers" (but not the biggest waivers that go too far). *See* Barron & Rakoff, *supra* note 224, at 278 ("[M]any grants of big waiver authority . . . mirror big delegation."); *id.* at 310–34 (defending the legality of "big waivers").

A more comprehensive examination of these two factors helps to clarify how the framework articulated in Table 1 functions.

i. *Scope of the Shift in Power from the Legislature to the Executive Branch*

First, the alleged relative power shift toward the executive can be broad or limited. Whether a power shift is broad or narrow is determined not by reference to the scope of the particular act the executive branch has taken, but rather on the likely impact of the scope of the action—and the rationale underlying it—on the balance of power between the branches. Thus, for example, the exercise of the cancellation power assailed in *Raines v. Byrd* was narrow—any exercise of the power would affect only the actual spending and tax benefit measures subject to cancellation—but the effect of allowing such cancellations to go forward under the Line Item Veto Act as a general matter was potentially quite broad.²³³ On the other hand, the issuance of a regulation pursuant to statutory authority poses little threat to future exercises of legislative power.

One would expect allegations of broad shifts in power to be more likely to give rise to standing. The functional approach to congressional standing ties standing to the impact of the alleged action on the legislature's bargaining power. The broader the scope of the power shift effected by the executive action, the greater the diminishment of legislative bargaining power, and hence the more likely it becomes for Congress to have standing to challenge that executive action.

ii. *The Extent to Which the Executive Action Is Unilateral.*

Second, Congress (or a house of Congress) can lose relative power to the executive branch by virtue of legislation or unilateral executive action. As above, for example, the executive branch might issue a regulation under direct congressional authorization, or it might proceed by executive order without authorization from, and indeed in contradiction to, a statute.

Since Congress has the option of withdrawing authority it has granted, cases have suggested that congressional standing would be more likely when executive action is unilateral.²³⁴ On reflection, however, this distinction turns out to have less force than some have suggested. As an initial matter, consider that, if Congress must resort to impeachment before commencing a lawsuit (a view endorsed by the D.C. Circuit in the *Campbell* case²³⁵), virtually no shift of power to the executive is unilateral. Under such a view, the failure to resort to impeachment constitutes complicity in the power shift.

233. Cf. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (“Were we to recognize the authority claimed by EPA” to alter by regulation the threshold for triggering application of part of the Clean Air Act from the emission of 250 tons, to 100,000 tons, of pollutant annually, “we would deal a severe blow to the Constitution’s separation of powers”).

234. See *supra* text accompanying notes 135, 141.

235. See *supra* text accompanying notes 142, 150–151.

Yet, were that the case, Congress (or houses and members thereof) would be embarking on a fundamental constitutional showdown with the President,²³⁶ and one moreover that is not at all likely to be focused on the underlying policy dispute.²³⁷ While judicial intervention might not be the preferred means by which to resolve an interbranch dispute, still it seems infinitely preferable to the prospect of impeachment.

More generally (and even rejecting the extreme view that resort to impeachment is a prerequisite to congressional standing), the notion that the greater access that members of Congress (and by extension the houses themselves) enjoy to the political process should reduce the likelihood of congressional standing is at least somewhat questionable. One house of Congress alone cannot repeal a statute. And, even if majorities in *both* houses of Congress support repeal of a statutorily authorized shift of power to the executive, that is not enough to repeal if (as seems likely) the President vetoes it. In short, the prospects for repeal will in general be remote enough that it makes little sense to conclude that those prospects—as a constitutional matter—render congressional standing off the table. Were it otherwise, future Congresses might find themselves bound by majority decision of their predecessors.

Thus assertions that standing should be absent when congressional action theoretically may remove the injury are overstated. This said, if a self-inflicted injury²³⁸ is not fairly traceable to the defendant,²³⁹ the extent to

236. See, e.g., BERGER, *supra* note 206, at 305 (describing impeachment as “a last resort”); Eric A. POSNER & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 994 (2008) (describing impeachments as “the most dramatic constitutional showdowns”); see also BERGER, *supra* note 206, at 340–41 (“To avoid adjudication [of disputes between the legislative and executive branches] by resort to the leaky doctrine of ‘political questions’ is to throw Congress back on its own resources, among them impeachment of the President for encroachment on its prerogatives, for subversion of the Constitution.”); Posner & Vermeule, *supra*, at 1026–27 (lamenting the dearth of judicial precedent on legislative–executive disputes).

