

## LEGISLATIVE EXHAUSTION

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### ABSTRACT

*Legislative lawsuits are a recurring by-product of divided government. Yet the Supreme Court has never definitively resolved whether Congress may sue the executive branch over its execution of the law. Some scholars argue that Congress should be able to establish Article III standing when its interests are harmed by executive action or inaction just like private parties. Others, including most prominently the late Justice Antonin Scalia, argue that intergovernmental disputes do not constitute Article III “cases” or “controversies” at all. Rather, the Framers envisioned the political branches resolving their differences through nonjudicial means.*

*This Article proposes a different approach to congressional lawsuits loosely derived from Justice Ruth Bader Ginsburg’s majority opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission* and the “equitable discretion” doctrine once utilized in the D.C. Circuit. Under what this Article terms the “Legislative Exhaustion” principle, Congress would be barred from federal court whenever it has nonjudicial means to obtain the remedy it seeks against the Executive. Conversely, when Congress has no way to directly overrule the Executive, such as when the Executive refuses to enforce a law based on constitutional objections, federal courts*

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*could resolve the constitutional dispute. Not only is such an exhaustion principle consistent with prudential doctrines, preserving judicial resources for cases that demand adjudication, but it also encourages the most important normative benefit the Framers hoped to achieve from interbranch disputes—namely, enhanced legislative deliberation concerning the merits of government policy. Thus, there is no single answer to whether Congress may sue the Executive. Rather, it depends on the nature of the claim and the nonjudicial remedies available to Congress.*

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## INTRODUCTION

May Congress sue the executive branch over its execution of the law? This thorny question has long bedeviled scholars and courts. Much of the debate has revolved around whether Congress can establish Article III standing when the Executive acts in a way that Congress claims violates the Constitution or is contrary to federal law, including executive choices not to enforce the law, either categorically or in specific cases.<sup>1</sup> Some argue that Congress may avail itself of the federal courts when its interests are harmed just like private parties.<sup>2</sup> Others, including most prominently the late Justice Antonin Scalia, have argued that intergovernmental disputes do not constitute Article III “cases” or “controversies” at all and that the

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1. See, e.g., Suzanne B. Goldberg, Essay, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 173 (2013) (“Congress may not have a cognizable Article III interest in defending a challenged law, given that it lacks the power to enforce that law.”); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1247-54 (2012) (arguing that Congress or outside counsel should have standing to defend laws in the absence of the Executive); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 578, 582 (2012) (arguing that Congress should have standing to defend federal laws when the Executive declines to do so and to seek declaratory judgments when the Executive declines to enforce the law); Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1355 (2014) (doubting whether “Congress would have standing to assert an ‘institutional injury’ arising out of the invalidation of a federal statute”); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 343 (2015) (advancing a theory of congressional standing based on injuries to Congress’s functions). But see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 143-46 (2010) (proposing a “Supreme Executive Tribunal” to hear congressional suits challenging presidential actions without establishing the traditional elements of standing); Grove, *supra*, at 1314 (looking to Article I and Article II rather than Article III for the source of Congress’s authority to step into court); Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 573 (2014) (arguing that structural constitutional principles preclude congressional standing to defend federal laws but not to enforce subpoenas or other internal rules); John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & POL. 103, 105 (2015) (arguing that “judicial power, cases and controversies, and judicial role [are] a distraction from the real issues” involved in interbranch disputes).

2. See, e.g., Gorod, *supra* note 1, at 1249 & n.214 (suggesting that Congress is institutionally injured when the Executive does not defend a law); Greene, *supra* note 1, at 588 (arguing that Congress is injured when the Executive does not enforce the law); Nash, *supra* note 1, at 373-79 (advocating for congressional standing in circumstances in which the executive branch nullifies congressional votes, withholds information, or threatens permanent and substantial injury to congressional bargaining power).

Framers envisioned the political branches resolving their differences through nonjudicial means.<sup>3</sup> Meanwhile, the federal courts are once again faced with the question in a lawsuit brought by the House of Representatives over the implementation of the Affordable Care Act.<sup>4</sup>

Enter Justice Ruth Bader Ginsburg's majority opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*Arizona v. Arizona*), issued on the last day of the 2014-2015 Term.<sup>5</sup> The case required the Court to decide whether the Arizona State Legislature had standing to sue an independent state agency that the voters of Arizona created using a ballot initiative.<sup>6</sup> In resolving this question, the Court asked whether the legislature had any nonjudicial means of regaining its redistricting authority.<sup>7</sup> Because

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3. See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2694 (2015) (Scalia, J., dissenting) ("Disputes between governmental branches or departments regarding the allocation of political power do not in my view constitute 'cases' or 'controversies' committed to our resolution by Art. III, § 2, of the Constitution."); *United States v. Windsor*, 133 S. Ct. 2675, 2702 (2013) (Scalia, J., dissenting) ("The matter ... ought to be left[] to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written."); *id.* at 2704 (arguing that "the impairment of a branch's powers alone" has never "conferred standing to commence litigation"); *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse."); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 263-65 (1980) (arguing that courts should abstain from adjudicating disputes between the political branches over their respective powers); Harrison, *supra* note 1, at 105 ("Executive failure properly to carry out the law does not harm the legislative power as such, because legislative power is fully effective when it issues a valid law, and executive default does not impair validity."). Professors Grove and Devins similarly look beyond Article III to understand these types of lawsuits. See Grove & Devins, *supra* note 1, at 627.

4. See Complaint at 4, *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 14-cv-01967(RMC)) ("The House now brings this civil action for declaratory and injunctive relief to halt these unconstitutional and unlawful actions which usurp the House's Article I legislative powers."). As this Article went to press, the House moved to hold briefing on the appeal in the case in abeyance until February 21, 2017, in light of the election of Donald J. Trump and the approach of unified government under Republican control. Appellee's Motion to Hold Briefing in Abeyance or, in the Alternative, to Extend the Briefing Schedule, *U.S. House of Representatives v. Burwell*, No. 16-5202 (D.C. Cir. Nov. 21, 2016).

5. 135 S. Ct. at 2652. Throughout the text of this Article, this case is referred to as *Arizona v. Arizona*.

6. See *id.* at 2659.

7. See *id.* at 2663-66. Although the Court held that the state legislature's "alleged injury" was not "too 'conjectural' or 'hypothetical' to establish standing," *id.* at 2663 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)), this conclusion seemed to depend entirely on

the Court believed any action by the legislature would have been futile under the Arizona Constitution, the Court held that the suit was ripe for adjudication on the merits.<sup>8</sup>

Although Justice Ginsburg cast her opinion within the traditional framework for analyzing Article III standing and disclaimed any implications for interbranch disputes at the federal level,<sup>9</sup> her opinion points toward a different approach to legislative standing. Under what this Article terms the “Legislative Exhaustion” principle, federal courts faced with complaints by Congress challenging executive action would ask whether Congress had any nonjudicial means of remedying its alleged harm.<sup>10</sup> If so, Congress would be precluded from availing itself of federal court jurisdiction. Not only is such an exhaustion principle supported by prudential doctrines preserving judicial resources for cases that demand adjudication,<sup>11</sup> it is also consistent with the normative benefits the Framers hoped to achieve from interbranch conflict in a presidential system.

The Framers separated the government of the new Republic into competitive branches not merely to diffuse power, but also to encourage more robust deliberation on the merits of controversial public policies.<sup>12</sup> Although the Framers failed to anticipate the role that

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the Court’s discussion of the futility of the Legislature pursuing nonjudicial means to assert its congressional redistricting authority, *see id.*

8. *See id.* at 2665-66.

9. *See id.* at 2665 n.12.

10. As discussed more fully below in Part I.E, Justice Ginsburg’s approach shares many characteristics with the “equitable discretion” principle that the D.C. Circuit used in the 1980s to dismiss suits of legislative plaintiffs who might otherwise have Article III standing when the “congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute.” *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981). Justice Ginsburg sat on the D.C. Circuit Court of Appeals from 1980 to 1993. Elizabeth E. Gillman & Joseph M. Micheletti, Essay, *Justice Ruth Bader Ginsburg*, 3 SETON HALL CONST. L.J. 657, 660-61 (1993).

11. *Cf.* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 569 (2009) (“[M]oot cases tended to focus not on constitutional text, but on instrumental concerns, such as conservation of judicial resources.”); Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413, 421 (2013) (indicating that prudential standing requirements limit “unreasonable demands on limited judicial resources or for other judicial policy reasons”).

12. *See* JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 46 (1994); ROBERT J. SPITZER, *THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY* 15-16 (1988); Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 373-74 (2014). The most familiar mechanisms for accomplishing this are bicameralism and presentment, along with the President’s limited veto

political parties would come to play in the new Republic, the democratization of the franchise, or the greater importance of nongovernmental parties in shaping public opinion, legislative deliberation remains a vital normative goal of interbranch conflict. Moreover, this goal is in considerable tension with judicial resolution of interbranch policy disputes. Courts generally review executive action based on their interpretation of what a statute directs the Executive to do, not what they think is the best policy on the merits.<sup>13</sup> The political branches, by contrast, are free to follow their policy preferences when grappling over the details of government programs, subject only to constitutional constraints.

Bringing this deliberation-forcing goal into focus suggests that when Congress can overrule the Executive through legislative acts that enhance deliberation on the merits of government policy—such as when Congress does not like the Executive’s use of enforcement discretion or its interpretation of the law—Congress should not have access to the federal courts. Opening the courthouse door to Congress deters and distracts from important legislative work refining statutory regimes and government policy in response to changing circumstances and executive initiatives. It is to this project that Congress can bring the full value of its deliberative processes to bear. Accordingly, there is generally less, not more, reason to allow the legislature to avail itself of the federal courts to resolve what are essentially political disputes between the branches over the merits of government policy.

The question becomes more difficult, however, when Congress has no tools to directly overrule the Executive, such as when the Executive refuses to enforce a statutory provision based on constitutional objections. Although Congress can punish the Executive, such punishment is unlikely to produce deliberation on the merits of the Executive’s actions. Moreover, such punitive action may damage collateral policies and personnel for reasons unrelated to the merits

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power, which force Congress to further debate the wisdom and substance of its legislative acts. SPITZER, *supra*, at 15-16; Sant’Ambrogio, *supra*, at 354.

13. There are of course some areas of law in which the courts do inquire into the merits of government policies, such as reviewing the constitutionality of acts under strict scrutiny or applying arbitrary and capricious review under the Administrative Procedure Act (APA). But Congress still has much greater freedom to inquire into the merits of policies when legislating than courts do when deciding how to interpret congressional acts.

of the policy dispute. Therefore, allowing Congress into federal court in such cases does not undermine the deliberation-forcing goals of interbranch conflict.

Thus, the Legislative Exhaustion principle provides a relatively easy way to resolve suits in which the Executive purports to act pursuant to statutory authority. In such cases, Congress has not exhausted its legislative remedies and should look to itself rather than to the federal courts for its salvation. But the Legislative Exhaustion principle would not preclude congressional lawsuits over presidential decisions not to enforce the law based on constitutional objections. When the President refuses to enforce a congressional act based on constitutional objections, Congress has exhausted its legislative remedies, and its weapons for battling the Executive are unlikely to produce deliberation on the merits of the policy in dispute. There may be other reasons to deny Congress standing in such cases, but Legislative Exhaustion does not provide one.

Proposals for legislative standing usually seek to ensure judicial resolution of constitutional questions and prevent executive officials from exercising an “extra-legislative veto” over duly enacted law—in other words, to prevent a unilateral check on statutory mandates that the Executive exercises outside of the legislative process.<sup>14</sup> This Article suggests that both the focus on providing courts with the final word on interbranch disputes and the desire to leave these disputes to the political process ignore a fundamental objective of interbranch competition—forcing enhanced political deliberation over the merits of contested policies. Focusing on this goal illuminates when judicial resolution of interbranch disputes is likely to undermine the deliberative objectives of our Madisonian system.

This Article proceeds in three parts. Part I surveys the doctrinal landscape of legislative standing and the difficulties of determining whether Congress suffers an injury sufficient to support Article III standing in disputes with the Executive. It closes with Justice Ginsburg’s opinion in *Arizona v. Arizona*, which may have roots in the D.C. Circuit’s “equitable discretion” doctrine, and begins to outline the Legislative Exhaustion principle that might follow from the opinion. Part II then turns to the Framers’ view of interbranch

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14. See Sant’Ambrogio, *supra* note 12, at 354.



conflict and their goal of enhancing political deliberation on the merits of controversial policies. In light of this goal, Part II examines each tool available to Congress in disputes with the Executive to determine which are likely to produce deliberation on the merits of policy. Finally, Part III returns to the Legislative Exhaustion principle with this deliberation-forcing goal in focus; further defines how Legislative Exhaustion would operate in practice; examines the principle's strengths and weaknesses; and applies Legislative Exhaustion to *U.S. House of Representatives v. Burwell* and other cases of interbranch litigation.

### I. LEGISLATIVE STANDING

The Supreme Court has long danced around the question of whether Congress has standing to sue the Executive over its execution or nonexecution of the law.<sup>15</sup> The Court did this most recently in *Arizona v. Arizona*, when it recognized the standing of a state legislature to sue an independent state commission but dropped a footnote explaining that the case did “not touch or concern the question whether Congress ha[d] standing to bring a suit against the President,” which “would raise separation-of-powers concerns” that might trigger an “especially rigorous” standing analysis.<sup>16</sup> Two terms before, in *United States v. Windsor*, the Court dodged the question whether the House of Representatives had standing to defend a law the Executive argued was unconstitutional

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15. See Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 19-42 (2015); *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 218 & n.1 (1997) (“After laying the foundation for the doctrine of legislative standing nearly sixty years ago, the Supreme Court maintained a conspicuous silence, despite numerous opportunities to address the issue.” (footnote omitted)); see also, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 n.12 (2015) (disclaiming any implications of the opinion for “whether Congress has standing to bring a suit against the President”); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (not deciding whether the House had standing to defend the Defense of Marriage Act); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (concluding that the Court “need not consider the standing issue as to the ... Members of Congress” because another party had standing); *Buckley v. Valeo*, 424 U.S. 1, 12 & n.10 (1976) (per curiam) (concluding that “at least some of the appellants,” which included candidates for federal office, political parties, and nonprofit advocacy organizations challenging the constitutionality of the Federal Election Campaign Act, “have a sufficient ‘personal stake’ to support standing”).

16. 135 S. Ct. at 2665 n.12 (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)).

by holding that the Executive's pro forma appeal of lower court orders gave the Court jurisdiction to decide the merits of the case even though the Executive agreed with the lower courts that the law was unconstitutional.<sup>17</sup> Indeed, as explained more fully below, *Windsor* also cast doubt on the one case previously thought to recognize congressional standing in a lawsuit with the Executive, *INS v. Chadha*.<sup>18</sup> And one of the most important opinions that advocates of legislative standing cite, *Coleman v. Miller*, is a fractured opinion in which only four Justices clearly supported the state legislators' standing to seek an injunction against the Kansas Secretary of State.<sup>19</sup>

This Part reviews the doctrine of legislative standing and concludes that the Court will never be able to definitively resolve the question using the injury-in-fact test. Institutional injuries arising from interbranch disputes are too abstract and indeterminate for courts to predictably distinguish between those that support Article III standing and those that do not. But the opinion in *Arizona v. Arizona* may offer a way of avoiding the difficulties of the traditional injury-in-fact test, at least in a subset of interbranch disputes.

### A. Article III Standing and Injuries in Fact

Article III of the Constitution “confines the judicial power of federal courts to deciding actual ‘Cases’ or ‘Controversies.’”<sup>20</sup> The courts have interpreted this to mean, among other things, that parties invoking the power of the federal courts must establish that they have standing.

The Supreme Court has repeatedly articulated three requirements of constitutional standing. First, the party must establish that it has suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and

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17. See 133 S. Ct. at 2686 (“An order directing the Treasury to pay money is ‘a real and immediate economic injury’ .... That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not.” (quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007))).

18. See *id.* at 2686-87 (discussing *INS v. Chadha*, 462 U.S. 919 (1983)).

19. See 307 U.S. 433, 446 (1939).

20. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting U.S. CONST. art. III, § 2).

(b) ‘actual or imminent, not “conjectural” or “hypothetical.”’<sup>21</sup> Second, “[t]he injury must be ‘fairly’ traceable to the challenged action.”<sup>22</sup> Third, “relief from the injury must be ‘likely’ to follow from a favorable [judicial] decision.”<sup>23</sup> In short, a party wishing to avail itself of the power of the federal courts must establish that it is seeking a judicially available “remedy for a personal and tangible harm.”<sup>24</sup> A mere “disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”<sup>25</sup> The Court has also said on more than one occasion that its standing inquiry is “especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”<sup>26</sup>

In more than two hundred years of push and pull between Congress and the Executive, however, the Court has never definitively recognized, nor categorically rejected, the standing of Congress to sue the Executive over the enforcement or defense of federal law.<sup>27</sup> The Court came closest to doing so in *INS v. Chadha*, which for a time provided a foundation (albeit shaky) for legislative standing.<sup>28</sup> But in *Windsor*, the Court significantly undermined whatever support *Chadha* might have once provided.<sup>29</sup>

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21. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (footnote omitted) (citations omitted) (first quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984), and then quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)); see also *Allen*, 468 U.S. at 751 (“The injury alleged must be, for example, ‘distinct and palpable,’ and not ‘abstract’ or ‘conjectural’ or ‘hypothetical.’” (citations omitted) (first quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), and then quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983))).

22. *Allen*, 468 U.S. at 751 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)).

23. *Id.* (quoting *Simon*, 426 U.S. at 38, 41).

24. *Hollingsworth*, 133 S. Ct. at 2661.

25. *Id.* (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

26. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 n.12 (2015) (alteration in original) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)).

27. See *Stern*, *supra* note 15, at 19.

28. See *id.* at 19-20.

29. See *id.* at 22-24.

*B. INS v. Chadha and Legislative Standing to Defend*

In *Chadha*, an alien challenged the constitutionality of a “legislative veto” contained in the Immigration and Nationality Act (INA).<sup>30</sup> The INA authorized the Attorney General to suspend the deportation of an alien otherwise subject to removal on the grounds of “extreme hardship,” but also authorized either house of Congress to “veto” the Attorney General’s decision.<sup>31</sup> The Executive agreed with Chadha that the legislative veto was unconstitutional but nevertheless continued to comply with the statute and formally appealed the decision of the Court of Appeals enjoining the Attorney General from taking any steps to deport Chadha—that is, complying with the legislative veto—even while arguing in court that both Chadha and the Court of Appeals were correct that the legislative veto was unconstitutional.<sup>32</sup>

The Supreme Court held that “the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take,”—deporting Chadha—“regardless of whether the agency welcomed the judgment.”<sup>33</sup> In addition, the Court held that there was “Art. III adverseness even though the only parties were the INS and Chadha” because the Court’s decisions would have “real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.”<sup>34</sup>

The *Chadha* holding, however, addressed statutory jurisdiction of the federal courts under 28 U.S.C. § 1252, not constitutional standing under Article III.<sup>35</sup> Moreover, in a footnote, the *Chadha* Court expressly acknowledged that “[i]n addition to meeting the statutory requisites of § 1252 ... an appeal must present a justiciable

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30. See 462 U.S. 919, 923 (1983).

31. *Id.* at 923-25 (quoting Immigration and Nationality Act, Pub. L. No. 87-885, Sec. 4, § 244(a)(1), 76 Stat. 1247, 1248 (1962)). Chadha challenged the legislative veto as a violation of separation of powers after the House vetoed the Attorney General’s decision to suspend his deportation. *Id.* at 928.

32. See United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (discussing *Chadha*).

33. *Id.* (quoting *Chadha*, 462 U.S. at 930).

34. *Chadha*, 462 U.S. at 939-40 (quoting *Chadha v. INS*, 634 F.2d 408, 419 (9th Cir. 1980), *aff’d*, 462 U.S. 919 (1983)). The Ninth Circuit opinion in *Chadha* was written by then-Judge Anthony Kennedy. See *Chadha*, 634 F.2d at 411. Thus, in *Windsor*, Justice Kennedy was relying on his own opinion in *Chadha*. See *Windsor*, 133 S. Ct. at 2686.

