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*Congressional Standing: Restoring Checks and Balances*  
by  
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Submitted in partial fulfillment of the requirements of the King Scholar Program  
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Professor Michael Sant' Ambrogio  
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The judicial branch needs to take a more assertive role in maintaining the separation of powers within the federal government. While historically hostile to the idea, the Supreme Court should liberalize congressional standing. Congressional standing should be allowed for disputes involving both the interpretation of the Constitution and statutes. By liberalizing congressional standing, the Court would create a system of checks and balances that is both normatively superior to the current system and more true to the Founding Fathers' intent for the prevention of tyranny within the federal government.

### **Introduction**

Imagine your favorite president being in office. Your viewpoints closely align with this president's, and you expect great things to happen with him in office. The president was just reelected for his second term on the campaign slogan "[c]hange we can believe in," but much to his, and your, chagrin, he has not been able to accomplish the very important things that he promised during his campaigns. The cause behind this lack of change – Congress's veritable blockade of the president's agenda. Even more frustrating is that the American citizens elected the president based on this agenda not just once, but twice. Well the president, having made it this far in life, is no dummy, and as the head of the executive branch of government, he has at his disposal more than 2,000,000 employees,<sup>1</sup> some of whom are the most intelligent advisors in the world. With the help of these experts, the president formulates a plan where "he acts within his constitutionally granted powers," and achieves the change that our country so desperately needed. That is a win, right?

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<sup>1</sup> U.S. Office of Pers. Mgmt., Federal Employment Reports, Historical Federal Workforce Tables, Executive Branch Civilian Employment Since 1940, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/>.

Now imagine your least favorite person as president in the same scenario. His shenanigans were always stopped by Congress before, but now, in his second term, after discussing the matter with his advisors, he uses his “executive power” to impose his will. Of course, he insists that his actions are squarely within his constitutional power, pointing to a legal opinion that his lawyers wrote.

While we might agree with the outcome when we share the same beliefs as a president who uses his position to achieve what we view as positive changes, are we really comfortable with a system where the only constitutional vetting that some executive action receives is from lawyers within the executive branch? The answer to that question in this paper is a resounding *no!* While there are myriad possible solutions to this issue, this paper takes the position that the most constitutionally sound and normatively superior solution is for the Court to liberalize congressional standing.

The paper is broken into five sections. Section one discusses separation of powers, focusing on both the intended and current structure of our government. Section two discusses standing generally. Section three discusses the current jurisprudence on congressional standing. Section four discusses the problems with congressional standing jurisprudence and why the Court should liberalize congressional standing. Finally, section five discusses four possible formulations for congressional standing.

**I. SEPARATION OF POWERS IS ESSENTIAL TO THE PREVENTION OF TYRANNY.**

“Power tends to corrupt, and absolute power corrupts absolutely.”<sup>2</sup> While the American government is by no means a government with absolute power, America’s federal government does have lots of power.<sup>3</sup> If the aforementioned, and often quoted, maxim holds true, then given the extent of power in the federal government, Americans would be remiss to ignore the possibility of their own government acting in a manner not permitted by the Constitution. Luckily for Americans the federal government’s power is distributed across three branches.<sup>4</sup> However, the difficult issue is not in having sufficient distribution of power on paper, rather it is how to best ensure a sufficient distribution of power *in fact*. The best answer, and the one that conforms with our founders’ intent to prevent tyranny, is to have a realistic and effective system of checks and balances to ensure an adequate separation of powers within our federal government.

**a. The text of the Constitution and intent of the founders make clear that the separation of powers required by the Constitution was to prevent the accumulation of powers by a single branch.**

The text of the Constitution does not specifically state that the powers within the federal government are to be divided among the several branches of the government;<sup>5</sup> however, the Constitution does enumerate the powers delegated to the different branches of government.<sup>6</sup>

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<sup>2</sup> Letter from Lord Acton to Archbishop Creighton (Apr. 5, 1887), available at [http://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524\\_label\\_010](http://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524_label_010).

<sup>3</sup> See Katie Johnson, *6 Reasons Why 60% of All Americans Now Think Government Has Too Much Power*, Americans for Tax Reform (Sept. 27, 2013), <http://www.atr.org/reasons-percent-all-americans-government-power-a7890>.

<sup>4</sup> U.S. Const. arts. I-III.

<sup>5</sup> See U.S. Const.

<sup>6</sup> *Id.* art. I, II, III.

The Constitution vests “*all legislative Powers . . . in a Congress . . . consist[ing] of a Senate and House of Representatives,*”<sup>7</sup> vests “[*t]he executive Power . . . in a President*”<sup>8</sup> and gives him veto power over congressional legislation,<sup>9</sup> and vests “[*t]he judicial Power of the United States . . . in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.*”<sup>10</sup> Moreover, because “[*t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,*” our federal government is one of enumerated and limited powers.<sup>11</sup> Finally, because our government is one of limited powers where the separate branches necessarily have some degree of overlap, and because common sense tells us there must be realistic and effective ways to prevent branches of the federal government from exceeding their limited powers, the branches must have *effective* checks on each other to prevent the unconstitutional accumulation of power by a particular branch of government.

Although an examination of the Constitution’s text is key to determining what separation of powers was envisioned to be, it is useful to understand the context in which the Constitution was enacted, and specifically, the problems that America’s founding fathers wanted to prevent, to further elucidate what the original intent was in regard to separation of powers.<sup>12</sup> The

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<sup>7</sup> *Id.* art. I, § 1 (emphasis added).

<sup>8</sup> *Id.* art. II, § 1, cl. 1 (emphasis added).

<sup>9</sup> *Id.* art. I, § 7.

<sup>10</sup> *Id.* art. III, § 1 (emphasis added).

<sup>11</sup> *Id.* amend. X.

<sup>12</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 576-95 (2008) (The Court examined the constitutional text and used “the historical background of the Second Amendment” to confirm the meaning of the Second Amendment.).

foremost concern in the minds of the Constitution’s drafters was the prevention of tyranny.<sup>13</sup> Tyranny can mean the deprivation of a natural right, but the sense of the word that was most important to the founders was “[t]he accumulation of all powers — the legislative, executive, and judicial — in the same hands . . . [and] the severe and autocratic exercise of sovereign power . . . by breaking down the division and distribution of governmental powers.”<sup>14</sup> Interestingly, the prevention of tyranny was competing with an interest in having a federal government that was strong enough to actually work.<sup>15</sup> The drafters of the Constitution, having experienced both tyranny under English rule, and ineffective governance under the Articles of Confederation, had these competing demands at the forefront of their minds as they went about designing our government.<sup>16</sup>

The founders recognized that a strong federal government carried with it the risk of tyranny.<sup>17</sup> So, the founders attempted to structure the government in a way that could best prevent tyranny from ruining America’s hard-fought gains. First, while distinct from the concept of separation of powers, was the founder’s creation of a federal government with limited and defined powers.<sup>18</sup> Second, and most importantly to this paper, was how the founders structured

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<sup>13</sup> The Federalist No. 47 (James Madison), available at <https://www.congress.gov/resources/display/content/The+Federalist+Papers>.

<sup>14</sup> *Id.* (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.”); Tyranny, Black’s Law Dictionary (10th ed. 2014);

<sup>15</sup> The Federalist No. 45.

<sup>16</sup> *See Id.* at Nos. 45-48, 51.

<sup>17</sup> *See Id.* at Nos. 45-46.

<sup>18</sup> U.S. Const. amend. X; *id.* arts. I, II, and III; The Federalist Nos. 45, 46 (James Madison).

the federal government.<sup>19</sup> The Constitution divided federal government's power between the legislative, executive, and judicial branches.<sup>20</sup> The evil being targeted by dividing the government's power was the accumulation of powers in a single branch.<sup>21</sup> In fact, Madison said that "the preservation of liberty requires that the three great departments of power should be *separate and distinct*."<sup>22</sup>

An important consideration of the founders when deciding how to structure the American government was the recent history they lived through.<sup>23</sup> The founders overcame tyrannical England and then had multiple states operating under the Articles of Confederation<sup>24</sup>. These recent historical happenings informed the decisions made in writing the Constitution.<sup>25</sup> One problem that many states encountered was "too great a mixture, and even an actual consolidation, of the different powers."<sup>26</sup> The founders realized, as demonstrated by multiple state constitutions that adhered to total separation only so far as claiming so in a stanza of their constitutions, that total separation among the departments would not be possible.<sup>27</sup> So the

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<sup>19</sup> The Federalist No. 47 (James Madison).

<sup>20</sup> U.S. Const. arts. I, II, and III.

<sup>21</sup> The Federalist No. 47 (James Madison).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at Nos. 45-48, 51.

<sup>24</sup> See generally Roger A. Bruns, *A More Perfect Union: The Creation of the United States Constitution*, [http://www.archives.gov/exhibits/charters/constitution\\_history.html](http://www.archives.gov/exhibits/charters/constitution_history.html) (last visited Apr. 25, 2016).

