MAKING SENSE OF LEGISLATIVE STANDING

MATTHEW I. HALL*

ABSTRACT

Legislative standing doctrine is neglected and under-theorized. There has always been a wide range of opinions on the Supreme Court about the proper contours of legislative standing doctrine and even about whether the Court should adjudicate disputes between the other two branches at all. Perhaps owing to these disagreements, the full Court has never articulated a clear vision of the doctrine. While the Court has managed to resolve some cases, it has not achieved the consensus necessary to provide a comprehensive and coherent account of critical doctrinal issues such as what type of injury can give rise to legislative standing and which legislative injuries may support litigation by legislators, as opposed to by a legislative institution. Thus, the so-called "legislative standing doctrine" is less a doctrine than a loosely organized collection of ad hoc results in cases.

For many years, these deficiencies hardly mattered. Legislative standing cases were so rare that the lack of a clear approach to identifying which litigants could assert which legislative injuries caused no great embarrassment. But there has been a dramatic uptick during the Obama administration in the frequency of litigation between Congress and the

*. Associate Professor of Law, The University of Georgia School of Law. I am grateful to Dan Coenen and Christian Turner, for exceptionally helpful discussions of the ideas underlying this paper, and to Kent Barnett, Nathan Chapman, Andrea Dennis, Chad Flanders, Samuel Jordan, Fazal Khan, Brian Lea, Evan Tsen Lee, Kay Levine, Benjamin Means, Marcia McCormick, Jonathan Remy Nash, and Usha Rodrigues for their thoughtful suggestions. I also thank the participants in a faculty workshop at St. Louis University School of Law and the participants in the 2014 Emory/UGA Law School Faculty Conference for helpful comments on an early draft of this paper. Thanks also to Dean Bo Rutledge and the University of Georgia School of Law for research support.

President. In just the past four terms, the Court has decided three cases raising legislative standing issues, and another one is undoubtedly on the way: in September 2015, the District Court for the District of Columbia granted standing to the House of Representatives to sue over the President's implementation of the Affordable Care Act ("ACA"). The uncertainty in the doctrine is thus long overdue for correction.

This Article provides that correction. First, it develops an original typology of legislative injury, detailing all the varieties of "injury" that might afflict legislators, legislatures, and other legislative litigants, and illustrating each with examples from past legislative standing cases. Second, it articulates a method for determining which legislative injuries may be asserted by individual legislators, and which require the participation of a full chamber, or both chambers acting bicamerally. Finally, it illustrates this model by applying it to the Court's recent forays into legislative standing and the pending ACA litigation.

TABLE OF CONTENTS

INTRODUCTION

> Differences between the President and the Congress are commonplace under our system. . . 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.[1]

Disagreements between Congress and the President are a perennial feature of our political system. Indeed, intra-branch squabbling is an intended feature of the Framers' constitutional design, and the legislative and executive branches typically work out their disagreements directly, through negotiation and pressure, using the tools given to each branch by the Constitution.[2] Occasionally, however, the legislative branch has sought to enlist the help of the judicial branch in refereeing its disputes with the President,[3] either by suing the appropriate executive officer or by intervening in a pending case between other parties. Although the Court has resolved some of these cases, and has rendered various ad hoc pronouncements concerning the circumstances in which legislators may litigate, it has never articulated a clear doctrine. Indeed, the case law contains various inconsistent pronouncements, rendering it difficult or impossible to discern a coherent doctrine of legislative standing.

1. Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring). *See also id.* at 998 ("If the Congress chooses not to confront the President, it is not our task to do so.").

2. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2704–05 (2013) (Scalia, J., dissenting) ("Our system is *designed* for confrontation. That is what '[a]mbition . . . counteract[ing] ambition,' THE FEDERALIST, No. 51, at 322 (J. Madison), is all about. If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit . . . .").

3. The reverse is rarely true. When the Senate fails to act on a presidential nominee, for instance, the President generally employs either political pressure or circumvention of the roadblock through the recess appointment power, and has never resorted to litigation.

For instance, in *INS v. Chadha*, the Court stated that "[w]e have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[4] But other cases in the legislative standing canon articulate far narrower versions of the legislative standing doctrine than *Chadha*'s, and those cases almost invariably deny standing to congressional litigants.[5] The most recent cases evince deep and open disagreement among the Justices concerning litigation by legislative entities and results that are hard to reconcile with one another. After nearly eighty years of fitful development, legislative standing case law has failed to develop a clear doctrine capable of generating predictable outcomes. Instead, it offers a grab bag of inconsistent rationales that offer little guidance to litigants and lower courts.

The question of "legislative standing" is fundamentally about when, if ever, the federal courts should get involved in refereeing disputes between Congress and the executive branch.[6] For decades, the confusion in the doctrine scarcely mattered because the political branches tended to work out their disagreements in the political process, litigating only rarely. But litigation between Congress and the President has become far more common in recent years. In just the past four terms, the Supreme Court has decided three major cases that raised issues of legislative standing—including politically charged cases involving same-sex marriage and congressional redistricting. Another high-profile case is now pending in federal court in which the House of Representatives has challenged the President's implementation of the Affordable Care Act ("ACA").[7] The lack of clear guidance from the Supreme Court has left lower courts at sea, generating uncertainty about issues of national import.

I argue that the confusion and inconsistency in legislative standing doctrine has one simple cause: the doctrine has been called on to address a multitude of distinct and unrelated types of claims that have little in common other than the presence of a legislative litigant. Courts and

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

5. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 818–24 (1997).

6. *See Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) ("Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor.").

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

scholars have addressed, under the rubric of legislative standing, claims involving: (1) individual injuries to legislators; (2) alleged injuries to particular powers belonging to the legislature; (3) injuries to the legislature's asserted interest in the effectiveness of its legislation, occasioned by the President's refusal either to enforce enacted legislation in the manner that the legislature prefers, or to defend a challenged statute; and (4) claimed injuries to both the federal government and state governments asserted by legislative litigants. In seeking to treat this diverse range of cases under a single doctrine, the Court has generated confusing (if not contradictory) holdings concerning the type of legislative injury that will support standing, and it has blurred unnecessarily the boundaries between legislative-standing principles and related doctrines. The law of legislative standing, in short, has been applied too broadly and asked to do too much. The doctrine that has resulted is a mess.

There is a better way. This Article develops a typology of legislative injuries and demonstrates that many so-called "legislative standing" cases are more sensibly addressed by other justiciability doctrines including ordinary standing doctrine and the political question doctrine. It then describes the subset of cases that actually do require a specialized doctrine of legislative standing and develops a more coherent set of principles for addressing those cases.

Part I begins by sketching out the terrain of legislative standing doctrine and related and overlapping justiciability doctrines, principally the standing and political question doctrines. Part II describes the confusion and contradiction that persist in legislative standing cases despite nearly eighty years of judicial efforts to clarify the law in this area. Part III shows that the "legislative standing" designation provides no help in resolving a number of so-called legislative standing cases—that is, that many "legislative standing" cases are better thought of as simple, run-of-the-mill standing cases, while others are more sensibly treated as political question cases. Part III then defines the subset of so-called "legislative standing" cases that actually benefit from a specialized doctrine of "legislative standing," and develops a better version of that doctrine, illustrating its operation by examining earlier rulings at the court of appeals and Supreme Court levels. Part IV develops this more straightforward version of legislative standing doctrine by applying it to pending litigation in which the House of Representatives has sued the President regarding his implementation of the ACA.

I. BACKGROUND

Legislative standing doctrine is commonly described as a subset of standing doctrine, pertinent in cases in which legislators or legislative bodies seek to litigate cases that concern official action.[8] To make sense of legislative standing doctrine, one must therefore understand its relationship to the standing doctrine and the political question doctrine.

A. STANDING DOCTRINE

Standing doctrine emanates from Article III of the U.S. Constitution, which extends federal jurisdiction only to specified categories of "Cases" and "Controversies."[9] The Supreme Court has construed this grant to limit federal jurisdiction to disputes in which a plaintiff demonstrates a sufficient "personal stake" in the outcome.[10] In particular, standing doctrine requires the plaintiff to "'show that he personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'"[11] In addition, the plaintiff's injury must be "an invasion of a judicially cognizable interest," which is to say: one that is legally protected.[12]

The required personal stake is not present when "the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens."[13] A party's alleged injury that involves nothing more than "harm to his and every citizen's interest in proper application of the Constitution and laws" generally is insufficient to support standing.[14]

8. *See Raines*, 521 U.S. at 818–24.

9. U.S. CONST. art. III, § 2, cl. 1.

10. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("[T]he standing question in its Art. III aspect 'is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (emphasis in original))).

11. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (quoting *Simon*, 426 U.S. at 38, 41). *See also* Allen v. Wright, 468 U.S. 737, 751 (1984).

12. Bennett v. Spear, 520 U.S. 154, 167 (1997).

13. *Warth*, 422 U.S. at 499 (citation omitted). *See also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 (1992).

14. *See Lujan*, 504 U.S. at 573. *See also* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 181, 200–01 (1992) (arguing that the Court in *Lujan* treated the ban on generalized grievances as constitutional in nature and emphasized "that Article III requires something more than [a request for] relief that no more directly and tangibly

Thus, when the injury alleged is an injury to the widely shared desire to have the government simply follow the law, standing is absent—in part because "the political process, rather than the judicial process, may provide the more appropriate remedy."[15] This is no less true when the plaintiffs are members of Congress than when they are citizens.[16]

The Court has explained that standing doctrine serves two principal purposes. First, it protects the constitutional scheme of separation of powers by limiting the power of our unelected federal judiciary to the decision of "cases."[17] As Chief Justice Roberts wrote in *Hollingsworth v. Perry*, "[t]o have standing, a litigant must seek relief for an injury that affects him in a personal and individual way," and that "[t]his is an essential limit on our power: It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives."[18] Thus, standing serves separation-of-powers interests by restricting the judiciary to the exercise of the judicial power—that is, the power to decide genuine disputes.[19] Second, standing law promotes better judicial decisionmaking by ensuring that issues are raised in a concrete factual setting and that plaintiffs have a sufficient stake in the outcome to adequately pursue the litigation.[20] The standing inquiry is "especially rigorous" when the case might force the Court to determine the constitutionality of an act of either the President or Congress.[21]

benefits [the plaintiff] than it does the public at large"). The extent to which *Lujan* transformed the prohibition on generalized grievances into a constitutional, rather than a prudential, aspect of standing doctrine has been the subject of some disagreement. *Compare id.*, *with* David J. Weiner, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 222–24 (2001).

15. FEC v. Akins, 524 U.S. 11, 23 (1998). *See also* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. Supp. 2008).

16. *See* Barnes v. Kline, 759 F.2d 21, 49–50 (D.C. Cir. 1985) (Bork, J., dissenting) ("This is an action by representatives of the people who themselves have . . . only a 'generalized grievance' about an allegedly unconstitutional operation of government. It is well settled that citizens, whose interest is here asserted derivatively, would have no standing to maintain this action. That being so, it is impossible that these representatives should have standing that their constituents lack.").

17. *See, e.g.*, *Warth*, 422 U.S. at 498 ("[S]tanding . . . is founded in concern about the proper—and properly limited—role of the courts in a democratic society.").

18. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659, 2662 (2013).

19. *See Lujan*, 504 U.S. at 559–60. *See also* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1543 (2012).