35. See *Chadha*, 462 U.S. at 929-31, 931 n.6.

case or controversy under Art. III.”<sup>36</sup> The *Chadha* Court then explained that “[s]uch a controversy clearly exists ... because of the presence of the two Houses of Congress as adverse parties.”<sup>37</sup> The Court also opined that Congress is a “proper party to defend” the constitutionality of a law “when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”<sup>38</sup> Advocates of legislative standing cite this language from *Chadha*.<sup>39</sup>

The context of these statements, however, raises questions about their meaning. First, the statements are part of a discussion of “prudential, as opposed to Art. III,” jurisdictional concerns.<sup>40</sup> Thus, the Court may have merely meant, as the Court later held in *Windsor*, that the presence of one or both houses of Congress as amicus parties defending the law’s validity dispelled any prudential concerns with adverseness.<sup>41</sup> Moreover, the two cases the *Chadha* Court cited in support of the “long held” rule that Congress is the proper party to defend a law when the Executive does not<sup>42</sup>—*Cheng Fan Kwok v. INS*<sup>43</sup> and *United States v. Lovett*<sup>44</sup>—stand for nothing of the kind.<sup>45</sup> Congress played no role in *Cheng Fan Kwok*, nor did the case involve a law the Executive deemed unconstitutional.<sup>46</sup> And in *Lovett*, Congress merely appeared as an amicus party.<sup>47</sup>

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36. *See id.* at 931 n.6.

37. *See id.*

38. *See id.* at 940.

39. *See, e.g.,* Greene, *supra* note 1, at 597-98, 597 n.105.

40. *Chadha*, 462 U.S. at 940.

41. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2686-87 (2013). The Attorney General argued this to the Supreme Court. *See* Brief for the United States on the Jurisdictional Questions at 34-37, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

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

43. 392 U.S. 206 (1968).

44. 328 U.S. 303 (1946).

45. The Attorney General and the amica curiae in *Windsor* argued this. *See* Brief for the United States on the Jurisdictional Questions, *supra* note 41, at 36-37; Brief for Court-Appointed Amica Curiae Addressing Jurisdiction at 10-11, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (distinguishing *Lovett* and *Cheng Fan Kwok* from broad language in *Chadha*).

46. *See Cheng Fan Kwok*, 392 U.S. at 210 n.9 (noting the Court invited a member of the Supreme Court Bar to appear and present oral argument as amicus curiae in support of the judgment below because the Executive agreed with petitioner’s interpretation of the law).

47. *See Lovett v. United States*, 66 F. Supp. 142, 143 (Ct. Cl. 1945) (“Special counsel appear in the cases as amici curiae, having been employed to defend the constitutionality of the disputed section. The special counsel are designated variously in the record as representing the House, the Congress, the United States.”), *aff’d*, 328 U.S. 303 (1946).

Second, the single authority the Court cited in support of the idea that “the presence of the two Houses of Congress as adverse parties” presented a “justiciable case or controversy”<sup>48</sup> also did not involve Congress, either as a party or amicus, and seems inapposite.<sup>49</sup> In sum, only one of the authorities cited in support of legislative standing, if that is indeed what the Court was trying to establish, involved Congress, and that case only involved Congress as an amicus party, not as a party participant.

Thus, the only thing clear about *Chadha* with respect to Article III standing is that it is not very clear. It is plausible that in order to dispel any prudential concerns with adverseness the Court was merely approving congressional defense as amicus of laws the Executive chooses not to defend.<sup>50</sup> This is how the Court in *Windsor* appeared to have interpreted this language from *Chadha*.<sup>51</sup> Moreover, if we interpret *Chadha*, as the majority did in *Windsor*, to mean that the Executive’s enforcement of the law and appeal of adverse judgments provides the federal courts with Article III jurisdiction even if the Executive agrees that the law is unconstitutional,<sup>52</sup> then the *Chadha* Court’s handling of legislative standing is effectively rendered dicta. That is, if the Executive’s presence conferred Article III jurisdiction on the Court in *Chadha*, as the

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48. *Chadha*, 462 U.S. at 931 n.6; see also *id.* at 940.

49. The *Chadha* Court cited *Director, Office of Workers’ Compensation Programs, U.S. Department of Labor v. Pereni North River Associates*, 459 U.S. 297 (1983). See *Chadha*, 462 U.S. at 931 n.6. In *Pereni*, the Court addressed whether it had jurisdiction to hear a case in which the Executive sought review of an administrative decision finding that the Longshoremen’s and Harbor Workers’ Compensation Act did not cover an injured construction worker. See *Pereni*, 459 U.S. at 302-03; see also Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-950 (2012). The employer argued that the Executive did not have standing because the decision of the Administrative Law Judge (ALJ) did not injure the Executive; the Executive’s only interest in the case was in furthering a different interpretation of the Act than the one the ALJ rendered. *Pereni*, 459 U.S. at 301-02. Nevertheless, the Court held that the injured worker’s presence as a party respondent gave the Court jurisdiction to consider the merits of the lower court decision. See *id.* at 304-05. Thus, the case seemed to have more to do with injury than adverseness.

50. Cf. *Chadha*, 462 U.S. at 940 (noting there were no prudential concerns because briefs from both houses of Congress were accepted).

51. See *United States v. Windsor*, 133 S. Ct. 2675, 2686-87 (2013) (suggesting that Congress’s presence in *Chadha* dispelled prudential concerns with hearing a nonadversarial suit).

52. See *id.*

Court made clear in *Windsor*, then the *Chadha* Court did not need to address whether the houses of Congress had standing.

### C. Legislative Injuries

If Congress is like other parties, then it should be able to establish Article III standing if it has suffered an injury-in-fact and met the other requirements of standing. But the only executive action that the Court has ever recognized as causing an injury to a legislature as an institution is the nullification or invalidation of a legislature's vote.<sup>53</sup>

The most important case concerning congressional standing is *Raines v. Byrd*, in which individual members of the House and Senate filed a lawsuit challenging the constitutionality of the Line Item Veto Act.<sup>54</sup> The members of Congress argued that the Act upset the constitutional balance between the President and Congress, and violated the constitutional requirements of bicameralism and presentment because the President was now free to cancel legislative appropriations.<sup>55</sup> The district court held that the Act's alleged dilution of the legislators' Article I voting power was sufficient to confer Article III standing.<sup>56</sup> But the Supreme Court disagreed, holding that the members of Congress did not have standing to challenge the law.<sup>57</sup>

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53. See *Raines v. Byrd*, 521 U.S. 811, 821-23 (1997) ("The one case in which we have upheld standing for legislators (albeit state legislators) claiming an institutional injury is *Coleman v. Miller*, 307 U.S. 433 (1939)."); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015) (finding a prospective nullification of the state legislature's vote because it would be futile under the state constitution).

54. See 521 U.S. at 813-14. See generally *Line Item Veto Act*, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by* *Clinton v. City of New York*, 524 U.S. 417 (1998).

55. *Raines*, 521 U.S. at 816. In a long line of cases, the D.C. Circuit Court of Appeals had held that individual members of Congress had standing to challenge actions that affected their constitutionally prescribed lawmaking powers. See, e.g., *Michel v. Anderson*, 14 F.3d 623, 625-28 (D.C. Cir. 1994); *Barnes v. Kline*, 759 F.2d 21, 28-29 (D.C. Cir. 1985), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 951-54 (D.C. Cir. 1984); *Kennedy v. Sampson*, 511 F.2d 430, 435-36 (D.C. Cir. 1974), *abrogated by* *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). But see *Moore*, 733 F.2d at 956-57 (Scalia, J., concurring in result) (disagreeing with majority's finding of standing).

56. See *Byrd v. Raines*, 956 F. Supp. 25, 31 (D.D.C. 1997), *vacated*, 521 U.S. 811 (1997).

57. See *Raines*, 521 U.S. at 813-14.

First, the Court explained that the legislators were not “singled out for specially unfavorable treatment as opposed to other Members of their respective bodies.”<sup>58</sup> Nor did they claim they were “deprived of something to which they *personally* [were] entitled—such as their seats as Members of Congress after their constituents elected *them*.”<sup>59</sup> Thus, the case was distinguishable from *Powell v. McCormack*, in which Adam Clayton Powell challenged a House resolution excluding him from taking his seat and depriving him of his salary.<sup>60</sup> Rather, the *Raines* legislators claimed “that the Act cause[d] a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally.”<sup>61</sup>

The Court then explained that it had upheld standing for legislators claiming an institutional injury in only one case—*Coleman v. Miller*.<sup>62</sup> In *Coleman*, the Kansas State Senate deadlocked twenty to twenty on whether to ratify the proposed Child Labor Amendment to the Federal Constitution.<sup>63</sup> Nevertheless, the Lieutenant Governor, who was also the presiding officer of the state senate, cast a deciding vote in favor of the amendment.<sup>64</sup> After a majority of the Kansas House of Representatives also voted to ratify the amendment, it was deemed ratified by the State.<sup>65</sup> The twenty state senators who had voted against ratification, along with one additional state senator and three state house members, brought suit challenging the ratification on the ground that the Lieutenant Governor was not entitled to cast the deciding vote in the state senate.<sup>66</sup> The Supreme Court held that the legislators had standing to challenge

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58. *Id.* at 821.

59. *Id.*

60. *See id.* 820-21 (discussing *Powell v. McCormack*, 395 U.S. 486, 496, 512-14 (1969)). In *Powell*, the Court held that the case presented an Article III case or controversy because the case was not moot even though Powell was seated in the next Congress. 395 U.S. at 496. The injury Powell alleged—denial of his seat and salary—was a classic type of common law injury based on a legal right. *See* David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 217 (2001).

61. *Raines*, 521 U.S. at 821.

62. *See id.*

63. *See Coleman v. Miller*, 307 U.S. 433, 435-36 (1939).

64. *Id.* at 436.

65. *Id.* at 436-37.

66. *Id.* at 436.



the ratification.<sup>67</sup> But the Court in *Raines* explained that, in the *Coleman* case,

if these legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity .... It is obvious, then, that our holding in *Coleman* 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.<sup>68</sup>

Although the plaintiffs in *Coleman* were individual legislators,<sup>69</sup> the Court in *Raines* described their alleged injury as an “institutional” injury to the state senate itself.<sup>70</sup> But the *Raines* Court refused to extend *Coleman* by expanding the circumstances in which the diminution of a legislature’s institutional power would provide a basis for standing:

There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here [based on the line-item veto]. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step.<sup>71</sup>

Thus, the relevant institutional injury in *Coleman* was that the secretary of state had “deemed” the amendment ratified notwithstanding the senate’s alleged failure to approve it.<sup>72</sup> The fact that the line-item veto challenged in *Raines* might violate Article I of the

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67. *See id.* at 437-38.

68. *Raines v. Byrd*, 521 U.S. 811, 822-23 (1997) (citation omitted).

69. *See Coleman*, 307 U.S. at 436-37.

70. *See Raines*, 521 U.S. at 821 (citing *Coleman*, 307 U.S. 433). The Court may have recognized standing in the individual senators and the representative rather than requiring the state senate to bring suit because of the obvious difficulty of obtaining a majority vote to pursue litigation when the vote on ratification was deadlocked.

71. *Id.* at 826.

72. Thus, for purposes of legislative standing, the Court does not seem to recognize injuries comprising increased probability of harm, such as it has recognized in the beneficiaries of the regulatory state. *See Weiner*, *supra* note 60, at 233-34. Rather, there must be a concrete injury to their legislative rights. *Id.*

Constitution, as indeed the Court later held,<sup>73</sup> did not in and of itself establish a distinct injury to the legislative branch for purposes of Article III standing.<sup>74</sup> No one had invalidated an Act of Congress.<sup>75</sup>

*D. Is Congress Injured by Executive Enforcement Decisions?*

Can the Executive's enforcement decisions cause an institutional injury to Congress sufficient to give it legislative standing? There are at least four ways in which the Executive might enforce a federal law. First, the Executive might choose not to enforce the law if it believes the law is unconstitutional.<sup>76</sup> This occurs exceedingly rarely, but is not unheard of.<sup>77</sup> Second, the Executive might enforce but not defend the law because the Executive believes the law is unconstitutional, but for other reasons believes that it can best meet its Take Care Clause responsibilities by continuing to enforce the law until a final judicial decision agrees with the Executive's constitutional judgment.<sup>78</sup> Third, the Executive might choose to enforce the law but exercise enforcement discretion based on the application of the law to unforeseen or inappropriate cases, resource constraints, or a variety of other reasons, including what the Executive believes to be the optimal level of enforcement.<sup>79</sup> Finally, the

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73. See *Clinton v. City of New York*, 524 U.S. 417, 421 (1998).

74. See *Raines*, 521 U.S. at 829-30.

75. Another way to read *Raines*, however, is that the Court will protect legislators from executive encroachment on their rights, but not injuries brought on themselves. See *id.* at 824-26, 829-30. Congress gave the Executive the line-item veto power, and therefore, in *Raines*, the Court would not hear congressional complaints that Congress was injured by its own actions. Cf. *id.* No one had invalidated anyone's votes. See *id.* at 824. Moreover, the legislators who brought the constitutional challenge had opposed the line-item veto in the legislative process and lost. See *id.* at 814. Perhaps the Court was concerned with opening the floodgates to suits by congressional sore losers. Cf. *id.* at 824-30.

76. See Sant'Ambrogio, *supra* note 12, at 407 (discussing the presidential nonenforcement theory).

77. Cf. Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1905-07 (2015) (arguing that executive nonenforcement of laws should be rare).

78. See *id.* at 1914.

79. See Sant'Ambrogio, *supra* note 12, at 382-87 (discussing the reasons why the Executive may exercise enforcement discretion). This includes situations in which the Executive supports the statutory goals as well as situations in which the Executive is hostile to the statute's underlying purpose and desires underenforcement to limit its impact.

Executive may enforce the law as best it can based on a sincere interpretation of its statutory mandate.<sup>80</sup>

The lines between the third and fourth categories are not always clear. Few laws can be enforced without some enforcement discretion, and interpretation will nearly always require policy judgments in the absence of clear statutory direction.<sup>81</sup> In addition, the second category—executive enforcement, but not defense—is unlikely to give rise to legislative standing in the wake of *Windsor* because the Court will recognize the standing of the Executive instead.<sup>82</sup> Therefore, this Section considers whether (1) nonenforcement based on constitutional objections or (2) the exercise of enforcement discretion or a difference in statutory interpretation causes an injury to Congress sufficient to support Article III standing under current doctrine.

### *1. Nonenforcement Based on Constitutional Objections*

If any enforcement decision would cause an injury to Congress, it would most likely be the decision of the Executive not to enforce a statutory provision based on constitutional objections. Advocates of legislative standing argue that such nonenforcement ignores an act of Congress in a way similar to how the State in *Coleman* ignored the legal effect of the state senate's deadlocked vote.<sup>83</sup> On the other side are those who argue that the Executive's decision not to enforce a law based on constitutional objections does not treat the law as if it had never been enacted; the President is merely looking to the higher authority of the Constitution.<sup>84</sup> The law remains on the books and the next President may take a different view of its

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80. See *id.* at 402, 404-05 (discussing the Executive's latitude for enforcement discretion).

81. See *id.* at 405 ("[T]he Executive may expand and contract its jurisdiction where Congress has not clearly defined its boundaries.").

82. See *supra* note 17 and accompanying text.

83. See Opposition of the United States House of Representatives to Defendants' Motion to Dismiss the Complaint at 32-33, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 14-cv-01967(RMC)).

84. See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 535-36 (2012) (asserting that the Faithful Execution Clause gives no warrant for a claim that unconstitutional laws are not laws); see also Harrison, *supra* note 1, at 109 (drawing a distinction between the validity of a law and compliance with and implementation of the law).

constitutionality.<sup>85</sup> Indeed, the same President might change his mind and decide to enforce the law, particularly if Congress punishes the Executive for nonenforcement. If the Executive resumes enforcement, then a court will—assuming it finds the law constitutional—assist the Executive in its enforcement. By contrast, a court will reject all efforts to enforce a law that has been repealed or that the court concludes was never properly enacted.<sup>86</sup>

Some go further still and argue that Congress's role in lawmaking ends where law execution begins.<sup>87</sup> The Court's opinion in *Hollingsworth v. Perry* lends some support to this idea.<sup>88</sup> In *Hollingsworth*, the Court held that a judicial declaration that California Proposition 8, a ballot initiative, was unconstitutional did not injure the official proponents because the lower court "had not ordered them to do or refrain from doing anything."<sup>89</sup> Similarly, when a court declares a federal law unconstitutional, it does not order Congress to do or refrain from doing anything.<sup>90</sup> Indeed, Congress may pass, and has passed, laws that are unconstitutional under settled Supreme Court precedents.<sup>91</sup>

Moreover, the *Hollingsworth* Court declared that the official proponents had no "direct stake' in the outcome of their appeal."<sup>92</sup> At that point, their "only interest in having the District Court order

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85. See Devins & Prakash, *supra* note 84, at 536-37 (noting that a President cannot bind his successors to his enforcement practices).

86. *Cf. id.* at 532, 536-37.

87. See, e.g., Defendants' Memorandum in Support of Their Motion to Dismiss the Complaint at 13, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 14-cv-01967(RMC)) ("This distinction between the enactment of federal law and the execution of federal law is critical.... Because Congress plays no direct role in the execution of federal law and has no continuing or distinct interest or stake in a bill once it becomes a law, Congress suffers no legally cognizable injury if that law (in Congress's view) is improperly administered."); see also Harrison, *supra* note 1, at 109-10 (discussing how the "failure of implementation" does not impair legislative power).

88. See 133 S. Ct. 2652 (2013).

89. *Id.* at 2662.

90. *Cf.* Harrison, *supra* note 1, at 127 (noting that the Court does not literally change a law when it declares that law unconstitutional).

91. For example, even after the Supreme Court held that the legislative veto was unconstitutional in *INS v. Chadha*, 462 U.S. 919, 959 (1983), Congress continued to include the legislative device in hundreds of statutes. See William F. Leahy, Recent Development, *The Fate of the Legislative Veto After Chadha*, 53 GEO. WASH. L. REV. 168, 174-75 (1984-85) (discussing cases in which parties sought to maintain the use of the legislative veto).

92. 133 S. Ct. at 2662 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

reversed was to vindicate the constitutional validity of a generally applicable California law.”<sup>93</sup> But as the Court has repeatedly explained,

[a] litigant “raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”<sup>94</sup>

The proponents of Proposition 8 might have argued that the invalidation of the law harmed them “more directly and tangibly”<sup>95</sup> than the public at large, because they were the ones who put the law on the ballot. Or they might have argued that voters are harmed in a concrete and particular way when a ballot initiative is declared unconstitutional because it diminishes the voters’ power in California (unlike at the federal level) as a source of law. Of course, this is similar to the argument that Congress itself is injured when a law is declared unconstitutional or the Executive does not fully enforce that law.<sup>96</sup>

Is there any difference between the injury to Congress when the Executive refuses to enforce an act it has passed and the injury to voters when a court invalidates a ballot measure they have approved? Both are injured in the sense that the law they made has been ignored as valid law. Thus, a strong case can be made that if the *Hollingsworth* Court rejected the standing of voters to defend a law they placed on the ballot and approved,<sup>97</sup> then it should also reject the standing of Congress to sue the Executive over its failure to enforce a congressional statute.

To be sure, the voters of California—though not the official proponents—represent a much larger group than the members of

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93. *Id.*

94. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992)).

95. *Id.*

96. See *Opposition of the United States House of Representatives to Defendants’ Motion to Dismiss the Complaint*, *supra* note 83, at 32-33 (claiming defendants injured the House by nullifying its vote on the Affordable Care Act).

97. See *Hollingsworth*, 133 S. Ct. at 2659 (noting that California voters passed Proposition 8).

Congress. But in *FEC v. Akins*, the Court held that an injury in fact may be widely shared—indeed shared by all citizens of the United States—yet still satisfy Article III.<sup>98</sup> In *Akins*, a group of voters alleged an injury based on the Federal Election Commission's failure to require certain disclosures of the American Israel Public Affairs Committee (AIPAC) under the Federal Election Campaign Act of 1971.<sup>99</sup> All voters, not just the plaintiffs, were denied this information.<sup>100</sup> Yet the Court held that “where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’”<sup>101</sup> Thus, if the plaintiffs in *Akins* were entitled to standing based on an injury shared by every eligible voter in the United States—currently around 220 million people<sup>102</sup>—then it is hard to see why the proponents of Proposition 8 would be denied standing merely because their injury was shared by seven million California voters who approved Proposition 8.<sup>103</sup>

If the Court is serious about its jurisdictional holding in *Hollingsworth*, then it is difficult to see how either the judicial invalidation of a law or the Executive's decision not to enforce a law, much less the exercise of enforcement discretion, injures Congress any more than the invalidation of a ballot initiative injures the citizens who approved it.<sup>104</sup> The difference from *Coleman* is that there is no dispute about the legal effect of the votes cast by individual legislators, either house of Congress, or Congress as a whole.<sup>105</sup> When the Executive decides not to enforce a law, the legal meaning of Congress's vote is not in doubt. Rather, the Executive is choosing

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98. See 524 U.S. 11, 24-25 (1998).

99. See *id.* at 13-14.

100. See *id.* at 20 (finding that Congress intended to protect voters generally by authorizing suit).

101. *Id.* at 24 (citing *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989)).