<sup>25</sup> See e.g. The Federalist No. 47 (James Madison) (examining "the constitutions of the several States" and the history of these states when discussing how power would be distributed in the new federal government).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

founders sought to prevent the evil of too much consolidation of powers.<sup>28</sup> Based on recent experience with state government in early America, the founders thought the most likely culprit for accumulation of power would be the legislature.<sup>29</sup> The problem, as the founders saw it, was that the legislature nature accumulated power.<sup>30</sup> Because absolute separation was impracticable, the founders attempted “to provide some practical security for each, against the invasion of the others.”<sup>31</sup> So, while it is true that the founders placed emphasis on preventing the accumulation of power in the legislature specifically, the overarching concern was not too powerful of a legislature, rather the founders’ overarching concern was the consolidation of too much power in *any* single branch.<sup>32</sup>

**b. Accumulation of powers has been and will continue to be a problem that must be effectively checked, no matter which branch is guilty.**

Well, the founders were right. Their specific concern that the legislative branch would attempt to expand its power past what the Constitution allowed and legislate in ways that were unconstitutional has proven to be a valid concern on multiple occasions. Congress tried to give itself the power to veto executive branch decisions outside of the legislative process in article I,<sup>33</sup>

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<sup>28</sup> *See Id.*

<sup>29</sup> *Id.* at No. 48.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *See Id.* at No. 47 (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.”).

<sup>33</sup> *See INS v. Chadha*, 462 U.S. 919, 934, 952-959 (1983) (the applicable law permitted one House of Congress to veto the Attorney General’s suspension of an alien’s deportation. The Court explained “the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative[.]” and because such action was conducted outside of the constitutionally mandated procedure of bicameralism and present, the legislative veto power in the law was unconstitutional).

Congress tried to retain control over the execution of the law by reserving removal power to itself<sup>34</sup> and by giving a committee with members appointed by the legislative branch the power to execute the law,<sup>35</sup> and Congress even tried to give the president the power to legislate.<sup>36</sup> However, the Constitution and the Supreme Court's adherence to the Constitution effectively checked the legislature's attempts to act in a manner that violated the Constitution. These checks on legislative power were made possible because the founders knew that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."<sup>37</sup>

The founders were also wrong. The founders were wrong in that they did not specifically expect that the executive branch would be where the majority of power consolidation would actually occur.<sup>38</sup> The founders were wrong because many of their assumptions have not held true.<sup>39</sup> Specifically, the founders never could have envisioned the size and scope of the executive branch as it exists today.<sup>40</sup>

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<sup>34</sup> See *Bowsher v. Synar*, 478 U.S. 714, 734 ("[b]y placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.").

<sup>35</sup> See *Buckley v. Valeo*, 424 U.S. 1, 137-43 (1976) (holding "provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.").

<sup>36</sup> See *Clinton v. City of N.Y.*, 524 U.S. 417, 448-49 (1998) (holding the line item veto power given to president was unconstitutional because it gave the president the power to create law outside of the process required by the Constitution.).

<sup>37</sup> The Federalist No. 78 (Alexander Hamilton) (quoting *Spirit of Laws*. Vol. I, page 181).

<sup>38</sup> See *Id.* at No. 48 (noting the proclivity of the legislative branch to extend its power beyond those powers delineated to it in a written constitution).

<sup>39</sup> See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996) (noting "[t]he dominance of the executive power" and that "'congressional government,' is long gone.").

<sup>40</sup> See generally *id.* (arguing the "inversion of the Founders' concern about the most dangerous branch . . . hardly registers in modern separation of powers thinking.").

The founders' assumption that the legislative branch would dominate was based, in part, on its exercise of legislating power.<sup>41</sup> However, since the late 1930's, with the rejection of the non-delegation doctrine,<sup>42</sup> the executive branch exercises a great deal of legislative power. Even more telling of which branch is prone to accumulating power is that the demise of the non-delegation doctrine was itself prompted by President Roosevelt's threat to pack the Supreme Court with justices who would do what he wanted.<sup>43</sup> Well, President Roosevelt did not have to pack the Court because members of the Court responded by doing what the President wanted, notwithstanding the Court's earlier opinions that rejected Congress's power to constitutionally delegate its legislative power to the executive branch.<sup>44</sup>

In fact, during the 112<sup>th</sup> Congress (2011-2012) 7,515 regulations were passed by the executive branch<sup>45</sup> while only 284 public laws were passed through bicameralism and presentment.<sup>46</sup> The 2014 Code of Federal Regulations has more than 175,000 pages.<sup>47</sup> Yes, an

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<sup>41</sup> The Federalist No. 48 (James Madison).

<sup>42</sup> *This Day in History, Roosevelt announces "court-packing" plan*, <http://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan> (last visited Apr. 06, 2016).

<sup>43</sup> *See id.* ("During the previous two years, the high court had struck down several key pieces of New Deal legislation on the grounds that the laws delegated an unconstitutional amount of authority to the executive branch and the federal government. Flushed with his landslide reelection in 1936, President Roosevelt issued a proposal in February 1937 to provide retirement at full pay for all members of the court over 70. If a justice refused to retire, an "assistant" with full voting rights was to be appointed, thus ensuring Roosevelt a liberal majority.").

<sup>44</sup> *See id.* ("In April, however, before the bill came to a vote in Congress, two Supreme Court justices came over to the liberal side and by a narrow majority upheld as constitutional the National Labor Relations Act and the Social Security Act.").

<sup>45</sup> Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* 6 (July 14, 2015), available at <https://fas.org/sgp/crs/misc/R43056.pdf>.

<sup>46</sup> Public Laws, 112<sup>th</sup> Congress (2011-2012), <https://www.congress.gov/public-laws/112th-congress> (last visited Apr. 07, 2016); Private Laws, 112<sup>th</sup> Congress (2011-2012), <https://www.congress.gov/private-laws/112th-congress> (last visited Apr. 07, 2016).

<sup>47</sup> Federal Register & CFR Publication Statistics – Aggregated Charts, <https://www.federalregister.gov/blog/learn/tutorials> (last visited Apr. 07, 2016).

agency's power to legislate is limited by "an intelligible principle,"<sup>48</sup> and yes, Congress can influence the agencies or take the power away with enough support, but the bottom line is that the president, as head of the executive branch with numerous regulatory agencies, plays a pervasive role in making regulations that carry the force of law and greatly influence America.

When one takes a step back and looks at how different our government is now than in 1776, it is astonishing. The federal government plays an extensive role in regulating minute aspects of our lives.<sup>49</sup> The executive branch's regulations typically affect the economy and our daily lives far more than the few general laws that Congress passes.<sup>50</sup> Given this reality, and the founders overarching concern about consolidation of power, did the founders intend to create a government where the president could in some situations act in violation of the Constitution without anyone being able to tell this one man that he has violated the foundational law of our nation?

Admittedly, the threats of today are very different than the threats faced by the founders.<sup>51</sup> The founders were part of a budding nation that had only recently won its freedom.

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<sup>48</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

<sup>49</sup> *E.g.* 21 C.F.R. 1240.61 (banning people from selling raw milk in interstate commerce).

<sup>50</sup> *See generally* Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute (2015 Edition), available at <https://cei.org/sites/default/files/10%2C000%20Commandments%202015%20-%2005-12-2015.pdf>. ("If one assumed that all costs of federal regulation and intervention flowed all the way down to households, U.S. households would 'pay' \$14,976 annually on average in regulatory hidden tax.")

<sup>51</sup> *Compare* The Federalist No. 45 (James Madison) (arguing a strong federal government was necessary to protect "the security of the people of America), with The World Bank, *GDP Rankings* (2014) available at <http://data.worldbank.org/data-catalog/GDP-ranking-table> (The United States GDP was approximately 17.4 trillion dollars in 2014 and the next closest economy was China with 10.35 trillion dollars), and Stockholm International Peace Research Institute, *SIPRI Military Expenditure Database*, [http://www.sipri.org/research/armaments/milex/milex\\_database/milex\\_database](http://www.sipri.org/research/armaments/milex/milex_database/milex_database) (last visited Apr. 25, 2016) (the United States spent approximately 596 billion dollars on its military in 2015 and China only spent 214.8 billion dollars on its military in 2015).

Now America is a superpower. America is a shining example of the great things that a diverse, educated populace with well instilled democratic values and a respect for the rule of law can accomplish. However, as Thomas Jefferson recognized, although “[t]he tyranny of the legislatures is the most formidable dread at present . . . . That of the executive will come in it’s [sic] turn, but it will be at a remote period.”<sup>52</sup> Even if the remote period for tyranny of the executive branch has not yet come, the dangers inherent in the concentration of power in the executive branch should give America pause to consider more effective checks on the executive branch. These checks will better ensure that the democratic values reflected in our Constitution are honored and having the checks will give citizens confidence that the rule of law is respected by the branch responsible for carrying out the law.

