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Litigating the Separation of Powers

By

Elizabeth Earle Beske¹

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INTRODUCTION

In marked contrast to its predecessor, the Roberts Court has carved a clear and confident role for itself in adjudicating separation-of-powers disputes. Examining the Constitution’s text, structure, and history to determine the respective authority of Congress and the Executive, the Roberts Court has proclaimed, is “what courts do.”² And yet, to field these cases, the Court has often been constrained by Rehnquist-era precedent to prefer individual private litigants over

¹ Associate Professor, American University Washington College of Law. I am deeply indebted to Henry Monaghan and wish also to thank Kent Barnett, John Q. Barrett, David Eggert, Tara Leigh Grove, Peggy McGuinness, Caleb Nelson, James Pfander, and Seth Barrett Tillman for their helpful comments on earlier versions of this draft.

² *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). Professors Laurence Tribe and Joshua Matz described the case as a “vivid defense of the role courts play in proclaiming the law” and a “ringing proclamation of judicial power to state the law.” Laurence Tribe & Joshua Matz, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 299-300 (2014).

institutional actors,³ even where doing so is difficult to square with the niceties of Article III and even where reliance on individual litigants means some separation-of-powers problems may never be resolved. Obvious stakeholders, the institutional actors, have faced a tough-to-impossible climb in bringing disputes before the courts, and the Supreme Court’s preference for individual claimants has required it to engage in some crafty, if occasionally dubious, moves to ensure a steady diet of claims.⁴ This article examines the Court’s reliance on individual litigants to raise separation-of-powers claims and finds significant problems, both doctrinal and practical. It proceeds to reexamine the Court’s treatment of institutional standing and argues that there is both room to maneuver around the more concerning limitations of *Raines v. Byrd*,⁵ the decades-old case that effectively shut down congressional, and, by implication, most institutional standing, and – more importantly – strong reason to do so in the limited circumstances where institutional actors lack the ability to self-help.⁶ There are both doctrinal and prudential reasons to be skeptical of wide-ranging institutional standing; however, there are identifiable circumstances where it is necessary, and placing the mantle primarily on individual litigants limits the role of real parties in interest, results in scattershot rulings, and rests uneasily with conventional notions of judicial power.

The increasingly formalist⁷ Roberts Court has been a frequent and comparatively enthusiastic participant in the separation-of-powers sphere. Consistent with its confidence playing the role announced in *Zivotofsky v. Clinton* (“*Zivotofsky I*”),⁸ the Roberts Court has repeatedly fielded cases in which litigants have claimed congressional incursions on the domain of Article III courts,⁹ examined the President’s authority to make recess appointments and thereby elide the Senate confirmation process,¹⁰ and jumped in to defend the prerogatives of the executive vis-à-vis Congress, particularly in the Appointments Clause context.¹¹ In *Trump v. Mazars USA, LLP*,¹² the Court refereed a clash between Congress and the President over

³ This article will contrast “individual litigants,” generally private individuals, with “institutional litigants,” who are actors situated within one of the three coordinate branches of government.

⁴ See *infra* notes _ - _ and accompanying text.

⁵ 521 U.S. 811 (1997).

⁶ David Pozen first brought the term “self-help” into the separation-of-powers sphere. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 7, 8 (2014). He defined it as “any attempt to resolve another branch’s wrongdoing in lieu of or prior to third-party dispute resolution.” *Id.* at 12; see also *id.* at 22 (focusing definition on forms of self-help “that begin, and often end, outside the courts”).

⁷ See Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 420-21 (2015) (describing decisive shift to formalism under Roberts Court as manifestation of distrust of other branches); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1615 (2012) (observing that Roberts Court has “eschewed functionalist reasoning in favor of formalist analysis of separation of powers questions”).

⁸ 566 U.S. 189 (2012).

⁹ See *Patchak v. Zinke*, 138 S. Ct. 897 (2018); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016); *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944-45 (2015); *Stern v. Marshall*, 564 U.S. 462, 482-84 (2011); see *infra* notes _ - _ and accompanying text.

¹⁰ See *Nat’l Labor Relations Bd. v. Noel Canning*, 573 U.S. 513, 538 (2013); see *infra* notes _ - _ and accompanying text.

¹¹ See *Lucia v. Sec. & Exchange Comm’n*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); see *infra* notes _ - _ and accompanying text.

¹² 140 S. Ct. 2019 (2020).

subpoenas for the President’s financial documents, reaching the merits and setting ground rules despite noting that coordinate branches had “managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us.”¹³

In fielding separation-of-powers claims, the Court has preferred individual litigants to institutional plaintiffs, even where individual interests and stakes are remote or derivative.¹⁴ In *Lucia v. Securities & Exchange Commission*,¹⁵ a litigant subject to an SEC enforcement proceeding challenged the appointment of his administrative law judge (ALJ), claiming that SEC ALJs are “officers” who must be appointed by “Heads of Departments.”¹⁶ After determining that the ALJs were in fact “officers,” the Court turned to the question of remedy.¹⁷ Recognizing that the ALJ before whom Lucia had had his hearing could fairly readily obtain a constitutional appointment from the SEC and would likely issue the same decision on rehearing,¹⁸ the Court required that Lucia have a new hearing before a *different* ALJ in order to “create incentive[s] to raise Appointments Clause challenges.”¹⁹ Without the prospect of such a bounty, the Court assumed the individual would have insufficient skin in the game and no reason to advance the legal claim. *Lucia*’s stark suggestion that individual plaintiffs are not, in fact, advancing their own interests in these cases rests uncomfortably with the conventional understanding of injury-in-fact.²⁰ In this area, the Court has relied without statutory authority on judicially-incentivized, *de facto* private attorneys general, and that, too, is in tension with the Court’s precedents.²¹