102. THOM FILE, U.S. CENSUS BUREAU, WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978-2014, at 3 (2015), <http://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf> [<https://perma.cc/ENP3-A7SQ>] (counting 220 million citizens over the age of 18). Not every citizen eligible to vote, however, has registered to vote, which is required before casting a ballot in every state except North Dakota. *Id.*

103. *Cf. Akins*, 524 U.S. at 24 (noting that the presence of a political forum to redress asserted issues does not disqualify voters from standing).

104. *Cf. Newdow v. U.S. Congress*, 313 F.3d 495, 499 (9th Cir. 2002) (“A public law, after enactment, is not the Senate's any more than it is the law of any other citizen or group of citizens in the United States. It is a law of the United States of America.”).

105. *Cf. Coleman v. Miller*, 307 U.S. 433, 438 (1939) (stating that the state “senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes”).

not to enforce the law based on its view of the law's constitutionality.

Of course, *Hollingsworth* may be wrong on this point. It seems odd to say that those who enact law have no further interest in the law once it is enacted. Surely lawmaking bodies create law to achieve certain goals and thereby have an ongoing interest in seeing those goals accomplished. This is why Congress is vested with supervisory powers over the executive branch, holds hearings, conducts investigations, demands documents, inquires into various matters within the jurisdiction of the executive branch, and (ultimately) enacts legislation to shape the activity of the Executive.<sup>106</sup>

Still, to the extent the Executive has a duty to enforce the law pursuant to the Take Care Clause,<sup>107</sup> this responsibility constitutes an obligation of the Executive to "the People" who ratified the Constitution, not to a coordinate branch of government created by the same Constitution.<sup>108</sup> Yet even the people are unable to assert an injury based on the Executive's failure to enforce the law without establishing a separate concrete injury of their own.<sup>109</sup> Without their own injury, the people have no more than a generalized grievance, which is insufficient to establish Article III standing.<sup>110</sup> Thus, if the people to whom the Executive owes a Take Care Clause obligation to execute the law cannot themselves sue the Executive for breach of this duty, why should Congress be able to do so?<sup>111</sup>

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106. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69-70 (2006) (discussing the ways Congress employs its legislative power to oversee administration of laws).

107. See U.S. CONST. art. II, § 3. Those who believe that the President has a constitutional duty to defend federal laws irrespective of her view of the laws' constitutionality generally cite this section of the Constitution. See, e.g., Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL'Y 377, 381 (2014) (claiming that the Take Care Clause requires the President to uphold his duty to defend).

108. See Harrison, *supra* note 1, at 106-07; Sant'Ambrogio, *supra* note 77, at 1903.

109. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (noting that citizens cannot assert injuries based on "generalized" grievances (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990))).

110. See *id.*; *Allen v. Wright*, 468 U.S. 737, 754 (1984).

111. Indeed, one can imagine the Court pausing before opening the federal courthouse to Congress whenever Congress believes that the Executive is not enforcing the law appropriately.

## 2. *Enforcement Discretion*

If there are doubts about whether Congress is injured by executive decisions not to enforce a statutory provision based on constitutional objections, it seems even more unlikely that the Executive's implementation of the law, including its exercise of enforcement discretion, could constitute a nullification of the underlying legislative act. After all, in such cases, the Executive claims to act pursuant to statutory authority,<sup>112</sup> so it is difficult to argue that the Executive is nullifying the law.<sup>113</sup>

Moreover, if the Executive's interpretation of its discretion under the law could cause an injury to Congress—under the theory that nonenforcement in certain circumstances or against certain parties constitutes a partial or temporary “nullification” of the law—then the injury would stem from a difference in statutory interpretation rather than a difference in constitutional views.<sup>114</sup> But if mere interpretive disagreements could be the basis for congressional lawsuits, then such suits would be available in a vast swath of circumstances. The idea of courts hearing disputes between the Executive and Congress—let alone one house of Congress, a committee, or individual legislators—over the proper interpretation of a statute whenever they disagree is too terrible for most to imagine.

Moreover, because the Executive acts pursuant to congressional statute in these cases, Congress has the power to narrow or eliminate any discretion the Executive claims as authority for its action

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112. See Sant'Ambrogio, *supra* note 12, at 388 (discussing instances in which Congress has “delegate[d] extra-legislative vetos to the Executive Branch”). Even when underenforcement is motivated by hostility to the underlying statute, the Executive generally will still claim to be exercising enforcement discretion if it does not cite a constitutional basis for its actions.

113. *But see* Opposition of the U.S. House of Representatives to Defendant's Motion to Dismiss the Complaint, *supra* note 83, at 32-33 (claiming that the defendants' rewrite of section 1513(d) of the Affordable Care Act and section 4980H of the Internal Revenue Code nullified the law).

114. This assumes good faith on the part of the Executive, but we have no reason to believe the Executive plays fast and loose when choosing between constitutional objections and enforcement discretion as a defense to inaction. Enforcement discretion offers the Executive significant latitude and is generally viewed as more legitimate than nonenforcement based on constitutional objections. See Sant'Ambrogio, *supra* note 12, at 397 (discussing why enforcement discretion is generally given more latitude than nonenforcement). Accordingly, the former is much more common than the latter.



or inaction.<sup>115</sup> It seems strange to say that Congress is institutionally injured by disagreements with the Executive over the proper interpretation of the law when Congress has the institutional power to overrule the Executive. That is, Congress can amend the statute to eliminate any ambiguity and make clear that its own interpretation of the statute is the correct one.<sup>116</sup>

Finally, in many—if not most—cases, the Congress that wrote the law being interpreted has left the political stage.<sup>117</sup> As a result it may be difficult—if not impossible—to know, in any interpretive dispute, whether the Executive or the sitting Congress has the better understanding of the enacting Congress’s statutory intent.

The injury-in-fact test is unlikely ever to provide a predictable means for determining whether Congress has standing to avail itself of a federal court to resolve disputes with the Executive. Too many serious questions remain about whether the Executive’s enforcement decisions cause an institutional injury to Congress sufficient to support congressional standing.<sup>118</sup> The alleged injuries are often too abstract to say whether the legislature is injured based on anything more than congressional say so. Especially when it comes to the particular manner in which the Executive enforces the law, the injury is likely to be in the eye of the beholder—one Congress’s injury is another Congress’s successful implementation of the law.<sup>119</sup>

Judge William Fletcher once said, “[i]f we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the

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115. See *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (“[T]he presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”); Sant’Ambrogio, *supra* note 12, at 405 (noting that Congress can amend a law to expand or contract the jurisdiction of executive agencies).

116. See Sant’Ambrogio, *supra* note 12, at 404 (discussing Congress’s ability to amend statutes to limit executive discretion in enforcement).

117. *Cf. id.* at 387 (“[T]he extra-legislative veto protect[s] the President from conflicts ... based on legislative bargains struck by enacting coalitions that had left the political stage.”).

118. See Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 16 (2016) (“The Court’s legislative standing doctrine is a Rorschach Test—open to multiple plausible, yet inconsistent, interpretations.”). Professor Hall argues that legislative plaintiffs should only be able to establish standing when they can point to “a specific prerogative or power eliminated by the defendant, or threatened with elimination as a result of the litigation.” *Id.* at 26.

119. *Cf. Sant’Ambrogio*, *supra* note 12, at 385-86 (discussing how the Executive’s enforcement decisions allow it “to juggle ... competing statutory goals and adapt enforcement priorities to the changing environment”).

allegations of her complaint.”<sup>120</sup> Judge Fletcher criticized the Court’s standing doctrine for claiming to merely require a neutral “factual” showing of injury while in fact applying external normative standards to plaintiffs alleging nontraditional injuries.<sup>121</sup> Whether Judge Fletcher and the other scholars who have criticized the Court’s standing jurisprudence are right or wrong, standing undeniably becomes more contested when we move beyond traditional injuries that we can verify without reference to a plaintiff’s state of mind, such as monetary loss, physical injuries, and even increased risk exposure.<sup>122</sup> Moreover, although there may be no reason to doubt the sincerity of most private plaintiffs, as discussed more fully below in Part II.A.4, there may be reason to doubt the sincerity, and certainly the constancy, of Congress when it sues the Executive during times of divided government.

#### *E. Arizona v. Arizona and Equitable Discretion*

The Supreme Court returned to the question of legislative standing at the end of the 2014-2015 Term in *Arizona v. Arizona*.<sup>123</sup> In that case, the Arizona Legislature sought to challenge the constitutionality of the Arizona Independent Redistricting Commission (AIRC), which was created by an Arizona ballot initiative amending the Arizona State Constitution.<sup>124</sup> The Arizona Legislature argued that the federal Elections Clause, which states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations,”<sup>125</sup> vests a state’s representative body with sole

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120. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231 (1988).

121. *See id.*

122. *See generally* Shaun Cassin, Comment, *Eggshell Minds and Invisible Injuries: Can Neuroscience Challenge Longstanding Treatment of Tort Injuries?*, 50 HOUS. L. REV. 929, 933 (2013) (noting that the existence of a physical injury is easier to prove than other kinds of harms).

123. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 135 S. Ct. 2652, 2658-59 (2015).

124. *See id.* at 2658.

125. U.S. CONST. art. I, § 4, cl. 1.

authority—absent congressional action—“to prescribe ... regulations ... for congressional redistricting.”<sup>126</sup>

A five-Justice majority held that the Arizona Legislature had standing to bring the suit and went on to address the merits of the case, ultimately deciding that the Elections Clause permitted the use of a ballot initiative as part of a state’s lawmaking power to structure the process for designing congressional districts.<sup>127</sup> First, the majority explained that the question of standing in no way depended on the merits of the claim.<sup>128</sup> Thus, although the Court rejected the argument that the Arizona Legislature had the “exclusive, constitutionally guarded role it assert[ed],” it nevertheless held that the Legislature had stated a concrete injury.<sup>129</sup>

Second, analogizing to *Coleman*, the Court held that the prospective nullification of any vote to adopt a redistricting plan injured the Arizona Legislature.<sup>130</sup> Such nullification would occur because the Arizona Constitution bans any effort by the Legislature to undermine the purposes of a citizen initiative.<sup>131</sup> The AIRC and the United States, as an amicus party, argued that there could be no injury until the Legislature took a “specific legislative act that would have taken effect but for Proposition 106”<sup>132</sup> or “the Arizona Secretary of State refuse[d] to implement a competing redistricting plan passed by the Legislature.”<sup>133</sup> Under this theory, the injury was “premat[ur]e,” or “too ‘conjectural’ or ‘hypothetical’ to establish standing.”<sup>134</sup> Clearly thinking ahead to the House of Representative’s

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126. *Ariz. State Legislature*, 135 S. Ct. at 2673 (alterations in original) (quoting Reply Brief for Appellant at 30, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314)).

127. *See id.* at 2659. Four Justices dissented on the merits, but two of the dissenters, Chief Justice John Roberts and Justice Samuel Alito, neither addressed the standing question nor joined the dissenting opinions of Justices Antonin Scalia or Clarence Thomas that did. *See id.* at 2677-78 (Roberts, C.J., dissenting); *id.* at 2694-97 (Scalia, J., dissenting) (discussing the doctrine of standing in a decision that only Justice Thomas joined); *id.* at 2697, 2699 (Thomas, J., dissenting) (concurring “with Justice Scalia that the Arizona Legislature lacks Article III standing to assert an institutional injury against another entity of state government”).

128. *See id.* at 2663 (majority opinion).

129. *Id.* at 2663, 2665-66.

130. *See id.* at 2665.

131. *See id.* at 2664.

132. *Id.* at 2663 (quoting Brief for Appellees Arizona Independent Redistricting Commission, et al. at 20, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314)).

133. *Id.* (citing Brief for the United States as Amicus Curiae Supporting Appellees at 14-17, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314)).

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

“usurpation” argument in *House v. Burwell*,<sup>135</sup> the United States (read executive branch) claimed that the Arizona Legislature’s

real complaint ... is not that its power to enact legislation has been “usurped,” but rather the distinct claim that any redistricting legislation it enacts will be ignored by state officials. That is, the claim of injury here is based on a predicted failure of state officials to *enforce* a district map adopted by the legislature, not on any regulation of the legislature’s own primary conduct in *enacting* such legislation.<sup>136</sup>

Consequently, the Department of Justice (DOJ) contended, the Arizona Legislature’s alleged injury was not “actual” or “imminent,” as the Court has said Article III requires.<sup>137</sup> And unless the Arizona Legislature enacted its own redistricting plan that the Arizona Secretary of State refused to enforce, its complaint was no more than a generalized grievance that the law was not being followed, which the Court has consistently held is insufficient to establish Article III standing.<sup>138</sup>

The Court rejected these arguments, explaining that “the Legislature’s passage of a competing plan and submission of that plan to the Secretary of State [would be] unavailing.”<sup>139</sup> The Court cited provisions of the Arizona Constitution that (1) prohibit the Legislature from adopting measures that supersede an initiative in whole or in part and do not further the purposes of the initiative; and (2) require the Secretary of State to implement the redistricting plan of the Commission and no other.<sup>140</sup> Therefore, the Court seemed to say, the Legislature had no nonjudicial remedy because

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135. See Opposition of the United States House of Representatives to Defendants’ Motion to Dismiss the Complaint, *supra* note 83, at 4 (claiming that the Congress’s power to limit the Executive is only effective if that power can be enforced through the courts). Indeed, the Department of Justice’s brief devoted considerable space discussing lawsuits by Congress against the President, while acknowledging that they were “not directly applicable here.” Brief for the United States as Amicus Curiae Supporting Appellees at 19, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314).

136. Brief for the United States, *supra* note 135, at 11.

137. See *id.* at 14 (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2541 (2014)).

138. See *id.* at 13.

139. See *Ariz. State Legislature*, 135 S. Ct. at 2663.

140. *Id.* at 2664.

any of the actions that the Arizona Independent Redistricting Commission and the DOJ suggested would be futile.<sup>141</sup> Or put differently, the Arizona Legislature had exhausted its legislative remedies.

Of course, there were likely other nonjudicial remedies available to the Arizona Legislature besides passing a competing redistricting plan. As the Commission pointed out, the Arizona Legislature has “the power to refer constitutional amendments to the People of Arizona.”<sup>142</sup> Therefore, the Commission argued, the Legislature could have proposed “an initiative that would eliminate the Commission entirely—the voters of Arizona have previously repealed other constitutional amendments just years after their initial passage.”<sup>143</sup> The Court did not address these arguments. Perhaps the Court did not believe it would be lawful for the Legislature to pursue such a course given the prohibition on attempts by the Legislature to supersede an initiative. But the Court did not delve into the meaning of the Arizona Constitution,<sup>144</sup> and it may be more appropriate to read the provision as merely precluding statutory acts that themselves undermine a referendum rather than a proposal that the electorate repeal its own initiative.

Alternatively, the Court may have felt the power of the Legislature to propose repeals was irrelevant because the citizens might reject the Legislature’s proposal, and its loss of redistricting power would remain uncured. This would be an exhaustion principle without much bite. Private parties that must exhaust their administrative remedies before seeking relief in federal court do not have the power to obtain the remedy they seek from the administrative forum; they only have the *possibility* of obtaining it.<sup>145</sup> The Arizona Legislature certainly did not attempt to obtain a remedy in a nonjudicial forum—for example, by submitting its proposal to the

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141. *See id.* at 2663-64 (discussing why the Legislature could not take the actions suggested by the Commission and the DOJ).

142. Brief for Appellees Arizona Independent Redistricting Commission, et al. at 9, *Ariz. State Legislature*, 135 S. Ct. 2652 (No. 13-1314) (citing ARIZ. CONST. art. IV, pt. 1, § 1, cl. 15; *id.* art. XXI, § 1).

143. *See id.* at 10.

144. *See Ariz. State Legislature*, 135 S. Ct. at 2664 (stating the provisions of the Arizona Constitution but not critically analyzing their meaning).

145. *See Ticolor Title Ins. Co. v. FTC*, 814 F.2d 731, 732 (D.C. Cir. 1987) (Edwards, J.).

electorate—and we can only speculate on whether such an attempt would have been futile.<sup>146</sup>

Of course at the federal level, Congress *does* have the power to overrule the Executive in legislative disputes.<sup>147</sup> If Congress wants to override a presidential veto, it has the power to do so with sufficient political will.<sup>148</sup> In addition, no mechanisms at the federal level exist by which the people can directly trump an act of Congress.<sup>149</sup> Therefore, regardless of the precise contours of the Legislative Exhaustion principle that we might glean from *Arizona v. Arizona*, at the federal level the principle would seem to bar Congress from bringing suits that seek what Congress could achieve through legislative means.<sup>150</sup>

To be clear, the Court expressly disclaimed the relevance of its opinion to the standing of Congress to sue the Executive.<sup>151</sup> But the Court distinguished such suits from the Arizona Legislature's action because the standing analysis would be more, not less, rigorous given the separation of powers concerns raised by congressional suits against the President. Therefore, although we might be wary of relying upon *Arizona v. Arizona* to establish congressional standing, it is worth considering how the Court's reasoning might be used to bar congressional lawsuits, even without the heightened separation of powers concerns.

Justice Ginsburg's approach, at least as articulated here, bears some resemblance to the "equitable discretion" doctrine the D.C. Circuit used to review legislator lawsuits when then-Judge Ginsburg sat on the D.C. Circuit.<sup>152</sup> The doctrine was one of several tools

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146. *See Ariz. State Legislature*, 135 S. Ct. at 2663-64.

147. *See* U.S. CONST. art. I, § 7, cl. 2 (outlining the legislative override of executive vetoes).

148. *See id.*

149. The Article V amendment process begins in Congress or the state legislatures and ends in the state legislatures or ratifying conventions called for that purpose. *See* U.S. CONST. art. V.

150. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 829 (1997) (concluding that members of Congress who lacked Article III standing had other legislative means to pursue a remedy to their claim).

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

152. *See Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981); *see also Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561, 562-64 (D.C. Cir. 1987) (approving the "equitable discretion" principle while disapproving dicta in *Riegle* suggesting that the court should also consider whether a private plaintiff is available); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984) ("[A]ppellants' dispute ... is primarily a

the court developed to handle an onslaught of legislator lawsuits beginning in the 1970s.<sup>153</sup> Under equitable discretion, the D.C. Circuit dismissed suits by legislative plaintiffs who might otherwise have Article III standing when the “congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute.”<sup>154</sup> The D.C. Circuit rested the principle on separation of powers concerns.<sup>155</sup>

The doctrine fell into disuse after the Supreme Court’s opinion in *Raines v. Byrd*.<sup>156</sup> The D.C. Circuit had used the doctrine in suits in which legislators claimed institutional injuries to Congress and themselves as individual members of Congress stemming from executive actions.<sup>157</sup> But once the *Raines* Court held that such claims did not state an injury under Article III absent nullification of the validity of their votes,<sup>158</sup> the D.C. Circuit no longer needed to use equitable discretion to dismiss suits by legislative plaintiffs who might otherwise have standing. Following *Raines*, the D.C. Circuit began holding that such plaintiffs did not have Article III standing and, consequently, never reached the question of equitable discretion.<sup>159</sup>

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controversy with other members of Congress.”). The “equitable discretion” doctrine was sometimes called “remedial discretion.” See, e.g., *id.* at 954.

153. See *Gregg v. Barrett*, 771 F.2d 539, 543 (D.C. Cir. 1985) (“A great upsurge in this type of lawsuit began during the Vietnam War era, when members of Congress, frustrated with what they perceived as the failures of this country’s Southeast Asian foreign and military policy, filed suit to declare unlawful various executive actions in pursuit of that policy.”), *abrogated by* *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

154. See *Riegle*, 656 F.2d at 881.

155. See *id.* at 882.

156. See 521 U.S. 811, 830 (1997) (holding that “individual members of Congress [did] not have a sufficient ‘personal stake’ in the dispute” and therefore could not demonstrate an injury sufficient to establish Article III standing).

157. See, e.g., *Gregg*, 771 F.2d at 543 (noting that equitable discretion was typically applied when individual members of Congress challenged executive actions).