### **c. What Powers do the Branches Have?**

One of the most important things the founders did when writing the Constitution was to define the powers of the branches of government. The concern of a tyrannical government was obviously present and the best solution to preventing this was to have a federal government of limited powers.<sup>53</sup> Not only did the founders limit the power of the federal government in general, but they limited the powers of the separate branches by enumerating those powers in the text of the Constitution.<sup>54</sup>

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<sup>52</sup> Letter from Thomas Jefferson to James Madison, Mar. 15. 1789, available at <https://www.loc.gov/item/mjtbib001586/>.

<sup>53</sup> See The Federalist Nos. 47-49, 51 (discussing the concern of a tyrannical government and how separating the powers among the branches would alleviate this concern).

<sup>54</sup> See generally U.S. Const.

Consistent with the founders' view that the legislature naturally accumulated power, the founders spent the majority of the Constitution's text clearly defining and limiting Congress's power.<sup>55</sup> First, the founders limited the areas in which Congress could pass laws by enumerating those areas and reserving un-enumerated powers to the states or the people themselves.<sup>56</sup> The founders also included the "necessary and proper" clause because, while a federal government of limited powers was important to preventing tyranny, the founders had seen first-hand how too weak of a federal government was not a good thing.<sup>57</sup>

The executive power is vested in the president of the United States.<sup>58</sup> The president is constitutionally required to "take care that the laws be faithfully executed."<sup>59</sup> In addition, the president has inherent authority because of his position.<sup>60</sup> Executive power, and the inherent authority such power provides, are nebulous concepts.<sup>61</sup> Making for further difficulty is that there is not much case law defining the powers of the president.<sup>62</sup> We do however know that the

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<sup>55</sup> Compare U.S. Const. art. I, with U.S. Const. arts. II-VII.

<sup>56</sup> U.S. Const. art. I; *id.* amend. X.

<sup>57</sup> *Id.* art. I; The Federalist No. 45 (James Madison).

<sup>58</sup> U.S. Const. art. II, § 1.

<sup>59</sup> U.S. Const. art. II, § 3.

<sup>60</sup> William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters, Boston University Law Review, Vol. 88:505. (noting the president's "authority to act in times of national emergency [and] the right to keep advice from subordinates confidential).

<sup>61</sup> *Id.* (the "overarching reason underlying the growth of the presidential power is that the constitutional text on the subject is notoriously unspecific.").

<sup>62</sup> See e.g. *Goldwater v. Carter*, 444 U.S. 996 (1979) (dismissing as a nonjusticiable political question whether or not the president had the power to unilaterally end a treaty).

executive branch cannot exercise pure legislative power,<sup>63</sup> rather it can only legislate if Congress delegates the power and provides an intelligible principle.<sup>64</sup>

The judicial branch's power was created in Article III of the Constitution.<sup>65</sup> The Constitution vests the judicial power in the branch, gives lifetime tenure and pay protection to the judges, and limits the jurisdiction of branch's power.<sup>66</sup> The jurisdiction of the power "extend[s] to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."<sup>67</sup> This provision has been interpreted to mean that "[t]he province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. . . . [and to prevent the Court from answering] [q]uestions, in their nature political, or which are by the Constitution and laws, submitted to the executive."<sup>68</sup>

**d. Have the Branches' Powers Been Effectively Checked?**

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<sup>63</sup> *Clinton v. City of N.Y.*, 524 U.S. 417, 447-49 (1998).

<sup>64</sup> Compare *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42, 551 (1935) (holding Congress's "attempted delegation of legislative power" that provided "no standards, aside from the statement of the general aims of rehabilitation" was an unconstitutional delegation of legislative power), with *Am. Trucking Ass'ns*, 531 U.S. at 472-76 (holding statute that required the EPA to "establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air" did was not an unconstitutional delegation of legislative power).

<sup>65</sup> U.S. Const. art. III.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* § 2.

<sup>68</sup> *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

The legislative branch's power has been effectively checked by the executive and judicial branches<sup>69</sup> and by itself because the highly partisan, two party American political system has caused an alliance based on party affiliation between the president and congressman within his same political party.<sup>70</sup> The judicial branch's power has been effectively checked by its naturally limited powers and self-imposed restraints.<sup>71</sup> However, the executive branch's power has not been effectively checked. The executive branch's exercise of power can be checked in a variety of ways, both by the judicial branch and the legislative branch.<sup>72</sup> First, the judicial branch can check executive power if a case is brought before it by individuals,<sup>73</sup> and this can be made easier based on how Congress drafts a statute.<sup>74</sup> The individuals must, among other things, have been "injured in fact" by the executive branch's exercise of power.<sup>75</sup> Second, Congress has a variety

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<sup>69</sup> See e.g. *id.* (holding "an act of the legislature, repugnant to the constitution, [was] void."); see United States Senate, *Summary of Bills Vetoed, 1789-present*, <http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm> (last visited Apr. 19, 2016) (showing presidents have vetoed 2571 bills and only 110 vetoes were overridden).

<sup>70</sup> See Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers* (2006). New York University Public Law and Legal Theory Working Papers. Paper 25. ("[The] rise of the party system has made a significant extraconstitutional supplement to real executive power. . . . he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution." (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J. concurring)).

<sup>71</sup> See e.g. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (explaining how the "case or controversy" requirements limit judicial power).

<sup>72</sup> See generally Michael Sant' Ambrogio, *Legislative Exhaustion*, Forthcoming 58 *William & Mary Law Review* \_ (2017).

<sup>73</sup> E.g. *Mead Corp. v. United States*, 283 F.3d 1342, 1350 (Fed. Cir. 2002) (holding the customs' classification of imported items was not in accordance with applicable law).

<sup>74</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); see also *FEC v. Akins*, 524 U.S. 11, 19 (1998) (holding Congress's use of the "any party aggrieved" language indicated an "inten[t] to protect voters such as respondents from suffering the kind of injury here at issue," being deprived of information relevant to voting, and that such injury was sufficiently concrete to constitute an "injury in fact.").

<sup>75</sup> *Allen*, 468 U.S. at 750.

of tools that it can use in an effort to check the president's exercise power: Congress can cut funding; Congress can investigate, which alerts the public and can expose executive branch malfeasance; Congress can pass a new law, subject to the president's veto power; and Congress can impeach the president.<sup>76</sup>

The overall problem is that none of the aforementioned "checks" are enough to realistically and effectively keep the executive branch operating in accordance with the Constitution. Specifically, under current standing jurisprudence, the judicial branch's power is not capable of addressing all instances where the executive branch is violating the Constitution.<sup>77</sup> While Congress is not helpless, it has a variety of self-help remedies it can deploy in an attempt to end unconstitutional executive action, these tools do not always work. Even in instances where Congress is able to convince the president to stop what Congress alleges are unconstitutional actions, Congress should not have to use its tools if the president is violating the Constitution. Rather, Congress should only be required to resort to these tools when the president's actions are constitutional.

Here is an example of when none of the "checks" on the executive branch would work. Imagine the president himself believes that military intervention is necessary in some far off corner of the world; however, the majority, although not veto-proof majority, of congressmen disagree with him. The president, having just begun his second term, faces little real political

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<sup>76</sup> See Sant'Ambrogio, *supra* note 72, at 33-44 (discussing the various ways that Congress can check the executive branch).

<sup>77</sup> Participation in a "policing action" that could very easily be called a War, unilaterally ending a treaty (*but see Goldwater v. Carter*, 444 U.S. 996 (1979) (dismissing as a "nonjusticiable political question" rather than for lack of standing), executive non-enforcement of the law to include excusing millions of illegal immigrants (see Brief for Petitioner at 18-33, *United States v. Texas*, (No. 15-674) (arguing Texas lacks standing to challenge the executive guidance on enforcement of immigration laws)), and executive spending of money in violation of congressional appropriations as could occur if President Obama moves prisoners from Guantanamo Bay to the United States.

accountability, so he decides now is the time for military intervention and orders the military to deploy half way across the globe to destroy the enemy. The power to declare war is of course reserved to Congress.<sup>78</sup> However, the president justifies his actions as being within his executive power because some attorneys who work for him wrote a short legal opinion saying his actions were constitutional, citing actions by past presidents to justify the opinion.<sup>79</sup>

Yes, Congress could hold hearings on the matter and subpoena persons from the Department of Defense to testify, but realistically this would not accomplish anything because such a high profile action would already be known by the public. Moreover, even if this was not a well-publicized action, a second term president is not very susceptible to democratic accountability since he cannot be reelected. Yes, Congress could withhold future funds for the action, but Congress would then face the wrath of public opinion caused by the public's righteous anger about funds being withheld from troops in battle.<sup>80</sup> The president should not be able to shift the blame to Congress and distract the public debate away from his potential violation of the Constitution. Further, even if Congress did fund the military campaign, doing so after the president unilaterally entered into a conflict would not necessarily satisfy the Constitution's requirement that Congress *declare war*.<sup>81</sup> Yes, Congress could in theory pass a

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<sup>78</sup> U.S. Const. art. I, § 8.