20. *See* Allen v. Wright, 468 U.S. 737, 770 (1984) (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

21. Raines v. Byrd, 521 U.S. 811, 819–20 (1997).

B. POLITICAL QUESTION DOCTRINE

Although the judiciary generally has a responsibility to decide cases properly before it, the Supreme Court has identified a narrow class of cases in which the courts may decline to hear a case on the ground that it presents a "political question."[22] The federal judiciary may not decide cases raising political questions, even if the case otherwise falls within the constitutional and statutory jurisdiction of the federal courts.[23] The criteria for identifying political questions are notoriously vague.[24] Indeed, the doctrine has been criticized as "the most confusing of the justiciability doctrines,"[25] and as "an enigma" to commentators, who have disagreed "not only about its wisdom and validity . . . [but also] over the doctrine's scope and rationale."[26] The Supreme Court in *Baker v. Carr* stated that the doctrine applies when there is:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial resolution; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[27]

Scholars and judges have observed that *Baker*'s formulation of the political question doctrine is readily manipulated. In particular, the Court's own efforts to apply *Baker*'s six factors in subsequent cases have been criticized as ad hoc and devoid of meaningful guidance for subsequent cases, while scholars have also argued that the lower courts have "seriously misunderstood" the political question doctrine.[28]

22. *See Baker*, 369 U.S. at 209. *See also* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012).

23. *Baker*, 369 U.S. at 209–11.

24. Kent Barnett, *Standing for (and Up to) Separation of Powers*, 91 IND. L.J. 665, 684 (2016) (referring to the political question doctrine as a "humorously vague, multi-headed" doctrine).

25. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 147–48 (Vicki Been et al. eds., 5th ed. 2007).

26. Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031 (1985). *See also* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600 (1976) ("There may be no doctrine requiring abstention from judicial review of 'political questions.'").

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

28. *See, e.g.*, John C. Harrison, *The Political Question Doctrines* 46 (Univ. of Va. Sch. of Law: Pub. Law & Legal Theory, Research Paper No. 59, 2015), http://ssrn.com/abstract=2668374 ("In the last few decades a substantial number of lower court decisions have seriously misunderstood the

Justice Sotomayor recently sought to simplify the doctrine, explaining that the six *Baker* factors "reflect three distinct justifications for withholding judgment on the merits of a dispute."[29] The first, textual commitment to another branch, requires judicial deference to the Constitution's explicit allocation of authority among the branches of government.[30] The second and third *Baker* factors, Sotomayor suggested, "reflect circumstances in which a dispute calls for decisionmaking beyond courts' competence," and thus "resolution of the suit is beyond the judicial role envisioned by Article III."[31] Lastly, the final three *Baker* factors "address circumstances in which prudence may counsel against a court's resolution of an issue presented."[32] Justice Sotomayor observed that these prudential factors have rarely been invoked to forego adjudication, but that "[r]are occasions" implicating *Baker*'s final three factors may present an "unusual case" in which judicial disposition should be avoided.[33] Where, for instance, the controversy implicates "the distribution of political authority between coordinate branches," "it may be appropriate for courts to stay their hand . . . until a dispute is ripe, intractable, and incapable of resolution by the political process."[34] Thus, the political question doctrine is particularly salient in cases in which legislators sue the executive branch.

Like the standing doctrine, the political question doctrine serves to protect the constitutional scheme of separation of powers, but it does so in a slightly different manner. Whereas the standing doctrine focuses on limiting judicial power to disputes of a judicial nature, the political question doctrine accords deference to the other branches and avoids judicial meddling in squabbles between the executive and legislature, even when a genuine dispute exists.

C. LEGISLATIVE STANDING DOCTRINE

The Supreme Court, with the lower courts following its lead, has developed a specialized set of standing rules to govern cases in which a legislator or legislative chamber seeks to assert or defend claims involving governmental action.[35] The three "bedrock requirement[s]" of ordinary

Supreme Court's political question doctrine.").

29. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring).

30. *Id.* at 1431–32.

31. *Id.* at 1432.

32. *Id.*

33. *Id.* at 1433.

34. *Id.*

35. For an argument that federal legislative standing is appropriate only where executive action threatens Congress's primary functions of legislating and gathering information, see generally Jonathan

standing doctrine apply in the legislative standing context as well. That is, a legislative litigant must show injury, causation, and redressability in order to establish legislative standing.[36] The Court has held that the requirements of standing are more, not less, rigorous in the legislative standing context than in ordinary standing cases because the separation-of-powers concerns that animate much of the standing doctrine are especially salient in the context of inter-governmental disputes, at least within the federal government.[37]

1. Legislative Standing to Sue

The Supreme Court's legislative standing case law is scarce, and the Court has repeatedly dodged opportunities to elaborate on the doctrine.[38] The Court has allowed legislative standing in only very few circumstances. First, the Court permitted state legislators to sue over outright nullification of their votes—that is, over allegations that a specified measure failed to garner sufficient votes to pass but was treated as passing, or passed the legislature but was treated as failing.[39] The Court also permitted a federal legislator to sue over denial of his salary and position in Congress,[40] but held that individual federal legislators could not sue to challenge the constitutionality of a duly enacted law because after legislation is enacted, legislators have no more stake in the proper enforcement or implementation of a law than any other citizen.[41] The Court recognized the House of Representatives' and the Senate's standing to defend a federal statute that

Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015).

36. Raines v. Byrd, 521 U.S. 811, 818–19 (1997).

37. *Id.* at 819–20.

38. *See The Supreme Court – Leading Cases: Separation of Powers – Congressional Standing*, 111 HARV. L. REV. 197, 217–18 & 217 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."). *See also, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 n.12 (2015) (stating that the Court's opinion finding legislative standing for the state legislature has no bearing on "whether Congress has standing to bring a suit against the President"); United States v. Windsor, 133 S. Ct. 2675, 2704–05 (2013) (Scalia, J., dissenting) (declining to reach the question of whether the House had standing to defend the Defense of Marriage Act); Bowsher v. Synar, 478 U.S. 714, 721 (1986) (declining to reach the standing issue as to members of Congress because another party already had standing).

39. Coleman v. Miller, 307 U.S. 433, 436, 438 (1939).

40. Powell v. McCormack, 395 U.S. 486 (1969).

41. *See Bowsher*, 478 U.S. at 733–34 ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."). *See also* Daughtrey v. Carter, 584 F.2d 1050, 1057 (D.C. Cir. 1978) ("Once a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public.").

conferred a power on those chambers.[42] Most recently, it recognized a state legislature's standing to challenge a state ballot initiative on the ground that it deprived the legislature of a power conferred by the Federal Constitution.[43]

The foundational Supreme Court case on legislative standing is *Coleman v. Miller*,[44] a 1939 case in which twenty Kansas state senators challenged the state legislature's ratification of the proposed Child Labor Amendment to the U.S. Constitution.[45] The state senate had deadlocked on the amendment by a vote of twenty to twenty, and the lieutenant governor, as presiding officer, cast a tie-breaking vote in favor of ratification.[46] The claim of the objecting state legislators rested on the argument that the lieutenant governor did not have the power to break a tie in relation to proposed federal constitutional amendments.[47] The plaintiffs alleged that their votes had been sufficient to defeat the amendment, and thus had been nullified by the determination that Kansas had ratified it. The Court recognized the plaintiffs' standing, holding that the alleged nullification of a legislative vote constituted a sufficient injury to confer standing on the legislator plaintiffs, and noted that the objectors' "votes against ratification have been overridden and virtually held for naught[,] although if they are right in their contentions their votes would have been sufficient to defeat ratification."[48] The Court held that these allegations established "a plain, direct and adequate interest in maintaining the effectiveness of their votes."[49]

In recognizing the plaintiffs' standing, the Court distinguished the case from others in which litigants asserted a mere right "to require that the Government be administered according to law."[50] The Court noted that such an assertion would not support standing either for ordinary citizens or for legislators,[51] but stated that—in the unusual circumstances of this case—standing was appropriate "at least [for] the twenty senators whose votes, if their contention were sustained, would have been sufficient to

42. *See* INS v. Chadha, 462 U.S. 919, 939 (1983).
43. *Ariz. State Legislature*, 135 S. Ct. at 2663–65.
44. Coleman v. Miller, 307 U.S. 433 (1939).
45. *Id*. at 435–36.
46. *Id.* at 436.
47. *Id.*
48. *Id*. at 438.
49. *Id.*
50. *Id.* at 440.
51. *Id.* (quoting Fairchild v. Hughes, 258 U.S. 126, 129 (1922)).

defeat the resolution ratifying the proposed constitutional amendment."[52] Those senators, the Court found, had alleged a sufficient injury to their interests in having their votes properly counted to give them "an interest in the controversy."[53]

Thirty years after *Coleman*, the Court found standing in a case involving a very different type of injury. In *Powell v. McCormack*, Congressman Adam Clayton Powell sued the sergeant at arms of the U.S. House of Representatives after the House refused to let him take his seat in Congress.[54] Powell alleged, among other things, wrongful deprivation of his salary and other benefits of his employment as a legislator. The Court found that Powell's claim presented a live case or controversy, in part because of his "obvious and continuing interest in his withheld salary."[55] The injury asserted in *Powell* was not an injury to the powers of the legislature or a claim of nullification of a particular vote, as in *Coleman*; rather, it was premised on Congressman Powell's claim that he had been "singled out for specially unfavorable treatment" by other members of Congress, who had refused to seat him after his election.[56] Although there were difficult separation-of-powers issues in *Powell*, the Court dealt with them under the political question doctrine rather than the doctrine of standing.[57]

The meaning and scope of vote nullification was left to lower courts for a half-century after *Coleman*.[58] It was not until 1997 that the Court took the opportunity to refine and clarify the rule of *Coleman*, in *Raines v. Byrd*. In *Raines*, several federal legislators brought an action seeking to invalidate the Line Item Veto Act of 1996,[59] claiming that the Act unconstitutionally granted legislative power to the President by effectively permitting the President to amend spending laws after enactment by removing particular

52. *Id.* at 446.
53. *Id.*
54. Powell v. McCormack, 395 U.S. 486, 486 (1969).
55. *Id.* at 497.
56. Raines v. Byrd, 521 U.S. 811, 820–21 (1997) (discussing *Powell*, 395 U.S. at 496, 512–14).
57. *Powell*, 395 U.S. at 516–22.
58. *Compare*, *e.g.*, Campbell v. Clinton, 203 F.3d 19, 22–23 (D.C. Cir. 2000) (holding that the plaintiff Congressman failed to successfully claim a *Coleman* nullification because "the President here did not claim to be acting pursuant to the defeated declaration of war or a statutory authorization, but instead 'pursuant to [his] constitutional authority . . . as Commander-in-Chief'"), *with* Kennedy v. Sampson, 511 F.2d 430, 435–36 (D.C. Cir. 1974) (holding that the legislator had standing because he could assert no greater interest in this lawsuit than the "effectiveness of his vote").
59. 2 U.S.C. § 691 (1996).

appropriations enacted by Congress.[60] The Court, in an opinion by Chief Justice Rehnquist, held that the plaintiffs lacked "a sufficient 'personal stake'" in the dispute, and had suffered neither a concrete personal injury, nor a judicially cognizable institutional injury.[61]

The Court explained that neither of the cases in which it had previously recognized legislative standing for legislators supported standing in *Raines*. First, the plaintiffs had not adequately alleged a personal injury of the sort at issue in *Powell*. Whereas Powell had alleged an injury to his personal interest in employment as a member of Congress, the Court characterized the *Raines* plaintiffs' claim as built on institutional injury *to Congress itself* — specifically, an injury to the power of Congress to craft legislation:[62] "Their claim is that the Act causes a type of institutional injury . . . which necessarily damages all Members of Congress and both Houses of Congress equally."[63] Thus, the asserted injury was not particularized to the plaintiffs, but rather was widely shared among all members of Congress.