158. See *supra* Part I.C.

159. Interestingly, Judge Rosemary Collyer did not address equitable discretion in her opinion in *U.S. House of Representatives v. Burwell*, despite the fact that the government advanced the argument in its briefs. See 130 F. Supp. 3d 53 (D.D.C. 2015); Defendants’ Memorandum in Support of Their Motion to Dismiss the Complaint, *supra* note 87, at 25-26. See also *infra* Part III.D for a discussion of *House v. Burwell*. Equitable discretion arguably remains good law in the D.C. Circuit, which applied the doctrine in a closely analogous case involving legislators who challenged an executive order as usurping their constitutional authority. See *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (“More to the point, it is exactly the position taken by the Representatives here: Their injury, they say, is the result of the President’s successful effort ‘to usurp Congressional authority by implementing

Even prior to *Raines*, judges on the D.C. Circuit who never believed legislator lawsuits constituted Article III cases or controversies had no use for the doctrine.<sup>160</sup> Indeed then-D.C. Circuit Judge Antonin Scalia was a particular critic, not because he believed legislators had Article III standing to resolve interbranch disputes in the courts, but because he feared that the courts would exercise their “discretion” to hear such claims.<sup>161</sup>

The concern with the prudential aspect of equitable discretion may be more acute today, inasmuch as the Court has suggested that there is no longer any room for prudential standing.<sup>162</sup> But it is easy to cast Legislative Exhaustion as an Article III prerequisite to judicial review, rather than as a prudential doctrine. The Court might hold that Congress cannot establish an injury in fact for purposes of Article III if it has legislative means of curing the injury.<sup>163</sup> The

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a program, for which [he] has no constitutional authority, in a manner contrary to the Constitution.’ Applying *Moore*, this court presumably would have found that injury sufficient to satisfy the standing requirement; after *Raines*, however, we cannot. *Raines* notwithstanding, *Moore* and *Kennedy* may remain good law, in part, but not in any way that is helpful to the plaintiff Representatives. 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.” (alterations in original) (citation omitted) (quoting *Moore v. U.S. House of Representatives*, 753 F.2d 946, 956 (D.C. Cir. 1984), *abrogated by Chenoweth v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977), which rejected the standing of a Representative to bring a nearly identical misuse of appropriations claim. *See generally House v. Burwell*, 130 F. Supp. 3d 53.

160. *See Moore*, 733 F.2d at 956-61 (Scalia, J., concurring); *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (Bork, J., concurring); *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1177-85 (D.C. Cir. 1983) (Bork, J., concurring).

161. *Moore*, 733 F.2d at 963 (although “remedial discretion ... may produce judicial abstention it will not necessarily do so. The court will proceed to consider, case by case, whether its involvement would ‘not serve a useful purpose.’” (quoting *id.* at 955 (majority opinion))).

162. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (holding that a court “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates”).

163. The D.C. Circuit suggested as much in *Chenoweth v. Clinton* when it remarked that “*Raines* ... may not overrule [equitable discretion] so much as require us to merge our separation of powers and standing analyses.” 181 F.3d at 116. The Supreme Court might also find redressability problems when Congress sues over the meaning of a statute because at any time a subsequent Congress could overrule the Court by amending the statute. *Cf. Allen v.*



separation of powers principle that undergirds both *Raines* and the discomfort with equitable discretion is that the federal courts were not designed to preside over disputes between the political branches.<sup>164</sup> Such lawsuits threaten to both raise the Court above its pay grade and undermine the political process.<sup>165</sup> Legislative Exhaustion is consistent with this separation of powers concern. Moreover, these are not mere throwaway lines. As the next Part demonstrates, legislative efforts to confront the Executive are central to the engine the Framers designed to drive our political system.

## II. INTERBRANCH CONFLICT IN THE DELIBERATIVE REPUBLIC

Interbranch disputes are not an anomaly in our governmental system; they are part of its institutional design. The Framers intended the branches to “compete” with one another for the people’s affections,<sup>166</sup> while guarding against “encroachments” and “invasions” of “the weaker departments” by “the stronger.”<sup>167</sup> Although

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Wright, 468 U.S. 737, 757-58 (1984) (noting how a judicial order might not redress the alleged injury due to the responses of third parties), *abrogated on other grounds by Lexmark Int’l, Inc.*, 134 S. Ct. 1377.

164. *Compare Moore*, 733 F.2d at 959 (Scalia, J., concurring) (“[W]e sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers.”), *with Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (“[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”).

165. *See, e.g., Raines*, 521 U.S. at 824, 829; *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.”); *id.* at 998 (“It cannot be said that either the Senate or the House has rejected the President’s claim. If the Congress chooses not to confront the President, it is not our task to do so.”).

166. Professor Todd E. Pettys uses this expression to describe the relationship between the state and federal governments in Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 336 (2003). Professor Pettys borrowed the concept from Madison’s description of how the state and federal governments would compete in THE FEDERALIST NO. 46, at 239 (James Madison) (Ian Shapiro ed., 2009). But this idea of competing for the people’s affections also describes how the Framers imagined the different branches of the federal government functioning. *See Sant’Ambrogio, supra* note 77, at 1888.

167. *See* THE FEDERALIST NO. 49, *supra* note 166, at 256-57 (James Madison).

this martial language might suggest interbranch conflicts cause the kinds of “injuries” that would support Article III standing,<sup>168</sup> there are at least two reasons for doubt. First, the Framers sought to provide the branches with their own tools for “settling the boundaries between [the branches’] respective powers.”<sup>169</sup> Individual citizens, by contrast, have fewer options for remedying injuries caused by the government.<sup>170</sup> Second, the Framers viewed interbranch competition as a means of promoting enhanced deliberation about controversial government policies.<sup>171</sup> Accordingly, after reviewing the relationship of interbranch conflicts as to how the Framers expected the new Republic to function, this Part examines each tool that Congress can use to check the Executive and its deliberative potential.

#### *A. The Framers’ Conception of Republican Government*

The Framers of the Constitution created a new political form—a deliberative democratic republic.<sup>172</sup> The new Republic was a representative, rather than a direct democracy; the representatives were charged with refining the views of the people through deliberation over the public good; and the government was structured to encourage such deliberation, particularly when the people and their representatives were divided over government policy.

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168. To be sure, the Framers were much more concerned with encroachments by Congress on the Executive. *See id.* No. 51, at 264 (James Madison) (“In republican government, the legislative authority necessarily predominates.”). But the Framers did not think this was the only quarter from which constitutional violations might arise, and with the growth of executive power since the Founding, it is not difficult to imagine that the greater threat might now come from elsewhere. *But see* Beermann, *supra* note 106, at 64-65 (noting that Congress’s role in administering laws has been examined much less following Executive Order 12,291).

169. *See* THE FEDERALIST NO. 49, *supra* note 166, at 257 (James Madison). According to Thomas Jefferson, “[T]he powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.” *Id.* No. 48, at 254 (James Madison) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 129 (J.W. Randolph ed., 1853)).

170. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346 (2012) (describing the limited circumstances in which individuals can bring a civil lawsuit against the United States as a defendant).

171. *See* Sant’Ambrogio, *supra* note 77, at 1890-91.

172. *See id.* at 1888-90.

### 1. *A Representative Republic*

The first sentence of the Constitution proclaimed that all sovereignty in the American Republic rested with “We the People.”<sup>173</sup> Whereas the Framers’ English forebears had located sovereignty in the government—first in the Monarchy, then in Parliament<sup>174</sup>—the Americans declared that the People retained their sovereignty, and the government would merely act as their agents.<sup>175</sup>

Nevertheless, the Framers created a representative rather than a direct democracy. The Framers were alarmed by an “excess of democracy” and “democratic despotism” during the post-Revolutionary period, when the people claimed the authority to direct their elected leaders how to vote, ignored laws they did not like, and threatened traditional property rights.<sup>176</sup> Imagining themselves the natural leaders of the new American Republic, the Framers thought the people did not always “*reason right* about the *means* of promoting” the public good.<sup>177</sup>

Accordingly, the Framers constructed a democracy in which the elected representatives are not agents of the people in the traditional principal-agent sense of the word,<sup>178</sup> they do not merely vote the will of their constituencies.<sup>179</sup> In the new Republic, the elected government would

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173. See U.S. CONST. pmb1.

174. See Sant’Ambrogio, *supra* note 77, at 1873, 1880.

175. To be sure, popular sovereignty was a legal fiction. See Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102, 103-04 (Robert A. Goldwin & William A. Schambra eds., 1980). Moreover, when the Framers talked about the People, they imagined a narrow group of white, propertied men, led by an even smaller group of men they deemed the natural leaders of American society. Sant’Ambrogio, *supra* note 77, at 1873 & n.13. But such quasi-aristocratic notions proved elusive, and over the past two centuries more and more people have been able to claim the full rights and privileges of citizenship. See, e.g., *id.*

176. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 409, 484 (1998) (noting that, in the 1780s, giving too much power to the people was leading to “democratic despotism” and tyranny at the hands of the public). See generally EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 275-77* (1988).

177. See THE FEDERALIST NO. 71, *supra* note 166, at 362 (Alexander Hamilton).

178. See FERGUS M. BORDEWICH, *THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT 19* (2016).

179. Sant’Ambrogio, *supra* note 77, at 1888-89.

refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.<sup>180</sup>

The Framers believed that legislative deliberation by informed leaders would allow judgment and reason to prevail over private interests, resulting in legislation for the public good.<sup>181</sup> Therefore, the Framers sought to establish a democracy in which the people's representatives would deliberate using "*reasoning on the merits of public policy.*"<sup>182</sup>

## 2. *The Nature of Political Deliberation*

Professor Joseph M. Bessette described three fundamental components of deliberation: information, argument, and persuasion.<sup>183</sup> First, the people's representatives need facts and information about social, economic, or political problems and opportunities that might be appropriate objects of government policy, the different policies that might be applied, and the likely impact of different courses of

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180. THE FEDERALIST NO. 10, *supra* note 166, at 51 (James Madison); *see also id.* NO. 57, at 290 (James Madison) ("The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."); *id.* NO. 71, at 362 (Alexander Hamilton) ("When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection."). In line with this view, when Congress drafted the First Amendment it enshrined the right of the people to "petition," but not to "instruct," their representatives. Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1147 (2016).

181. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985); *see also* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 57-60 (1990).

182. BESSETTE, *supra* note 12, at 46.

183. *See id.* at 46-53.

action.<sup>184</sup> The political branches are equipped with a plethora of information-gathering tools to provide the factual fuel necessary for legislative deliberation.<sup>185</sup> The Constitution requires that members of Congress be residents of their congressional districts or states,<sup>186</sup> so that they can bring their knowledge of the experiences and needs of their constituents to bear in national debates.<sup>187</sup> The Constitution also directs the President to “give ... Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”<sup>188</sup> Moreover, since the Founding, Congress has developed a robust information-gathering capacity based on the committee system within each house and congressional agencies created to “generate and analyze information for policy purposes.”<sup>189</sup>

The second component of deliberation is argument connecting information and goals to produce policies.<sup>190</sup> This is the heart of deliberation and the focus of much activity within the halls of Congress, the White House, the executive branch, and the states. It involves arguments about both appropriate policy goals—for example, universal access to health care—and different means of achieving them—for example, a national health insurance program or a free-market system.

Third, and perhaps most importantly, deliberation involves persuasion.<sup>191</sup> The Framers imagined legislative deliberation as potentially transformative, creating an opportunity for the type of free and open exchange that can change minds in a democratic society.<sup>192</sup> According to Professor Cass Sunstein “this conception

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184. *Id.* at 49-51.

185. *Id.* at 50.

186. See U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

187. Bessette, *supra* note 175, at 107-08; Alfred F. Young, *Conservatives, the Constitution, and the “Spirit of Accommodation,”* in HOW DEMOCRATIC IS THE CONSTITUTION?, *supra* note 175, at 117, 140-41.

188. See U.S. CONST. art. II, § 3.

189. BESSETTE, *supra* note 12, at 50. These include the Congressional Research Service, the General Accounting Office, the Congressional Budget Office, and the Office of Technology Assessment. See *id.* Notwithstanding complaints about excessive partisanship among our politicians, these agencies have remained remarkably independent of partisan politics in their information gathering and analysis.

190. *Id.* at 51.

191. *Id.* at 52-53.

192. See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 187-89

reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that ‘practical reason’ can be used to settle social issues.”<sup>193</sup> Therefore, representatives do not make arguments based on information merely to stake out positions (or posture) or aggregate the opinions of their constituencies. Rather, they engage in a process of persuasion, reconsideration, adjustment, and compromise, in which they refine policy goals and means to produce laws better designed to advance the public interest.

### 3. *Deliberation-Forcing Design*

The Framers not only expected the national legislature to be composed of men with better powers of reasoning and understanding of the public good, but they also structured the national political institutions in such a way as to encourage policies in the public interest and discourage the enactment of bad laws, particularly when there was not a clear consensus about whether a policy was in the public interest.<sup>194</sup>

First, they structured the political branches to bring diverse views to bear on policy discussions.<sup>195</sup> Each of our three national political institutions—the House, the Senate, and the President—represents a different set of constituencies.<sup>196</sup> Although the Framers believed in the power of reasoning to produce an objective public good, they also understood that politicians would respond to the particular demands of their constituencies and bring their interests and experiences to bear in national debates.<sup>197</sup> The House members would represent the most cohesive constituencies by virtue of their relatively small size and would be most likely to respond to their desires because they face reelection most often.<sup>198</sup> Senators

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(1997); HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 90-93, 244-45 (2002).

193. See Sunstein, *supra* note 181, at 31-32.

194. Sant’Ambrogio, *supra* note 77, at 1889-91. And the people’s electoral power would ensure that their representatives were responsive to their views. *Id.* at 1890.

195. *Id.*

196. *Id.*

197. *Id.*

198. See BESSETTE, *supra* note 12, at 20-21. By the standards of the day, however, the two-

(originally elected by the state legislatures) would represent broader state interests and would be less likely to be captured by shifting public moods or passions due to their six-year terms.<sup>199</sup> Meanwhile, the President and Vice President would represent a national perspective, or at least the perspective of a national majority coalition.<sup>200</sup>

Second, the Framers ratcheted up the procedural hurdles for passing controversial policies with bicameralism, presentment, and the President's Article I veto power.<sup>201</sup> The House and the Senate, representing their different interests and with different time horizons, would both have to agree to the passage of any law.<sup>202</sup> To the extent they disagreed in any way, they would have to iron out the differences and vote on an identical bill, encouraging additional deliberation.<sup>203</sup> Moreover, the limited veto power of the President would encourage more deliberation than either an absolute veto or no veto at all.<sup>204</sup> The limited veto would invite Congress to debate whether to accommodate the President's objections, work towards a negotiated compromise, or stick to its original policy and override the veto.<sup>205</sup> An absolute veto would give the legislature fewer options, and no veto would eliminate the need to ever have an additional layer of deliberation.<sup>206</sup> The overarching goal of this structure was to prevent the passage of "bad laws" by enhancing deliberation about controversial policies.<sup>207</sup>

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year term for representatives was quite long, and the size of their constituencies quite large. The members of the "people's house" of the new Republic served terms at least "twice as long as the popular [legislative] branches in every ... state but South Carolina." *Id.* at 25.

199. *Id.*

200. *Id.* at 232.

201. *See* U.S. CONST. art. I, § 7.

202. *See id.* art. I, § 7, cl. 2.

203. *See id.*

204. *See* SPITZER, *supra* note 12, at 19.

205. *See id.*

206. *See id.* at 11-12.

207. *See id.* at 16-17.

#### 4. *Separation of Parties, Not Powers*<sup>208</sup>

Professors Daryl Levinson and Richard Pildes argue that today the actual competition in our government occurs between political parties, not the branches of government.<sup>209</sup> Thus, “the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.”<sup>210</sup> In times of divided government, interbranch conflict will function in much the way the Framers imagined, with ambition counteracting ambition, and the deliberation that civic republicanism imagines, even if the engine doing the work is party competition, rather than institutional conflict between the political branches, which merely serve as the vehicles for the parties.<sup>211</sup> But in times of unified government, little competition will persist between the legislative and executive branches.<sup>212</sup> As a result, “smaller partisan majorities will be able to effect major policy change without the full range of checks and balances that are supposed to divide and diffuse power in the Madisonian system.”<sup>213</sup> Consequently, there is a risk that unified government will be “*too* efficacious and ideologically aggressive.”<sup>214</sup>

Thus, the emergence of parties does not undermine the civic republican ideal of deliberation at all times. When government is divided, the competition between the parties will look much like the competition between the branches that the Framers imagined.<sup>215</sup> It is only during times of unified government that we may need to think of other mechanisms to encourage civic republican

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208. This Part takes its name from Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

209. *See id.* at 2315; *see also* James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN'S L. REV. 293, 308 (2005) (“[C]onstitutional actors in a democracy are no less interested in self-aggrandizement than the Framers believed; it is just that they must aggrandize themselves very differently in a democratic form of government than in a monarchical one.”).

210. Levinson & Pildes, *supra* note 208, at 2315.

211. *Id.* at 2329-30.

212. *Id.*

213. *Id.* at 2338.

214. *Id.* at 2339.

215. *Id.* at 2327.



deliberation.<sup>216</sup> Because interbranch disputes will typically arise during times of divided government, separation of parties suggests that usually the courts will not need to play a deliberation-forcing role in such disputes.<sup>217</sup>

### *B. Deliberation and Interbranch Conflict*

Congress has a variety of ways in which it can check or punish the Executive when it does not like the Executive's enforcement or defense of federal law.<sup>218</sup> Indeed, it is for this reason that many of those who oppose legislative standing see no need for it.<sup>219</sup> But not all congressional responses are likely to produce deliberation on the merits of the policy in dispute. This Section examines each congressional tool in terms of its deliberative benefits. It concludes that when the Executive is acting pursuant to statutory authority, Congress has a variety of tools that will produce greater deliberation on the merits of government policy than legislative lawsuits. But when the Executive refuses to enforce a law based on constitutional objections, Congress has fewer deliberation-producing options.

#### *1. Legislative Action*

If Congress disagrees with the Executive's interpretation of its statutory obligations, Congress has the power to amend the statute to clarify or eliminate the Executive's discretion.<sup>220</sup> We should not

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216. To address this danger, Professors Levinson and Pildes suggest a variety of ways in which courts might encourage greater deliberation during times of unified government. For example, courts might be more generous in construing statutes in support of executive authority in times of divided government and less generous in times of unified government. *Id.* at 2354. By contrast, during times of divided government, "partisan conflict and competition between the political branches may reduce the need for an external check." *Id.*

217. *Id.* at 2367-68.

218. *See* Beermann, *supra* note 106, at 67-68.

219. *See, e.g.,* *United States v. Windsor*, 133 S. Ct. 2675, 2704-05 (2013) (Scalia, J., dissenting) ("If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit."); *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring) ("[W]e are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.")

220. *See* Sant'Ambrogio, *supra* note 12, at 395.

underestimate Congress's institutional power. Few areas of public policy exist in which the President has constitutional authority to act contrary to a congressional statute.<sup>221</sup> Most of the executive actions that members of Congress complain about involve interpretations of "[v]ague, general, or ambiguous statutes" with broad, and sometimes conflicting, mandates.<sup>222</sup> Since the decline of the nondelegation doctrine,<sup>223</sup> the Court has done little to police congressional delegations of authority to pursue such broad and undefined goals as the "public convenience, interest, or necessity,"<sup>224</sup> "public health,"<sup>225</sup> or "safe or healthful employment and places of employment."<sup>226</sup> At the same time, the Court has given the Executive a long leash for implementing such statutes.<sup>227</sup> Most notably, the Court often has deferred to reasonable interpretations of ambiguous statutes under the *Chevron* doctrine,<sup>228</sup> and has granted the Executive substantial enforcement discretion, allowing the Executive

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221. See Beermann, *supra* note 106, at 72. A few of the most prominent examples are the President's discretion over whether to receive Ambassadors, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015) ("The formal act of recognition is an executive power that Congress may not qualify."), and the pardon power, *Biddle v. Perovich*, 274 U.S. 480, 487-88 (1927). There is some debate over whether the Necessary and Proper Clause permits Congress to place restrictions on the exercise of presidential powers even when they are pursuant to the President's constitutionally assigned powers rather than pursuant to federal law. Beermann, *supra* note 106, at 76.

222. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676 (1975).

223. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" (citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935))); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 246 ("The congressional nondelegation doctrine had its last good year in 1935 (and perhaps its first good year then as well)."); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 330 (1999) ("The Old Nondelegation Doctrine: One Good Year, Two Hundred and Two Bad Years").

224. Communications Act of 1934 § 303, 47 U.S.C. § 303 (2012).

225. Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (2012).

226. Occupational Safety and Health Act of 1970 § 3(8), 29 U.S.C. § 652(8) (2012).

227. See Beermann, *supra* note 106, at 78.

228. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). *But see King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

to stay its hand even when it comes to activity that was clearly prohibited under the statute.<sup>229</sup> Nevertheless, Congress retains the power to be clearer and more specific in its mandates, thereby narrowing the Executive's discretion in these areas: "When Congress legislates with precision, the President and other administrative officials may have little discretion in the execution of the law."<sup>230</sup>

For example, after the Secretary of Health and Human Services interpreted "miner" as used in the Black Lung Benefits Title of the Federal Coal Mine Health and Safety Act of 1969 to mean an "individual who is working or has worked as an employee"—thus excluding self-employed miners<sup>231</sup>—Congress responded by clarifying the Act's definition of "miner" to include self-employed miners.<sup>232</sup> The Secretary acknowledged that it had to change its own interpretation of the law as a result of the congressional action.<sup>233</sup> Similarly, when the Secretary of Transportation promulgated a motor vehicle safety standard requiring a lock on automobile ignitions that would not unlock until the automobile's seatbelts were fastened,<sup>234</sup> the American people complained to their representatives and Congress

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229. See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985).