The Roberts Court found itself in this conceptual jam because its predecessor, the Rehnquist Court, had shut down most litigation avenues for the institutional actors whose interests lurk in the background. After a majority of the Burger Court failed to coalesce around the political question doctrine to dodge a dispute between President Carter and several Senators in *Goldwater v. Carter*,²² Chief Justice Rehnquist switched tactics in *Raines v. Byrd*,²³ which adopted a constricted view of congressional standing and enshrined Chief Justice Rehnquist’s shut-it-down mood.²⁴ *Raines* cast doubt upon *any* separation-of-powers suits by members of Congress without express authorization from the entire chamber and left intact only a sliver of

¹³ *Id.* at 2031.

¹⁴ *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 222 (2011) (“In the precedents of this Court, the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances.”).

¹⁵ 138 S. Ct. 2044 (2018).

¹⁶ *Id.* at 2047.

¹⁷ *Id.* at 2055.

¹⁸ During the pendency of the case, the SEC issued an order that “ratified its prior appointment” of the ALJs. *See* Press Release, Securities and Exchange Commission (Nov. 30, 2017), <https://www.sec.gov/news/press-release/2017-215>. Lucia challenged the validity of that ratification, but the Court found no reason to address it because the SEC had not indicated that Lucia’s rehearing would be before an ALJ whose appointment depended on it. *See Lucia*, 138 S. Ct. at 2055 n.6.

¹⁹ *Id.* at 2055 n.5.

²⁰ *See* Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 141 (2014) (describing Court’s tacit recognition “that we should regard as fiction” the notion that an Appointments Clause case “was about the rights of any particular litigant”).

²¹ *See infra* notes ___ and accompanying text.

²² 444 U.S. 996 (1979).

²³ 521 U.S. 811 (1997).

²⁴ *See id.* at 823.

suits asserting institutional injury when members' voting power is "held for naught."²⁵ Rejecting the claim in *Raines* could have been easy – individual legislators had challenged a statute enacted over their objection and thus sought to import a political tussle straight from the halls of Congress into the judicial arena.²⁶ The complained-of incursion on congressional authority in *Raines*, in other words, was a congressional creation. In its haste to reject the challenge, the Court wrote an opinion far broader than circumstance required and failed to distinguish amongst different kinds of congressional claims and injuries. In so doing, the Court left Congress almost completely incapable of appealing to the judiciary where its problem is not with its own handiwork but with the actions of another branch.

The executive branch has more self-help options in the event of congressional encroachment, so its role going to court as a turf-defending plaintiff in its own right has not been conclusively established.²⁷ If the executive finds that an act of Congress invades its constitutional prerogatives, the President usually can either veto or, more controversially, refuse to enforce it.²⁸ But if the act of Congress is self-executing, like an administrative scheme that trenches on the executive's appointment authority, the executive branch has no such ability to self-help. Individual litigants subject to coercive action – particularly if duly incentivized as in *Lucia* – can serve to vindicate the executive's authority in many cases. The protection offered by individual litigants, though, is spotty; they can rarely serve as an alternative prospect in the absence of coercive action, leaving some separation-of-powers claims without adequate redress.²⁹

One never writes on a blank slate in the justiciability area, and this particular "fragment" has generated significant recent debate, with scholars all over the map in their approaches and arguments.³⁰ Preferring vindication by institutional actors, Professor Aziz Huq has argued that individual plaintiffs should not have standing to "enforce a structural constitutional principle redounding to the benefit of an official institution, [when] there is no reason the latter could not enforce that interest itself."³¹ He has expressly reserved the question whether the Court's precedents have in fact permitted institutional plaintiffs to sue,³² and this article both takes that up and finds that the current understanding of case law in fact gives institutional actors too little recourse. Likewise favoring a role for institutional plaintiffs, Professor Jamal Greene has

²⁵ *Id.* at 823, 829-30. See Greene, *supra* note __, at 139 (observing that the Court has permitted congressional standing "only in the narrow circumstances of an injury to a member's personal rather than institutional interests").

²⁶ *Id.* at 814.

²⁷ See Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PENN. L. REV. 1311, 1326 (2014) ("The Supreme Court has never held that the executive has standing to assert an institutional interest in the enforcement of federal law or, relatedly, in protecting any other duties or powers conferred by Article II.").

²⁸ See *id.* at 1327; see also Pozen, *supra* note __, at 22-23 (noting that most scholars believe the President's refusal to enforce an act she has not determined to be unconstitutional would violate the Take Care Clause).

²⁹ Consider, for example, the various efforts to challenge the allegedly unconstitutional composition of the Federal Open Market Committee, a key policy arm of the Federal Reserve System. See *infra* notes __ and accompanying text.

³⁰ See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061 (2015) (observing that "[r]ecent years have witnessed the accelerated fragmentation of standing into a multitude of varied, complexly related subdoctrines").

³¹ Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1514 (2013).