Moreover, the Court noted that the plaintiffs' asserted injury to their legislative powers was, in a real sense, inflicted by Congress upon itself.[64] Indeed, the plaintiffs had tried and failed to persuade Congress not to pass the Act. The Court expressed doubts that individual legislators who had lost a legislative battle could ever establish standing to assert a resulting injury on behalf of either their chamber or Congress itself. In such a case, the Court stated, the plaintiffs' quarrel was with their colleagues in Congress and not with the executive branch.[65] The Court expressed a deep reluctance to let members who had lost a battle in the legislative process seek judicial intervention by invoking an injury to Congress as a whole.[66]

Nor had the plaintiffs alleged a sufficient injury to themselves as individual legislators. Plaintiffs' allegations were, the Court held,

60. *Raines*, 521 U.S. at 816. The plaintiffs were eventually proved right on the merits when the Court invalidated the Act the following year. *See* Clinton v. City of New York, 524 U.S. 417, 448–49 (1998).

61. *Raines*, 521 U.S. at 830 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

62. *Id.* at 821.

63. *Id.*

64. *See id.* at 824. *See also* Michael Sant'Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730897 (arguing that the availability of legislative self-help measures makes legislative standing particularly inappropriate).

65. *Raines*, 521 U.S. at 830 n.11.

66. This difference of opinion between the plaintiffs and their respective chambers was not speculative; the Senate, together with the House leadership, had filed an amicus brief urging that the law be upheld. *See id.* at 818 n.2 (noting that the "House Bipartisan Legal Advisory Group . . . and the Senate filed a joint brief as amici curiae" urging that the law be upheld).

insufficient to establish a judicially cognizable vote nullification injury of the type at issue in *Coleman*.[67] In order to do so, plaintiffs would have needed to allege that a particular legislative act was passed despite sufficient votes being cast to defeat it, or defeated despite sufficient votes being cast to pass it. The *Raines* Court read *Coleman* narrowly, as standing "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."[68] By that standard, the *Raines* plaintiffs' allegations were insufficient to allege a vote nullification injury, because "[t]hey have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the [Line Item Veto] Act, their votes were given full effect. They simply lost that vote."[69]

Thus, *Raines* suggests that to establish legislative standing on their own behalf, individual legislators must show vote nullification of the sort at issue in *Coleman*: that a specific legislative vote was "completely nullified,"[70] as when a legislative act goes into effect (or does not go into effect) despite the legislator-plaintiff having cast a vote that was "sufficient to defeat (or enact)" the act.[71] The Court further suggested, albeit in dicta, that even such a showing may not be sufficient to establish legislative standing for *federal* legislators. The Court noted that *Coleman* concerned state legislators, and that separation-of-powers concerns applicable to a suit by federal legislators might preclude legislative standing *even on facts otherwise similar to Coleman*:

> [W]e need not decide whether *Coleman* may also be distinguished in other ways. For instance, appellants have argued that *Coleman* . . . has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman* . . . .[72]

67. *Id.* at 824.

68. *Id.* at 823.

69. *Id.* at 824.

70. *Id.* at 823.

71. *Id.*; Campbell v. Clinton, 203 F.3d 19, 23, 29 (D.C. Cir. 2000) (holding that *Raines* requires nullification of a specific legislative vote and does not justify standing whenever the President acts contrary to Congress's intent or exceeds his statutory authority). *See also* Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 258 (2001); Weiner, *supra* note 14, at 206.

72. *Raines*, 521 U.S. at 824 n.8.

Most recently, in 2015, the Court decided *Arizona State Legislature v. Arizona Independent Redistricting Commission*. In *Arizona State Legislature*, the Court held that a state legislature had standing to challenge a state law passed by ballot initiative that allegedly deprived the legislature of a power conferred upon it by the U.S. Constitution.[73] The plaintiff in *Arizona State Legislature* was the state legislature itself, which sued to invalidate a state constitutional provision that created an independent commission to draw legislative districts. The plaintiff argued that the U.S. Constitution conferred the districting power on the "legislature" of each state, and thus the law creating the redistricting commission was unconstitutional.[74] The defendants argued, among other things, that the legislature lacked legislative standing and that the case was therefore non-justiciable. The Court, in an opinion by Justice Ginsburg, found that the ballot initiative's deprivation of the legislature's redistricting power sufficiently injured the legislature as a whole to confer standing on the legislature itself.[75]

2. Legislative Standing to Defend

A separate strain in the legislative standing case law concerns attempts by legislative litigants to defend federal statutes against constitutional challenges. The Supreme Court in *INS v. Chadha* permitted Congress to defend the constitutionality of a law that conferred a specific power on Congress in circumstances where the executive branch refused to defend the law.[76] The statute at issue in *Chadha* conferred on each house of Congress the power to legislatively "veto" certain decisions of the Immigration and Naturalization Service ("INS"). The *Chadha* Court treated legislative standing to defend a challenged federal law as not merely permissible, but quite uncontroversial, writing that "[w]e have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[77]

Chadha thus suggests that the potential invalidation of a federal statute may constitute an injury to Congress sufficient to confer standing, and at least one member of the Court would interpret it in that way.[78]

73. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2659 (2015).
74. *Id.* at 2658–59 (citing U.S. CONST. art. I, § 4, cl. 1).
75. *Id.* at 2659.
76. INS v. Chadha, 462 U.S. 919, 939–40 (1983).
77. *Id.* at 940.
78. *See* United States v. Windsor, 133 S. Ct. 2675, 2711–12 (2013) (Alito, J., dissenting).

Congressional entities have frequently asserted injury from the threatened invalidation of federal laws, claiming in essence, a continuing stake in the validity of their own "legislative handiwork."[79] Most judicial and scholarly treatments of *Chadha*, however, take a narrower view, noting that the law that Congress was permitted to defend in *Chadha* conferred a special prerogative — the legislative veto — on both the House and the Senate.[80] Thus, *Chadha* is generally understood to recognize legislative injury in the threatened elimination of legislative powers, but not in the threatened invalidation of general federal statutes.[81]

II. THE CONFUSION OF LEGISLATIVE STANDING

The Court's legislative standing doctrine is a Rorschach test — open to multiple plausible, yet inconsistent, interpretations.[82] After nearly eighty years of effort to develop a useful and coherent doctrine, the precise nature of the injury required to support standing for a legislative litigant remains very much in dispute. The basic elements of any standing doctrine—who can sue whom, and about what?—have never been fully resolved for legislative standing, and even the foundational case of *Coleman v. Miller* has been attacked recently as possibly "stand[ing] for nothing."[83] The Court's most recent legislative standing cases—the five-to-four decisions in *Arizona State Legislature v. Arizona Independent Redistricting Commission* and *United States v. Windsor*—illustrate the failure of the Court's decades-long effort to define a clear, coherent legislative standing doctrine.

The difficulties that the Court has had in defining legislative standing

79. *See, e.g.*, Motion for Leave to Intervene of the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 9, 12, Massachusetts v. U.S. Dep't of HHS, 682 F.3d 1 (1st Cir. 2012) (No. 10-2204, 10-2207, & 10-2214) (asserting that "in light of the Department's refusal to [defend DOMA,] the House should be allowed to intervene to discharge that function" and "the House has a strong interest in defending the constitutionality of its legislative handiwork"); Memorandum of Points and Authorities in Support of Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for Leave to Intervene at 9, 13, McLaughlin v. Panetta, (D. Mass. May 1, 2012) (No. 11-11905).

80. *See, e.g.*, Hall, *supra* note 19, at 1548–49.

81. *Id. See also* Raines v. Byrd, 521 U.S. 811, 828–29 (1997); *infra* Part III.C.

82. *See* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 683 (1990); Nash, *supra* note 35, at 342. *See also* Kerr v. Hickenlooper, 880 F. Supp. 2d 1112, 1133 (D. Colo. 2012) ("The law remains unclear regarding the situations in which an institutional legislative injury . . . confers standing on legislators, and when it does not.").

83. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2696 (2015) (Scalia, J., dissenting) ("*Coleman* was a peculiar case that may well stand for nothing.").

doctrine are perhaps inevitable for a doctrine that tries to do so much. The injuries asserted in legislative standing cases are many and varied, and they arise in a multitude of situations that have very little in common with one another. The effort to define a single doctrine to accommodate these very different types of cases has necessitated smoothing over, or simply ignoring, important factual and legal distinctions that ought to be accounted for. Compounding this problem, the Court has never established clear boundaries between so-called "legislative standing" doctrine and other justiciability doctrines that may overlap with it. The result has been confusion at all levels of the judiciary, as well as among litigants and scholars.

A. THE SHIFTING TERRAIN OF INSTITUTIONAL INJURY

The Supreme Court's legislative standing cases ostensibly follow the traditional form of Article III standing inquiries, under which the plaintiff must "show that he personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."[84] But the Court has never reached consensus regarding the proper bounds of the concept of legislative injury, and so the doctrine remains frustratingly vague. If anything, the trend has been away from consensus, with an increasingly vocal minority of the Court arguing that legislative standing should never be permitted, and that Congress's "only recourse is to confront the President directly."[85] Although this abolitionist view has not commanded a majority on the Court, there is language in the majority's opinion in *Raines v. Byrd* suggesting that individual legislators may not assert an institutional injury that affects Congress itself.[86] Even the majority's opinion in *Arizona State Legislature* characterized *Raines* as holding "specifically and only that 'individual members of Congress [lack] Article III standing.'"[87]

There is a similar lack of consensus on the Court about assertions of "institutional injury" by legislative institutions. In *Windsor*, for instance,

84. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982). *See also Ariz. State Legislature*, 135 S. Ct. at 2663 ("To qualify as a party with standing to litigate, the Arizona Legislature must show, first and foremost, injury in the form of invasion of a legally protected interest that is concrete and particularized and actual or imminent." (citation and internal quotation marks omitted)).

85. United States v. Windsor, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting).

86. *See Raines*, 521 U.S. at 821, 829 (denying standing to individual legislators where claimed injury "necessarily damages all Members of Congress and both Houses of Congress equally").