230. Beermann, *supra* note 106, at 71-72.

231. See *Moore v. Harris*, 623 F.2d 908, 911 (4th Cir. 1980) (quoting 20 C.F.R. § 410.110(j) (1979)).

232. The Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(b), 92 Stat. 95, 95 (1978) (codified at 30 U.S.C. § 902 (2012)) states:

The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal.

Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

See also H.R. REP. NO. 95-864, at 15 (1978) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 308, 310 ("The Senate amendment modified the definition to include all self-employed miners.").

233. See 20 C.F.R. § 725.1(d) (2016) ("The Black Lung Benefits Reform Act of 1977 contains a number of significant amendments to the Act's standards for determining eligibility for benefits. Among these are ... [a] provision which defines 'miner' to include any person who works or has worked in or around a coal mine or coal preparation facility, and in coal mine construction or coal transportation under certain circumstances."); *Moore*, 623 F.2d at 913 ("The Secretary fully accepts that, under the current language of the Black Lung Benefits Act, self-employment in a coal mine counts toward the definitions of 'miner' and 'pneumoconiosis' and toward the presumptions.").

234. See Federal Motor Vehicle Safety Standards, 37 Fed. Reg. 3911, 3911-12 (proposed Feb. 24, 1972), withdrawn, 39 Fed. Reg. 38,380 (Oct. 31, 1974).

passed the Motor Vehicle and School Bus Safety Amendments of 1974, which (1) prohibited the Department of Transportation from requiring interlocks and (2) required future passive restraint regulations to first be cleared by Congress.<sup>235</sup> The Ford Administration then formally withdrew the interlock regulations.<sup>236</sup>

Congress can also limit an agency's enforcement discretion "either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."<sup>237</sup> In *Heckler v. Chaney*, the Court contrasted the Food and Drug Administration's general enforcement policy under the Food Drug and Cosmetic Act with the Secretary of Labor's enforcement obligations under the Labor-Management Reporting and Disclosure Act (LMRDA).<sup>238</sup> The LMRDA provided that upon the filing of a complaint by a union member, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation ... has occurred ... he shall ... bring a civil action."<sup>239</sup> If a statute clearly requires the agency to bring an enforcement action under certain specified conditions, then a federal court will enforce the congressional command.

Thus, in almost every conflict between Congress and the executive branch over the Executive's obligations under a statute, Congress has the power to enforce its view through statutory amendments.<sup>240</sup>

Such legislative efforts to make statutes more precise and specific are the strongest form of deliberative activity in which Congress can engage. Such deliberation moves beyond broad policy goals, such as clean air or public health, and grapples with how different policy responses might accomplish these goals, their feasibility, costs, and collateral consequences. Congress must use its

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235. Pub. L. No. 93-492, § 109, 88 Stat. 1470, 1482-84 (1974) (repealed 1994). Congress could veto the regulations by concurrent resolution—a two-house legislative veto, which would now almost certainly be unconstitutional under *INS v. Chadha*. See 462 U.S. 919, 923, 959 (1983).

236. See Seat Belt Interlock Option, 39 Fed. Reg. 38,380, 38,380 (Oct. 31, 1974) (to be codified at 49 C.F.R. pt. 571.208).

237. *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

238. See *id.* at 833-35.

239. *Id.* at 833 (alterations in original) (quoting 29 U.S.C. § 482 (1982)).

240. The problem for Congress is not lack of power. Rather, it is lack of political support or political will. I address this issue *infra* in Parts III.A & III.B.

information-gathering tools to better understand the problem the Executive seeks to address, the nature of the remedies the Executive chooses, and the likely outcome of the Executive's actions. Indeed, a change in policy can provide Congress with particularly robust information about the impact of two different responses to a problem.<sup>241</sup>

Moreover, when Congress considers the details of legislative reforms, it participates in a deliberative feedback loop with "We the People." Interest groups, the news media, and ordinary citizens around the kitchen table engage in a dialogue and debate concerning the policy alternatives before Congress.<sup>242</sup> This public discourse in turn shapes congressional outcomes.<sup>243</sup>

Thus, legislative amendments represent the gold standard of deliberation-forcing tools available to Congress. They are the ideal means of resolving interbranch disputes.

## 2. *The Power of the Purse*

One of Congress's most powerful tools for controlling the Executive is its power over appropriations. The Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>244</sup> Therefore, if Congress does not like executive actions that require congressional funds, Congress can reduce, eliminate, or attach strings to those funds.<sup>245</sup> Congress has made frequent use of its power of the purse to shape executive action through appropriation riders.<sup>246</sup> Appropriation riders place limits on how an agency can use appropriated funds, notwithstanding what it might otherwise be able to do under existing law.<sup>247</sup>

For example, despite President Obama's commitment to closing the Guantánamo Bay Detention Camp (GITMO), Congress stymied

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241. Cf. BESSETTE, *supra* note 12, at 233 ("[S]eparation of powers conflicts may actually promote the formation of deliberative majorities.").

242. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 77-78 (2010).

243. *Id.* at 17.

244. U.S. CONST. art. I, § 9, cl. 7.

245. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 462-63.

246. *See id.*

247. *See id.*

his efforts through its appropriations power.<sup>248</sup> Soon after Obama took office, the Democrat-controlled Congress rejected his request for eighty million dollars to close the detention center, with the Senate voting ninety to six to block the use of any funds to transfer or release prisoners held at GITMO.<sup>249</sup> This was sufficient to give the Administration pause. The following year Congress went further in its defense appropriations bill, banning the use of funds (1) to transfer detainees to the United States, even for purposes of prosecution; (2) to purchase or construct any facilities within the United States for housing any of the detainees; and (3) to transfer any detainee to a foreign country unless the Secretary of Defense finds that it is safe to do so.<sup>250</sup> Congress included similar restrictions in subsequent defense appropriations.<sup>251</sup> These actions successfully prevented the Obama Administration from closing GITMO.<sup>252</sup>

It is often easier for Congress to use appropriations to check the Executive than to amend or pass new substantive laws. First, because of the different status quo ante when the Executive needs appropriated funds for a particular activity, congressional inaction works against rather than for the Executive.<sup>253</sup> Second, as the GITMO case illustrates, individual appropriations are usually part of large appropriations bills that the President is reluctant to veto due to the other essential appropriations in the package. President Obama signed the Defense Authorization Acts containing the restrictions on funds for closing GITMO because the Act provided funds for other military activities that the President considered vital.<sup>254</sup> Indeed, unlike legislative acts overruling specific executive

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248. See David M. Herszenhorn, *Funds to Close Guantánamo Denied*, N.Y. TIMES (May 20, 2009), <http://www.nytimes.com/2009/05/21/us/politics/21detain.html> [<https://perma.cc/44H2-2NZH>].

249. *Id.*

250. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1032-1034, 124 Stat. 4137, 4351-53 (2011).

251. JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION 28 (2016); MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R40754, GUANTANAMO DETENTION CENTER: LEGISLATIVE ACTIVITY IN THE 111TH CONGRESS 3-7, 9 (2011).

252. Connie Bruck, *Why Obama Has Failed to Close Guantánamo*, NEW YORKER (Aug. 1, 2016), <http://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo> [<https://perma.cc/FC4K-RP2H>].

253. See Devins, *supra* note 245, at 473-74, 473 n.113.

254. President Barack Obama, Statement by the President on H.R. 1540 (Dec. 31, 2011),

actions, which are relatively rare, Congress frequently makes use of appropriation riders.<sup>255</sup>

Still, not all executive actions require congressional appropriations. Some executive programs have their own sources of funds. For example, Congress found it difficult to check the Obama Administration's deferred action immigration programs using its power over appropriations, because the United States Citizenship and Immigration Services, the federal agency responsible for reviewing applications for deferred action, is entirely self-funded through the fees it collects on immigration applications.<sup>256</sup> This flips the status quo ante and requires congressional action rather than inaction to check. Moreover, appropriations will generally be a more effective tool to check executive action, which generally requires money, than executive inaction, which generally does not.

Several scholars have criticized Congress's use of appropriations to achieve substantive ends as a means of avoiding significant deliberation on the merits of the underlying policy.<sup>257</sup> Appropriation riders often bypass the committees with relevant expertise—diminishing Congress's understanding of the matter—and are frequently enacted hastily—minimizing the opportunities for reasoned deliberation.<sup>258</sup>

Still, appropriation riders can produce some deliberation on the merits of the policy in dispute. When Congress rebuffed the Obama Administration's request for funds to close GITMO and prohibited

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<https://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540> [<https://perma.cc/MHW8-26V6>] (“The fact that I support this bill as a whole does not mean I agree with everything in it. In particular, I have signed this bill despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists.”).

255. Beermann, *supra* note 106, at 85-88 (describing several cases).

256. Jennifer Bendery, *House Appropriations Committee Confirms Congress Can't Defund Obama's Immigration Action*, HUFFINGTON POST (Nov. 20, 2014, 11:00 AM), [http://www.huffingtonpost.com/2014/11/20/defund-obama-immigration-action\\_n\\_6191958.html](http://www.huffingtonpost.com/2014/11/20/defund-obama-immigration-action_n_6191958.html) [<https://perma.cc/64HD-QZNT>]; Pema Levy, *What Can the GOP Do to Stop Obama's Immigration Order?*, NEWSWEEK (Nov. 20, 2014, 4:55 PM), <http://www.newsweek.com/what-can-gop-do-stop-obamas-immigration-orders-285931> [<https://perma.cc/9CAQ-NXXU>].

257. See, e.g., Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 389-90 (criticizing secretive nondeliberative process for passing continuing resolutions); Devins, *supra* note 245, at 456, 458; Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1153 (2014).

258. See Devins, *supra* note 245, at 465.

the use of any appropriations to transfer detainees to the United States, it was quite clear that Congress was unconvinced of the merits of the President's plan.<sup>259</sup> Some members of Congress expressed concern with the risks that the detainees might pose if transferred to the United States and the need for some type of risk assessment.<sup>260</sup> Others opposed spending more money on facilities for the Guantánamo detainees "after spending nearby half a billion dollars on the Guantánamo facility."<sup>261</sup> Even the President's Democratic supporters felt that the Administration had simply not provided a credible plan for closing the base and handling the transfers.<sup>262</sup>

Moreover, appropriations are generally limited in their time horizon, usually to a fiscal year.<sup>263</sup> Thus, Congress must periodically revisit the substantive issue planted in an appropriations act, unlike permanent statutes without an expiration date.<sup>264</sup> This shift in the status quo opens up opportunities for deliberative interventions in response to changes in the composition of Congress or in public opinion.<sup>265</sup> Imagine, for example, if the prohibition on federal recognition of same-sex marriages at the state level in the Defense of Marriage Act (DOMA) had been enacted through an appropriations rider rather than a substantive law. Because of the shift in public opinion, it is hard to imagine Congress continuing to pass an appropriations rider with such a prohibition by 2009, if not earlier. The Democrats controlled both houses of the 111th Congress and

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259. *Senate Blocks Transfer of Gitmo Detainees*, NBCNEWS.COM (May 20, 2009, 8:52 PM), [http://www.nbcnews.com/id/30826649/ns/politics-capitol\\_hill/t/senate-blocks-transfer-gitmo-detainees/](http://www.nbcnews.com/id/30826649/ns/politics-capitol_hill/t/senate-blocks-transfer-gitmo-detainees/) [https://perma.cc/HA68-MY4Y].

260. See H.R. REP. NO. 111-230, at 464 (2009), as reprinted in 2009 U.S.C.C.A.N. 1382, 1476; see also 155 CONG. REC. 32,467 (2009) (statement of Rep. Tiahrt) ("Terrorists do not belong in the streets or prisons of America.").

261. 155 CONG. REC. 32,465 (statement of Rep. Mica).

262. Senator Daniel Inouye, D-Hawaii, Chairman of the Appropriations Committee, who favored closing Guantánamo, sought to eliminate the funds because "the administration ha[d] not offered a workable plan at this point." See *Senate Blocks Transfer of Gitmo Detainees*, *supra* note 259.

263. See STEVEN S. SMITH ET AL., *THE AMERICAN CONGRESS* 384 (9th ed. 2015); Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1376 (1980).

264. *But see* Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 249-50 (2007) (arguing that temporary legislation is much more common than most scholars assume).

265. See *id.* at 252 (discussing the impact of shifts in the legislative status quo on temporary legislation).



President Obama had campaigned on repealing DOMA.<sup>266</sup> Certainly, the issue would have been raised during debates over the appropriations. Even before the 111th Congress, given the significant shift in public opinion regarding same-sex marriage since 1996,<sup>267</sup> opponents of DOMA might have attempted to mount a filibuster in the Senate or raised the issue in the Democrat-controlled House. But DOMA survived until the Supreme Court struck it down in 2013, because Congress's minority-empowering rules make it difficult to repeal laws that have lost political support.<sup>268</sup> Similarly, in the case of Guantánamo, the Obama Administration could have returned to Congress if it believed it was in a stronger position politically or might have reached a compromise regarding the detention facility. Military appropriations are bills that Congress will ultimately enact, so if the Administration had put forward a politically credible plan, it would have likely produced deliberation as part of the appropriations process.

Thus, although congressional checks on the Executive through appropriations do not tend to produce the same level of deliberation as substantive legislation, they do produce some deliberation on the merits of the underlying policy dispute, create opportunities for deliberation in subsequent Congresses, and avoid strong entrenchment of the enacting (appropriating) coalition's views.

### 3. Collateral Political Attacks

Beyond direct checks on executive action through legislative amendments and appropriations, Congress can also mount collateral political attacks on the Executive. As Justice Scalia described it, "Nothing says 'enforce the Act' quite like '... or you will have money for little else.'"<sup>269</sup> That is, Congress can withhold its support for collateral presidential priorities or personnel even when Congress cannot overrule the Executive directly. The President cannot go for

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266. Andy Towle, *Barack Obama Writes Open Letter to LGBT Community*, TOWLEROAD (Feb. 28, 2008, 2:30 PM), <http://www.towleroad.com/2008/02/barack-obama-wr/> [<https://perma.cc/9947-BZ66>].

267. See Sant'Ambrogio, *supra* note 12, at 362-63.

268. See *id.* at 377-78.

269. *United States v. Windsor*, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting) (omission in original).

long without legislative achievements, money for important programs, or confirmation of judges and executive branch officials. Thus, to the extent that certain executive actions are shielded from direct attacks, the House or Senate can always threaten some other policy or personnel. Indeed, this vulnerability to Congress leads some to believe that courts should eschew interbranch disputes and leave them entirely to political struggle and compromise.<sup>270</sup>

Collateral political attacks are easier to mount than legislative action or appropriations because they do not necessarily require agreement among a controlling congressional coalition. Individual Senators and key members of Congress can be a thorn in the side of the President by withholding their approval from pieces of his legislative agenda or his nominees to the bureaucracy and the federal bench.<sup>271</sup> Such congressional inaction and obstruction does not require the broad consensus (and in some cases supermajorities) of legislative action.<sup>272</sup> Thus, as with appropriations, the status quo favors collateral political attacks inasmuch as the President needs action from Congress. But unlike large appropriations bills, which are difficult to hold hostage forever, a hold on a nominee for a federal judgeship or an executive position below the cabinet level can persist for quite some time without any impact on the rest of Congress's work.<sup>273</sup>

Although collateral political attacks are an easy way to bring the Executive to heel, they are not well suited to producing deliberation on the merits of the policy over which the two branches disagree.

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270. *Id.* at 2704 (“Our system is *designed* for confrontation. That is what ‘[a]mbition ... counteract[ing] ambition,’ is all about.” (alterations in the original) (quoting THE FEDERALIST No. 51, *supra* note 166, at 264 (James Madison))); *Barnes v. Kline*, 759 F.2d 21, 55 (D.C. Cir. 1985) (Bork, J., dissenting) (“[E]xcept where a conventional lawsuit requires a judicial resolution, much of the allocation of powers is best left to political struggle and compromise.”), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

271. *See* Beermann, *supra* note 106, at 136-37.

272. These types of attacks raise distinct normative concerns because they are often not transparent, do not enjoy majority support in the chamber, and can harm unrelated policies and personnel. *Id.* at 140-41. Thus, they are unlikely to produce the desired political deliberation.

273. Of course, the ability of Congress or members of Congress to punish the President through collateral attacks will (as with everything else) depend on the politics of the case. That is, it will depend on how congressional constituents view the disputed law and how they feel about the presidential priorities or personnel vulnerable to congressional attack. *Id.* at 111.

The debate is likely to shift from the underlying policy dispute to the collateral political attack itself.<sup>274</sup> Moreover, collateral political attacks by definition impact presidential policies and personnel unrelated to the underlying policy dispute.<sup>275</sup> Thus, they are costly for our political system and do a poor job of containing interbranch disputes to areas of true disagreement.

#### 4. *Impeachment and Censure*

The strongest medicine available to Congress in conflicts with the Executive is impeachment. The Constitution provides that “[t]he President, Vice President and all civil Officers of the United States [may] be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>276</sup> There is some debate over whether “high Crimes and Misdemeanors” should involve only official misconduct,<sup>277</sup> but because the Supreme Court has demurred from setting any standards in the impeachment process,<sup>278</sup> it is a political question for the House and Senate to judge. The House has voted to impeach a President only twice in our nation’s history, and neither President was convicted

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274. *See id.* at 110-11 (examining the Senate’s use of the appointments power as leverage for unrelated political gains).

275. *See id.* at 127 (questioning the motives of some members of Congress in acquiring information from the Executive).

276. U.S. CONST. art. II, § 4. In order to remove an official in this way, the House of Representatives must vote to approve articles of impeachment and the Senate must then vote by a two-thirds majority to convict the official on the impeachment charges. *Id.* art. I, § 2, cl. 5 (“The House of Representatives ... shall have the sole Power of Impeachment.”); *id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.... [N]o Person shall be convicted without the Concurrence of two thirds of the Members present.”).

277. Scholars generally agree that impeachment should be reserved for particularly egregious acts that threaten our system of government rather than a way to resolve run-of-the-mill policy disagreements. *See, e.g.,* Neil Kinkopf, *The Scope of “High Crimes and Misdemeanors” After the Impeachment of President Clinton*, 63 LAW & CONTEMP. PROBS. 201, 202 (2000) (“There is broad agreement among scholars, members of Congress, and other commentators that a necessary element of any high crime and misdemeanor is great injury directly to the constitutional system of government.”).

278. *See Nixon v. United States*, 506 U.S. 224, 234 (1993) (“[T]he Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments.”).

after a trial in the Senate.<sup>279</sup> Thus, Congress itself appears to view impeachment as something to use rarely.

Congress or an individual house of Congress can also censure the President for executive action. The House of Representatives and the Senate have each censured a President for conduct that did not rise to the level of impeachment.<sup>280</sup> Unlike a successful impeachment, however, censure has no legal effect; the President remains in office and need not change his behavior.

Impeachment proceedings or a censure motion are likely to produce political deliberation on the President's actions.<sup>281</sup> But if history is any guide, then these mechanisms might not produce deliberation on the merits of the underlying policy dispute between the political branches. The impeachment of President Clinton focused on his conduct during civil litigation unrelated to any government policy.<sup>282</sup> The impeachment of President Andrew Johnson focused on whether his removal of Secretary Edwin Stanton from office violated the Tenure of Office Act, rather than Congress's

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279. President Andrew Johnson was impeached in 1868, Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberations Must Be Public*, 51 HASTINGS L.J. 365, 368, 380-85 (2000), and President William Jefferson Clinton was impeached in 1998, Fred H. Altshuler, *Comparing the Nixon and Clinton Impeachments*, 51 HASTINGS L.J. 745, 745, 752 (2000). The House Judiciary Committee reported a bill of impeachment against President Richard Nixon to the full House, but Nixon resigned before the House could vote on his impeachment. *Id.* at 745 n.1.

280. In 1834, the Senate censured President Andrew Jackson for withholding documents concerning his defunding of the Bank of the United States. Michael J. Gerhardt, Essay, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 35-36 (1999). In 1848, the House of Representatives censured President James Polk for beginning the Mexican-American War "unnecessar[ily] and unconstitutional[ly]." James C. Ho, *Misunderstood Precedent: Andrew Jackson and the Real Case Against Censure*, 24 HARV. J.L. & PUB. POL'Y 283, 300 n.71 (2000) (quoting CONG. GLOBE, 30th Cong., 1st Sess. 95, 304 (1848)). Motions for censure have been introduced but have not passed on a few other occasions. See Gerhardt, *supra*, at 35. It is interesting that this has occurred so infrequently. Perhaps it is because the censure has no tangible impact. Although one would think that it would be politically costly for the President, it might be even more costly for Congress as a demonstration of its impotence. Alternatively, because Congress has a variety of other ways of imposing tangible costs on the President, it might prefer collateral attacks on substantive policies or personnel to the public theater of censure. See *id.* at 33-34.