<sup>79</sup> Salima Koroma, *The U.S. Doesn't Declare War Anymore*, TIME.COM (Sept. 18, 2014), <http://time.com/3399479/war-powers-bush-obama/> (“When Franklin D. Roosevelt declared war on Japan after the 1941 Pearl Harbor attacks, it signified the last time the U.S. officially declared war. Korea, Vietnam, the Persian Gulf, Afghanistan, Iraq: technically, those were not wars.”).

<sup>80</sup> The public, even if they were against the use of military force in a particular instance, would likely disapprove of Congress withholding funds because withholding resources from the military while it is engaged in active operations could result in the death of service members that would have been preventable with the proper resources.

<sup>81</sup> See U.S. Const. art I, § 8; *New York v. United States*, 505 U.S. 144, 182 (1992) (“The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.”).

law prohibiting the president from continuing the military action. However, even assuming that the president would not have his lawyers write a memo stating that the current use of military forces was solely within his discretion as Commander in Chief,<sup>82</sup> given the realities of the legislative process (i.e. all the veto-gates) and the fact that in this scenario there is not a veto-proof majority of Congressmen opposed to the president's action, a law will not get passed. Finally, no individual would have a sufficient injury in fact to have standing to bring suit against the president. Requiring Congress to exhaust all of its legislative remedies would not be practical, effective, what the founders intended, nor a normatively attractive solution to a potential constitutional violation by the president.

In addition to this “hypothetical” situation, there are other instances, both ongoing and in the recent past, where the executive branch is or was 1) arguably acting in violation of the Constitution, and 2) the current “checks” either are proving or proved ineffective at stopping the alleged violation of the Constitution. by the executive branch. President Bush authorized warrantless wiretapping of United States citizens' telephone calls.<sup>83</sup> President Bush deployed the military of the United States to Iraq and Afghanistan where it fought enemy forces without a

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<sup>82</sup> See U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), available at <https://www.justice.gov/archive/opa/docs/whitepaperonnsalegalauthorities.pdf> (where the justice department wrote a memorandum defending the President's warrantless wiretapping even in the face of a previously passed law that outlawed warrantless wiretapping except in specified instances).

<sup>83</sup> Compare U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), available at <https://www.justice.gov/archive/opa/docs/whitepaperonnsalegalauthorities.pdf> (arguing the inherent powers of the president, past presidential actions, and the 2001 AUMF authorized warrantless wiretapping), with *Letter from Scholars and Former Government officials to Congressional Leadership in Response to Justice Department Letter of December 22, 2005* (Jan. 9, 2006), available at <https://fas.org/irp/agency/doj/fisa/doj-response.pdf> (notifying Congress of the legal arguments against the executive branch's insistence that the NSA's warrantless wiretapping program was contrary to law), and *The National Security Agency's Domestic Spying Program*: February 2, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Whitepaper of January 19, 2006, 81 Ind. L.J. 1415 (2005) (arguing the AUMF did not allow wiretapping because the Foreign Intelligence Surveillance Act was the “exclusive means” by which electronic surveillance could be conducted,” and the .

formal declaration of war.<sup>84</sup> President Obama continued these conflicts without a formal declaration of war. President Obama ordered military intervention in Libya<sup>85</sup> and Syria.<sup>86</sup> President Obama issued executive orders on immigration, after having denied that he had the constitutional authority to reform immigration law on at least twenty-two prior occasions.<sup>87</sup> Finally, President Obama's threatened actions regarding the closing of Guantanamo Bay and the moving of the terrorists who were imprisoned there in the face of consistent congressional insistence that the President not move those prisoners.<sup>88</sup>

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<sup>84</sup> *But See* AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002, 107 P.L. 243, 116 Stat. 1498, 1501 (authorizing the president "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to-- (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."); and [SENSE OF CONGRESS REGARDING TERRORIST ATTACKS], 107 P.L. 40, 115 Stat. 224, 225 (authorizing the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

<sup>85</sup> *See AUTHORITY TO USE MILITARY FORCE IN LIBYA*, 35 Op. Off. Legal Counsel (2011) (concluding the President was not required by the Constitution to get prior congressional approval of military operations in Libya); *but see* Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 *Presidential Studies Quarterly* Vol. 1 176—89 (Mar. 2011) (arguing that "[t]he decision to act unilaterally without seeking congressional authority eventually forced the administration to adopt legal interpretations that were not only strained, but in several cases incredulous.").

<sup>86</sup> Jacqueline Klimas, *Obama launches 2,800 strikes on Iraq, Syria without congressional approval*, *The Washington Times* (April 27, 2015), <http://www.washingtontimes.com/news/2015/apr/27/congress-still-not-specifically-authorizing-islami/?page=all> (explaining the President has justified military intervention in Syria and Iraq under authorizations from the original Afghanistan and 2002 Iraq conflicts).

<sup>87</sup> Matt Wolk, *22 Times President Obama Said He Couldn't Ignore or Create His Own Immigration Law*, *SPEAKER.GOV* (Nov. 19, 2014), <http://www.speaker.gov/general/22-times-president-obama-said-he-couldn-t-ignore-or-create-his-own-immigration-law>; Brief for Petitioner at 18-33, *United States v. Texas*, (No. 15-674) (The federal government argues Texas lacks standing to challenge the executive guidance on enforcement of immigration laws. Case is pending before the Supreme Court. It is great that the lower Courts have affirmed Texas' standing, but the Supreme Court has not yet decided if the states indeed having standing. Even if Texas is held to have standing, these facts illustrate that it is unlikely for any individual to have a sufficient injury in fact to have standing to challenge the executive action in question.).

<sup>88</sup> *See* Charles "Cully" Stimson, *Closing Guantanamo: A Legal and Policy Analysis of the Senate Provision*, *Heritage.org* (Sept. 28, 2015), [http://www.heritage.org/research/reports/2015/09/closing-guantanamo-a-legal-and-policy-analysis-of-the-senate-provision#\\_ftnref35](http://www.heritage.org/research/reports/2015/09/closing-guantanamo-a-legal-and-policy-analysis-of-the-senate-provision#_ftnref35) (describing the background and series of executive orders and laws concerning the transfer of Guantanamo Bay detainees.).

If an individual brought suit for any one of the aforementioned actions he would likely lack a sufficient injury for them to have standing.<sup>89</sup> It is easy to see why the judicial branch should not, and does not, want its role to be to solve such generalized grievances brought to it by individual citizens. However, it should be different when Congress brings suit challenging the executive branch's constitutional authority to do what it is doing. Some of these examples come down to an issue of statutory interpretation, but the judicial branch still should decide such cases. If the executive branch is executing a statute contrary to what the law is, then the executive branch is acting unconstitutionally, either because the president is not "taking care" that the law be faithfully executed<sup>90</sup> or because the executive branch is legislating.<sup>91</sup>

The president and executive branch as a whole are capable of exercising power in a way that violates the Constitution.<sup>92</sup> The fact that the president has in the past violated the Constitution is all the more reason to expect future presidents too will exceed their authority. The likelihood for future unconstitutional actions by presidents, if unchecked, is even greater for a variety of reasons, including presidents' use of the classic "he did it, therefore so can I" defense in concert with "impartial" legal advice from lawyers that work under someone appointed by and

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<sup>89</sup> In the case of wiretapping an individual who had been subject to the wiretapping would likely not know because the information of who was being monitored would be sensitive intelligence information. In the wiretapping and other examples members of the public would just have a generalized grievance which does not represent an injury in fact. See *E.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (holding the plaintiff, "plaintiff [who] raised only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.").

<sup>90</sup> U.S. Const. art II, § 3.

<sup>91</sup> *Id.* art. I, § 7; e.g. *Schechter Poultry Corp.* 295 U.S. at 537-42.

<sup>92</sup> *E.g. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

who can be removed by the president, to justify the constitutionality of their actions.<sup>93</sup> The president also holds a great deal of power because Congress has delegated power to agencies allowing them to regulate most areas where federal law governs activities.<sup>94</sup> Furthermore, because the legislative process is ridden with veto-gates and because regulatory schemes are so complex, it is difficult to imagine Congress regularly being able to override an agency action with the currently available tools, even if the agency action was unconstitutional. Finally, the office of the president naturally has lots of discretion, whether it be in allocating scarce resources or in conducting foreign affairs. The president is able to mobilize his massive resources to find a way to operate in the “loophole” created when individuals lack a sufficient injury to challenge executive actions, and accomplish what a court might otherwise determine was unconstitutional.