87. *Ariz. State Legislature*, 135 S. Ct. at 2664.

four Justices signed two separate opinions advancing diametrically opposed visions of legislative standing.[88] *Windsor* was the 2013 case that struck down the Defense of Marriage Act ("DOMA") as unconstitutional. The President agreed with the plaintiff that DOMA was unconstitutional, and the Bipartisan Legal Advisory Group of the House of Representatives (the "BLAG") intervened to defend the statute. On the question whether the BLAG had standing to petition for certiorari, Justice Alito argued that it had standing under a straightforward reading of *INS v. Chadha*.[89] Namely, the House had suffered an "injury in fact" by virtue of the court of appeal's judgment "striking down . . . DOMA as unconstitutional," and the BLAG was entitled, as the House's designee, to challenge the judgment below.[90]

Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, blasted Justice Alito's conception of legislative standing as unbounded, arguing that it rested upon "a shifting concept of injury designed to support standing when we would like it."[91] Justice Scalia also argued that Justice Alito's broad reading of legislative standing was without historical precedent, insisting that "[h]eretofore in our national history," the Court had never permitted Congress to litigate over the President's mere failure to enforce or defend a law.[92] Justice Scalia advanced a far narrower understanding of *Chadha*, as permitting Congress to litigate only in defense of statutes that grant Congress a concrete power. Justice Scalia's alternative conception of legislative standing would have held that Congress's "only recourse" when the President refuses to defend a law "is to confront the President directly" using its own institutional powers, including the appropriations and appointment powers, and if necessary, the power of impeachment.[93]

Although the dissenting opinions in *Windsor* reveal deep division on the Court about the proper scope of legislative standing, the majority found the case justiciable on other grounds,[94] and thereby avoided the need to

88. *Windsor*, 133 S. Ct. at 2711 (Alito, J., dissenting); *id.* at 2697 (Scalia, J., dissenting, joined in parts by Chief Justice Roberts and Justice Thomas). The majority in *Windsor* managed to side-step the legislative standing issue entirely, finding the case justiciable on other grounds. *Id.* at 2687–88.

89. *Id.* at 2712 (Alito, J., dissenting).

90. *Id.* at 2713.

91. *Id.* at 2703–04 n.3 (Scalia, J., dissenting).

92. *Id.* at 2703.

93. *Id.* at 2704–05.

94. In particular, the Court found that the United States' interest in the case was sufficient to create a justiciable case or controversy, notwithstanding the position on the merits taken by the administration. *See id.* at 2687–88 (majority opinion).

decide the legislative standing questions. Two years later, in *Arizona State Legislature*, the Court addressed legislative standing head-on, holding five to four that the Arizona Legislature was injured by an alleged usurpation of its constitutional authority.[95] In contrast with *Chadha*'s clear holding that legislatures have standing to litigate against encroachments on their institutional powers, the opinions in *Arizona State Legislature* revealed the breadth and depth of the current Court's fundamental disagreements about the principles underlying legislative standing doctrine.

The Court in *Arizona State Legislature* recognized legislative standing to vindicate a legislature's powers. The Court distinguished *Raines* on two grounds: the plaintiffs there were individual legislators asserting an institutional injury, and they were federal, rather than state, legislators. *Raines*, the Court said, held "specifically and only that 'individual members of Congress [lack] Article III standing'" to assert institutional injuries.[96] Because the plaintiff Arizona Legislature "in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers," *Raines* was not controlling.[97] And because the plaintiff was the state legislature rather than the federal Congress, the separation-of-powers considerations underlying much of standing doctrine were diminished, and the legislative standing inquiry was arguably less stringent.[98] Thus, "the case before us does not touch or concern the question whether Congress has standing to bring a suit against the President."[99]

Chief Justice Roberts dissented on the merits, joined by Justices Alito, Scalia, and Thomas. Justices Thomas and Scalia each dissented separately, on the ground that the plaintiff lacked standing to assert its claims. Justice Scalia argued that "[d]isputes 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."[100] He argued that the Court should only recognize legislative standing in circumstances where the plaintiff could "show a discrete harm [apart from] the alleged usurpation of its powers."[101]

95. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 (2015).
96. *Id.* at 2664.
97. *Id.*
98. *Id.* at 2665 n.12.
99. *Id.*
100. *Id.* at 2694 (Scalia, J., dissenting).
101. *Id.* at 2696. *See* also *id.* at 2694 (arguing that the judicial power does not extend to "suits between units of government regarding their legitimate powers"); *id.* at 2699 (Thomas, J., dissenting) ("I agree with Justice Scalia that the Arizona Legislature lacks Article III standing to assert an

Of course, as the majority opinion pointed out, the Court had — in both *Coleman* and *Chadha* — previously recognized legislative standing to assert usurpation of the legislature's powers. To this observation, Justice Scalia responded by ignoring *Chadha* entirely, and wishing *Coleman* away, arguing that *Coleman* "was a peculiar case that may well stand for nothing."[102] Justice Scalia asserted that it was unclear that a majority had joined the portion of the Court's opinion finding standing, and that its standing holding therefore could conceivably have been "a 4-4 standoff."[103] The discussion of legislative standing in *Coleman*, Justice Scalia explained, was "arguably nothing but dictum. The peculiar decision in *Coleman* should be charitably ignored."[104] The majority responded that despite Justice Scalia's "endeavor to wish away *Coleman*," the opinion was styled the "Opinion of the Court," and the Court had subsequently — indeed, repeatedly — cited it as precedential.[105]

In sum, the law concerning the standing of legislative institutions to assert injuries to their institutional powers remains under-theorized and continues to generate significant controversy. Although the case law clearly recognizes justiciable legislative injury in the deprivation of a specific power possessed by a legislature, *Chadha* can be read either broadly—as permitting legislative standing to defend any of Congress's "legislative handiwork" against challenge—or narrowly—as recognizing legislative injury only from potential invalidation of a statute that confers a concrete power on Congress. The House in recent litigation has advocated the broader view, with support from at least Justice Alito,[106] but the Court has not resolved the question.

B. INDIVIDUAL LEGISLATORS AND INSTITUTIONAL INJURY

The lack of any clear consensus regarding the legislative standing of legislative institutions in cases like *Chadha*, *Windsor*, and *Arizona State Legislature*, illustrates in a striking way the confusion in the current doctrine. But an even deeper confusion is evident in the inconsistent case

institutional injury against another entity of state government.").

102. *Id.* at 2696 (Scalia, J., dissenting).

103. *Id.* at 2696–97.

104. *Id.* at 2697.

105. *Id.* at 2665 n.13 (majority opinion).

106. Memorandum of Points and Authorities in Support of Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose at 4, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-8435). *See also* United States v. Windsor, 133 S. Ct. 2675, 2711 (2013) (Alito, J., dissenting).

law regarding litigation by individual legislators. The Supreme Court's case law on the standing of individual legislators consists of three cases, which among them have failed to articulate a clear or consistent doctrine regarding the injuries that an individual legislator might be permitted to assert in court.

The Court has identified two types of injury that an individual legislator might allege: "individual injury" and "institutional injury," but both concepts of injury remain under-theorized. First, the Court has never explained why claims by legislators in their individual capacities should be treated as *legislative* standing cases at all.[107] In *Powell*, the Court treated Congressman Powell's claim under the rubric of legislative standing, and lower courts and scholars have continued to treat it as such. But the doctrine the Court applied in *Powell* was indistinguishable from ordinary standing doctrine.[108] The effort to define the bounds of legislative standing doctrine broadly enough to encompass cases like *Powell* has been both unnecessary — because ordinary standing doctrine would have sufficed — and confounding, because those cases are so different, both factually and legally, from other legislative standing cases.

Nor has the Court done much to clarify what a claim of institutional injury by an individual legislator might look like. The Court has addressed institutional injuries asserted by non-institutional legislative plaintiffs only twice — in *Coleman* and *Raines*, and only in *Coleman* did it permit individual legislators to assert an injury to their institutional power as legislators.[109] Lower court opinions applying *Coleman* have struggled to articulate a coherent model of institutional injury in the context of individual legislators, and the Court's effort in *Raines* — with several different opinions all over the map on this point — did little to reduce the confusion.[110]

107. *See infra* Part III.A.

108. The Court found standing because "the Clerk of the House threatened to refuse to perform the service for Powell to which a duly elected Congressman is entitled, that the Sergeant at Arms refused to pay Powell his salary, and that the Doorkeeper threatened to deny Powell admission to the House chamber." Powell v. McCormack, 395 U.S. 486, 493 (1969). The Court also addressed the political question doctrine, finding that the case did not raise a political question. *Id.* at 548–49.

109. Coleman v. Miller, 307 U.S. 433, 456 (1939).

110. *See, e.g.*, Barnes v. Kline, 759 F.2d 21, 28–29 (D.C. Cir. 1985); *id.* at 41 (Bork, J., dissenting); Moore v. U.S. House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984); Kennedy v. Sampson, 511 F.2d 430, 435–36 (D.C. Cir. 1974). *But see* Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975) (holding that member of Congress has no standing to challenge constitutionality of American military operations in Vietnam war); Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973) (same). *See also* Raines v. Byrd, 521 U.S. 811, 821–27 (1997).

In this field, only one thing is clear: *Coleman* held that nullification of a specific legislative vote could constitute an injury sufficient to confer standing on those *individual legislators* whose votes were nullified.[111] Seventy years later, *Raines* limited *Coleman*, holding that individual legislators cannot assert an injury to their legislative power when all members of the legislature are similarly affected because "the institutional injury they allege is wholly abstract and widely dispersed."[112] Thus, injuries to Congress's power can be asserted by Congress itself (under *Chadha*), but not by individual members (under *Raines*).

Raines might be understood as holding that individual-legislator standing must be based on an injury personal to the legislative litigant herself, as opposed to an institutional injury. In other words, the complete nullification of a legislator's vote, in situations where other legislators' votes were not similarly affected, qualifies as a personal injury — a work-related injury, one might say — functionally akin to the personal injury at issue in *Powell*. This is the reading that Justice Scalia urged eighteen years later in his dissent in *Arizona State Legislature*. But, as Justice Souter noted in his concurrence in *Raines*, this narrow understanding of *Coleman* is belied by decades of Supreme Court case law.[113] And Justice Breyer, dissenting in *Raines*, also disputed the notion that "the Constitution [draws] an absolute line between disputes involving a 'personal' harm and those involving an 'official' harm."[114] In particular, Breyer noted that "*Coleman* itself involved injuries in the plaintiff legislators' official capacity," and the Court had heard many other "cases involving injuries suffered by state officials in their official capacities."[115] In addition, Breyer noted that even the majority opinion in *Raines*, by acknowledging "that legislators might have standing to complain of rules that 'denied' them 'their vote . . . in a discriminatory manner,' concedes at least the possibility that any constitutional rule distinguishing 'official' from 'personal' injury is not absolute."[116]

111. *Coleman*, 307 U.S. at 456. *See also Raines*, 521 U.S. at 821–27 (discussing *Coleman*).

112. *Raines*, 521 U.S. at 829–30. *See also id.* at 825–26 (holding that appellees' argument "pulls *Coleman* too far from its moorings" since "[t]here 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").

113. *Id.* at 830–32 (Souter, J., concurring).

114. *Id.* at 841 (Breyer, J., dissenting).

115. *Id.* (citing Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978) (permitting standing for a federal district judge) and Board of Ed. of Centr. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 241 n.5 (1968) (permitting standing for school board members)).

116. *Id.*

In summary, the case law reveals disagreement both broad and deep among the current Justices on the very nature of legislative standing, and the doctrine has grown steadily less clear over the past twenty years. Under pressure on one side by legislative litigants advancing aggressive theories of standing, and on the other by the movement afoot on the Court to all but eliminate legislative standing, the doctrine has been deformed beyond recognition.[117] Moreover, the Court has never mustered a majority definitively to explain the continuing relevance of *Coleman* or the principles that guide the determination of which institutional injuries can be litigated, and by whom.[118] In the absence of definitive guidance from the Court regarding the scope of institutional injury, lower courts continue to struggle to make sense of the doctrine and consistently to apply it.