281. But such decision must be public to produce the desired deliberation. Cohn, *supra* note 279, at 366 ("Although the American public had direct television access to nearly every stage of the impeachment [of President Clinton], the actual decision-making in this historic case took place behind closed doors.")

282. See Altshuler, *supra* note 279, at 751-52.

disagreement with President Johnson's approach to Reconstruction.<sup>283</sup>

Moreover, given the high political costs, Congress should reserve impeachment for truly egregious conduct. Impeachment should not be the congressional response to a sincere presidential belief about how best to interpret a vague statute, or a sincere presidential belief that a congressional statute unconstitutionally infringes on individual rights or the President's own executive power.<sup>284</sup> In such cases, the game is not worth the candle.

### 5. *Judicial Review and Standing in Private Parties*

Another means by which Congress circumscribes executive action while conserving resources is by giving private parties the power to sue the Executive when it strays too far from Congress's statutory mandates. Congress can, within constitutional limits, construct standing on behalf of the constituents it seeks to benefit with its legislative acts.<sup>285</sup> Although Congress may not hand the courthouse keys to any citizen, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."<sup>286</sup> Thus, the beneficiaries of laws aimed at protecting the environment,<sup>287</sup> improving the quality of the air,<sup>288</sup> or ensuring public access to important information<sup>289</sup> generally have standing to challenge the Executive's implementation of those laws if they can establish that the government action or inaction has injured them in a concrete and personal way.<sup>290</sup>

Private standing is less effective, however, at circumscribing the Executive's implementation of a law when it involves certain types

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283. See Cohn, *supra* note 279, at 383.

284. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1309 (1996) ("[The Framers'] concern that the President not be reduced to serving at the pleasure of the Congress indicates that mere congressional disagreements with the President's policies do not rise to the level of 'high Crimes and Misdemeanors.'").

285. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

286. *Id.*

287. See, e.g., *id.* at 557-58 (majority opinion).

288. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 839-40 (1984).

289. See, e.g., *FEC v. Akins*, 524 U.S. 11, 13-14 (1998).

290. See, e.g., *Lujan*, 504 U.S. at 566-67.

of nonenforcement. First, it is not always clear who is harmed by nonenforcement of certain laws. In the case of DOMA, for example, it was not evident who benefited in a concrete and personal way from the denial of federal recognition of same-sex marriages recognized at the state level.<sup>291</sup> The beneficiaries of DOMA are difficult to identify. As a result, if President Obama had declined to enforce DOMA, it is questionable whether anyone would have had standing to challenge the President's nonenforcement.

Second, even when laws have clear beneficiaries, the injured party must be able to establish that it is injured by nonenforcement in a concrete, personal, and actual or imminent way.<sup>292</sup> The plaintiffs in *Lujan v. Defenders of Wildlife* were unable to establish standing to protest the failure of the Department of Interior to enforce certain provisions of the Endangered Species Act because, although nonenforcement might injure those who wanted to observe certain endangered species that the Act sought to protect, the plaintiffs had no concrete plans to visit the animals' natural habitats.<sup>293</sup> As a result, the Court held that the alleged injury lacked imminence.<sup>294</sup>

Third, the Executive's exercise of enforcement discretion is presumptively unreviewable.<sup>295</sup> Consequently, a court will not review nonenforcement decisions unless they are based on constitutional objections, a belief that the Executive does not have jurisdiction, or an abdication of the Executive's responsibilities under the statute.<sup>296</sup> Congress can, however, flip this presumption by providing guidelines for the agency to follow in exercising its enforcement powers.<sup>297</sup>

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291. Similarly, it was not clear who benefited from a statutory ban on HIV-positive members serving in the military, which President Clinton signed as part of an appropriations bill in 1996, but refused to defend before it was ultimately repealed. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, 328-29, repealed by Act of Apr. 26, 1996, Pub. L. No. 104-134, § 2707, 110 Stat. 1321, 1321-30; Press Briefing, Jack Quinn, Counsel to the President, & Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice (Feb. 9, 1996), <http://clinton6.nara.gov/1996/02/1996-02-09-quinn-and-dellinger-briefing-on-hiv-provision.html> [<https://perma.cc/C3EB-YNN5>].

292. See *Lujan*, 504 U.S. at 560-61.

293. See *id.* at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.")

294. See *id.* at 563-64.

295. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

296. See *id.* at 833 n.4, 838.

297. See *id.* at 833.

Constructing private standing in congressional enactments encourages deliberation concerning the law's intended beneficiaries and who should have a ticket to the courthouse.<sup>298</sup> The articulation of statutory benefits and burdens makes the impact of proposed policies more transparent and is precisely the type of legislative deliberation that should be encouraged.<sup>299</sup> This practice helps political representatives and the public understand the full costs and benefits of legislative acts. In addition, deliberation over private standing allows the enacting Congress to fine-tune the benefits that it seeks to deliver.<sup>300</sup> In some cases, Congress may want to limit the scope of judicial review,<sup>301</sup> whereas in other cases, Congress will want to push the limits of standing available under Article III to constrain future executives.<sup>302</sup> In either case, the enacting Congress will confront these questions when it crafts its substantive mandate, rather than deferring decisions about the strength of the law to the political branches down the road. Thus, providing private parties with standing to seek judicial review may have deliberative benefits akin to that of other forms of legislative action with policy goals.<sup>303</sup>

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298. See, e.g., Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 353-54 (1989) (describing congressional deliberation over creating *qui tam* and citizen suits).

299. See, e.g., S. REP. NO. 92-414, at 81 (1971), as reprinted in 1972 U.S.C.A.N. 3668, 3748 (describing a citizen suit provision in the Federal Water Pollution Control Act Amendments of 1971 as consistent with the Act's goal of developing "clear and identifiable requirements ... for enforcement").

300. See, e.g., *Air Pollution—1970: Hearings on S. 3229, S. 3446, and S. 3546 Before the Subcomm. on Air & Water Pollution of the Comm. on Pub. Works*, 91st Cong. 621-23 (1970) (statement of James Moorman) (arguing that a private attorneys general provision will "materially speed up the process of restoring our nation's air quality" under the Clean Air Act because "we cannot rely solely on government officials alone to get the job done" and suggesting that including an action for damages would stimulate greater enforcement).

301. For example, the 1998 Veterans' Judicial Review Act bars courts from reviewing certain decisions by the Secretary of Veteran Affairs, see 38 U.S.C. §§ 511(a), 512 (2012); *Bates v. Nicholson*, 398 F.3d 1355, 1362-65 (Fed. Cir. 2005), and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act substantially limits review of immigration and deportation orders, see 8 U.S.C. § 1252(a) (2012).

302. See, e.g., *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) ("[T]he citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." (quoting *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975))).

303. See Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 174-76 (2011).

Nevertheless, such deliberation is most likely to occur before a live interbranch dispute with the Executive. If Congress does not provide private parties with standing to seek judicial review *ex ante*, it is unlikely to do so, at least without more, *ex post*. Providing for private standing and judicial review requires legislative action. If Congress has the political support to check the Executive legislatively, it is hard to see why it would merely delegate the job to private parties. Congress is more likely to constrain the Executive in one of the other ways outlined above. Therefore, attention to private standing *ex ante* should produce important deliberative benefits, but Congress is unlikely to use standing alone to check the Executive in the midst of a live interbranch policy dispute.

### 6. *Creating an Independent Agency*

If Congress is concerned with the President's manipulation of statutory discretion to serve the President's agenda, or Congress simply wants more influence over the execution of the law, then Congress can delegate executive authority to an independent agency rather than an agency headed by an appointee who serves at the pleasure of the President.<sup>304</sup> It is conventional wisdom that agency

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304. For adherents of a unitary executive, limiting the President's control over executive officials is unconstitutional. *See, e.g.,* Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 787-88, 788 n.113 (2016) (citing multiple scholarly sources arguing for the unitary executive theory). But the Supreme Court has approved congressional limits on the power to remove executive officials. In *Morrison v. Olson*, for example, the Court approved for cause removal restrictions on independent counsel charged with prosecuting crimes of executive branch officials. *See* 487 U.S. 654, 696 (1988). The Attorney General, rather than the President, removed the independent counsel for cause, but the Court treated the Attorney General as the President's proxy. *Id.* at 692-93. Prosecutors are generally considered to be the quintessential executive officials. *See id.* at 705-06 (Scalia, J., dissenting) (stating the appointment of an independent counsel "deprives the President of exclusive control over [a] quintessentially executive activity"); Matthew A. Samberg, Note, "Established by Law": Saving Statutory Limitations on Presidential Appointments from Unconstitutionality, 85 N.Y.U. L. REV. 1735, 1745 (2010) (describing prosecutors as quintessentially executive); Hanah Metchis Volokh, Note, *Congressional Immunity Grants and Separation of Powers: Legislative Vetoes of Federal Prosecutions*, 95 GEO. L.J. 2017, 2029 (2007) (same). *But see* Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1070 (1990) (arguing that "the Framers did not intend prosecution to be a core executive function"). For cause removal protection is generally interpreted to mean that the President may not remove the protected official based merely on policy disagreements. *See, e.g.,* Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV.



heads shielded from the President with “for cause” employment protections, term limits, and the like will be more responsive to congressional preferences.<sup>305</sup>

To the extent that Congress attempts to shield an agency executive post—for example, in response to an objectionable executive action—Congress will face the same barriers as with substantive legislative action. But if Congress can muster the political will to overcome presidential resistance, it is hard to see how it is worth the effort merely to provide a presidential appointee with more independence. The agency may not change course and congressional efforts may be for naught. As a result, Congress is more likely to use this tool, like private standing, *ex ante* when creating the agency or delegating it authority.

The merits of any interbranch policy dispute will likely be tangential to deliberation over whether the President can be trusted with executive authority. Debates over agency independence are likely to focus on the appropriateness of political influence over the field of action rather than the underlying merits of specific policies that Congress would like to see protected from presidential interference.<sup>306</sup> Members of Congress may vote for agency independence

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273, 278 (1993) (stating that for cause removal protection “encourages agency heads to ... engage in policy disputes with the White House”).

Thus, if Congress may insulate prosecutors from the President, it can probably insulate a plethora of other executive officials, so long as the protections do not interfere with the President’s constitutional functions, *Morrison*, 487 U.S. at 690-93, and Congress does not create more than one layer of for cause protection between the President and the executive official, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (“We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.”). Exploring the limits of removal protection is beyond the scope of this Article, but undoubtedly some high executive branch officials must serve at the pleasure of the President.

305. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 25 (2010) (“Scholars concerned with maintaining the power of the unitary executive have made much of the fact that independent agencies shift power from the President to Congress.”).

306. See, e.g., *Free Enter. Fund*, 561 U.S. at 531-32 (Breyer, J., dissenting) (citing the remarks of Senator Morgan upon creation of the Federal Trade Commission (FTC) that a political party should not “hold the power of life and death over the great business interests of this country” (quoting 51 CONG. REC. 8857 (1914))); see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1132 (2000) (“It was also believed that the FTC needed to be independent in order to correct ‘the partisan and pressure-controlled administration of the anti-trust laws by the Department of Justice.’” (quoting ROBERT E. CUSHMAN, THE INDEPENDENT

on the grounds that it needs to shield the subject matter from ordinary politics rather than on the basis of the underlying policy dispute.<sup>307</sup>

Moreover, unlike the provisions of private standing and judicial review, delegating responsibility for the defense and enforcement of federal law to an independent agency will not encourage the enacting Congress to deliberate about the beneficiaries of the law and the costs and benefits of judicial review. Indeed, it might produce less attention if the enacting Congress believes the independent agency will not shrink from executing the law to the fullest extent possible.

In sum, insulating an agency from the President would likely produce little deliberation on the merits of a live interbranch policy dispute and less deliberation than attention to private standing on the scope of substantive statutory provisions.

### *7. Legislative Standing*

The most compelling argument in favor of legislative standing is that Congress provides a ready, willing, and able party to challenge the Executive over its implementation of the law.<sup>308</sup> But Congress will not challenge the Executive at all times. During times of unified government, Congress is unlikely to mount such suits.<sup>309</sup> Even in times of divided government, Congress will not challenge all executive actions it dislikes. Intervention will depend, just like the President's decision not to enforce or defend a law, on the extent of political support for the law.<sup>310</sup> Nevertheless, during times of divided government, lawsuits may be an alluring alternative to legislative efforts in the face of a presidential veto threat.

Congress's presence in court does not itself further legislative deliberation. Litigation is a distinct enterprise from deliberation on the floors of Congress. Whereas legislative deliberation is multi-vocal and speaks to diverse audiences, a party in court speaks to a

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REGULATORY COMMISSIONS 189 (1972))).

307. Barkow, *supra* note 305, at 19-21.

308. Of course this presumes that we need more parties to challenge the Executive during times of divided government, which not everyone accepts.

309. *See supra* note 4 (describing the House's motion to delay its suit against the Obama Administration due to the advent of unified government).

310. *See* Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1211-12 (2012).

single decision maker in the language of the law.<sup>311</sup> Moreover, Congress does not vote on legal briefs, which would be impractical. Thus, in the context of litigation, Congress must delegate its authority to lawyers and perhaps a committee overseeing the lawyers, such as the House Bi-Partisan Legal Advisory Group (BLAG).<sup>312</sup> Although deliberation among the legislators on such a committee may occur, the committee will represent only a sliver of the whole House.<sup>313</sup>

Legislative standing is in significant tension with the deliberative goals of our Madisonian system. Although litigation can spur public discussion of policy or constitutional values, such discourse is incomplete without Congress playing its deliberative role “to refine and enlarge the public views.”<sup>314</sup> Legislative standing, like an independent legal defense counsel, would enable Congress to avoid politically uncomfortable debates on the merits of controversial policies by paying homage to “the judicial department[’s power] to say what the law is”<sup>315</sup> and delegating its constitutional views to the lawyers.<sup>316</sup> Litigation is not deliberation; indeed, in some respects it is the polar opposite of what the Founders envisioned for our political institutions.<sup>317</sup> The courtroom provides no opportunity for

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311. See Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 947 (2012) (noting that when parties bring disputes to court they present their competing views to an “impartial decisionmaker”).

312. There is no institutional mechanism for Congress as a body to participate in litigation. Rather, each house has its own counsel’s office and its own procedures for participating in litigation. See generally *id.* at 942-47. The Office of the Senate Legal Counsel may, pursuant to a joint resolution adopted by the Senate, intervene in any pending legal action “in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue.” 2 U.S.C. §§ 288b(c), 288e(a) (2012). In the House, the general counsel to the clerk of the House of Representatives, who serves at the pleasure of the Speaker, may participate in litigation on behalf of the House pursuant to a majority vote of the BLAG, which consists of the Speaker, the majority leader, the majority whip, the minority leader, and the minority whip. RULES OF THE HOUSE OF REPRESENTATIVES, 114th CONG., R. II(8) (2015). But “[o]n occasion, however, the general counsel acts under the authority of just the majority leadership or even the Speaker alone.” Frost, *supra* note 311, at 944; see also *infra* notes 321-24 and accompanying text (describing BLAG’s intervention in the DOMA litigation).

313. Cf. Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1700 (2009) (noting how Presidents must compete with committee chairs, who represent a single state or congressional district, for control of the bureaucracy).

314. THE FEDERALIST NO. 10, *supra* note 166, at 51 (James Madison).

315. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

316. See, e.g., *infra* notes 321-24 and accompanying text.

317. See, e.g., THE FEDERALIST NO. 10, *supra* note 166, at 51 (James Madison).

the type of free and open exchange that can change minds and forge compromises in a democratic society.<sup>318</sup>

Thus, any deliberative benefits of legislative standing must stem from congressional deliberation over whether to bring suit. But these decisions are procedural questions and do not force Congress to come to grips with the policy implications of the law or the reasons for its enactment.<sup>319</sup> Whereas legislative repeal efforts force Congress to deliberate the merits of the policy under review, votes on whether to defend a law can be grounded in reasons divorced from the merits of the underlying policy. For example, members of Congress can simply cite their desire for judicial resolution of the statutory or constitutional question to check a unilateral executive veto. Indeed, the stakes are quite low because the judiciary will make the final decision even if Congress votes to intervene. So, votes on legislative intervention in lawsuits do not have much potential for transformative deliberation.

The House decision to defend DOMA illustrates the dearth of political deliberation that legislative standing produces. BLAG decided to intervene without any deliberation on the floor of the House.<sup>320</sup> It was not until BLAG's authority to intervene on behalf of the House was questioned that the full House voted to authorize BLAG's continued defense of DOMA as part of a vote on the House rules.<sup>321</sup> But even then, virtually no debate on the question occurred.<sup>322</sup> The House leadership explained BLAG's defense of DOMA based not on the law's normative merits, but on the view that the judiciary should have the final say on the law's constitutionality.<sup>323</sup>

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318. See PETTIT, *supra* note 192, at 187-91; RICHARDSON, *supra* note 192, at 184-90.

319. See Frost, *supra* note 311, at 949 (noting that Congress purposely leaves statutes vague so courts or agencies can interpret them).

320. BLAG met for thirty minutes behind closed doors and then voted along party lines to intervene. Molly K. Hooper, *House Leaders Vote to Intervene in DOMA Defense*, HILL (Mar. 9, 2011, 10:43 PM), <http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense> [<https://perma.cc/9QX4-TCXG>].

321. See 159 CONG. REC. H8 (daily ed. Jan. 3, 2013).

322. Representative Eric Cantor inserted a section-by-section analysis of the House Resolution into the record, justifying BLAG's intervention due to "the Executive Branch's abdication of its constitutional responsibility" to defend a congressional act, while Representatives Jerrold Nadler and Adam Schiff spoke briefly in opposition of authorizing BLAG to intervene based on the costs of litigation and their opinion that DOMA was unconstitutional. *Id.* at H13, H17.

323. See *id.* at H13; see also Press Release, House Speaker John Boehner, Statement by

This is hardly the type of substantive political deliberation that interbranch disagreements about the meaning of the Constitution should produce.

Similarly, the House decision to sue the Executive over its failure to meet certain statutory deadlines for implementing the Affordable Care Act (ACA)<sup>324</sup> had nothing to do with the merits of a policy dispute between the House and the Executive over health care. Indeed, when the House authorized the lawsuit, it had already voted fifty times to repeal the ACA in whole or in part.<sup>325</sup> Rather, during the House deliberations on the lawsuit, Republicans pointed to President Obama's unconstitutional usurpation of legislative power and declared it was Congress's, not the Executive's, job to amend the law.<sup>326</sup> Indeed, the lawsuit was so untethered from specific policy issues that the House Resolution authorized the Speaker of the House to "initiate or intervene in one or more civil actions ... *with respect to implementation of any provision of the [ACA].*"<sup>327</sup> The House essentially authorized a roving commission to bring any legal claims that might stick.

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In sum, Congress has a variety of tools to bring the Executive to heel in interbranch conflicts, but not all of them will produce legislative deliberation on the merits of the underlying dispute. Legislative amendments are likely to produce the richest deliberation; appropriation acts are likely to produce some, but less robust,

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House Speaker John Boehner (R-OH) Regarding the Defense of Marriage Act (Mar. 4, 2011), <http://www.speaker.gov/press-release/statement-house-speaker-john-boehner-r-oh-regarding-defense-marriage-act> [<https://perma.cc/6BE4-JE3K>] ("The constitutionality of this law should be determined by the courts—not by the president unilaterally—and this action by the House will ensure the matter is addressed in a manner consistent with our Constitution.").

324. See Complaint, *supra* note 4, at 15.

325. See 160 CONG. REC. H7091 (daily ed. July 30, 2014) (statement of Rep. Hoyer on H.R. Res. 676).

326. See *generally* 160 CONG. REC. H7087-100 (daily ed. July 30, 2014) (debate on H.R. 676). The House had not yet developed the claim discussed below in Part III.C concerning the Executive's use of unappropriated funds.

327. H.R. Res. 676, 113th Cong. (2014), 160 CONG. REC. H7087 (daily ed. July 30, 2014) (emphasis added); see also Deirdre Walsh, *GOP-Led House Authorizes Lawsuit Against Obama*, CNN (July 31, 2014, 8:04 AM), <http://www.cnn.com/2014/07/30/politics/gop-obama-lawsuit/> [<https://perma.cc/DQ74-PBL3>].

deliberation; and collateral political attacks and agency insulating devices are likely to produce the least deliberation on the merits of policy disputes. In addition, attention to private standing will produce important deliberation by enacting coalitions about the costs and benefits of federal laws, whereas congressional standing is unlikely to produce legislative deliberation on the merits of policy disputes.