³² *Id.* at 1440 n.16.

advocated a statute or constitutional amendment conferring power on the Court, at the behest of institutional actors, to adjudicate separation-of-powers disputes where the Constitution lays out a rule.³³ He has argued that “[d]ispute over the meaning of constitutional rules is . . . precisely the context that least rewards patience in awaiting a plaintiff who has suffered individualized harm.”³⁴ This article agrees with Greene’s instincts and finds a reading of *Raines* and its progeny that permits some suits by institutional actors to enforce constitutional rules under existing law. Taking an opposing approach, Professor Kent Barnett has contended that individual regulated parties should have standing to raise separation-of-powers claims, which he likens to “procedural challenges for which Article III relaxes or ignores its otherwise mandatory desiderata.”³⁵ He has argued that individual actors are superior to the political branches, which often face partisan and policy-based distractions and impediments to suit.³⁶ This article parts company with Barnett on standing (in places) and demonstrates that there are some cases individual actors cannot reliably bring. Professor Tara Leigh Grove has argued that the enumerated powers granted to Congress and the executive in Articles I and II, respectively, do not encompass the authority to bring suit to protect their turf – thus precluding any institutional standing in this context – and that courts in any event ought to be skeptical of government standing in order to avoid enmeshing the judiciary in battles more suited to the political arena.³⁷ This article finds room in the Constitution for turf-protection and, though appreciating Grove’s skepticism, contends that limited institutional standing is necessary for safeguarding our constitutional structure, particularly in this polarized “Age of Dysfunction.”³⁸

Whether it is a good or bad idea for the federal judiciary to leap into the fray and decide complicated separation-of-powers questions, the Roberts Court has demonstrated enthusiasm for the jumps, carving out a niche for itself in policing the boundaries of the three branches’ authority and opening its doors to, and even inviting, structural challenge. Reliance on individuals to bring these questions before the Court gives rise to considerable problems; the conceit of this article is that existing stumbling blocks to suits by institutional actors can be, and in certain circumstances ought to be, overcome. Part I compares the Rehnquist and Roberts’ Courts approaches to the justiciability of conflicts between coordinate branches and demonstrates that, while the Rehnquist Court shied away from such battles, the Roberts Court has reclaimed a more confident role in determining boundaries in both garden-variety and more nuanced turf disputes. Part II examines the Roberts Court’s reliance on individual claimants,

³³ Greene, *supra* note __, at 146, 152.

³⁴ *Id.* at 152.

³⁵ Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 694 (2016). As discussed *infra*, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), may be read to cast doubt on the present viability of bare procedural interests. See *infra* notes __ and accompanying text.

³⁶ See Barnett, *supra* note __, at 685.

³⁷ See Grove, *supra* note __, at 1355-57 (arguing that neither Congress nor the executive has authority to sue for institutional injuries); Tara Leigh Grove, *Justice Scalia’s Other Standing Legacy*, 84 U. CHI. L. REV. 2243, 2264 (2017) (observing that a central purpose of standing is to “ensur[e] that the courts do not become substitute forums for matters that should be left to the political process”). See generally Tara Leigh Grove, *Government Standing and the Fallacy of the Institutional Injury*, 167 U. PA. L. REV. 611 (2019) (arguing against the concept of institutional injury at all and claiming that institutional actors lack any interest in their institutional prerogatives).

³⁸ Jonathan Zasloff coined this term, and it is perhaps even more apt now than when he described it in 2012. See Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 479 (2012).

born of necessity after Rehnquist-era *Raines* sharply curtailed institutional standing, and demonstrates that dependence on individual litigants instead of institutional litigants to vindicate separation-of-powers principles is difficult to square with principles of standing, relies on a questionable private attorney general mechanism, and gives rise to gaps in the Court’s ability to play its self-appointed part. Finally, in light of the problems presented by exclusive reliance on individual plaintiffs, Part III revisits the question of institutional litigants. This part finds room in existing case law for institutional standing where the gravamen of the claim is that an outside actor is thwarting the exercise of institutional prerogatives set out in the Constitution.

I. The Roberts Court’s Comparative Confidence in Adjudicating Boundary Disputes

Two related justiciability concepts surround the question of which actors are best-suited (if indeed any are well-suited) to bring separation-of-powers questions into the federal courts, the political question doctrine and standing. This section briefly touches upon each before tracing how they have surfaced in the Rehnquist and Roberts Courts in the context of structural litigation. As I will show, the Roberts Court has embraced a more expansive role for the federal judiciary, despite the political question doctrine, without a corresponding reassessment of standing concepts.

A. Diffuse Theoretical Underpinnings of the Political Question Doctrine

As is evident from its most recent outing in the political gerrymandering cases,³⁹ the political question doctrine often sharply divides both the Court and its audience and is by no means in retreat. Chief Justice Marshall first staked out the Court’s role in limiting the other branches to their enumerated powers in *Marbury v. Madison*,⁴⁰ distinguishing between actions that are susceptible of judicial resolution and those that are not.⁴¹ Where executive actors proceed on matters properly within their discretion, “there exists, and can exist, no power to control that discretion.”⁴² The judiciary lacks any role, and “nothing can be more perfectly clear than their acts are only politically examinable.”⁴³ Conversely, where an institutional actor exceeds that discretion, an injured party “has a right to resort to the laws of his country for a remedy.”⁴⁴ Marshall saw it as the judiciary’s province to determine whether an institutional actor was acting *intra vires* or *ultra vires* and proceeded to do precisely that.⁴⁵ Thus, in the course of deciding *Marbury*’s right to the commission, the Court concluded both that Congress had

³⁹ See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). In *Rucho*, a deeply divided Court held that the political question doctrine precluded judicial consideration of political gerrymandering cases because of the absence of “legal standards to limit and direct their decisions.” *Id.* at 2507.

⁴⁰ 5 U.S. (1 Cranch) 137 (1803).