The important question for this paper is not whether the executive branch should play as large of a role in creating law as it does, nor is it how much power is too much for the executive branch. Rather, the important questions addressed in this paper are two-fold: First, did the founders intend to allow such a great expansion in one branch’s power to go without realistic, effective checks on that power; second, even ignoring the founders’ intent, should our country have more realistic and effective checks and balances to prevent tyranny?

## **II. Standing**

Why does the standing doctrine exist if the doctrine is not explicitly mentioned in the constitution? Well, as we all know the Constitution is not explicit about much; however, we do

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<sup>93</sup> William P. Marshall, *SYMPOSIUM: THE ROLE OF THE PRESIDENT IN THE TWENTY-FIRST CENTURY: ARTICLE: ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS*, 88 B.U.L. Rev. 505, 509-519 (2008) (explaining 11 reasons why the power of the president continues to expand).

<sup>94</sup> *Id.* at 514.

get some guidance from the text of the Constitution and the structure of government that it establishes. As mentioned before, the Constitution states “[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>95</sup>

However, consistent with the Constitution’s conferral of limited powers to the legislative and executive branches, the judicial power only “extend[s] to all cases, in law and equity, arising under this Constitution, the laws of the United States, and . . . to controversies to which the United States shall be a party.”<sup>96</sup> The “case or controversy” mandate, thus, is a prerequisite to Judiciary’s constitutional exercise of power, “stat[ing] fundamental limits on federal judicial power.”<sup>97</sup> Standing is one of multiple “case or controversy” requirements, and it is likely the most important to limiting judicial power.<sup>98</sup> To satisfy the constitutional requirement of standing, the plaintiff must show that 1) there is an injury in fact, 2) the injury is fairly traceable to the defendant’s actions, and 3) the injury is likely to be redressed by the relief requested.<sup>99</sup> The aforementioned requirements are not susceptible to “precise definitions,” and the standing analysis cannot be reduced to a mechanical exercise; however, because the standing requirement “is built on a single basic idea—the idea of separation of powers,” courts can try to further that underlying purpose without doing injury to the Constitution.<sup>100</sup>

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<sup>95</sup> U.S. Const. art. III, § 1.

<sup>96</sup> *Id.* art. III, § 2.

<sup>97</sup> *Allen*, 468 U.S. at 750.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 752.

To have standing, the plaintiff must first show an “injury in fact.”<sup>101</sup> However, this requirement is not to be confused with success on the merits, because allegations by the plaintiff are construed as true to assess standing.<sup>102</sup> The Court has held that “an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”<sup>103</sup> While the injury must be “concrete and particularized,” the Court has shown a willingness to liberally construe this requirement to include even esthetic injury caused by government inaction.<sup>104</sup> Second, the plaintiff must show the injury was caused by the defendant’s actions; the injury must be “fairly . . . traced to the challenged action of the defendant.”<sup>105</sup> Third, the plaintiff must establish that the courts can redress asserted injury; to meet this requirement, the injury must be “likely to be redressed by a favorable decision.” *Id.*, at 38. Finally, the plaintiff must fall within the zone of interests protected by the law.<sup>106</sup>

### **III. Congressional Standing Jurisprudence**

Generally, there is a whole lot of nothing when it comes to Supreme Court precedent on congressional standing. This is especially true for claims based on an institutional injury. In fact, until *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the only

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<sup>101</sup> *Id.* at 783 (Stevens Dissenting).

<sup>102</sup> *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (stating “courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party” when determining if a plaintiff has standing).

<sup>103</sup> *E.g. Allen*, 468 U.S. at 754. *Defenders of Wildlife*, 504 U.S. at 573-74.

<sup>104</sup> *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (acknowledging that esthetic “harm may amount to an “injury in fact” sufficient to lay the basis for standing”); *see e.g. Defenders of Wildlife*, 504 U.S. at 561-62 (recognizing that government inaction can confer standing, but determining the plaintiffs in this case did not have standing).

<sup>105</sup> *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976).

<sup>106</sup> *Lexmark Intern. v. Static Control*, 134 S. Ct. 1377, 1387 (2014).

time the Court recognized the standing of legislators claiming an institutional injury was in *Coleman v. Miller* in 1939.<sup>107</sup>

In *Coleman*, the Court recognized the standing of twenty state senators claiming an injury to the state senate as an institution.<sup>108</sup> The twenty senators had voted against a resolution that the State of Kansas ratify a proposed amendment to the United States Constitution.<sup>109</sup> Twenty senators had voted in favor of the resolution, and twenty senators had voted against the resolution.<sup>110</sup> The Lieutenant Governor then cast a tie-breaking vote in favor of the resolution.<sup>111</sup> The Court said that the senators' asserted injury, "maintaining the effectiveness of their votes," was a right given to them under the United States Constitution.<sup>112</sup> Next, because these votes "would have been decisive in defeating the ratifying resolution,"<sup>113</sup> because without the Lieutenant Governor's vote the resolution would not have passed, the Court found the twenty senators who had voted against the resolution had standing to allow for judicial review of the alleged institutional injury to the Kansas Senate.<sup>114</sup> The Court, after giving standing, decided the case against the Senators on the merits.<sup>115</sup>

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<sup>107</sup> *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (referencing *Coleman v. Miller*, 307 U.S. 433 (1939)).

<sup>108</sup> *Coleman*, 307 U.S. at 446.

<sup>109</sup> *Id.* at 435-36.

<sup>110</sup> *Id.* at 436.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 438.

<sup>113</sup> *Id.* at 441.

<sup>114</sup> *Id.* at 446.

<sup>115</sup> *Id.* at 456.

Interestingly, the concurring opinion concluded that the senators lacked standing because the question that called for a decision was “political.”<sup>116</sup> The concurring opinion emphasized that the Constitution gave “Congress exclusive power to control submission of constitutional amendments.”<sup>117</sup> Thus, Congress’ proclamation that an amendment was ratified in accordance with the Constitution was binding on the Courts.<sup>118</sup> The concurring members viewed the Court’s consideration of the issue as “judicial interference” into matters that were not subject to judicial review.<sup>119</sup>

In 1969, the Court gave standing to Congressman Adam Powell. Congressman Powell was elected as a Congressman from New York, but pursuant to a House resolution Congressman Powell was excluded from taking his seat in Congress.<sup>120</sup> Congressman Powell brought suit claiming his exclusion was in violation of the Constitution and deprived him of his seat in Congress and salary.<sup>121</sup> The deprivation of the seat and salary was the injury-in-fact sufficient for purposes of standing, and was an assertion of an individual rather than an institutional injury by Congressman Powell.<sup>122</sup> More interesting than the type of injury was the Court’s willingness to “interpret the Constitution in a manner at variance with the construction given the document

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<sup>116</sup> *Id.* at 456-57.

<sup>117</sup> *Id.* at 457.

<sup>118</sup> *Id.* at 457-58.

<sup>119</sup> *Id.* at 458-59.

<sup>120</sup> *Powell v. McCormack*, 395 U.S. 486, 489-93 (1969).

<sup>121</sup> *Id.* at 493.

<sup>122</sup> *Raines*, 521 U.S. at 821.

by another branch.”<sup>123</sup> Further the Court stated that “[t]he alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.”<sup>124</sup>

In 1997, the Court received a case from the D.C. Circuit. The Federal District Court for the District of Columbia had held that the six members, who had served during the 104<sup>th</sup> Congress when the Line Item Veto Act passed, had standing to challenge the constitutionality of the act.<sup>125</sup> The members of congress bringing suit all voted “nay,” and they brought suit under a provision in the Act that allowed “any Member of Congress or any individual adversely affected. . . [to] bring an action for declaratory judgement and injunctive relief on the ground that any provision of this part violates the Constitution.”<sup>126</sup> The congressmen asserted injuries to themselves in their capacity as congressmen because the Act effected the legal effect of their future votes, prevented them from exercising their role in repealing laws, and altered the balance of power between branches of government.<sup>127</sup> All of these injuries, they asserted, violated Article I of the Constitution.<sup>128</sup>

The Court held the congressmen lacked standing.<sup>129</sup> The court began by laying out the elements of standing and emphasizing standing’s “overriding and time-honored concern about keeping the judiciary’s power within its proper sphere.”<sup>130</sup> First, the Court made clear that

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<sup>123</sup> *Powell*, 395 U.S. at 549.

<sup>124</sup> *Id.*

<sup>125</sup> *Raines*, 521 U.S. at 816-17.

<sup>126</sup> *Id.* at 816.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 813.

<sup>130</sup> *Id.* at 820.