III. MAKING SENSE OF LEGISLATIVE STANDING DOCTRINE

No other occupation gets its own standing doctrine. We do not speak of "educational standing" when public school teachers or law professors sue.[119] The fundamental premise underlying the concept of "legislative standing" doctrine is that there is something distinctive about legislators and their interests such that treating their litigation behavior under a single specialized doctrine will aid understanding and clarity. But the promise of legislative standing doctrine remains unrealized because the Court has been unable to agree on a rigorous definition of the critical concept of institutional injury. As a result, the application of the doctrine in new cases remains unpredictable, and lower court rulings are inconsistent.

This Part attempts to clean up this mess by offering a typology of injuries to legislative entities and a theory of which of those injuries may be asserted in court, and by whom. First, Part III.A shows that many cases that have been classified as "legislative standing" cases are better regarded as ordinary standing cases, because the injuries complained of are individual in nature, and the legislative litigant's role as a legislator is irrelevant to the standing analysis. Part III.B then unpacks the vague concept of

117. *Compare* United States v. Windsor, 133 S. Ct. 2675, 2712 (2013) (Alito, J., dissenting) (arguing that Congress has standing to defend laws it has passed when the President refuses to do so), *with id.* at 2701–02 (Scalia, J., dissenting) (arguing that Article III courts lack jurisdiction to hear disputes between Congress and the President), *and* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2695 (2015) (Scalia, J., dissenting) (same, as to state legislatures).

118. *See Ariz. State Legislature*, 135 S. Ct. at 2694–97 (Scalia, J. dissenting).

119. *See generally* Dunn v. Blumstein, 405 U.S. 330 (1972) (finding justiciable a law professor's challenge to a state's durational residency requirement for voting); Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686 (Mich. 2010) (discussing teacher's standing under state law to sue school board to enforce state statute).

"institutional injury" and categorizes the several types of cases to which courts have applied that label. It then identifies and explores the various considerations that govern the determination of who has standing to assert claims relating to those injuries.

Part III.C shows how the opacity of current doctrine has opened the door to a model of legislative standing that contemplates far more legislative suits, and a correspondingly broader role for federal courts in refereeing policy disputes between Congress and the President. This theory has been advanced repeatedly by legislative litigants and has found some favor on the Court. Part III.C also demonstrates the advantages of the narrower theory of legislative standing developed herein. Part III.D then explores some differences in the legislative standing analysis for state legislative litigants compared to federal legislative litigants.

The end result is a doctrine of legislative standing that is more predictable and more respectful of the limited role of courts in adjudicating disputes between the other branches.

A. INDIVIDUAL INJURY TO LEGISLATORS

Making sense of legislative standing begins with the recognition that some so-called legislative standing cases are not legislative standing cases at all. Rather, they are ordinary standing cases that happen to involve a legislator. One of the Supreme Court's canonical legislative standing cases is exemplary in this regard. In *Powell v. McCormack*, Congressman Adam Clayton Powell sued the sergeant at arms of the House of Representatives, alleging that he had been unlawfully deprived of his seat in Congress and the accompanying salary and benefits.[120] Although *Powell* is typically treated as a legislative standing case, that treatment is neither necessary to resolve the case, nor enlightening regarding the nature of legislative standing.

Powell is an easy case for standing under ordinary standing doctrine, and the Supreme Court's analysis reflects this: the Court noted that regardless of whether his loss of legislative power was a legally cognizable injury, Powell had made a clear showing of injury in the form of deprivation of his salary. In that respect, Congressman Powell was situated just like any other employee suing for wrongful termination: having demonstrated the requisite injury and personal stake in the outcome, his

120. Powell v. McCormack, 395 U.S. 486 (1969).

standing was beyond dispute. Thus, ordinary standing doctrine plainly dictates the result in the case, without need of a specialized "legislative standing" doctrine. The same is true of many so-called legislative standing cases involving individual injury. The litigant's status as a legislator is irrelevant to the determination of whether he has a personal stake in the litigation.

To the extent that judicial involvement in a dispute between the House of Representatives and a member of Congress seems troubling, it is not because there is doubt about Powell's standing. Concerns about meddling in the affairs of a coordinate branch are better considered under the political question doctrine. The *Powell* Court rejected the defendants' contention that Powell's claims raised a political question, finding none of the *Baker* factors satisfied. Moreover, the separation-of-powers concerns that underlie standing doctrine[121] are at a minimum in such cases, inasmuch as there is no quarrel between the coordinate branches of government.[122] The case involves merely a private injury to the plaintiff, redressable by a money judgment.

There is, in short, no reason to stretch our definition of legislative injury to fit cases like *Powell*. Other justiciability doctrines adequately resolve those cases, and the effort to expand legislative standing to encompass them simply renders legislative standing doctrine less coherent. Claims of injury to a legislator in his or her individual capacity are better addressed under ordinary standing doctrine. A proper understanding of legislative standing doctrine would include only those claims that meet the test for *institutional* — as opposed to personal — injury.[123]

B. INJURY FROM THE ELIMINATION OF A LEGISLATIVE PREROGATIVE

The key to developing a coherent doctrine of legislative standing is to understand the concept of institutional injury. Unfortunately, the courts have used that term to describe a multitude of different interests and circumstances, without offering a coherent theory to explain the various results. Although unsuccessful invocations of legislative standing come in all shapes and sizes, every Supreme Court case that has ever recognized

121. *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation of powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

122. To the extent there is a separation-of-powers issue in such cases, it concerns judicial meddling in intra-branch affairs of a coordinate branch. As such, the *Powell* Court appropriately dealt with such concerns in the context of the political question doctrine. *See Powell*, 395 U.S. at 518–22.

123. *See infra* Part III.B.2.

legislative standing based on institutional injury involved a particular kind of injury: namely, the elimination of a specific prerogative possessed by the legislative litigant.

1. Institutional Prerogatives: The Legislature's Standing

Legislative institutions claiming legislative standing to litigate over an institutional injury have been successful only when they could identify a specific prerogative or power eliminated by the defendant, or threatened with elimination as a result of the litigation.

INS v. Chadha and *Arizona State Legislature v. Arizona Independent Redistricting Commission* are exemplary of this type of institutional injury. *Chadha* concerned a federal statutory provision that authorized either house of Congress, by resolution of that house alone, to invalidate a decision by the INS to allow a particular deportable alien to remain in the United States.[124] Jagdish Chadha faced deportation after the House exercised its legislative veto, and challenged the law as a violation of separation of powers. The INS—represented by the U.S. Attorney General—agreed with Chadha's claim that the legislative veto provision was unconstitutional, and the Ninth Circuit permitted Congress to intervene to defend the challenged statute.[125] The Supreme Court permitted the intervention, stating that legislative defense of statutes that conferred authority on Congress was appropriate where the executive branch refused to defend the statute: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[126] The Court has subsequently made it clear that *Chadha* recognizes Congress's stake in opposing a concrete threat to the institutional prerogatives of the legislature, but does not give legislative litigants standing to litigate about statutes more generally, much less standing based on "some amorphous general supervision of the operations

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

125. *Id.* at 923–28. Legislative standing questions have most often been litigated in cases where the legislator litigants were plaintiffs, but they may also arise in situations in which the legislative litigants are asserting their interests as defendants, as in *Chadha*. The analysis of their asserted institutional interests proceeds along similar lines in such cases.

126. *Id.* at 940. Taken out of context, that statement would appear to permit congressional intervention in any case in which the Attorney General declines to defend the constitutionality of a federal statute. But the Court has interpreted *Chadha* far more narrowly, as permitting congressional defense of statutes only when the statute bears directly on Congress's institutional authority.

of government."[127]

More recently, in *Arizona State Legislature*, the Court held that the plaintiff legislature had alleged an institutional injury sufficient to support legislative standing.[128] In that case, the state legislature challenged a state ballot initiative that had amended the state constitution to create the Arizona Independent Redistricting Commission and endowed the commission with authority over legislative redistricting.[129] Plaintiff argued that this provision of state law violated 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."[130]

The Court found that the Arizona Legislature had standing because the challenged state law provision eliminated the legislature's role in drawing congressional districts, thereby "strip[ping] the Legislature of its alleged prerogative to initiate redistricting."[131] This elimination of a prerogative constituted a judicially cognizable institutional injury sufficient to give the legislature standing.[132] The Court distinguished *Raines v. Byrd* as a case in which none of the individual plaintiffs "could tenably claim a 'personal stake' in the suit," because the institutional injury at issue — reduction in the legislative power — was an injury to Congress itself, and "scarcely zeroed in on any individual Member."[133] Moreover, the Court noted, the plaintiffs in *Raines* had no standing to assert *Congress's* interest in Court because they had "not been authorized to represent their respective Houses of Congress."[134] *Raines* thus focused attention squarely on *who* has legislative standing to challenge interferences with the legislature's role.

2. Who May Assert Injuries to the Legislature's Role?

Under the Court's legislative standing case law, then, institutional injury to a legislative body is best understood as the elimination of a prerogative belonging to that legislative body. This has an important implication regarding who is the proper party to litigate such a claimed injury. In particular, legislative standing should be available only to the

127. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 828–29 (1997) (quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (interpreting *Chadha* narrowly)).
128. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015).
129. *Id.* at 2658.
130. *Id.* at 2659 (quoting U.S. CONST. art. I, § 4, cl. 1).
131. *Id.* at 2663–65.
132. *Id.* at 2664–66.
133. *Id.* at 2664.
134. *Id.* (citing Raines v. Byrd, 521 U.S. 811, 829 (1997)).

legislative entity with the authority to exercise the prerogative at issue.

Thus, for instance, either the House or the Senate would have standing to defend a legislative prerogative belonging to a single house of Congress — such as the one-house legislative veto at issue in *Chadha*. Either house of Congress could exercise the veto at issue in *Chadha*, and so either could appear to defend it in court, with or without the other chamber. By the same token, a prerogative belonging solely to one house of Congress — such as the Senate's power to ratify treaties or to advise and consent concerning presidential appointments — could give rise to legislative standing for the Senate in an appropriate case, but not to the House or to an individual senator.[135]

In contrast, a power that can only be exercised by both houses of Congress acting together would require the participation of both houses in litigation in order to establish legislative standing. So, for instance, in a little-remembered case decided around the same time as *Chadha*, legislative standing to defend a *two-house* legislative veto required the participation of both houses of Congress. The D.C. Circuit in *Consumers Union v. FTC* held that the case satisfied Article III by virtue of the participation of "[t]he House and Senate, as named defendants."[136]

The critical point is that legislative standing to litigate over a prerogative is derived from, and coextensive with, the authority to exercise that prerogative. Thus, in none of these examples could an individual legislator, or a group of them, establish legislative standing to defend a legislative veto, or the Senate's role in treaty ratification, because such a litigant would not have authority to *exercise* the prerogative in question. Asserting someone else's prerogatives would raise questions of third-party standing, and courts have generally not found standing in such cases. As discussed below, this insight also helps to explain *Coleman v. Miller*, which remains the only case in which the Court has recognized legislative standing for individual legislators to assert an "institutional injury."