⁴¹ See *id.* at 166-67. See also Elizabeth Earle Beske, *Political Question Disconnects*, 67 AM. U. L. REV. FORUM 35, 37 (2019) (finding antecedents of the political question doctrine in *Marbury*).

⁴² *Id.* at 166. See also *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866) (barring judicial review of a “purely executive and political” presidential action).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *id.* at 176. See also Barkow, *supra* note ___, at 248-49 (noting that Marshall made clear “that it was for the Court to determine whether an issue presented a political question, committed to the discretion of the political branches, or a judicial question, which the Court could answer.”).

exceeded its authority in conferring additional original jurisdiction on the Supreme Court and that federal courts had authority to issue writs of mandamus for executive actors who stepped out of bounds.⁴⁶

While *Marbury* provided logical underpinnings for the classical political question doctrine, competing conceptions emerged over time. Professors Herbert Wechsler, a classicist, and the Alexander Bickel, a prudentialist, famously debated whether the political question doctrine ought to be invoked sparingly⁴⁷ or employed whenever judges believed that expedience and, particularly, concern for institutional legitimacy, might require it.⁴⁸ The Court laid out six factors in *Baker v. Carr*⁴⁹ to guide invocation of the doctrine that confusingly combined features of both views.⁵⁰ At the same time, others questioned the need for the doctrine at all. Professor Louis Henkin wrote an influential article entitled, *Is There a 'Political Question' Doctrine?*,⁵¹ in which he argued that situations deemed “nonjusticiable” simply involved on-the-merits conclusions that the institutional actor was acting within the boundaries of its discretion.⁵² Put differently, and in terms that might have resonated with Chief Justice Marshall, the Court had adjudged that “[t]he act complained of violates no constitutional limitation on that power, either because the Constitution imposes no relevant limitations, or because the action is amply within the limits prescribed.”⁵³

⁴⁶ *Marbury*, 5 U.S. (1 Cranch). at 166,

177. Professor Monaghan argues that *Marbury* entrenches a private rights model of adjudication, delimiting constitutional boundaries only in the course of adjudicating individual rights. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1367 (1973). Certainly, cases like *Georgia v. Stanton*, 73 U.S. 50, 77 (1867), substantiate this insight. In *Stanton*, the Court rejected the State of Georgia’s challenge to enforcement of the Reconstruction Acts, deeming the questions “political” and noting pointedly that the case did not involve the infringement of “private rights or private property.” *Id.* Professor Fallon finds support for a “special function” model in *Marbury* as well, noting that *Marbury*’s conclusion that mandamus lies against federal officers was a gratuitous pronouncement given the Court’s determination that it lacked jurisdiction to hear the case. See Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 15-16 (2003).

⁴⁷ This is the Wechsler view. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959).

⁴⁸ This is the Bickelian counterargument. See Alexander M. Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

⁴⁹ 369 U.S. 186, 217 (1962). The six factors are (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department”; (2) “a lack of judicially discoverable and manageable standards for resolving it”; (3) “the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion”; (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; (5) “an unusual need for unquestioning adherence to a political decision already made”; and (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.*

⁵⁰ See Barkow, *supra* note __, at 265 (classifying first and perhaps second factor as classical and factors three through six as prudential). Scholars have sharply debated the nature and scope of the political question doctrine. See Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1910 (2015); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PENN. L. REV. 97, 99 (1988) (noting broad disagreement over whether the doctrine exists at all or whether it exists but should not).

⁵¹ Louis Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976).

⁵² See *id.* at 601.

⁵³ *Id.*

Over the decades, the Court has vacillated in its embrace of its role as referee. Then-Associate Justice Rehnquist, and later, the Rehnquist Court writ large, gravitated to a more prudentialist view that federal courts ought to have a minimal role in navigating disputes among branches to avoid the unseemliness of wading into an inter-branch dispute, while the Roberts Court has reclaimed a more first-principles view that federal courts have a constitutionally mandated role to play in delineating the outer boundaries of coordinate branch authority.⁵⁴

B. The Elusive Standing Algorithm

The other justiciability concept interposing obstacles to adjudication in the separation-of-powers context, standing, makes the political question doctrine look both simple and uncontroversial.⁵⁵ While all lawyers can recite the simple mantra that standing encompasses the three requirements of injury-in-fact, causation, and redressability, standing has justifiably been described by observers as “incoherent,”⁵⁶ a “mixture of complexity and lack of articulate explanation,”⁵⁷ “radically unsatisfying,”⁵⁸ and a “word game played by secret rules.”⁵⁹

“Standing” as a discrete concept is a newish creation. It is generally (though not invariably) accepted that, before the twentieth century, standing doctrine barely existed.⁶⁰ Most

⁵⁴ See *infra* notes __ and accompanying text.

⁵⁵ See Richard M. Re, *Relative Standing*, 102 *Georgetown L.J.* 1191, 1195 (2014) (“[I]t is hard to find a scholarly treatment of standing that does not remark upon the doctrine’s incoherence.”).

⁵⁶ F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 *CORNELL L. REV.* 275, 276 (2008); see also Susan Bandes, *The Idea of a Case*, 42 *STAN. L. REV.* 227, 228 (1990) (noting that courts and commentators “have failed to formulate a coherent definition of article III’s case requirement”); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 *N.C. L. REV.* 1741, 1742 (1999) (lamenting that he cannot provide students “with a doctrinal algorithm that they can use to predict judicial decisions with a reasonable degree of confidence”).