237. See Harrison, *supra* note 53, at 9 (“Impeachment . . . has never been a serious instrument by which the houses of Congress influence executive policy.”).

238. That the injury is in some sense self inflicted raises the specter of Professor Robert Pushaw’s argument that standing should be, and in practice generally is, limited to “‘accidental’ plaintiffs.” See Pushaw, *Fortuity*, *supra* note 188, at 324–47; Pushaw, *Accidental Plaintiffs*, *supra* note 183, at 66–105 (arguing that standing is best understood to limit court access to plaintiffs who have been injured because of chance events beyond their control). One might hesitate to classify an affirmative decision by lawmakers to confer power on the executive branch as fortuitous.

At the same time, if lawmakers *in good faith* believe that a bill would not permanently shift power away from the legislative branch—that is, not for the purpose of generating an advisory opinion—then one might say that the institution’s ongoing injury is in some sense fortuitous. Still, again at the margins, this factor might have limited influence in the standing calculus.

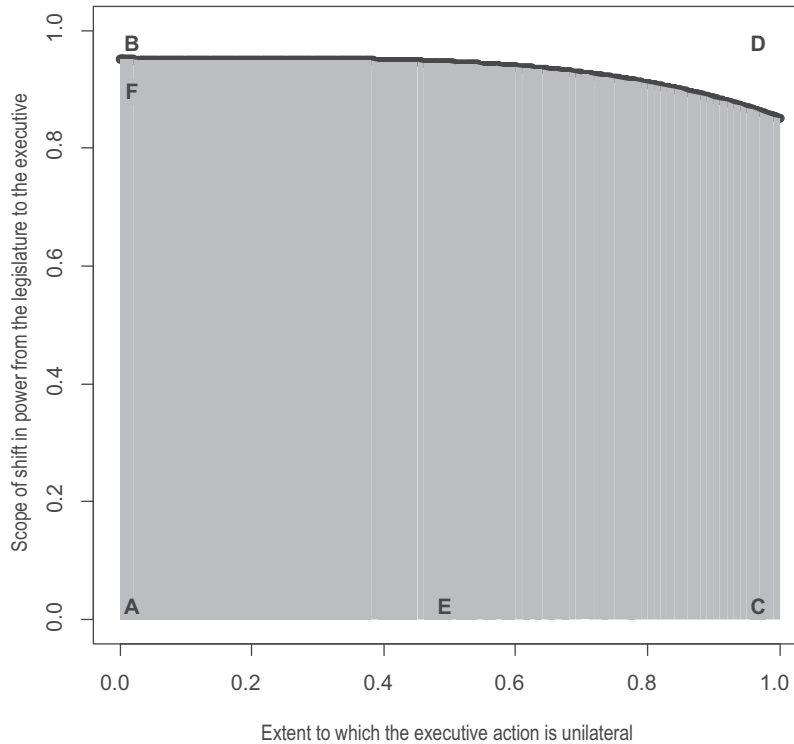
239. Cf. Leading Cases, *Constitutional Law: Constitutional Structure*, 111 HARV. L. REV. 207, 226–27 (1997) (“[T]he injuries alleged [in *Raines*] were not fairly traceable to the actions of the named defendants. . . . Rather, those alleged injuries were caused by legislators who enacted the Line Item Veto Act” (footnote omitted)).

which executive action is unilateral logically might make a difference at the margins.

Comprehending both the extent to which executive action is unilateral and the scope of the reduction in congressional bargaining power as continuous variables allows us to construct a two-dimensional representation of different types of executive action. This is reflected in Figure 1, where the x-axis represents the extent to which executive action is unilateral, and the y-axis represents the reduction of bargaining power (both normalized to run from 0 to 1 (or, equivalently, 0% to 100%)). The curve represents a likely boundary between settings in which congressional standing exists and does not exist; the shaded area beneath the curve corresponds to settings in which congressional standing does not exist.

FIGURE 1.