Congress *cannot* give constitutional standing “to a plaintiff who would not otherwise having standing.”<sup>131</sup> Next, the Court distinguished between precedent where there was standing and the present case.<sup>132</sup> In *Powell v. McCormack*, 395 U.S. 486, 496 (1969), the Court held Congressman Powell had standing where his asserted injury was being excluded from the House of Representatives and the loss of salary from this exclusion.<sup>133</sup> The key difference between *Powell* and the present case is that Congressman Powell’s injury was personal while the injury asserted by the six senators was an injury to institution.<sup>134</sup> The Court continued by making various, further distinctions between *Coleman* and the current case.<sup>135</sup> The crucial distinction between the present case and *Coleman* was that the senators who brought suit in *Coleman* had votes “sufficient to defeat (or enact) a specific legislative act” and the result of the alleged unconstitutional action was complete vote nullification.<sup>136</sup> Whereas in the present case the congressmen’s votes, even though the bill was passed, were given full effect.<sup>137</sup>

Most recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held the Arizona Legislature had standing to bring suit challenging the constitutionality of a proposition that removed redistricting authority from the Arizona Legislature.<sup>138</sup> Voters adopted a proposition in 2000 that amended Arizona’s Constitution in an

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<sup>131</sup> *Id.* at Note 3.

<sup>132</sup> *Id.* at 820-826.

<sup>133</sup> *Id.* at 821.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 821-26.

<sup>136</sup> *Id.* at 823.

<sup>137</sup> *Id.* at 824.

<sup>138</sup> *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n.*, 135 S. Ct. 2652, 2659 (2015).

effort to end gerrymandering of political districts by the Arizona Legislature.<sup>139</sup> After the 2012 congressional districts were drafted by the independent commission, the Arizona Legislature brought suit “arguing that the AIRC and its map violated the ‘Elections Clause’ of the U.S. Constitution.”<sup>140</sup> Key in the Court’s standing analysis was that Arizona’s Constitution bans the legislature from “undermin[ing] the purposes of an initiative.”<sup>141</sup> Thus, the result of the proposition was an allegedly unconstitutional *complete vote nullification*.<sup>142</sup>

In reaching its decision that the Arizona Legislature had standing to bring suit, the Court compared the present case to both *Raines* and *Coleman*. The Court distinguished from *Raines* on the basis of who was bringing suit. As discussed previously, *Raines* involved six members of Congress who brought the suit individually while claiming an institutional injury. The six individuals brought suit against the wishes of both the house and senate and the asserted injury impacted all members equally. In the present case, the suit was brought by the Arizona legislature itself after approval in both chambers. It was therefore the institution itself asserting an institutional injury. The Court went on to analogize the present case to *Coleman* because in both cases there was complete vote nullification. In the present case the Arizona Constitution prohibited the legislature “from undermin[ing] the purposes of an initiative,” thus if the act was constitutional, the Arizona Legislature could not itself take any action to overturn the proposition and was being denied its asserted constitutional right to participate in redistricting. The effect of

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<sup>139</sup> *Id.* at 2661.

<sup>140</sup> *Id.* at 2662.

<sup>141</sup> *Id.* at 2665.

<sup>142</sup> *Id.*

not being able to, by itself, do anything to correct the alleged constitutional infringement, was complete vote nullification.

What can we take away from Supreme Court precedent on the issue of congressional standing? First, the traditional standing analysis still applies.<sup>143</sup> There must be an injury in fact, the injury must be fairly traceable to the challenged action, and must be redressable by a favorable ruling.<sup>144</sup> Second, complete vote nullification is one example of an injury sufficient to justify institutional congressional standing.<sup>145</sup> Third, *individual congressmen* cannot assert an institutional injury based on alleged injury that equally impacted all members of Congress.<sup>146</sup> Fourth, the Court is afraid of inserting itself into a position where it decides the meaning of the Constitution when the controversy is between the other two branches of the federal government.<sup>147</sup> Finally, there are still a great deal of unanswered questions as to when Congress would have standing. However, the Court, at least in words, has said it will not shy away from its constitutional duty of being the final arbiter of the Constitution’s meaning as applied to a co-

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<sup>143</sup> *Ariz. State Legis.*, 135 S. Ct. at 2663; *Raines*, 521 U.S. at 818.

<sup>144</sup> *Raines*, 521 U.S. at 818.

<sup>145</sup> Compare *Coleman*, 307 U.S. at 446 (holding “the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which . . . is sufficient to give the Court jurisdiction to review that decision.”), and *Arizona State Legis.*, at 2665 (holding the Arizona Legislature had standing because “Proposition 106, together with the Arizona Constitution’s ban on efforts to undermine the purposes of an initiative, would ‘completely nullify]’ any vote by the Legislature, now or ‘in the future.’”), with *Raines*, 521 U.S. at 824 (holding the six members of Congress lacked standing because “[i]n the vote on the Line Item Veto Act, their votes were given full effect.”).

<sup>146</sup> *Raines*, 521 U.S. at 821, 829 (“Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress Equally. . . . 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.”).

<sup>147</sup> *Id.* at 820.

equal branch of government's actions in accordance with its own interpretation of the Constitution.<sup>148</sup>

#### IV. Problems with Current Congressional Standing Jurisprudence

The first weakness of current congressional standing jurisprudence is the lack of it. This is especially true when looking at standing in the context of the federal Congress. Both *Arizona* and *Coleman*, the two cases approving legislative standing, concerned state legislatures.<sup>149</sup> The Court has yet to answer whether the same standing analysis applies when dealing with questions of the federal legislature's standing. The problem is that the underlying concern of standing is separation of powers, which is not implicated when a federal court decides the powers of a state branch of government. If a similar dispute to what arose in *Coleman* occurred, but it involved the federal legislature instead of a state legislature, the Court would, as a coequal branch of the federal government, be resolving a direct dispute between the two other coequal branches of the federal government, implicating the separation of powers concerns that are core reasons for the standing doctrine.

A second weakness, again stemming from the lack of Court cases, is the question of what situations, other than complete vote nullification, would the Court allow for congressional standing? The Court has made two related things clear: first, the Court does not want to interfere with the other branches of government; and second, the Court wants to limit its own role in deciding controversies between the other branches. However, would the Court consider playing

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<sup>148</sup> *Chadha*, 462 U.S. at 941-43 (“No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts.”); *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>149</sup> *Ariz. State Legis.*, 135 S. Ct. at 2658; *Coleman*, 307 U.S. at 436.

a more active role in ensuring our government acts in accordance with the Constitution if a set of facts showed a clear constitutional violation by the executive branch?

Finally, the question of whether the current lack of a remedy to right a wrong will be addressed by the courts remains unanswered. Because the Court has refused to take up more cases on the issue we have potentially unconstitutional actions that have no practical remedy. It is understandable that the Court does not want individual citizens who lack a concrete injury to be able to petition the courts to decide whether the government is acting in accordance with the constitution, but it is a completely different situation when a coequal branch of government claims that another branch is not abiding by the Constitution. The Court does not want to overstep its own constitutional authority, and this is clearly a laudable goal, but by liberalizing congressional standing the Court would not be self-aggrandizing. Rather, because the judiciary's constitutional role is "to say what the law is," and because the "courts, as well as other departments, are bound by [the Constitution]," the Court would only be fulfilling what was intended to and should be its role.<sup>150</sup> For "[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"<sup>151</sup>

Moreover, the Court has not shied away from its role deciding cases that require it to interpret the Constitution and review a coequal branch's compliance with its requirements. The Court has said that a suit "arises under" the Constitution if a petitioner's claim "will be sustained if the Constitution . . . [is] given one construction and will be defeated if [it is] given another."<sup>152</sup>

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<sup>150</sup> *Marbury*, 5 U.S. at 177.

<sup>151</sup> *Id.* at 176.

<sup>152</sup> *Powell*, 395 U.S. at 549 ("[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged

All that congressional standing would do is more clearly delineate the constitutional powers of the executive branch and close a gap to allow better enforcement of constitutional constraints on executive power.

The Court must take seriously its role in saying “what the law is.” If the Court does not embrace congressional standing, then the American public will lack confidence in its government because citizens will fear the tyranny that could result from a lack of a realistic and effective checks against unconstitutional executive actions. The founders knew that Congress could not police itself and would try to expand its powers, and the checks and balances in general and the role taken by the Court specifically have effectively checked Congress’s unconstitutional actions. The Court too has checked the executive branch for unconstitutional actions,<sup>153</sup> but the Court, through self-imposed, as opposed to constitutionally mandated constraints, has limited its role in preventing constitutional violations that likely have and will continue to occur. These potential constitutional violations are much more dangerous to our Country than smaller constitutional violations by the legislative branch that the Court has rightfully stepped in to end. The constitutional infringements that are going unchecked are that of a branch of the federal government being controlled by one person who at times has, and others in the future will likely continue to, aggrandized his power. This can be an especially big problem for a president who begins his second term because the power of political accountability as to someone who never has to seek re-election is significantly lessened.<sup>154</sup> Yes, the president still has some

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conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.”); *Bell v. Hood*, 327 U.S. 678, 685 (1946) (“the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction.”).