135. *Cf.* Goldwater v. Carter, 444 U.S. 996, 997–98 (1979) (Powell, J., concurring) (finding case nonjusticiable, with no majority opinion, where "a few members of Congress" alleged that the President's abrogation of a treaty without Senate approval deprived them of their constitutional role). The most sensible reading of *Goldwater* is that had the Senate itself sued, it would have had legislative standing. The dispute might still have been dismissed in that event as a political question. *See id.* at 1002–06 (Rehnquist, J., concurring, joined by three other Justices) (arguing that the case presented a political question).

136. Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575, 577–78 (D.C. Cir. 1982).

3. Individual Prerogatives: Legislator Standing

Most legislative prerogatives are either one-house prerogatives, as in *Chadha*, or bicameral prerogatives, as in *Consumers Union*. *Coleman* illustrates a third category: legislative prerogatives that may be exercised by an individual legislator or group of them, and thus may support legislative standing for an individual legislator alleging institutional injury.

The *Coleman* Court found standing because the plaintiffs' votes had been "overridden and virtually held for naught."[137] In subsequent cases, the Court has interpreted *Coleman* to mean "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."[138] In essence, then, nullification of a vote means "treating a vote that did not pass as if it had, or vice versa."[139]

In practice, this standard has proved difficult to apply, as there remains ample room for disagreement concerning the application of the concept of vote nullification. Nearly every case since *Raines* that seeks to establish legislative standing has tried to fit within the *Coleman* rule by alleging nullification of one vote or another.[140]

There is, however, a straightforward way to understand *Coleman* that is simpler to apply, consistent with other legislative standing cases, and sensitive to *Coleman*'s unusual circumstances. *Coleman* is best understood as a case involving a specific legislative prerogative belonging to individual legislators: namely, the power to vote on matters that come before the legislature, *and to have one's votes counted*. In *Coleman*, the initial vote on ratification of the Child Labor Amendment in the Kansas

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

138. *Raines*, 521 U.S. at 823.

139. Campbell v. Clinton, 203 F.3d 19, 22 (D.C. Cir. 2000).

140. Even institutional plaintiffs now try to characterize their claims of institutional injury using the rhetoric of vote nullification. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2659 (2015). *See also* Reply Brief on Jurisdiction for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 5, 11, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (arguing that judgment for plaintiff would harm the House's concrete interests by "permanently nullif[ying]" its passage of DOMA); Opposition of United States House of Representatives to Defendants' Motion to Dismiss at 25–26, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, (D.D.C. 2015) (No. 14-cv-01967) (arguing that the President's expenditure of Treasury funds, allegedly without appropriation, "nullifies" legislative votes not to make an appropriation). *Cf. Campbell*, 203 F.3d at 22 (noting plaintiff congressmen's argument that the President's use of American military forces in former Yugoslavia "nullified" their votes against authorizing such action).

State Senate was twenty to twenty.[141] Plaintiffs claimed the tie should have defeated the amendment, but instead an ineligible voter (the lieutenant governor) was permitted to cast the deciding vote in favor of Kansas' ratification of the Amendment.[142] This procedure, plaintiffs alleged, nullified their votes, which otherwise would have been sufficient to defeat the amendment.

Because the injury was nullification of a specific vote, the proper party to assert the injury was any legislator whose vote was nullified—that is to say: whose vote would have been sufficient to carry the day, had the votes been properly tallied. In the actual case, each of the twenty senators who voted against the Amendment sued, but as a logical matter, *any one of them* could have established legislative standing. Each of the twenty senators was entitled to vote, each was entitled to have his vote given force, and each could claim that his vote was the decisive twentieth vote necessary to defeat the Amendment. Thus, each of those twenty senators was injured by the alleged nullification of his or her vote.

This understanding of *Coleman* is reinforced by comparing *Coleman* to cases like *Raines* that have rejected claims of institutional injury by individual legislators. In *Raines*, plaintiffs challenged the Line Item Veto Act, asserting that the "dynamic of lawmaking" would be fundamentally altered by the line-item veto because "the Act . . . alters the legal and practical effect of votes on bills covered by it, . . . divests the [legislators] of their constitutional role in the repeal of legislation . . . and alters the constitutional balance of powers between" Congress and the President.[143] The Court rejected standing for the individual legislator plaintiffs for two reasons: first, no votes had been nullified. When Congress considered the Line Item Veto Act itself, the plaintiffs' votes were "given full effect. [Plaintiffs] simply lost that vote."[144] And second, any injury to the lawmaking authority belonged to Congress itself, not to the individual legislators.[145] Because the plaintiffs could not exercise the legislative power, they could not establish standing by showing an injury to the legislative power.

Raines reveals that the identity of the legislative litigant is critical in institutional injury cases. Institutions can assert their own interests in court,

141. Coleman v. Miller, 307 U.S. 433, 436 (1939).
142. *Id.*
143. *Raines*, 521 U.S. at 816 (citation omitted).
144. *Id.* at 824.
145. *Id.* at 824–25.

as in *Chadha* and *Arizona State Legislature*, and perhaps they may delegate their authority to sue to a committee, as the House routinely does with the BLAG, or conceivably even to a single member of Congress.[146] But individual members of Congress may only assert an institutional injury when an individual prerogative is threatened.

Coleman and *Raines* are the Supreme Court's only major pronouncements on institutional injuries to individual legislators, and only *Raines* involved such a claim by federal legislators.[147] Thus, most of the development of legislative standing doctrine has come from lower courts—primarily the Court of Appeals for the D.C. Circuit. The two leading cases following *Raines* are *Chenoweth v. Clinton*[148] and *Campbell v. Clinton*,[149] both of which support this reading of *Raines* as precluding an assertion of Congress's interests by individual members, at least absent Congress's explicit delegation.

In *Chenoweth*, four members of Congress sued President Clinton over an Executive Order establishing the American Heritage Rivers Initiative. The plaintiffs had sought to block the initiative by introducing legislation to prevent the President from establishing it, but the bill was never voted upon. After President Clinton issued Executive Order 13,061, establishing the initiative, the plaintiffs sued, alleging that the President's action was without statutory authority, and thus deprived the plaintiffs of their legislative authority.[150] The district court dismissed for lack of standing, finding that *Raines* precluded plaintiffs' theory of standing because individual members of Congress can establish institutional injury only by showing vote nullification.[151]

On appeal, the D.C. Circuit affirmed, holding that the asserted injury did not rise to the level of "nullification" under *Coleman* and *Raines*, and

146. In *Raines*, the Court emphasized that there had been no such delegation. *See id.* at 829 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.").

147. *Coleman* involved state legislators, while *Powell* involved a personal, not institutional, injury. Notably, the Court has never recognized standing on the part of congressional plaintiffs to allege an institutional injury against the President. The closest the Court has come was *Chadha*, in which it granted Congress standing to defend a provision of federal law that granted certain authority to Congress, when the President refused to defend the law against a private party's challenge. *See* INS. v. Chadha, 462 U.S. 919, 939–40 (1983).

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

149. Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).

150. *Chenoweth*, 181 F.3d at 113.

151. Chenoweth v. Clinton, 997 F. Supp. 36, 39 (D.D.C. 1998) ("[A]n institutional injury may support legislative standing only if the injury occurs under the same circumstances as those in *Coleman*, or in some other way matches the level and quality of vote nullification that took place in *Coleman*.").

thus was insufficient to support legislative standing.[152] The court characterized the asserted injury as "dilution of their authority as legislators," and noted that it was "identical to the injury the Court in *Raines* deprecated as 'widely dispersed,' and 'abstract.'"[153] In other words, it was an injury afflicting all of Congress, and thus could only be asserted by Congress or with Congress's explicit authorization.[154]

C. STANDING TO DEFEND CHALLENGED FEDERAL LAWS

Legislative litigants have advanced a broader theory of legislative standing in several recent cases, arguing in essence that the legislature is injured whenever its "legislative handiwork"—that is, statutes—are threatened with invalidation.[155] This theory finds little support in the case law, and it has never been adopted by the Court or by any court of appeals. But it has been championed by Justice Alito, and recently was relied on by a federal district court in granting standing to the House of Representatives to challenge the ACA.[156]

The Court had the opportunity to consider whether Congress has an interest in defending statutes, at least where the President declines to do so, in *United States v. Windsor*. In *Windsor*, the House of Representatives, acting through the BLAG, sought to intervene to defend DOMA. The legislative litigants alleged that executive conduct in refusing to defend DOMA caused injury to Congress. In particular, they asserted that Congress is injured by the President's abdication of his constitutional responsibility to defend Congress's "legislative handiwork."[157] The Court found it unnecessary to decide the legislative standing question, holding that the case was justiciable regardless of Congress's standing because the United States retained a sufficient stake in the action to satisfy Article III's cases or controversies clause. Thus, the Court found that it "need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority."[158]

152. *Chenoweth*, 181 F.3d at 117.

153. *Id.* at 115.

154. *Id.*

155. *See, e.g.*, Reply Brief on Jurisdiction for Respondent, *supra* note 140, at 5, 11 (arguing that judgment for plaintiff would harm the House's concrete interests by "permanently nullify[ing]" its passage of DOMA).

156. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57–58 (D.D.C. 2015).

157. Brief in Opposition at 6, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

158. *Windsor*, 133 S. Ct. at 2688.

Justice Alito was prepared to recognize legislative standing for the BLAG in *Windsor*, but no other Justice went so far. Justice Scalia, joined by two other Justices, argued that the BLAG's conception of legislative standing was unsupported by precedent and contrary to both separation-of-powers principles and historical practice. According to Justice Scalia, legislators have no more right to seek a judicial mandate of executive action than do ordinary citizens. He added that recognizing legislative standing to defend or to seek enforcement of the law would usurp the executive branch's basic responsibility, rooted in the text of Article II, to "take [c]are that the [l]aws be faithfully executed."[159]

In sum, neither *Windsor* nor any other Supreme Court case recognize a general principle of legislative standing to defend all legislative enactments. And there are good reasons for courts not to embrace such a theory: as Justice Scalia has noted, unlike ordinary citizens, legislative actors have ample means to protect their own interests, and thus have no need to seek help from the judiciary. The Framers gave Congress extensive powers with which to protect its own interests, and did not intend to empower the judiciary to referee inter-branch disputes. "Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor."[160]

159. *Id.* at 2703 (Scalia, J., dissenting) (quoting U.S. CONST. art II, § 3). *See also* Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92, 95–99 (2013). The counterargument is that when the President is assertedly failing to faithfully execute a law, it will often be the case that no other litigant has a justiciable injury. Thus, if Congress cannot sue, no one can, and the practical effect would be that the President can nullify laws. *See Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States: Hearing on H.R. 313 Before the H. Comm. on Rules*, 113th Cong. 13–14 (2014) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University). There are at least two problems with this position. First, it is entirely inconsistent with black letter principles of standing doctrine: the Court has never recognized a litigant's standing based merely on the fact that no other potential litigant can establish a justiciable injury. And second, the argument from necessity is overblown: Congress possesses numerous tools with which to pressure, or if necessary remove, a recalcitrant President. Congress's reticence to use those tools does not warrant relaxing the requirements for standing. The fact that Congress could remove a President who refused to enforce the law means that Congress's asserted injury is caused by its own failure to act. In the language of standing, the congressional litigant has failed to show causation.

160. *Windsor*, 133 S. Ct. at 2704–05 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)). *See also id.* ("If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit . . . . But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so.").