Therefore, legislative amendment, appropriation acts, and attention to private standing fare well when measured against the deliberative goal of interbranch conflict, whereas collateral political attacks, agency insulating devices, and congressional standing fare poorly. To the extent standing doctrine seeks to further interbranch deliberation, it should encourage congressional use of deliberation-promoting tools and discourage the use of tools that undermine or substitute for deliberative actions in nondeliberative ways.

With this framework in mind, the next Part returns to the Legislative Exhaustion principle raised at the end of Part I.

### III. A DELIBERATION-ENHANCING APPROACH TO LEGISLATIVE STANDING

Any theory of legislative standing to challenge executive action should be cognizant of the deliberation the Framers hoped such interbranch conflicts would produce. This Part develops the Legislative Exhaustion principle with these deliberation-forcing goals front and center. It further defines how Legislative Exhaustion would operate in practice, examines the principle's strengths and weaknesses, and applies Legislative Exhaustion to *House v. Burwell* and other cases of interbranch litigation.

#### *A. The Legislative Exhaustion Principle*

Consistent with the deliberative goals of interbranch conflict, Legislative Exhaustion would preclude congressional lawsuits when Congress can remedy its harm with tools that are likely to produce deliberation on the merits of its dispute with the Executive. Thus, when the Executive claims to act pursuant to statutory authority, whether based on an interpretation of the law or the exercise of enforcement discretion, Legislative Exhaustion would

bar Congress from suing the Executive in federal court. In such cases, Congress has the means of directly checking the Executive through legislative action, and permitting legislative lawsuits risks undermining the deliberative function of interbranch conflict.

Therefore, Legislative Exhaustion requires the court to look not just at Congress's claim, but also at the Executive's defense. Congress must be able to show that the Executive is acting based on constitutional, rather than any claimed statutory, authority. To be sure, this assumes good faith on the part of the Executive when it offers a rationale for its execution of the law—in other words, whether it is acting pursuant to statutory or constitutional authority. But fortunately, the Executive is usually clear about the legal bases for its actions. For example, the Executive provided extensive analysis of the statutory support for the Department of Homeland Security's Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans programs<sup>328</sup> and of the constitutional basis for its decision not to defend DOMA.<sup>329</sup> The Legislative Exhaustion principle would encourage the Executive to be even clearer, particularly when its interpretation of a statute would shield the Executive from congressional lawsuits.<sup>330</sup> Indeed, if the Executive provided no statutory justification for its actions, then a court might presume the Executive was acting based on its

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328. See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/2P3D-VZTM>] (regarding policies for the removal of undocumented immigrants); Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/XE9H-7NR4>] (exercising prosecutorial discretion with respect to individuals who came to the United States as children); Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/46ZT-KN8Y>].

329. Letter from Eric Holder, Att'y Gen., to John Boehner, Speaker, U.S. House of Representative (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/KE4Z-L83L>] (explaining constitutional reasons for decision not to defend DOMA).

330. To be sure, the Executive might offer both statutory and constitutional reasons for its action, such as interpreting the statute in a particular way in order to avoid constitutional doubts. In such cases, Congress still has its own remedy unless and until it amends the statute so that such an interpretation is no longer possible under the constitutional avoidance canon and the Executive refuses to enforce the statute as clarified. See *supra* Part II.B.1.

constitutional authority—from a functional standpoint there would be no difference<sup>331</sup>—and might treat the suit on this basis.

In this way, the courts can serve an information-forcing function, with Legislative Exhaustion facilitating a dialogue between the political branches. The articulation of the Executive's statutory interpretation enables Congress to overrule interpretations it considers inconsistent with good policy.<sup>332</sup> Such legislative action encourages enhanced deliberation on the merits of government policy. Conversely, opening the courthouse door to Congress in such circumstances might distract and deter it from refining statutory regimes and government programs in response to changing circumstances and executive initiatives. Therefore, a Legislative Exhaustion principle that denies Congress access to the federal courts when legislative alternatives can provide Congress with the remedy that it seeks is consistent with the deliberation-forcing goals of interbranch conflicts.

Congress does not truly exhaust its legislative remedies against the Executive in any policy dispute unless and until it overrules the Executive through legislative amendment, and the Executive refuses to execute the law on constitutional grounds in the way that Congress prescribes. The constitutional basis for the Executive's defiance may be express or implied due to the absence of any statutory rationale.<sup>333</sup> Thus, a failed attempt to overrule the Executive—because Congress cannot muster political majorities to pass a legislative amendment or cannot muster the supermajorities needed to override the President's veto—does not exhaust Congress's legislative remedies. Legislative failure is not final—there is

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331. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (“The President’s power, if any, ... must stem either from an act of Congress or from the Constitution itself.”); *id.* at 637 (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers.”).

332. Although the Executive does not always articulate the precise limits of enforcement discretion under a given statute, Congress still retains the power to revise the statute in such a way as to prohibit whatever nonenforcement decisions it finds objectionable. See *supra* Part II.B.1.

333. As suggested *supra* in note 332 and accompanying text, in the absence of a statutory justification for Congress's actions, such as “a pattern of nonenforcement of clear statutory language,” *Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J., concurring), a court may conclude that Congress has exhausted its legislative remedies because functionally the Executive could be relying only upon its constitutional powers.



no legislative version of *res judicata*—and legislative deliberation regarding contested government policies is a continuous process. In this way, Legislative Exhaustion differs from the exhaustion of administrative remedies. Agencies might hear a motion for reconsideration, but they will otherwise bar duplicative proceedings once a party has lost in the administrative forum.<sup>334</sup> Parties who obtain a final administrative order may then, under administrative exhaustion principles, turn to the federal courts.<sup>335</sup> Legislatures do not issue final orders, however.

Therefore, a strict Legislative Exhaustion principle would bar Congress from federal court whenever legislative relief is available. If at first Congress does not succeed, it must try again. Congress must rely on the legislative forum whenever it is available. It does not exhaust its legislative remedies until the President refuses to adhere to a validly enacted law based on constitutional objections.

Once the Executive refuses to enforce a law based on constitutional objections, however, Congress *has* exhausted the legislative remedies likely to produce deliberation on the merits of the policy dispute. If the Executive does not defend nonenforcement based on statutory grounds, whether based on its enforcement discretion or an interpretation of its statutory mandate, new legislation can do nothing to overrule the Executive.<sup>336</sup> Only a judicial decision can resolve the interbranch dispute over the Executive's obligations under the Constitution.<sup>337</sup>

Although Congress certainly can punish the Executive by attacking collateral policies or personnel, censuring the President, or even impeaching him, such punishment is unlikely to produce deliberation on the merits of the underlying policy dispute.<sup>338</sup> Moreover, these actions may hurt policies and personnel for reasons unrelated to their merits. If the normative goal of Legislative Exhaustion is to encourage deliberation on the merits of government policy, then there is little reason to require Congress to exhaust efforts that are unlikely to produce the desired deliberation. In such cases,

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334. See, e.g., *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 735 (D.C. Cir. 1987) (recognizing that once agency proceedings are finalized, the next step is to challenge in federal court).

335. See *id.*

336. See *Sant'Ambrogio*, *supra* note 12, at 408.

337. See *id.*

338. See *supra* Parts II.B.3-4.

legislative lawsuits are merely substituting for other nonoptimal—and perhaps less optimal—congressional checks on the Executive.

The one argument in favor of denying standing to Congress in all suits against the Executive is that it might encourage Congress to devote greater attention *ex ante* to creating standing in private parties who could themselves challenge executive nonenforcement based on constitutional objections.<sup>339</sup> Focusing on which parties should have standing to haul the Executive into court and why would make the costs and benefits of legislation more transparent and would contribute to more robust legislative deliberation.<sup>340</sup> But attention to private standing *ex ante* will not promote deliberation on the merits of an interbranch policy dispute *ex post*. Thus, the reasons for precluding Congress from going to court are less compelling if the goal is to enhance legislative deliberation on the interbranch conflict. Moreover, legislative lawsuits might be a way for Congress to express its constitutional views.

### *B. Legislative Exhaustion and Unicameral Suits*

Would the Legislative Exhaustion principle work any differently when only one house of Congress sues the Executive? When Congress has nonjudicial remedies, as in disputes over statutory meaning, one house of Congress (or even individual representatives) would be able to pursue these same remedies.<sup>341</sup> But unlike Congress itself, the House or the Senate alone cannot obtain the remedy it seeks. Even with sufficient political will, each house can block the other,<sup>342</sup> whereas the Executive does not have the power to block Congress if it has the votes to override a presidential veto.<sup>343</sup> Should this distinction make a difference?

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339. Despite the difficulties of challenging executive nonenforcement discussed *supra* in Part I.D, the presumption against reviewability of nonenforcement decisions does not apply to nonenforcement based on constitutional objections, *see Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J., concurring), or “a pattern of nonenforcement of clear statutory language,” *id.*; *accord id.* at 833 (majority opinion).

340. Conversely, if Congress had access to the courthouse it might have less reason to attend to private standing in substantive legislation.

341. *See SMITH ET AL.*, *supra* note 263, at 225 (recognizing that legislation may originate from any member from either house of Congress).

342. *See id.* at 54 (explaining that approval is required from both the House and the Senate before legislation goes to the president).

343. *See id.* at 269 (discussing Congress’s ability to override an executive veto).

If the goal of Legislative Exhaustion is to encourage legislative deliberation, it should bar suits by individual houses of Congress that Congress as a whole could not bring. Indeed, it would make little sense to bar Congress from court but allow the House or the Senate alone to bring such suits. More importantly, allowing a single house to sue the Executive when it is unable to convince its legislative partner of the merits of its policy would undermine intercameral deliberation. Bicameralism, as much as presentment, is part of the constitutional structure designed to produce deliberation on the merits of government policy.<sup>344</sup>

But for the same reason, Legislative Exhaustion might not bar unicameral suits against the Executive when Congress has no deliberative remedies available to it. For example, if the President refuses to enforce the law based on constitutional objections, it is harder to justify denying a single house access to court on Legislative Exhaustion grounds. In such cases, no deliberative, nonjudicial remedies are available either to Congress as a whole or to a single house of Congress.<sup>345</sup> Therefore, denying one house standing would have few deliberative benefits. Conversely, permitting such suits would allow the house to express its constitutional views in a judicial forum,<sup>346</sup> especially when the same party controls both the White House and one house of Congress.

Although there may be other reasons to deny a single house standing to sue the Executive over nonenforcement,<sup>347</sup> a Legislative Exhaustion principle designed to encourage political deliberation on contested government policies does not provide one.

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344. See U.S. CONST. art. I, § 7, cl. 2 (requiring that in order for bills to become laws, they must be passed by both houses of Congress *and* be presented to the President).

345. See Sant’Ambrogio, *supra* note 12, at 358 (stating that the President’s ability not to enforce laws he finds constitutionally objectionable allows him “to rewrite laws ... without any direct congressional check”).

346. See Greene, *supra* note 1, at 582 (explaining the benefits of granting Congress standing in court).

347. See generally Grove & Devins, *supra* note 1. Moreover, the injury becomes more dubious when only one house of Congress seeks standing because the unenforced law is the work of Congress as a whole. See Hall, *supra* note 118, at 28 (citing *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575, 577-78 (D.C. Cir. 1982)). For the same reason, it is particularly difficult to conceive individual legislators establishing an injury in fact to sue the Executive over enforcement decisions. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997).

*C. Institutional Realism and Responses*

The argument to this point could be characterized as rather formalist, theorizing the institutions of government at a high level of abstraction and treating each institution as a single, unitary actor.<sup>348</sup> Indeed, the Framers' conception of how interbranch conflict would function in the new Republic was itself quite formalist. But as discussed in Part II.A.4, the Framers failed to predict important ways in which our political system would develop and grow over the next two hundred odd years. Therefore, this Section turns to potential objections to the Legislative Exhaustion principle from the perspective of institutional realism. That is, this Section considers how the Legislative Exhaustion principle might function in the real world of the current state of partisan politics and over time.<sup>349</sup> In doing so, it examines a variety of realist criticisms and responses.

To begin, an institutional realist might argue that Legislative Exhaustion and its precursor in the D.C. Circuit<sup>350</sup> ignore the practical realities of interbranch disputes.<sup>351</sup> The realist would point out that although Congress has the formal power to overrule the Executive's interpretation of a statute, in most cases Congress cannot practically do so.<sup>352</sup> The President will almost certainly oppose any effort to overturn an agency's interpretation of law, at least if it is important, and the President's veto, along with a filibuster in the Senate (if the President's party does not control the Senate), will require Congress to build supermajorities to enforce its statutory preferences.<sup>353</sup>

An institutional formalist would likely reply, "So what? That is how the political branches are designed."<sup>354</sup> Still, the realist might

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348. See Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (defining institutional formalism).

349. See *id.* (defining institutional realism).

350. See *supra* notes 152-59 and accompanying text.

351. See Pildes, *supra* note 348, at 3 (arguing "that the tension between institutionally formalist and realist approaches [to public law] is pervasive").

352. See *id.* at 12-21 (explaining the tension between realism and formalism in describing the role of the President).

353. In addition, there are numerous "veto gates" separate and apart from the presidential veto and the Senate filibuster that make any legislative action exceedingly difficult. See Sant'Ambrogio, *supra* note 12, at 377.

354. See Pildes, *supra* note 348, at 2 (explaining that institutional formalists see governmental actors as formal agents operating with specific legal power).

respond, the Framers designed the branches so that they would function in a certain way.<sup>355</sup> Broad delegations of authority and divided government give the Executive too great an advantage in its policy struggles with Congress, upsetting the balance among the branches and their various constituencies that was intended to shape government policy.<sup>356</sup> Moreover, although failed attempts to overrule the President might produce desirable legislative deliberation, knowing the hurdles, Congress might not undertake the effort.

Foreclosing legislative lawsuits may not necessarily cause Congress to turn to a more deliberative legislative check on the Executive. If Congress is considering a legislative lawsuit, then it is almost certainly a time of divided government, and the threat of a presidential veto looms large.<sup>357</sup> Congress may decide it is not worth the time and energy to pass a bill that the President is likely to veto unless Congress is confident it has the political support to override the veto. But in some cases, foreclosing a lawsuit will encourage legislative action, particularly if the opposition party's base is pressuring its representatives in Congress to act. During the Obama Administration, the House attempted to repeal the ACA in whole or in part no less than sixty times, despite no prospect of overriding President Obama's inevitable veto.<sup>358</sup> Indeed, until the last two years of Obama's second term, the House had no chance of even securing the agreement of the Senate.<sup>359</sup>

Furthermore, this realist criticism ignores the long view. Party control of the political branches changes over time. The fact that the current President threatens to veto legislation does not mean the next President will. For example, Congress did not overrule the Nixon Administration's 1970 interpretation of "miner" as used in the Black Lung Act until the Carter Administration.<sup>360</sup> Similarly, with the election of Donald J. Trump in 2016, the Republican Congress

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355. *See id.* at 4.

356. *See id.* at 19-20 (explaining that the modern, party-driven era has effectively limited congressional checks and balances on presidential power).

357. *Cf.* Levinson & Pildes, *supra* note 208, at 2340-41 (recognizing that presidential vetoes "all but disappear during periods of unified government").

358. *See* Deirdre Walsh, *House Sends Obamacare Repeal Bill to White House*, CNN (Jan. 6, 2016, 7:33 PM), <http://www.cnn.com/2016/01/06/politics/house-obamacare-repeal-planned-parenthood/> [<https://perma.cc/Y9DR-7ZQM>].

359. *See id.*

360. *See supra* note 233 and accompanying text.

is in a much better position to enact its preferred interpretation of the ACA and related appropriations or to repeal and replace the Act. Indeed, the merits of the Act and what to do about it were a topic of debate during the electoral campaign.<sup>361</sup>

The challenge of institutional realism is knowing how far to travel down the rabbit hole.<sup>362</sup> Other realist responses to legislative lawsuits might lead to different conclusions. The institutional realist described above might be called the “strong executive realist,” focused on the practical reality of executive power to block congressional moves. A “congressional gridlock realist,” however, might point out that Congress has trouble getting anything accomplished in the present era.<sup>363</sup> Moreover, when Congress does manage to enact new policies, it often produces awkward statutes that create rich opportunities for litigation but are difficult for Congress to refine due to partisan deadlock.<sup>364</sup> Yet the Executive is charged with executing these laws in a way that accomplishes the enacting Congress’s goals.<sup>365</sup>

Now consider the House lawsuit over the implementation of the ACA. The congressional gridlock realist would argue that after strong majorities in a Democratic Congress pushed through an “inartful[ly] draft[ed]” statute,<sup>366</sup> the Executive attempted to implement the statute in a way that would accomplish the broad statutory goal of expanding health care coverage.<sup>367</sup> But once the

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361. See, e.g., Julie Rovner, *Fact-Checking Candidates on the Affordable Care Act*, CNN (Feb. 5, 2016, 5:20 AM), <http://www.cnn.com/2016/02/05/health/voters-guide-affordable-care-act> [<https://perma.cc/J74C-G3BW>].

362. Legal doctrine typically treats government institutions such as the Legislature and the Executive as a “black box .... [T]he role of judicial review is to assay the powers and properties of the institution at a general, essentialized level that intentionally ignores these fluid features—though these features are central ... to the way the institution actually functions.” Pildes, *supra* note 348, at 2. But “[i]f legal doctrine is receptive at all to institutional realism,” the question remains, “where should this form of realism begin and end?” *Id.* at 3.

363. See *id.* at 34.

364. See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 43 (1994) (noting that in cases of ambiguous statutes, Congress has failed to address the matter in controversy).

365. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed.”).

366. See *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

367. See *id.* at 2487 (explaining that the IRS promulgated a rule interpreting “an Exchange established by the State,” 26 U.S.C. § 36B(b)-(c), to include both state and federal health

Republicans took control of the House, rather than helping the Executive with this project, they exploited the statute's inartful drafting to repeatedly urge the courts to adopt interpretations of the ACA that would make it difficult, if not impossible, for the law to accomplish its goals.<sup>368</sup>

Because one policy-making branch of government has difficulty refining policy, the congressional gridlock realist might argue that the courts should grant the other policy-making branch greater discretion in how it pursues the statutory goals.<sup>369</sup> To the extent the Executive's implementation of the law injures individuals, the federal courts remain open to their suits.<sup>370</sup> But the congressional gridlock realist would frown upon congressional attempts to litigate policy disputes that the legislative branch cannot resolve through bicameralism and presentment, or worse, that the legislative branch uses to harass the Executive. Indeed, the desire of the House to suspend its lawsuit over the ACA after the election of Donald J. Trump raises questions about the sincerity of its desire to compel enforcement of the employer mandate.<sup>371</sup>

Finally, a "technocratic" or "democratic realist" might prefer deferring to the policy-making expertise of the democratically accountable Executive rather than giving a federal judge, or even five Supreme Court Justices, the power to resolve the political branches' policy stalemates.<sup>372</sup>

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insurance exchanges).

368. A group of senators as *Amici Curiae* argued that "[t]he plain text of the ACA reflects a specific choice by Congress to make health insurance premium subsidies available only to those who purchase insurance from 'an Exchange established by the State.'" Brief of *Amici Curiae* Senators John Cornyn et al. in Support of Petitioners at 3, *King*, 135 S. Ct. 2480 (No. 14-114) (quoting 26 U.S.C. § 36B(c)(2)(A)(i) (2012)). But the Supreme Court rejected this interpretation because it "would destabilize the individual insurance market in any State with a Federal Exchange and likely create the very 'death spirals' that Congress designed the Act to avoid." *King*, 135 S. Ct. at 2493.

369. The same institutional realism may undergird *Chevron* deference.

370. And if private standing is too narrow to accomplish this, then the Court should broaden it.

371. See Jeffrey Young, *House Republicans Ask Court to Delay Their Lawsuit to Blow Up Obamacare*, HUFFINGTON POST (Nov. 21, 2016, 7:07 PM), [http://www.huffingtonpost.com/entry/house-republicans-obamacare-lawsuit-delay\\_us\\_58338205e4b058ce7aacab8c](http://www.huffingtonpost.com/entry/house-republicans-obamacare-lawsuit-delay_us_58338205e4b058ce7aacab8c) [<https://perma.cc/8Q9L-DNUP>].

372. *Cf.* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (deferring to agencies' reasonable interpretations of law based on expertise and political accountability).

Thus, institutional realism can point in more than one direction, depending on whether we are most concerned with a skewed balance of power between the branches, congressional gridlock, or institutional expertise and accountability.

Nevertheless, the Legislative Exhaustion principle could be modified to address, at least in part, the concerns of the strong executive realist. If denying congressional standing tips the balance of power between Congress and the Executive too far in the latter's direction, the exhaustion requirement could be relaxed and recalibrated. Rather than requiring Congress to enact its preferred policy over the President's all but inevitable veto, for example, the courts might deem Congress to have exhausted its legislative remedies by passing a bill curing the statutory ambiguity upon which the Executive relied. Even if the President vetoed the clarifying legislation, Congress could then go to court challenging the Executive's interpretation and seeking a judicial endorsement of its own. This might discourage Congress from using legislative lawsuits merely to harass the Executive because legislators would have to go on the record with their votes in support of the policy position Congress brings to court.<sup>373</sup> Furthermore, passing a statutory amendment by majority vote would encourage legislative deliberation on the merits of the policy.<sup>374</sup> Thus, it would be consistent with the deliberation-forcing goals of interbranch conflict.