⁵⁷ Fallon, *supra* note __, at 1063; see also William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 238 (1988) (arguing that “standing determinations are actually determinations on the merits”).

⁵⁸ Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 *BOSTON U. L. REV.* 301, 304 (2002).

⁵⁹ *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

⁶⁰ See Richard H. Fallon *et al.*, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 116 (7th ed. 2015) [hereinafter *HART & WECHSLER*]; Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 *MICH. L. REV.* 163, 179 (1992) (describing emergence of standing “as part and parcel of the heated struggle, in the 1920s and 1930s, within the country and the courts about the constitutional legitimacy of the emerging regulatory state”). See also Fallon, *supra* note __, at 1064 (“Through most of American legal history, standing doctrine as we know it today – as a doctrine regulating who is a proper party to invoke the jurisdiction of a federal court to assert a legal claim or defense . . . – did not exist.”); Ferejohn & Kramer, *supra* note __, at 1009 (“There was no doctrine of standing prior to the middle of the twentieth century.”); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 *U. PA. L. REV.* 1033, 1035 (1968) (noting that historical practice permitted the non-Hohfeldian, or ideological, plaintiff and did not require a Hohfeldian plaintiff whose own rights and interests had been impaired); James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 *UCLA L. REV.* 170, 196-200 (2018) (urging that nineteenth-century federal courts’ practice of fielding claims for noncontentious relief casts doubt on the modern understanding of the case-or-controversy requirement, which treats “case” and “controversy” as functionally identical); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 *U. PA. L. REV.* 309, 350 (describing standing as a creation of the New Deal that turned federal courts away from the public- and private-interest models of the prior century) (1995). Cf. Re, *supra* note __, at 1220 (noting that, because it was not until the twentieth century that nontraditional interests required adaptation of the traditional justiciability models, “modern standing doctrine’s eighteenth century British pedigree (or lack thereof) is largely beside the point”). But see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *MICH. L. REV.* 689, 712, 732-33 (2004)

lawsuits involved either private litigants suing to vindicate private rights – generally those recognized by the common law – or public officials vindicating public rights.⁶¹ Beginning with the New Deal, three phenomena expanded the pool of potential plaintiffs with claims against the government and put pressure on this system. First, the surge of statutes and regulations accompanying the emergence of the administrative state gave rise to large numbers of people with rights and interests not recognized at common law.⁶² Second, awareness of regulatory capture led courts increasingly to recognize that regulatory beneficiaries and competitors, in addition to regulatory targets, might have cognizable legal interests meriting protection.⁶³ Finally, expansion of the protections of the Bill of Rights and their selective incorporation into the Fourteenth Amendment’s Due Process Clause to bind the states led to an increase in litigation to vindicate widely shared constitutional values.⁶⁴ This was fine by the Warren Court, and during the “generous sixties and seventies,” the Supreme Court “broadened dramatically the category of who could challenge governmental action.”⁶⁵

Standing doctrine emerged in reaction as pressures on the system, along with the transition from Warren to Burger to Rehnquist Court, led the Court to adopt a more restrictive view of its role in the process. The Court first coined the term “injury in fact” in a 1970 case that broadened the pool of litigants, permitting suit so long as a plaintiff had suffered an “injury in

(contending that early American courts generally did not permit private plaintiffs to vindicate public rights and that early, consistent concern for proper parties is an antecedent of modern standing doctrine).

⁶¹ See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008); Fallon, *supra* note __, at 1065; Woolhandler & Nelson, *supra* note __, at 712. Cf. Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 101, 110-11 (2009) (describing Court’s mid-twentieth-century acceptance of congressionally-conferred standing on private litigants to vindicate the public interest); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396 (1988) (describing private attorney general model, in addition to private rights model, as a feature accepted at the time of the framers).

⁶² See HART & WECHSLER, *supra* note __, at 116-117; Fallon, *supra* note __, at 1065; Fletcher, *supra* note __, at 225.

⁶³ See Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 785 (2019) (describing how appreciation for risks of agency capture made judicial review of agency action “more attractive to liberals”); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1047 (1997) (describing late-1960s loss of faith in agencies that was not accompanied by a loss of faith in activist government, which led to greater role for courts); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-85 (1975) (noting agency critics’ settled concerns that agencies are beholden to regulated interests at the expense of interests of “consumers, environmentalists, and the poor”); see also Robert J. Pushaw, Jr., *Fortuity and the Article III “Case”*: A Critique of Fletcher’s *The Structure of Standing*, 65 ALA. L. REV. 289, 299-300 (2013) (describing abandonment of the “legal interest” test under the Warren Court in favor of “newfangled,” more “abstract and generalized” injuries); Sunstein, *supra* note __, at 183-84 (describing how perception of regulatory capture gave rise to notion that beneficiaries could suffer actionable legal harm through regulatory nonfeasance); Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1433, 1443 (1988) (observing that the prospect of agency nonfeasance and regulatory capture gave rise to robust role for judicial checks on administrative behavior). See generally *Ass’n of Data Processing Orgs. v. Camp*, 397 U.S. 150, 155 (1970) (approving standing without an explicit statutory grant where litigant was “within the class of persons that the statutory provision was designed to protect”).

⁶⁴ See HART & WECHSLER, *supra* note __, at 116-117; Fallon, *supra* note __, at 1065; Hessick, *supra* note __, at 286-87; Fletcher, *supra* note __, at 225. See generally Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 828-29 (2018) (characterizing Warren Court’s activism as a shift in the Court’s perception of the judicial function).