Graph of viability of standing as a function of the extent to which the executive action is unilateral, and the breadth of the shift in power from the legislature to the executive (shaded area corresponds to settings where standing is likely *not* viable).



The points identified as A, B, C, and D correspond to the settings described in Table 1. And, consistent with the discussion above, points A and C lie within the shaded area, while points B and D do not. Point E corresponds to a setting in which the executive branch has acted pursuant to an

implicit grant of prosecutorial discretion—so that the executive action is neither purely unilateral nor entirely joint—and the scope of the action has little impact on the balance of power; there is no standing for a congressional challenge. Finally, point F corresponds to a setting in which the executive branch has acted pursuant to a congressional delegation that, while broad, has more constraint than the grant invalidated in *Schechter Poultry* did.

More generally, the frontier curve for congressional standing reflects the notion that standing will be the exception rather than the rule.²⁴⁰ It also adheres to the notion that larger shifts in power away from the legislature are more likely to translate into viable standing. Finally, the boundary curve is true to the notion that legislative complicity in the power shift will not have a large impact on the viability of standing. Still, the curve increasingly slopes downward (albeit only a little) as congressional complicity gets very small, reflecting that very low levels of congressional involvement can reduce the scope of the power shift (slightly) to accommodate standing.

C. *Standing for Members of Congress Beyond Functional-Based Congressional Standing*

The bases for congressional standing arising out of congressional functions define only bases for standing that are institutional—or, in the words of the *Raines* case, “run with” congressional seats.²⁴¹ As such, they supplement, and are in addition to, bases for standing that are not institutional in nature. Thus, for example, the excluded congressman in *Powell v. McCormack* suffered an injury that, in *Raines*’s terms, was personal and did not run with his seat.²⁴² Congressional standing was properly found to exist, though it would not fall within the rubric of *function-based* congressional standing.

Further, congressional standing exists because the party is a member, a group of members, or a house of Congress. Sometimes a party may happen to fit that description and enjoy standing, but not by virtue of the party’s legislative status; in such cases, the standing that inheres is not congressional standing. For example, a member of Congress likely has standing to challenge the constitutionality of a campaign-finance restriction, but that is because he is a candidate, not because he is a current officeholder.²⁴³ The injury is to the member’s ability to campaign for office, not to her ability to function while in office.

240. This narrow scope of my proposal for congressional standing contrasts with proposals by other commentators for quite minimal requirements for standing for voters, let alone legislators. See, e.g., Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 26–27, 49–50 (2001) (arguing for a standard for voter standing that would mirror the standard for shareholder standing against corporations).

241. See *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

242. See *supra* notes 92–94 and accompanying text.

243. See, e.g., *Shays v. FEC*, 414 F.2d 76, 82 (D.C. Cir. 2005) (upholding standing of congressmen who sponsored federal campaign legislation to challenge FEC’s implementation of that legislation “not based on their sponsorship of the legislation, but rather as candidates waging reelection contests governed by [the legislation]”).

D. *The Interplay Between Constitutional Congressional Standing and Other Standing Doctrines*

None of the foregoing is to say that the federal courts are under an absolute obligation to hear disputes between the legislative and executive branches. Even when there is core constitutional standing, other doctrines may counsel against allowing a case to proceed in federal court.

First, the political-question doctrine may sometimes provide a basis for federal courts to decline to hear interbranch controversies based on separation-of-powers concerns. The doctrine has application, for example, where the Constitution commits resolution of the question at issue to the political branches.²⁴⁴ The point remains, however, that—to whatever extent the political-question doctrine might apply to preclude standing—the application of the political-question doctrine in no way draws into doubt core Article III standing.²⁴⁵

Another factor that might, consistent with the account of Article III congressional standing I outlined above, figure into the prudential standing calculus is whether one can readily imagine a private plaintiff who could raise a similar challenge.²⁴⁶ The Court in *Raines* identified the availability of a private plaintiff as potentially relevant to the standing calculus,²⁴⁷ but did not specify whether the issue was constitutional or prudential. On reflection, however, the availability should not be seen to affect constitutional standing. Just as “[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing,”²⁴⁸ the availability of

244. *Powell v. McCormack*, 395 U.S. 486, 518–19 (1969). Compare, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002–04 (1979) (Rehnquist, J., concurring) (arguing that *Coleman* compelled the conclusion that the question whether the Senate must vote on abrogating a treaty was a nonjusticiable political question, and indeed that “the justifications for concluding that the question here is political in nature are even more compelling than in *Coleman* because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked”), *with id.* at 998–1002 (Powell, J., concurring) (arguing that the political-question doctrine was inapplicable), *and id.* at 1006–07 (Brennan, J., dissenting) (agreeing on that point with Justice Powell).