Such a modification, however, is not likely to be appealing to either institutional formalists or other types of institutional realists without stronger empirical evidence and appropriate benchmarks to demonstrate that the Executive has too much power vis-à-vis Congress, or that suits by injured parties are not sufficient to police executive action under current standing doctrine. But these alternatives illustrate how the Legislative Exhaustion principle could be modified to address certain realist concerns if they resonate with the Court.

In sum, Legislative Exhaustion would require congressional plaintiffs to exhaust their legislative remedies before bringing their

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373. Unlike in the case of *House v. Burwell*, for example, discussed *infra* in Part III.D, it is unlikely that many House Republicans would have wanted to go on record supporting a more aggressive implementation of the employer mandate (part of a statute they opposed).

374. See *supra* Part II.B.1 (analyzing how legislative action taken to address interbranch conflict may increase deliberation over the merits of a policy).



disputes with the Executive to federal court. When the Executive refuses to enforce a statute on constitutional grounds, the court would deem Congress to have exhausted its legislative remedies. A certain kind of institutional realist might also deem Congress's legislative remedies exhausted if majorities in both houses of Congress enacted a clarifying amendment that the President thereafter vetoed. But a more formalist approach, or an approach that takes other realist concerns into account, would bar legislative lawsuits unless and until the President refused to enforce a law on constitutional grounds.

#### D. U.S. House of Representatives v. Burwell

The federal courts recently had to address the question of congressional standing in a lawsuit brought by the House of Representatives against the Secretary of Health and Human Services and the Secretary of the Treasury over their implementation of the ACA.<sup>375</sup> In the suit, the House alleged that the Secretaries' implementation of the ACA violated Article I of the Constitution because it usurped Congress's legislative and appropriations powers.<sup>376</sup>

First, the House claimed that the Secretaries usurped Congress's legislative powers by delaying the implementation of certain aspects of the ACA's "employer mandate" (the delay claim).<sup>377</sup> The employer mandate requires that "large employer[s]" offer affordable health care to all of their full-time employees (FTEs) and dependents by December 31, 2013, or they will be assessed "employer shared responsibility payments."<sup>378</sup> These payments shall be paid "upon notice and demand by the Secretary."<sup>379</sup> The House alleged that the Secretaries amended these statutory provisions by (1) delaying the assessment of "[a]ny employer shared responsibility payments ... until 2015," and in some cases until 2016; and (2) reducing the

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375. See Complaint, *supra* note 4, at 1-2.

376. *Id.* at 4 ("The House now brings this civil action for declaratory and injunctive relief to halt these unconstitutional and unlawful actions which usurp the House's Article I legislative powers.").

377. *Id.* at 4.

378. *Id.* at 14 (alteration in original) (quoting 26 U.S.C. § 4980H (2012)).

379. 26 U.S.C. § 4980H(d)(1).

percentage of FTEs who must be offered insurance by certain large employers in 2015 and 2016.<sup>380</sup>

Second, the House claimed that the Secretaries usurped the House's appropriations authority by making certain payments to insurers to offset costs the insurers incurred providing "Cost-Sharing Reductions to Beneficiaries" (the appropriations claim).<sup>381</sup> The ACA authorizes such payments, but the House argued that Congress never appropriated money for the payments and, therefore, the Secretaries violated Article I, Section 9, Clause 7 of the Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>382</sup> The Secretaries contend that "[t]he cost sharing reduction payments are being made as part of a mandatory payment program that Congress has fully appropriated."<sup>383</sup>

On September 9, 2015, Judge Rosemary Collyer of the D.C. District Court issued an opinion addressing whether the House had Article III standing to proceed with its claims.<sup>384</sup> Judge Collyer concluded that the House did not have standing to pursue its delay claim, but that it did have standing to pursue the appropriations claim.<sup>385</sup> Judge Collyer reached this conclusion after "[d]istill[ing]" the claims "to their essences."<sup>386</sup> She concluded that the House's objections to the manner in which the Administration implemented the employer mandate were in essence statutory claims, whereas the House's objections to the Administration's appropriations were constitutional claims:

[T]he Non-Appropriation Theory alleges that the Executive was unfaithful to the Constitution, while the Employer-Mandate

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380. Complaint, *supra* note 4, at 15-16.

381. *Id.* at 9-11.

382. *See id.* at 6, 8-14 (quoting U.S. CONST. art. I, § 9, cl. 7).

383. Defendants' Memorandum in Support of Their Motion to Dismiss the Complaint, *supra* note 87, at 6 (citing 42 U.S.C. § 18082 (2012)).

384. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57 (D.D.C. 2015).

385. *Id.* at 57-58. Judge Collyer subsequently held on the merits that Congress had not appropriated any funds to reimburse insurers for their Cost-Sharing Reductions to Beneficiaries under the APA. *See U.S. House of Representatives v. Burwell*, No. 14-cv-01967(RMC), 2016 WL 2750934, at \*7 (D.D.C. May 12, 2016). Although Judge Collyer entered an injunction against the Secretaries, she stayed the injunction pending the parties' appeals to the D.C. Circuit. *Id.* at \*19.

386. *House v. Burwell*, 130 F. Supp. 3d at 70.

Theory alleges that the Executive was unfaithful to a statute, the ACA. That is a critical distinction, inasmuch as the Court finds that the House has standing to assert the first but not the second.<sup>387</sup>

According to Judge Collyer, the first claim was a statutory claim because the House argued that the Secretaries violated the ACA by not enforcing the deadline.<sup>388</sup> In contrast, the second claim was a constitutional claim, because the House argued that the Secretaries violated the Constitution:

Properly understood ... the Non-Appropriation Theory is not about the implementation, interpretation, or execution of any federal statute. It is a complaint that the Executive has drawn funds from the Treasury without a congressional appropriation—not in violation of any statute, but in violation of Article I, § 9, cl. 7 of the Constitution.<sup>389</sup>

At first glance, it might appear that Judge Collyer's ruling is consistent with Legislative Exhaustion. She allowed a constitutional claim to proceed, while barring the statutory claim. But a closer examination suggests that the Legislative Exhaustion principle would bar the appropriations claim, whereas the delay claim is more difficult for the principle than might initially be appreciated.

It is far from easy to determine whether the House's claims are "essentially" statutory or "essentially" constitutional. In fact, the House claimed that the Secretaries' actions in each case violated both federal statutes and the Constitution.<sup>390</sup> The House predicated the delay claim on the violation of statutory deadlines, but the House also claimed that the Secretaries had usurped the House's legislative authority when they unilaterally amended the statutory deadlines.<sup>391</sup> Conversely, although the theory alleged a usurpation of the House's appropriation power under the Constitution, it was only because the House alleged that no statute authorized the

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387. *Id.*

388. *See id.* at 75.

389. *Id.* at 70.

390. *See Complaint, supra* note 4, at 18-25.

391. *See id.* at 23-25.

appropriation.<sup>392</sup> Consequently, the Secretaries violated 31 U.S.C. § 1324, which prohibits disbursements except in accordance with certain provisions not applicable here.<sup>393</sup>

The Executive defended the delay claim by arguing that it had inherent enforcement discretion under the statute—a question of statutory interpretation—whereas the Executive defended the appropriations claim *not* by claiming that it had authority under the Constitution to appropriate funds, but by asserting that the Executive was spending the funds under a “mandatory payment program that Congress ha[d] fully appropriated.”<sup>394</sup> Indeed, Judge Collyer acknowledged that the court would resolve the merits of the appropriations claim on the basis of which party had the better argument over whether 42 U.S.C. § 18082 authorized the expenditures.<sup>395</sup> If that is true, then it is hard to distinguish the appropriations claim from the delay claim—both involve questions of statutory interpretation. And in each case, if the court finds that the Executive’s interpretation of the statute is wrong, then the Executive would be acting unconstitutionally if it did not cure its behavior.

In her subsequent decision on the merits, Judge Collyer supplemented her standing analysis concerning the appropriations claim by explaining that: “[T]he interpretation of a federal statute only becomes necessary when a defendant raises such a statute as a defense. Such a defense does not turn a constitutional claim into a statutory dispute. The House’s injury depends on the Constitution and not on the U.S. Code.”<sup>396</sup>

This explanation is no more satisfying. Whenever Congress alleges that executive action is not authorized by statute, it can cast its claim either as a constitutional claim that the Executive violated Article I, Section 1<sup>397</sup> or as a claim that the Executive violated the Administrative Procedure Act based on the Executive’s erroneous

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392. *See id.* at 13-14.

393. *See* 31 U.S.C. § 1324 (2012).

394. Defendants’ Memorandum in Support of Their Motion to Dismiss the Complaint, *supra* note 87, at 6 (citing 42 U.S.C. § 18082 (2012)).

395. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 81 (D.D.C. 2015).

396. *U.S. House of Representatives v. Burwell*, No. 14-cv-01967(RMC), 2016 WL 2750934, at \*19 (D.D.C. May 12, 2016).

397. *See* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.”).

interpretation of the relevant statute.<sup>398</sup> Similarly, Congress can cast a claim that the Executive appropriated unappropriated funds either as a claim that the Executive violated Article I, Section 9, Clause 7<sup>399</sup> or as a claim that the Executive violated 31 U.S.C. § 1324.<sup>400</sup> Indeed, in *House v. Burwell*, the House asserted both statutory and constitutional claims concerning the same executive conduct. It would be strange if a federal court's decision whether to hear an interbranch dispute turned on such arbitrary pleading. Indeed, distilling the claims to their essences, as Judge Collyer suggested, one would think that the central issue in the case, regardless of how the claims were framed, was whether Congress had authorized the Executive's actions by statute and by appropriations.

Thus, it is hard to understand how the Executive's interpretation of its authority under a statute is any different than its interpretation of its authority under an appropriations act. Many areas exist in which the Executive cannot act without congressional authorization.<sup>401</sup> Whenever there is a claim that the Executive exceeds its statutory authority, the claim could be converted into a constitutional claim that the Executive usurped Congress's legislative authority. But the constitutional claim in such cases is meaningless—"full of sound and fury, Signifying nothing."<sup>402</sup> Unless the Executive asserts a constitutional prerogative in its defense, the court will review the Executive's action based on whether the Executive had statutory authority for what it was doing, regardless of whether the action involves a disbursement of funds or the nonenforcement of a deadline.

The Legislative Exhaustion principle would focus instead on whether Congress has nonjudicial means to obtain the relief that it seeks. This requires looking at both Congress's claim and the Executive's defense. If the Executive defends its actions based on statutory authority, then Congress has the means to give itself the

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398. See 5 U.S.C. § 706(2)(C) (2012) (forbidding agency action "in excess of statutory jurisdiction, authority, or limitations").

399. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

400. 31 U.S.C. § 1324 (2012) (prohibiting disbursements except in accordance with certain exceptions).

401. See Beermann, *supra* note 106, at 72.

402. Cf. WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 5, sc. 5.

remedy it desires. In *House v. Burwell*, Congress could repeal or amend the statutory provision under which the Executive claimed authority to spend the funds.<sup>403</sup> Congress could include a rider in its next appropriations stating: “no funds shall be disbursed from the Treasury to pay the cost-sharing reductions authorized by § 18071 of the ACA.” But of course this would require legislative deliberation over the merits of withdrawing support for insurers to offset the cost-sharing reductions they provided to beneficiaries.<sup>404</sup>

Interestingly, the delay claim is more difficult for the Legislative Exhaustion principle than its statutory basis would indicate. It is certainly a claim that the Executive violated a statutory mandate. But violations of statutory deadlines are particularly difficult for Congress to cure with new legislation.<sup>405</sup> Put simply, how much clearer can Congress be about when it wants the Executive to act? There is no ambiguity about the effective date of the employer-mandate provisions. Therefore, unlike the Secretaries’ interpretation of their appropriations authority, which Congress can overrule with a clear appropriations rider, Congress cannot do anything to make a statutory deadline clearer. Thus, it might appear as though Congress has exhausted its legislative remedies and that the Executive had asserted a new and more expansive kind of enforcement discretion.

A closer look at the ACA provisions, however, suggests this is a traditional use of enforcement discretion. The ACA provides that employer shared responsibility payments shall be paid “upon notice and demand by the Secretary.”<sup>406</sup> But the statute does not provide any guidelines for when the Secretary shall demand payment.<sup>407</sup> There is a robust debate, beyond the scope of this Article, concerning the limits of enforcement discretion, particularly when the Executive prospectively declares that it shall not enforce a law in certain

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403. See Defendants’ Memorandum in Support of Motion to Dismiss the Complaint, *supra* note 87, at 6 (citing 42 U.S.C. § 18082 (2012) as authorizing the use of funds).

404. See Beerman, *supra* note 106, at 69.

405. See Michael D. Sant’Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1419-22 (2011).

406. 26 U.S.C. § 4980H(d)(1) (2012).

407. Cf. *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (noting the presumption against reviewability “may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers”).

categories of cases.<sup>408</sup> But whatever those limits, the question for Legislative Exhaustion is whether Congress has nonjudicial remedies available to it. In this case, it does. Congress could not only circumscribe the Secretary's enforcement discretion—for example, with a statutory provision directing that “whenever the Secretary has probable cause to believe that an employer owes a shared responsibility payment under § 1513, the Secretary shall make a demand for payment”—it could also make the shared responsibility payments automatic as part of the employer's income taxes. Again, undertaking either of these solutions would require members of the House to convince their colleagues of the merits of the shared responsibility payments. But the 114th Congress had no interest in promoting the merits of any aspect of the ACA.<sup>409</sup>

Still, this leaves the vexing problem of agency delays.<sup>410</sup> Should Congress have standing to sue the Executive over its violation of a clear statutory deadline? This is probably one of the most challenging claims for the Legislative Exhaustion principle. On the one hand, without a new and expansive understanding of enforcement discretion permitting the Executive to ignore statutory deadlines absent some (admittedly difficult to conceive) guidelines to constrain its discretion, there is no legislative action by which Congress can make its deadline any clearer.<sup>411</sup> Moreover, the Executive does not typically defend the violation of statutory deadlines by pointing to statutory or constitutional authority; more often it accepts culpability and asserts that it is doing the best it can with the available resources and its other priorities.<sup>412</sup> On the other hand, many

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408. See, e.g., Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENG. J. MEDICINE 1967 (2014); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

409. Indeed, Judge Collyer held that the House did not have standing to pursue its employer mandate claims for a second reason—the House had asked for no remedy to redress the Secretaries' failure to implement the employer mandate more expeditiously. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76 (D.D.C. 2015) (“[T]he House does *not* seek injunctive relief with regard to the employer mandate.”). It is illustrative of the political nature of these types of lawsuits that the House sought no relief.

410. See generally Sant’Ambrogio, *supra* note 405 (discussing agency delays).

411. The merits of such an expansion of enforcement discretion is beyond the scope of this Article, but under existing doctrine, most courts feel obligated to “compel agency action unlawfully withheld” as best that they can, when an agency misses an express statutory deadline. See *id.* at 1403 (quoting 5 U.S.C. § 706(1) (2012)); *id.* at 1403 n.100 (collecting cases).

412. See *id.* at 1393 (discussing some of the factors that may be involved in agency delays).

administrative delays stem from problems Congress created or has left unaddressed.<sup>413</sup> Should federal courts hear claims by Congress that a large benefits program is not rendering decisions in compliance with statutory deadlines when it has starved the agency of resources to hire the decision makers needed to process the benefits claims in a timely manner?<sup>414</sup>

There is no avoiding the need for careful analysis of the nature of the interbranch dispute and the exercise of judgment by the court. If the failure to comply with the statutory deadline is caused by resource constraints or the Executive's understanding of statutory priorities, then the Legislative Exhaustion principle should bar Congress from federal court because Congress has deliberative legislative remedies available to it. On the other hand, if the delay is based on presidential priorities that Congress cannot directly check,<sup>415</sup> then Legislative Exhaustion should not bar the congressional suit.<sup>416</sup>

### *E. Raines, Coleman, and Legislative Lawsuits*

Legislative Exhaustion is consistent with the outcomes in *Raines v. Byrd*<sup>417</sup> and *Coleman v. Miller*.<sup>418</sup> The legislative plaintiffs in *Raines* objected to the President's use of the line-item veto pursuant to the Line Item Veto Act.<sup>419</sup> But as the Court pointed out, the legislators could remedy their alleged harm by convincing their colleagues to repeal the Act.<sup>420</sup> Moreover, there was no statutory ambiguity at all for a court to resolve. The legislators were merely upset that they had lost in the legislative process and did not like the law that their colleagues had passed.<sup>421</sup> No matter the specific

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413. *See id.* at 1397-98.

414. *See* Michael Sant'Ambrogio & Adam Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. (forthcoming 2017) (manuscript at 3-4).

415. *See, e.g.,* Massachusetts v. EPA, 549 U.S. 497, 533-34 (2007) (holding that the agency cannot justify its inaction by pointing to the President's priorities).

416. Although these judgments will be difficult when Congress challenges the Executive's failure to meet a hard and fast deadline, they will be less difficult than satisfactorily resolving the injury-in-fact test in a broad swath of legislative lawsuits.

417. 521 U.S. 811 (1997).

418. 307 U.S. 433 (1939).

419. *See Raines*, 521 U.S. at 816.

420. *See id.* at 824, 829.

421. *See id.*



requirements of Legislative Exhaustion, permitting congressional losers into court would undermine the deliberation functions of Congress, so *Raines* is an easy case.

The exhaustion question is trickier in *Coleman*. Had the State Legislature exhausted its remedies against the Kansas Secretary of State? The Kansas Senate could have revoted on the resolution for ratification of the amendment and attempted to produce a clearer rejection of ratification.<sup>422</sup> But in the view of the Kansas Senate it had already rejected the proposed amendment and the state executive officials were refusing to recognize the validity of that vote based on their interpretation of Article V of the U.S. Constitution.<sup>423</sup> Moreover, even if the Kansas Senate had voted more decisively against ratification a second time, it is not clear whether it would have been effective. First, the Court has generally left the validity of ratification to Congress's discretion as a political question.<sup>424</sup> Second, although the Kansas Senate tried to muster the political will to decisively defeat ratification, Congress might have deemed the amendment ratified, making any action by the Kansas Senate too little, too late.<sup>425</sup>

Thus, *Coleman* is an unusual case, but it is probably most analogous to a situation in which the Executive refused to follow the legislature's direction based on its different constitutional views. In such cases, the legislature has exhausted its deliberation-producing legislative remedies. Therefore, the Legislative Exhaustion principle would not bar the case from federal court.

#### F. Chadha, Windsor, and Congressional Defense

Finally, Legislative Exhaustion is consistent with the Court's approach to congressional intervention in cases such as *INS v.*

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422. Cf. *Coleman*, 307 U.S. at 436.

423. See *id.* at 446-47.

424. See *id.* at 450 (“[T]he efficacy of ratifications by state legislatures [after a] previous rejection or attempted withdrawal[] should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.”).

425. See *id.* at 448-49 (noting that Congress ratified the Fourteenth Amendment despite Ohio's and New Jersey's attempts to withdraw their ratifications).

*Chadha*<sup>426</sup> and *United States v. Windsor*,<sup>427</sup> even though it sheds no light on the Court's recognition of the Executive's standing to defend laws the President believes are unconstitutional. Although the courts will probably not have to confront this question in the wake of *Windsor*,<sup>428</sup> permitting Congress to intervene in such suits as a party is unlikely to distract or deter it from legislative deliberation. Moreover, in such cases, the Executive is choosing not to defend the law based on its constitutional objections. There is no statute that needs clarifying through legislative action, and litigation may be the only way for the Legislature to engage in a constitutional dialogue with the other branches.

#### CONCLUSION

The Legislative Exhaustion principle provides a relatively easy way to resolve suits in which the Executive purports to act pursuant to statutory authority. In such cases, Legislative Exhaustion suggests that the opponents of legislative standing are correct in requiring Congress to rely on legislative tools to resolve interbranch disputes. This principle enables the courts to avoid grappling with whether institutional injuries are sufficiently concrete to support Article III standing.

But Legislative Exhaustion would not prevent Congress from challenging presidential decisions not to enforce the law based on constitutional objections. In such cases, the tools that Congress can use to punish the Executive are unlikely to produce deliberation on the merits of the interbranch policy dispute. There may be other reasons to bar Congress from court, but neither Legislative Exhaustion nor the deliberation-forcing goals of interbranch conflict provide one.

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426. 462 U.S. 919 (1983).

427. 133 S. Ct. 2675 (2013).

428. *See supra* text accompanying note 17.