D. SOME PECULIARITIES OF STATE LEGISLATIVE STANDING

The Court has indicated that legislative standing law may impose fewer restrictions on litigation by state legislative entities than litigation by federal legislative entities.[161] With regard to the defense of challenged statutes, for instance, the sovereign—either the United States or the government of a particular state—has a recognized interest in defending the constitutionality of its laws. The federal constitutional scheme of separation of powers, as well as federal statutes, render the President the appropriate litigant to assert this interest of the United States in the judicial forum.[162] The choice of what state official may represent the state's interest in court, however, is (or at least, is largely) a matter of state law. States, that is, are largely free to designate an appropriate official to represent their interests in court. Unlike the federal government, not all states have a unitary executive.[163] Even of those that do, many choose to endow their legislature with the authority to assert the interests of the state in court, in ways not open to Congress in light of the Constitution's specialized treatment of the separation of federal powers.[164] Indeed, because the constitutional scheme of separation of powers applies to the federal government and not the states, the Court has specifically noted, in both *Raines* and *Arizona State Legislature*, that suits by state officials do not raise the same separation-of-powers concerns as suits brought by federal legislative litigants.[165]

Indeed, the Court has gone a long step further, by recognizing that state law may confer an interest on state legislators sufficient to permit legislative standing to assert the state's sovereign interest in defending a law. In *Karcher v. May*, for instance, the Court found that state legislators had standing to litigate on behalf of the state, based on a specialized

161. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997); Karcher v. May, 484 U.S. 72, 81–82 (1987).

162. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.").

163. *See, e.g.*, TEX. CONST. art. IV, §§ 1–2; FLA. CONST. art. IV, §§ 4–6; CAL. CONST. art. V, §§ 11, 13.

164. *See, e.g.*, *Karcher*, 484 U.S. at 81–82 (noting that New Jersey law gives legislative officials the authority to represent interests of the state of New Jersey in certain litigation).

165. *See* Raines v. Byrd, 521 U.S. 811, 824 n.8 (1997) (noting, without deciding, that the type of standing recognized in *Coleman* arguably "has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman*"). *See also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 n.12 (2015) ("The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. . . . [A] suit between Congress and the President would raise separation-of-powers concerns absent here.").

provision of New Jersey state law. In *Karcher*, state executive officials had refused to defend a state law against a federal constitutional challenge.[166] As a result, leaders of the New Jersey state legislature intervened in federal litigation to defend the statute.[167] The Supreme Court held that the legislator-intervenors had Article III standing to defend the law in the trial court based on its determination that legislative leaders "had authority under state law to represent the State's interests" by defending a state statute that "neither the Attorney General nor the named defendants would defend."[168] Thus, standing at the trial court level had been proper.[169]

The Court, however, went on to find that the legislator-intervenors lacked standing based on changes in their status that occurred after trial. While the case was pending, the intervenors lost their leadership positions, and their successors moved to withdraw their appearance.[170] The Court rejected the intervenors' request to proceed in their individual capacities, holding that the intervenors no longer had standing to defend the law in the Supreme Court.[171] But this determination rested on the Court's holding that *state* law granted standing to legislative leaders *only* in their official capacity. Thus, once the intervenors had lost their leadership positions, the state-law right on which their standing was based no longer was theirs to assert.[172] Put simply, the Court held that state lawmakers can create legislative standing, and that the scope of the legislative standing thus created is determined in accordance with state law.

The situation is different with respect to federal legislators. In *Karcher*, the Court deferred to the state of New Jersey's judgments about the appropriate distribution of governmental authority between its executive and legislative branches. But for reasons of federal separation of powers, the Court has been unreceptive to comparable federal attempts to confer legislative standing by statute.[173] As the Court noted when it denied

166. *Karcher*, 484 U.S. at 75, 82.

167. *Id.* at 82.

168. *Id.* at 75, 82. For a more detailed discussion of the Court's application of standing doctrine to assess defendants' stake in a case, see generally Hall, *Standing of Intervenor-Defendants*, *supra* note 19.

169. *Karcher*, 484 U.S. at 80. The same analysis may not extend to state law conferrals of standing on non-legislators. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2664–65 (2013).

170. *Karcher*, 484 U.S. at 76.

171. *Id.* at 77 ("The authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded Karcher and Orechio [the intervenor-defendants] in office.").

172. *Id.*

173. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2664–65 (2015) (granting standing to state legislature, but indicating that its analysis might be very different with a federal legislative plaintiff, because separation of powers might dictate a different outcome).

legislative standing in *Raines*, "[i]t is settled that *Congress* cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[174]

IV. APPLYING LEGISLATIVE STANDING

An increasingly partisan atmosphere in American politics—coupled with the ill-defined nature of legislative standing doctrine—has led to a significant increase in assertions of legislative standing in federal court.[175] Of particular significance, the House of Representatives has advanced an aggressive version of legislative standing, seeking judicial intervention in all manners of disputes with the President. One case, pending in the United States District Court for the District of Columbia as of 2016, illustrates both the House's aggressive approach to legislative standing and the persistent confusion about institutional injury that pervades the work of the lower courts in legislative standing cases. This same case also provides a vehicle for demonstrating the benefits of the new model of legislative standing law put forth in this article.

A. BACKGROUND OF *U.S. HOUSE OF REPRESENTATIVES V. BURWELL*

In November 2014, the House of Representatives sued Secretary of Health and Human Services Sylvia Burwell and Treasury Secretary Jacob Lew over their implementation of the ACA. The complaint alleges eight separate claims, but the gravamen of the complaint is that the defendants have (1) "effectively amended the [ACA's] employer mandate by delaying its effect and narrowing its scope" and (2) violated Article I of the Constitution by spending funds from the Treasury that Congress has not properly appropriated.[176]

The employer mandate claims challenge the executive branch's delayed implementation of one provision of the ACA. Section 1513—the so-called "employer mandate"—imposes a tax penalty on certain employers who fail to offer an employer sponsored health plan to at least 90 percent of their employees. The ACA states that the Section 1513 tax penalties will apply to employers who fail to comply with the employer mandate for each month "beginning after December 31, 2013."[177]

174. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (emphasis added).
175. *See* Hall, *How Congress Could Defend DOMA*, *supra* note 159, at 99–100.
176. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57 (D.D.C. 2015).
177. *See id.* at 60–61.

The appropriations claims allege that Section 1402 of the ACA authorizes the treasury secretary to make "cost sharing" payments to insurance companies to subsidize insurance coverage for certain policyholders, but that Congress has never enacted an appropriation to fund such payments.[178] Despite the alleged lack of an appropriation, the plaintiffs allege that defendants have paid out some $4 billion pursuant to section 1402.[179] The plaintiffs allege that these payments violate Article I, Section 9 of the Constitution, which states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[180]

The plaintiffs allege that the defendants have effectively "legislated changes" to Section 1513, both by delaying the employer mandate's effective date by one year and by reducing the percentage of employees who must be offered coverage in order to avoid the tax penalties.[181] According to the plaintiffs, the defendants "usurp[ed] the House's legislative authority" when they unilaterally changed, or "effectively . . . amended," the date that the penalties would go into effect.[182]

On July 30, 2014, the House adopted House Resolution 676, which authorized the Speaker to file suit in federal court against an executive official for failure "to act in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of any provision of the Patient Protection and Affordable Care Act."[183]

On January 26, 2015, the defendants moved to dismiss, arguing that the plaintiffs have not suffered a legally cognizable injury sufficient to support legislative standing.[184]

178. Complaint ¶¶ 25–29, *Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 14-cv-01967).

179. *Burwell*, 130 F. Supp. 3d at 58–63.

180. U.S. CONST. art I, § 9, cl. 7.

181. *See* Complaint, *supra* note 178, ¶¶ 45–50.

182. *Id.* ¶ 45, 55.

183. H.R. Res. 676, 113th Cong. (2014). After commencement of the *Burwell* case, the 113th Congress ended and the 114th began. The 114th Congress swiftly adopted House Resolution No. 5, which authorized the 114th House of Representatives to continue the action. H.R. Res. 5, 114th Cong. (2015).

184. *See* Defendants' Memorandum in Support of Their Motion to Dismiss the Complaint, *Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 14-cv-01967).

B. THE DISTRICT COURT'S OPINION

On September 9, 2015, the district court granted in part and denied in part defendants' motion to dismiss. The court dismissed plaintiff's employer mandate claims, holding that Congress lacked standing to challenge the President's non-enforcement of a statute. The court held that plaintiff's theory—that Congress is injured whenever the President fails to implement a statute in accordance with Congress's wishes—"proves too much."[185] Under plaintiff's theory, "every instance of an extra-statutory action by an Executive officer might constitute a cognizable constitutional violation, redressable by Congress through a lawsuit."[186]

The court, however, denied defendants' motion with regard to the House's appropriations claims. As stated by the court, "The House of Representatives as an institution would suffer a concrete particularized injury if the Executive were able to draw funds from the Treasury without a valid appropriation. The House therefore has standing to sue on its Non-Appropriation Theory, to the extent that it seeks to remedy constitutional violations."[187] Notably, the court held that the House could allege no cognizable injury with respect to appropriations claims premised on defendants' violation of any statute.[188] According to the court, statutory violations would cause the House no *particularized* harm; the only harm it would suffer was to the generalized interest in seeing the law obeyed. With regard to Count I, in contrast, the Court held that the House did have standing to seek redress for "a violation of the specific, constitutional prohibition in Article I, Section 9, cl. 7 that is meant to safeguard the House's role in the appropriations process and keep the political branches of government in equipoise."[189]

C. MAKING SENSE OF LEGISLATIVE STANDING IN *BURWELL*

The House's complaint raises two distinct sets of legislative standing issues, one relatively straightforward—because there is ample precedent

185. *Burwell*, 130 F. Supp. 3d at 75. *See also id.* at 76 ("The Employer-Mandate Theory concerns the Executive's alleged infidelity to the ACA.").

186. *Id.* at 75.

187. *Id.* at 74.

188. *See id.* at 74–75.

189. *Id.* at 74. The court dismissed Count II, which was premised on the constitutional grant of the legislative power to Congress, and which it found "far more general" and thus "insufficient to allege a particularized harm to the House." As the court noted, if the House's theory were accepted, then every instance of the executive branch's alleged statutory non-compliance would violate the constitution and give rise to legislative standing. *Id.*

rejecting the House's view of legislative standing—and one more complex. As with any legislative standing case, a proper resolution of *Burwell* begins with a clearer understanding of the institutional injuries alleged by the plaintiffs.

1. The Employer Mandate Claims

Three of the House's eight claims in the *Burwell* case are based on the theory that the defendants have not abided by the employer mandate as enacted in ACA, thereby nullifying that provision of the statute. In particular, by delaying the effective date of the mandate beyond January 1, 2014 and reducing the percentage of employees that must be offered insurance, the House alleges, the defendants have "injure[d] the House by, among other things, usurping its Article I legislative authority."[190]

These claims fail to assert a cognizable institutional injury under any plausible understanding of legislative standing doctrine, for at least three reasons. First, the injury complained of is, in essence, the President's failure to enforce the law, as the House understands it, against someone else. But a mere interest in the "vindication of the rule of law" is not a cognizable interest for purposes of Article III standing, either for legislative litigants or for citizens in general.[191] Simply put, "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[192] Permitting legislative litigants to bring such claims would shift to the judiciary the President's fundamental Article II duty to "take Care that the Laws be faithfully executed."[193] As the Court has previously noted, treating the President's failure to enforce or implement the law to Congress's liking as a cognizable injury to Congress "obviously [is] not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts . . . ."[194]

Second, the House's argument that its passage of the ACA has been effectively nullified by the President's implementation decisions

190. *See* Complaint, *supra* note 178, ¶ 50.

191. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106 (1998). *See also* Russell v. DeJongh, 491 F.3d 130, 134–35 (3d Cir. 2007) ("[T]he authorities appear to hold uniformly that an official's mere disobedience or flawed execution of a law for which a legislator voted . . . is not an injury in fact for standing purposes. . . . The principal reason for this is that once a bill has become law, a legislator's interest in seeing that the law is followed is no different from a private citizen's general interest in proper government.").

192. Bowsher v. Synar, 478 U.S. 714, 722 (1986).

193. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

194. Raines v. Byrd, 521 U.S. 811, 828 (1997).

misunderstands the concept of nullification as used in *Coleman v. Miller*. As the Supreme Court put it in *Raines*, "our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to [enact] a specific legislative act have standing to sue if that legislative action [does not go into effect] on the ground that their votes have been completely nullified."[195] Here, however, the ACA was validly enacted into law; there is no allegation that the President has treated the Act as though it had not been passed. Thus, *Coleman* simply does not apply to the House's allegations.[196]

Third, even if the complaint *was* able to allege nullification under *Coleman*, the votes nullified would be those votes that were cast for the ACA. The plaintiffs in *Coleman* were the legislators whose votes were nullified; here, the plaintiff is the House itself, and the vote to authorize suit in *Burwell* was a party-line vote in which not a single member who voted for ACA voted to authorize the lawsuit. The complaint in *Burwell* thus turns *Coleman* on its head: the members who voted against the ACA now sue to complain that the President is not implementing the law they opposed swiftly enough. No Supreme Court case has ever recognized legislative standing in such circumstances.

2. The Appropriations Claims

The remaining five of the House's claims are premised on the notion that the defendants have disbursed money from the Treasury to implement certain provisions of the ACA without funds having been appropriated by Congress for that purpose. The plaintiff claims that this violates the Appropriations Clause of Article I, Section 9, which states that: "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[197] Recognizing standing to assert these claims would be unprecedented for two reasons: first, the appropriations claims assert a mere violation of law by the President; not, as the cases require, the elimination of a congressional prerogative. Second, recognizing standing here would allow the House to assert an injury that belongs to Congress as a whole. The appropriations power is not exercised by the House alone, but by Congress, and thus any claim of injury from usurpation of that power must be brought by Congress.

195. *Id.* at 823.

196. *See* Campbell v. Clinton, 203 F.3d 19, 22 (D.C. Cir. 2000) (noting that the *Coleman* Court "used nullify to mean treating a vote that did not pass as if it had, or vice versa").

197. U.S. CONST. art I, § 9, cl. 7.

a. The Appropriations Claims Do Not Assert the Requisite Elimination of a Legislative Prerogative

The Complaint does not allege deprivation of a legislative prerogative, as was the case in *INS v. Chadha* and *Arizona State Legislature v. Arizona Independent Redistricting Commission*. In those cases, the legislative litigants were found to possess a cognizable injury because a power they had formerly executed was eliminated (in *Arizona State Legislature*) or threatened with elimination by the lawsuit (in *Chadha*). Here, there is no such allegation: the House retains its power to appropriate; it merely alleges that the President is violating Article I, Section 9 by spending money without an appropriation. These allegations, like the employer mandate claims, are at bottom a claim that the President is violating the law.

But the rule that a mere interest in the "vindication of the rule of law" is not a cognizable interest for purposes of Article III standing applies whether the law allegedly violated is constitutional or statutory.[198] If the House's theory of standing were adopted, the established limits on legislative standing "would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President . . . implements a law in a manner that is not to Congress's liking."[199]

Burwell is not the first case in which legislative litigants alleged presidential usurpation of the appropriations power, but if affirmed, it would be the first case in which the Court recognized such a claim. In *Chenoweth v. Clinton*, the D.C. Circuit rejected plaintiffs' claim of injury from "the President's successful effort to usurp Congressional authority" by, among other things, spending funds that had not been appropriated.[200]

In short, the district court's effort to distinguish statutory powers from constitutional powers misses the point. Congress has not been injured by the President's alleged failure to comply with the law, whatever the source of that law, and Congress's power to appropriate has not been taken away: Congress has passed numerous appropriations bills since the *Burwell* suit was filed. Just as with the employer mandate claims, to recognize the House's claim of injury by virtue of the President's alleged expenditure of

198. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106 (1998).

199. United States v. Windsor, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting).

200. Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999). *See also* Harrington v. Bush, 553 F.2d 190, 213 (D.C. Cir. 1977) (stating that agency's alleged misuse of appropriations "does not invade the lawmaking power of Congress").

funds in violation of the Appropriations Clause would permit Congress to challenge in court the President's alleged failure to comply with the law, and thus would shift to the judiciary the President's fundamental Article II duty to "take [c]are that the [l]aws be faithfully executed."[201]

b. The Appropriations Claims Improperly Assert an Injury to Congress Without the Senate's Concurrence

A second and independent reason why the House lacks legislative standing to bring the appropriations claims is that the proper party to assert such an injury is not the House of Representatives, but the U.S. Congress. The appropriation power is vested, not in the House, but in "Congress,"[202] and it can only be exercised bicamerally. Yet, the Senate has not participated in the lawsuit or given any indication that it objects to the President's conduct.

There is absolutely no precedent, and no reason in law or logic, for permitting a legislative entity to sue over a claimed "power" that it lacks authority to exercise. Indeed, in every previous case in which the Court has recognized legislative standing, the legislative entity that appeared in Court to assert an injury was the same legislative entity that was allegedly injured. In *Arizona State Legislature*, for instance, the redistricting power belonged to the Arizona Legislature—it could only be exercised bicamerally—and the plaintiff in that case was the Arizona Legislature. In *Chadha*, the one-house legislative veto could be exercised by either the House or Senate acting alone, so *either chamber* could have litigated (as it happens, they both did, but either one could have proceeded alone, and the Court noted that "[b]oth Houses are . . . proper parties.").[203] In contrast, where the congressional prerogative at issue can only be exercised by the House and Senate acting together, as in *Consumers Union v. Federal Trade Commission*,[204] legislative standing would be satisfied only if the two chambers joined together to litigate.

Limiting legislative standing in this manner would not give the President free reign to violate congressional prerogatives. Both chambers could sue together, and barring that, either chamber could use its own

201. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

202. U.S. CONST. art I, § 9, cl. 7.

203. INS v. Chadha, 462 U.S. 919, 930 n.5 (1983).

204. *See* Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575, 577–78 (D.C. Cir. 1982) (finding legislative standing requirements satisfied by participation of both "the House and Senate, as named defendants").

constitutional tools to act directly against the President. As Justice Scalia has noted, "[o]ur system is *designed* for confrontation. That is what '[a]mbition . . . counteract[ing] ambition,' is all about."[205] If Congress believes the President has overstepped his bounds, it is incumbent on *Congress* to say so:

> If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit . . . . But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor.[206]

Here, not only does Congress not, apparently, "care enough to act against the President itself," it does not appear to care enough "to instruct its lawyers to ask [the Court] to do so" because the Senate has not objected in any way. To permit the House of Representatives to sue over an injury that belongs to the Congress as a whole would violate the bedrock principle of all standing doctrine that a plaintiff must establish that he, personally, has been injured, not that others have.[207]

Moreover, requiring the concurrence of both chambers of Congress in order to litigate over an alleged injury to Congress protects important constitutional policies. As the *Burwell* case makes clear, there will be times when the two chambers do not agree; thus a two-house requirement will make congressional suits against the President more difficult to initiate and thus more rare. And restraining the legislature is what the bicameral structure of the U.S. Congress is all about. As Justice Kennedy noted in his opinion for the Ninth Circuit in *Chadha*, the federal legislature is structured in a bicameral fashion *precisely* because it makes it harder for Congress to act, and thus restrains the dangerous legislative power. "The principal structural utilities of bicameralism are to restrain the legislative power, to

205. United States v. Windsor, 133 S. Ct. 2675, 2704–05 (2013) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed. 1961)).

206. *Id. See also* Sant'Ambrogio, *supra* note 64 (arguing that legislative standing is especially inappropriate where Congress has failed to use the means at its disposal to apply pressure to the President directly) .

207. *See* Warth v. Seldin, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered" by others). *See also* Raines v. Byrd, 521 U.S. 811, 814, 821, 829, 829 n.10 (1997) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544 (1986) and United States v. Ballin, 144 U.S. 1, 7 (1892) for the proposition that legislative bodies must generally act collectively in seeking judicial review) (denying standing where members of Congress had alleged no individual injury and had not been authorized by their respective chambers to assert the institutional interests thereof).

operate to correct its abuse, and to contribute to the integrity of its exercise."[208] The district court's theory of legislative standing would undermine the Framers' intentions and drag the federal courts into partisan wrangling between elected officials.

Although the district court's decision to grant standing to the House to assert an injury belonging to Congress as a whole is unprecedented, it is an understandable error. The Supreme Court's legislative standing case law is far from crystalline, and although it is implicit in every past legislative standing case that a legislative entity may not assert injuries belonging to another—at least not without express authorization[209]—the Court has not explicitly so held. In fact, the Court has a decades-long practice of dodging legislative standing questions when possible.[210] The district court's error simply underscores the necessity of a rigorous clarification and restatement of legislative standing law.

CONCLUSION

This Article addresses two critical gaps in the theory underlying legislative standing doctrine: what sort of institutional injuries suffice to support legislative standing and which legislative litigants can assert a given injury? A better doctrine of legislative standing begins with a clear picture of the different types of institutional injury that may afflict legislative litigants. Vague and abstract injuries such as "diminution of legislative power" have generally been rejected by courts, and appropriately so.[211] Only the elimination of a concrete prerogative belonging to a legislative litigant provides a sufficient injury to support legislative standing for that litigant. Once the injury has been identified with precision, courts should determine whether the proper legislative litigant appears in the action. Only a litigant who can exercise the legislative prerogative that is the subject of the lawsuit can assert that

208. Chadha v. INS, 634 F.2d 408, 434 (9th Cir. 1980). Justice Kennedy elaborated, noting that "[f]rom a reading of the Federalist Papers as a whole, the point emerges with singular clarity that bicameralism was deemed to be one of the most fundamental of the checks on governmental power. The critical function of bicameralism as a restraint on power was explained in the Federalist Papers explicitly, early, and at length. It was one of the principal arguments used, particularly by Madison, to convince the people that the federal government would operate responsibly." *Id.*

209. *See* Hall, *How Congress Could Defend DOMA*, *supra* note 159, at 100–02 (discussing requirement that BLAG be authorized to represent interests of House of Representatives).

210. *See Separation of Powers*, *supra* note 38, at 217 ("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."). *See also id.* at 237–59.

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

prerogative in court. Reconceiving legislative standing doctrine to provide clearer answers to these questions would have various salutary effects, including eliminating inconsistent results, providing litigants with greater predictability, and harmonizing legislative standing doctrine with other related justiciability doctrines.