245. See *supra* notes 58–59 and accompanying text; see also *Goldwater*, 444 U.S. at 1006 (Blackmun, J., dissenting in part) (“It is . . . indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness.” (emphasis added)).

246. This suggests that private plaintiffs should in some sense displace institutional ones. At odds with this idea, Professor Huq argues that, if the choice is between individual plaintiffs and institutional plaintiffs (such as states and political branches), institutional plaintiffs may be better positioned to advance structural constitutional claims. See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1510–13 (2013); see also *id.* at 1469–89 (detailing doctrinal problems with standing likely to arise when individuals pursue structural constitutional claims).

247. See *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (“[O]ur conclusion [does not] . . . foreclose[] the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if [that fact] were different we need not now decide.”).

248. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1154 (2013) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

other plaintiffs who could file suit should not furnish a reason to deny standing.

That said, there might be reasons to deny standing on prudential grounds when a private plaintiff can reasonably be expected to file suit raising a similar challenge to that advanced by congressional plaintiffs.²⁴⁹ As Justice Souter explained in his concurrence in *Raines*, “the certainty of a plaintiff who obviously would have standing to bring a suit to court after the politics had at least subsided from a full boil is a good reason to resolve doubts about standing against the plaintiff invoking an official interest.”²⁵⁰

A final factor that reasonably might enter into the prudential standing calculus is whether the legislative plaintiffs had sought reasonable self-help. I have argued above the requirement that legislators seek impeachment is too extreme.²⁵¹ One could imagine, however, a more limited “exhaustion of legislative remedies” requirement that at least called on legislative plaintiffs to try to introduce bills that might (if they were enacted) reverse the action of which the plaintiffs complain.²⁵²

CONCLUSION

This Article has argued that determinations of congressional standing should consider the functions that Congress and its members fulfill. Beyond the Court’s narrow construction of congressional function in *Raines*, Congress gathers information, and therefore should have standing to vindicate that information-gathering function. Moreover, the requirement that Congress vote on bills empowers Congress to shape the law even if no actual congressional vote on a proposal takes place; standing should be wide enough to ensure that that bargaining power is not permanently diluted.

A functionalist approach is broadly consistent with existing standing doctrine and the purposes underlying standing. It would not unduly open

249. And, indeed, Professor Huq suggests this will generally be the case. See Huq, *supra* note 112, at 1677.

250. *Raines*, 521 U.S. at 835 (Souter, J., concurring).

At the same time, it is not free from doubt that a suit brought by a private plaintiff will be preferable to a congressional lawsuit. See Note, *supra* note 94, at 1754 (“[A]llowing congressmen, as opposed to private litigants, to sue to protect their legislative prerogatives would improve the quality of adjudication by ensuring that the litigants have a true ‘personal stake’ in the proceedings. Typically, congressmen who seek access to federal courts for separation of powers disputes are better informed of the relevant legal and factual issues and have a more immediate stake in the outcome of the case than most private citizens.” (footnotes omitted)).

251. See *supra* text following note 151.

252. Of course, if the bill actually became law, then any lawsuit would become moot. Thus, a lawsuit presumably would proceed only if the bill did *not* become law.

Presumably as well, there would be no requirement for legislators to continue to submit successive bills on generic promises from opponents that some more limited form of the bill might move forward (or not be vetoed). Cf. *Palazzolo v. Rhode Island*, 533 U.S. 606, 624–26 (2001) (finding no requirement under takings jurisprudence that landowner file repeated petitions with a zoning agency when the agency has made clear that such petitions would be futile).

the floodgates of litigation or invite the federal courts to render advisory opinions. Finally, prudential considerations would continue to serve as gatekeepers to ensure that too many political questions do not migrate to the judicial branch for resolution.