⁶⁵ Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 G.W. L. REV. 718, 719 (1987).

fact” that was “arguably . . . within the zone of interests” of a regulatory statute.⁶⁶ Two years later, *Sierra Club v. Morton*⁶⁷ clarified that, even if plaintiff was within this zone of statutory interests, “the party seeking review must himself have suffered an injury” so as to preclude “judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences.”⁶⁸ On its heels came *Warth v. Seldin*,⁶⁹ which expressly grounded the new injury-in-fact element in Article III’s “case or controversy” requirement⁷⁰ and emphasized the additional elements of causation and redressability.⁷¹

Development of standing’s intellectual underpinnings followed. In 1983, then-Judge Antonin Scalia published an essay that connected robust enforcement of the standing requirement under Article III to the separation of powers.⁷² Scalia’s central thesis was that standing restricts the unelected federal judiciary to its “undemocratic” role of protecting individuals from injury at the behest of elected majorities and precludes it from the “even more undemocratic” role of venturing into the political process.⁷³ Where plaintiff’s injury is widely shared and not unique, Scalia contended, his sole recourse is to persuade like-minded actors to vote for his cause through ordinary political means.⁷⁴

The Court embraced a separation-of-powers rationale for standing in *Allen v. Wright*⁷⁵ and adopted Scalia’s vision wholesale in *Lujan v. Defenders of Wildlife*.⁷⁶ In *Allen*, the Court noted that “the idea of separation of powers that underlies standing doctrine” prevents courts

⁶⁶ *Data Processing*, 397 U.S. at 152-53. *Data Processing* was the first case to employ “injury in fact” in the standing context. See Magill, *supra* note __, at 129. Sunstein unsparingly criticizes *Data Processing* for leaving “obscure” standing’s connection to Article III and for inadequately explaining and grounding its approach. See Sunstein, *supra* note __, at 186. Although the case supplied the now-familiar restrictive element with a name, the zone of interests test initially expanded the ranks of plaintiffs eligible to file suit. See Hessick, *supra* note __, at 294-95; Ferejohn & Kramer, *supra* note __, at 1010; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 888-89 (1983). Caleb Nelson has argued that *Data Processing* is widely misunderstood to confer remedial rights on anyone who satisfies the Court’s test; he argues instead that the loose standard articulated by the Court was a preliminary screening mechanism that was distinct from “the merits”—that is, whether plaintiff had a cause action. See Nelson, *supra* note __, at 709-10, 763.

⁶⁷ 405 U.S. 727 (1972).

⁶⁸ *Id.* at 738, 740.

⁶⁹ 422 U.S. 490 (1975).

⁷⁰ See *id.* at 498-99.

⁷¹ See *id.* at 505-07. Under Article III’s “case or controversy” requirement, it is canonically accepted that federal courts resolve abstract legal questions only as a “necessary byproduct” of actual disputes between two parties. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 300 (1979); see also Henry P. Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363, 1366 (1973) (noting that the Court’s opinions reflect the idea that “judicial intervention should occur only when unavoidably necessary”).

⁷² Scalia, *supra* note __, at 894-97. For an analysis of Justice Scalia’s imprint on standing doctrine, see generally James E. Pfander, *Scalia’s Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEG. STUD. 85 (2017). Pfander finds that, while he lost a few skirmishes, Justice Scalia “broadly succeeded in re-making the law of standing along the lines sketched in his 1983 essay.” *Id.* at 98. Pfander notes that Scalia found little textual hook for his standing concept, anchoring it in Article III’s case-or-controversy requirement “(for want of a better vehicle),” and made little effort to justify his conception of standing by reference to historical practice. See *id.* at 90.

⁷³ *Id.* at 894.

⁷⁴ See *id.*

⁷⁵ 468 U.S. 737 (1984).

⁷⁶ 504 U.S. 555 (1992).

from acting as “virtually continuing monitors of the wisdom and soundness of Executive action.”⁷⁷ In *Lujan*, the Court denied standing to environmental groups suing under the Endangered Species Act’s citizen suit provision, again announcing that the courts would not litigate “the undifferentiated public interest in executive officers’ compliance with the law.”⁷⁸ The Court reminded that, notwithstanding congressional authorization, the Constitution required that plaintiffs’ claimed injury be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”⁷⁹

Individual cases over the next decades revealed great rifts in the Justices’ approaches to standing, particularly where widely shared grievances are concerned. In *FEC v. Akins*,⁸⁰ the Court held that a group of voters had standing to challenge the FEC’s determination that the American Israel Public Affairs Committee (AIPAC) is not a “political committee” required to make membership and financial disclosures.⁸¹ Justice Breyer, writing for the Court, found that “the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes.”⁸² Justice Scalia dissented bitterly, complaining that *Akins*’ injury was undifferentiated from that of any other voter.⁸³ In *Massachusetts v. EPA*, a 5-4 Court approved standing for Massachusetts as owner of coastal property to challenge the EPA’s “abdication” of enforcement authority under the Clean Air Act.⁸⁴ Chief Justice Roberts, in dissent, argued that the threatened injury, global warming, “may ultimately affect nearly everyone on the planet,” and its very concept “seems inconsistent with [the] particularization requirement.”⁸⁵

⁷⁷ 468 U.S. at 759-60; *see also id.* at 752 (stating that standing “is built on a single basic idea – the idea of separation of powers”). As subsequent cases would reflect, the “single basic idea” of separation of powers proved elusive as the Justices appeared to embrace varying ideas about what it entailed. *See generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008) (identifying three separate and distinct separation-of-powers rationales underlying standing and arguing that existing doctrine serves none of them well). Elliott recounts that standing is variously justified as [1] promoting concrete adversity between litigants with a personal stake in the case, [2] diverting from the courts cases involving generalized grievances better resolved through the political system, and [3] protecting the executive branch against incursions on its authority to enforce the law. *See id.* at 468.