<sup>153</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 660.

<sup>154</sup> Maurizio Zanardi, Paola Conconi & Nicolas Sahuguet, *Democracy and accountability: The perverse effects of term limits*, Center for Economic and Policy Research (Aug. 30, 2008), <http://voxeu.org/article/democracy-and->

accountability based on party obligations, because the party to which the president belongs wants to have members elected to office, and based on needing Congress to accomplish his objectives. However, a lot can be accomplished by a determined president especially when democratic accountability is lessened, and once things have been accomplished they can be difficult, if not impossible, to undo even if they were done in violation of the Constitution.

Current congressional standing jurisprudence does not effectively address these problems. The Court has not utterly failed in its role in checking the executive branch. Most of the time actions by the executive branch affect some regulated entity in a manner that “injures” it sufficient to give standing. So why do we need congressional standing? We need congressional standing because there are instances where no private parties have standing to challenge executive action. Two areas that are prime for congressional standing would be for 1) injuries to the public treasury caused by executive branch spending that is contrary to law,<sup>155</sup> and 2) executive branch non-enforcement.<sup>156</sup> Additional justiciability problems created by the political question doctrine<sup>157</sup> and the presumption of unreviewability in non-enforcement cases<sup>158</sup> would

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accountability-perverse-effects-term-limits (“Term limits may reduce the disciplining effect of electoral accountability, as politicians who cannot be re-elected have little to lose from displeasing voters and may thus behave in a more self-interested way.”).

<sup>155</sup> See e.g. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (denying taxpayer standing after reiterating that “[i]t has long been established, however, that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government. In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes *an individual federal taxpayer* any measurable economic harm. And if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.” (emphasis added)).

<sup>156</sup> See e.g. *Linda R. S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 1149 (1973) (denying standing to the plaintiff who challenged a prosecutor’s decision to not prosecute her husband after reiterating that “[t]he Court’s prior decisions consistently [have held] that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.”).

<sup>157</sup> See *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring) (holding “the basic question presented by the petitioners in this case is ‘political’ and therefore nonjusticiable because it involves the authority of the president in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the president.”).

likely temper the number of cases that courts actually decided, but these concepts should be further examined by the Court, *and where the executive branch is violating the Constitution, they should not apply*.<sup>159</sup> However, even if there are few instances where Congress would prevail in these suits, public confidence in the federal government would be better because the decision as to whether or not the executive branch actually had legal authority for its actions would be answered by a neutral entity, which under the Constitution is the judicial branch.

## V. Proposals for Congressional Standing

There are obviously many possible formulations for congressional standing. Contained herein are a few formulations of congressional standing, a veritable menu from which the Court could choose to implement one or more variations with or without additional adjustments. The underlying goal that the Court should pursue in choosing which situations merit congressional standing should be ensuring our Constitution is honored.

There are many concerns that have led the Court and scholars to encourage continued adherence to the status quo, which is virtually nonexistent congressional standing.<sup>160</sup> The underlying concern of those opposed to congressional standing is the proper role of the judicial

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<sup>158</sup> See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (holding “an agency’s decision not to take enforcement action should be presumed immune from judicial review under the APA, 5 U.S.C.S. § 701(a)(2).”).

<sup>159</sup> Because “[n]o policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute,” *Chadha*, 462 U.S. at 941-43; and because the unreviewability of nonenforcement decisions is only a rebuttable presumption, *Heckler*, 470 U.S. at 832 (1985); and because the Court’s role “is to say what the law is,” *Marbury*, 5 U.S. at 177-78; the decision of the constitutionality of a question should be answered by the Court.

<sup>160</sup> See Anthony Clark Arend and Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 Harv. J.L. & Pub. Pol’y 209, 272-82 (critiquing legislative standing).

branch.<sup>161</sup> Some view the proper role of the judicial branch as only deciding cases affecting private rights.<sup>162</sup> This concern is further reflected in the political question doctrine that would apply quite often to cases involving disputes between branches of the federal government.<sup>163</sup>

The answer to these concerns is the reason why increased congressional standing is necessary – to ensure that the Constitution is honored. The Constitution being honored requires a federal government of limited powers and this includes limited powers for the branches enforced by effective checks on their exercise of power to keep it within its constitutional limits. Admittedly, individual liberties can often be protected by plaintiffs who are injured in fact by government action because of the broad right of legal review offered by the Administrative Procedure Act.<sup>164</sup> Nonetheless, because constitutional violations are not redressable in all instances, the risks of tyranny inherent in a single branch of the federal government accumulating too much power demand an additional way to redress them. We as a nation suffer a collective injury, but more importantly for the issue of standing, Congress as an institution suffers a concrete injury as a co-equal branch of government when the executive branch violates the Constitution either by failing to “take care” that the laws be faithfully executed or by exceeding its constitutional power.

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<sup>161</sup> *Id.* at 280-81.

<sup>162</sup> See *Moore v. United States House of Representatives*, 733 F.2d, 946, 956-61 (D.C. Cir. 1984) (Scalia, J., concurring) (viewing the “purely intergovernmental dispute” as having “no place in the law courts.”).

<sup>163</sup> See *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring) (holding “the basic question presented by the petitioners in this case is ‘political’ and therefore nonjusticiable because it involves the authority of the president in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the president.”).

<sup>164</sup> See 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

Some scholars argue that congressional standing is not in line with the founders' intent and that it is normatively unappealing. The arguments are for the most part two-fold: first, that the founders' overarching concern was with too powerful of a legislature and congressional standing gives Congress more power over the executive branch, the result of which is congressional aggrandizement<sup>165</sup>; second, that Congress already has the tools necessary to check executive power and allowing it to forego using these tools results in judicial aggrandizement and is normatively bad.<sup>166</sup> These arguments have little merit.

Even in cases where Congress prevails in its suit, congressional aggrandizement does not occur. Congress "gains" power only so far as it maintains its current powers and the executive branch is preventing from exceeding its power under the Constitution. Surely it would be ridiculous to think that ensuring the executive branch follows the Constitution is not something that our founding fathers wanted or that we as a nation want today. While the balance of power would be different, it would only be different so far as the Constitution mandates that balance of power.

Yes, Congress has tools to check executive power. But insisting on exhaustion of legislative remedies by Congress before such a suit can progress is ludicrous. The closest thing I can compare such a requirement to would be insisting that a doctor use a chain saw to perform surgery on someone's ankle because they have one in their office. While the doctor could cut off the person's ankle and that ankle would no longer give the patient any issues, it would obviously be much better if the doctor could use a scalpel to address the precise problem. Similarly, Congress has the power of the purse and the power to pass new laws. However, as a recent

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<sup>165</sup> Arend, *supra* note 160, at 279-280.

<sup>166</sup> See generally Sant' Ambrogio, *supra* note 72.

budget standoff showed,<sup>167</sup> because of the interconnectedness of the federal government, unless Congress is willing to cause serious and unrelated collateral damage, like putting the national security of the United States at risk, there is not much it can do to stop a president's alleged violation of the Constitution. Further, in the example just mentioned Congress did not have a veto-proof majority,<sup>168</sup> so Congress could not have passed a new law to stop President Obama's alleged violation of the Constitution because President Obama surely would have exercised his veto power to shield his executive action. Congress has blunt instruments in its power of the purse and ability to pass new laws, but congressional standing would give Congress a "scalpel" to, under limited circumstances and only where the executive branch violates the Constitution, allow the judicial branch to prevent the trampling of the Constitution. This results in a government that is more in tune with the founders' intent and normatively superior than our Country without such a mechanism. For every legal wrong, there must be a remedy. In this case, if the president chooses to act in violation of the Constitution, Congress should have the right to resort to the courts to enjoin his unconstitutional actions.

**a. Solution #1:**

First, and uncontroversially, an individual Congressman should be able to bring suit for an injury suffered by him in his official capacity if the facts conform with the ordinary standing

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<sup>167</sup> In 2015 Congress disagreed with President Obama's executive action on immigration, with some Congressmen claiming the executive action violated the Constitution. As a result of disagreeing with the President's actions, Congress attempted to use the power of the purse to persuade the President to withdraw the executive action. However, because of the complicated and interconnected nature of the government, the only way that Congress could exercise the power of the purse, to end what some Congressmen alleged was a violation of the Constitution by the executive branch, was to withhold funds from the entire Department of Homeland security (DHS). Withholding funds from DHS would have caused serious consequences that were completely unrelated to the dispute over the President's executive action on immigration. *See generally* Homeland security cash stand-off over US migrant policy, BBC News (Feb. 23, 2015), <http://www.bbc.com/news/world-us-canada-31591653>.