⁷⁸ *See Lujan*, 504 U.S. at 577.

⁷⁹ *Id.* at 560 (citations omitted).

⁸⁰ 524 U.S. 11 (1998).

⁸¹ *See id.* at 13.

⁸² *Id.* at 24.

⁸³ *See id.* at 36 (Scalia, J., dissenting).

⁸⁴ 549 U.S. 497, 504 (2007).

⁸⁵ *Id.* at 535, 541 (Roberts, C.J., dissenting). Professor Richard Fallon has noted standing’s “accelerated fragmentation . . . into a multitude of varied, complexly related subdoctrines.” Fallon, *supra* note __, at 1061. Judge Fletcher has described standing as “a set of loosely linked proto-doctrines.” William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 278 (2013). Professor Richard Re has intriguingly argued that many of these disparate results can be rationalized under the construct of relative standing. *See generally* Re, *supra* note __. Re notes that the Court frequently loosens the requirements of standing where no superior plaintiffs exist to the party before the court and raises the bar where the plaintiff, though injured, has an inferior claim to that of other parties. *See, e.g., id.* at 1224 (noting that the Court approved standing for a white defendant to challenge a prosecutor’s use of peremptory challenges to remove black venirepersons because no other party was better situated to raise the claim).

Most recently, the Court has strengthened its supervision over Congress’s ability to create rights, the violation of which gives rise to injury in fact. In *Spokeo, Inc. v. Robins*⁸⁶ and *TransUnion LLC v. Ramirez*,⁸⁷ the Court evaluated claimed violations of the Fair Credit Reporting Act of 1970, which requires consumer reporting agencies to employ “reasonable procedures to assure maximum possible accuracy” of consumer reports and authorizes liability for willful failure to comply.⁸⁸ *Spokeo* found that, despite the broad citizen suit provision, legally sufficient injury – either tangible or intangible – must “actually exist.”⁸⁹ The Court remanded plaintiff’s claim that an online information aggregator had published inaccurate information about him in violation of the Act so the Ninth Circuit could ponder whether his injury, concededly particularized, was also “concrete.”⁹⁰ Not all errors, the Court reasoned, were “real” harm; a misprinted zip code, for example, was almost surely insufficient to support a federal lawsuit.⁹¹ *Spokeo* reaffirmed that a plaintiff must come forward with a high likelihood of something that looks like harm-in-the-harmful sense, even where his injury is unique to him and even where Congress has broadly authorized the suit. *TransUnion* entrenched this judicial supervision. In *TransUnion*, the Court reaffirmed *Spokeo*’s holding and approach, holding that a class of litigants whom creditors had erroneously told third parties were on a terror watchlist had standing to sue, while those whose status had not been disclosed to third parties could not.⁹²

Spokeo and *TransUnion* offer an approach to the identification of harm that places the judiciary in the driver’s seat.⁹³ At issue were intangible injuries, not good, old-fashioned physical and economic harms.⁹⁴ To assess whether statutory violations give rise to concrete harm, the Court instructed that lower courts should first look to historical analogues, as harms that have traditionally been understood to supply a basis for a lawsuit at common law are likely concrete.⁹⁵ Second, the court should tip its hat, but not defer, to the judgment of Congress, for its views are “instructive and important.”⁹⁶ Finally, the Court’s *ipse dixit* about the harmlessness of

⁸⁶ 136 S. Ct. 1540 (2016).

⁸⁷ 141 S. Ct. 2190 (2021).

⁸⁸ 15 U.S.C. § 1681e(b), n(a).

⁸⁹ 136 S. Ct. at 1548.

⁹⁰ *Id.* at 1548-49.

⁹¹ See *Spokeo*, 136 S. Ct. at 1550. Commentators have criticized the conclusion that a misprinted zip code inflicts no injury. See, e.g., Lauren E. Willis, *Spokeo Misspeaks*, 50 LOY. OF L.A. L. REV. 233, 241-42 (2017) (citing studies that an erroneous zip code can affect job prospects, access to credit, insurance rates, and voter eligibility).

⁹² See *TransUnion*, 141 S. Ct. 2208-10 (2021).

⁹³ Elsewhere, I have heavily criticized this approach. See generally Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. ___ (forthcoming 2022).

⁹⁴ See *Spokeo*, 136 S. Ct. at 1549. See also Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2325 (2018) (“The tangible/intangible distinction, thus understood, creates two tiers of harm: one category of ‘obvious’ harm and one category of harm, the reality of which requires a more complex inquiry.”). Bayefsky aptly criticizes this tidy dichotomy by noting that physical and economic harms have not invariably given rise to an actionable claim in the past. See *id.* at 2327-29. For an in-depth and critical discussion of *Spokeo*, see William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 226-27 (2017) (concluding that the Court’s effort to “identify the subset of statutory rights that vaguely resemble the common law” is “a misstep”).

⁹⁵ See *id.* The Court cited by way of example the *Vermont Agency* case approving of standing for *qui tam* plaintiffs, which relied in part on the device’s 700-year-old pedigree. See *id.* (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)).