<sup>168</sup> United States Senate, *Party Division in the Senate, 1789-present*, <http://www.senate.gov/history/partydiv.htm> (last visited Apr. 20, 2016) (showing the republican majority held 54 seats in the Senate during the 114<sup>th</sup> Congress).

requirements. This is the factual situation already approved by the Court in *Powell v. McCormack*.<sup>169</sup> This is the least controversial form of congressional standing, and could arguably not fall under the rubric of congressional standing, but would likely be approved by today's Court.

**b. Solution #2:**

Second, the Court could allow individual congressmen to assert institutional injuries when the asserted injury is complete vote nullification. While prudential standing is likely a thing of the past,<sup>170</sup> the concept should be applied to the issue of congressional standing. The Constitution speaks in terms of the separate branches of government, and therefore, in general, is not designed to protect individual congressmen. Thus, a congressman, in terms of his position as a congressman, would not generally be in the zone of interests protected by the Constitution, and could not assert an institutional injury. While such a congressman would not have standing for a general assertion that the executive branch is violating the Constitution, there is a stronger case for this type of congressional standing when the asserted injury is complete vote nullification. An example of complete vote nullification, ignoring the merits of the claim, would be if the president appointed a federal judge without the advice and consent of the Senate. Federal judges of course have lifetime tenure and the Senate has the constitutional role of approving federal judges. Because there would not be any legislative recourse for a Senator, and because the Senator never had the chance the vote in the first place, he or she could then assert a constitutional injury to the institution of the Senate on its behalf. This type of standing would be

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<sup>169</sup> *Powell*, 395 U.S. at 549 (holding Congressman Powell had standing to sue based on the alleged individual injury of being deprived of his seat).

<sup>170</sup> See *Lexmark Intern.*, 134 S. Ct. at 1387 (“‘prudential standing’ is a misnomer” as applied to the zone-of-interests analysis).

limited to areas where Congress has an enumerated role and the effect of executive action is to completely remove Congress from the process.

**c. Solution #3:**

Third, the Court could allow the House *or* Senate as an individual body to bring suit to assert an institutional injury, but only if it is unlikely that any individual would have standing to bring suit. Additionally, the House or Senate, when acting alone, could only bring suit when the asserted injury was to one of that body's institutional interests enumerated in the Constitution.<sup>171</sup> Limiting suits brought by an individual house to instances when that house has an institutional interest enumerated in the Constitution is important for two reasons, one being based on the Constitution, and the other being based on the normative appeal of applying the limitation. First, because the Constitution enumerated institutional interests, when one of those interests is asserted to have been violated by the executive branch, that house has allegedly suffered an injury that falls within the zone of interests protected by the Constitution.<sup>172</sup> Second, limiting the instances where suit can be unilaterally brought by a house of Congress will decrease the number of situations where this power has the potential of being abused. As mentioned before, the concepts of the now defunct prudential standing should apply as a limiting mechanism on when and how congressional standing can be employed. The same prudential standing issues that were present for individual Congressman and Senators are present if the House or Senate does not have a constitutionally enumerated role in a particular issue. So, if the constitutional question or

Comment [MSI]: The "zone of interests" concept is a little strange to me here because the Constitution was written to protect the people, not Congress or any other branch of government. It's a restraint on government for the benefit of the people, not the branches. I think you want to say the House or Senate may bring suit to protect an institutional interest enumerated in the Constitution.

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<sup>171</sup> The Senate, for example, has enumerated institutional interests in impeachment (U.S. Const. art. I, § 3), treaties, and executive branch appointments (U.S. Const. art. II, § 2), and the House has enumerated institutional interests in impeachment and in the raising of revenue (U.S. Const. art. I, §§ 2, 7).

<sup>172</sup> See *City of N.Y.*, 524 U.S. at 448-49 (holding the line item veto power given to president was unconstitutional because it gave the president the power to create law outside of the process required by the Constitution, which required passage of the bill by both houses (i.e. Congress's enumerated role in the law making process)).

statutory interpretation at issue did not involve a constitutionally enumerated role in that area for the body attempting to bring suit on its own, then that body would lack standing. Thus, under this analysis the House would generally have standing to challenge executive actions involving taxation if it was unlikely that any individual would have standing to bring suit. The House would have standing in these instances because the alleged injury, the executive's failure to "take care" or its legislating in the arena of raising revenue, would be to the House's enumerated roll in originating bills that raise revenue.<sup>173</sup> In this instance, the House would be able to bring suit without securing approval by the Senate. Giving standing to the House would not mean success on the merits and a court could very easily find that the billions of dollars spent did not involve the spending of unappropriated funds or that the spending was the proper exercise of executive power under the Constitution, but at least the executive branch could be stopped from its actions if it indeed was violating the Constitution.

**d. Solution #4:**

Fourth, the Court could allow Congress to bring suit to assert an institutional injury based on alleged unconstitutional act by the executive branch caused by exceeding its own constitutional power or by failing "to take care" that the laws be faithfully executed, but only if it is unlikely that any individual would have standing to bring suit. This formulation of congressional standing presents no problems with the prudential standing analysis that should apply to determining congressional standing. Congress, as a body, is a coequal branch of government with specific enumerated powers and the exclusive power to originate laws, declare

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<sup>173</sup> See U.S. Const. art. I, § 7 (All bills for raising Revenue shall originate in the House of Representatives"); Federalist No. 66 (Alexander Hamilton) ("The exclusive privilege of originating money bills will belong to the House of Representatives.").

war.... etc.<sup>174</sup> It is intuitive, given the enumerated powers therein, that Congress's institutional interests fall within the zone of interests protected by the Constitution's conferral of limited powers to the separate branches of government. There are many different possibilities for how a suit would be approved and the House and Senate could develop their own rules for approving suits or the Court could define the steps necessary to give congressional standing.

My recommendation, and the one that adheres most closely to ensuring the Constitution is followed, is to eliminate the traditional veto-gates that are present during the normal legislative process. Veto-gates, while more important to encouraging debate and promoting compromises are not as important when determining whether a suit to challenge executive branch actions should be undertaken. When Congress is deciding whether or not to pass a law, *Congress is the body making a decision* and should do so only after a reasoned analysis of the pertinent facts and a vigorous debate of the applicable policy considerations. In contrast, when Congress is deciding whether or not to bring a suit challenging the constitutionality of an executive branch action, *Congress is only deciding if it wants the judicial branch to make a decision* based on an analysis of the pertinent facts and applicable law. Thus, only a limited duration for debate accompanied by a ye or nay vote in both the House and Senate should be undertaken prior to bringing suit. After approval in both the House and the Senate, the suit would go forward asserting an institutional injury. Such a system would lessen the risk of the judiciary being flooded with cases because Congress has limited time. In addition to the aforementioned safeguard to prevent Congress from bringing frivolous lawsuits, our form of government also serves as a safeguard to prevent congressional standing from being used as a tool to unjustifiably harass the executive branch. The congressmen approving any suit against the president must, every few years, win an

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<sup>174</sup> U.S. Const. art. I.

election to continue in office. If the public generally agrees with what the President is doing and Congress brings numerous lawsuits attempting to stop the executive, even if the lawsuits had merit, would be viewed as trying to interfere with the will of the people. Thus, if public choice theory<sup>175</sup> holds any merit, then it is unlikely that a majority of congressmen would be willing to bring a flood of frivolous lawsuits against the President unless such actions were the will of the people because the congressmen would be doing so at the potential cost of their place in office.

While traditional laws must go through both bicameralism *and presentment*, presentment should not be required for instituting a suit against the executive branch. All that presentment would do is to potentially give the president the power to continue to act unconstitutionally by exercising his veto power to insulate the executive branch from suit. This absurd outcome would occur in cases where there was not a veto-proof majority. Further, because Congress is not legislating, Congress should not be required to go through the constitutionally mandated process for legislating, rather the legislative branch itself is just asserting an injury based on the executive branch's violation of the Constitution.

#### **e. Conclusion**

Admittedly, none of these proposals are uncontroversial. As can be gleamed from the summary of law on congressional standing, the Supreme Court has not paid a great deal of attention to the idea of giving Congress standing. Moreover, the Court is likely to show continued hostility to embracing the role or arbitrating disputes between the legislative and executive branches of the federal government, and articulating limits to executive power. However, given the founders' intent and the normative appeal of a federal government where

Comment [MS2]: This seems naive. The party out of the White House always wants to harass the Executive and will do so with lawsuits if they control Congress. The Burwell case is a good example. The House authorized the lawyers to bring any and all claims concerning the ACA. They hadn't even developed their appropriation theory yet.

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<sup>175</sup> See generally P.J. Hill, *Public Choice: A Review*, 34 *Faith & Economics* 1 (1999) (“collective action is modeled with individual decision-makers using the political process to further their self-interests.”).

each branch is *actually, effectively* prevented from acting in violation of the Constitution, the Court should adopt, when a case with appropriate facts presents itself, one or more of the four proposals for congressional standing.