⁹⁶ *Id.* The Court left the status of purely procedural rights in some doubt, reaffirming that Congress has the ability to create new rights, violations of which may give rise to standing, but qualifying that these must be connected to a risk

zip code errors suggests a considerable role for common sense.⁹⁷ The *TransUnion* Court doubled down, again directing courts to compare novel assertions of intangible injury to common law analogues and, in its application, concluding that some deviations from the common law might give rise to actionable harm,⁹⁸ while others surely would not.⁹⁹ The Court offered no guiding principle by which to distinguish actionable from nonactionable harm, thus again vesting the lower courts with considerable judicial discretion in policing boundaries. Rather than rationalizing and clarifying a doctrine already subject to criticism, then, the Court's most recent moves have engendered more confusion, as several lower court judges lamented post-*Spokeo*.¹⁰⁰

C. Justiciability, Separation of Powers, and the Rehnquist Court

We are left with two different doctrines, each of which is subject to criticism, each of which has over time enjoyed varying reception and diverse justifications, and each of which can be deployed to keep certain disputes out of the federal courts. Associate and then Chief Justice Rehnquist was very wary of a role for federal courts in the adjudication of disputes where coordinate branches were feature players, and he deployed, or attempted to deploy, both the political question doctrine and standing in order to circumscribe institutional players' authority to bring such cases. A product of the Watergate era,¹⁰¹ Rehnquist embraced a prudential approach that focused on the unseemliness of federal courts jumping into the fray.¹⁰² In the Burger Court, Rehnquist's view that the federal courts ought to stand down and let vying branches work it out

of *underlying* harm. That harm, presumably, is harm-in-the-traditional sense. *See id.* This now-required nexus between a prophylactic procedural right and the risk of more conventional harm it seeks to prevent will narrow the category of actionable procedural rights and may give rise to a more robust redressability inquiry in the procedural context going forward. *Cf.* Barnett, *supra* note ___, at 694-96 (arguing, pre-*Spokeo*, that individual standing to bring separation-of-powers claims is analogous to "procedural challenges for which Article III relaxes or ignores its otherwise mandatory desiderata").

⁹⁷ *See Spokeo*, 136 S. Ct. at 1550. *See also* Yeager v. Ocwen Loan Servicing, LLC, 237 F. Supp. 3d 1211, 1217 (M.D. Ala. 2017) (noting role of common sense in *Spokeo* inquiry and surmising "one should not be distracted by minnows when the aim of the statute is trout").

⁹⁸ *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209 (2021) (rejecting *TransUnion*'s argument that plaintiffs had not suffered actionable harm because the inclusion of their names on the terror watchlist was "not literally false," even though falsity was a key requirement of common-law defamation).

⁹⁹ *See id.* at 2209-10 (concluding that plaintiffs who could not establish disclosure of their watchlist status to third parties could not establish actionable harm because "[p]ublication is essential to liability" in a common-law defamation suit).

¹⁰⁰ *See, e.g.,* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1121 (11th Cir. 2021) (Newsom, J., concurring) (arguing, after *Spokeo*, that "our current Article III standing doctrine can't be correct—as a matter of text, history, or logic"); Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 957-58 (11th Cir. 2020) (*en banc*) (Jordan, J., dissenting) (noting "how far standing doctrine has drifted from its beginnings and from constitutional first principles").

¹⁰¹ Rehnquist served as head of the Justice Department's Office of Legal Counsel in the Nixon Administration from January 1969 to October 1971. Joan Biskupic described Rehnquist as a "political insider whose service in the Nixon White House helped shape his hard-right outlook." Joan Biskupic, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 46 (2019).

¹⁰² Judge Bybee and Tuan Samahon have likened Rehnquist's separation-of-powers jurisprudence to the riddle of the Sphinx, "a difficult creature to characterize, arguably evolving over time" and culminating in a late stage that lacked any unifying principle. Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1736 (2006).

through the political process initially failed to gain traction.¹⁰³ Over time, though, and as personnel changed, Rehnquist's views found a steady cohort.¹⁰⁴

a. Political Question Cases in the Rehnquist Era

Associate Justice Rehnquist joined a Court in 1972 that was relatively comfortable navigating interbranch disputes. In the waning days of the Warren Court, before Rehnquist's tenure, the Court's first brush with the political question doctrine in a case involving the actions of a coordinate branch rejected application of the doctrine to preclude a judicial role.¹⁰⁵ Adam Clayton Powell, elected to Congress, challenged the House's refusal to allow him to take his seat due to alleged financial improprieties.¹⁰⁶ The House had asserted the authority of each house of Congress to "Judge the . . . Qualifications of its own Members."¹⁰⁷ The district court¹⁰⁸ and the court of appeals¹⁰⁹ invoked the political question doctrine to preclude the exercise of jurisdiction, and the Supreme Court reversed in a 7-1 decision.¹¹⁰ Carefully examining English precedent, records of the convention, and post-ratification history, the Court concluded that the Constitution authorized the House to judge only those qualifications that it specifically enumerated in Article I, section 2 and did not confer on Congress discretion to exclude a member for any other reason.¹¹¹ While *Powell* took the six *Baker v. Carr* factors as its point of departure, the opinion devoted over thirty pages to analysis of whether the Constitution had committed the matter to congressional discretion¹¹² and relegated the more prudential, Bickelian factors to a scant two paragraphs under the subheading, "Other Considerations."¹¹³ The Court firmly rejected the Speaker's contention that it ought to stay its hand because judicial resolution would "produce 'a potentially embarrassing confrontation between coordinate branches' of the Federal Government."¹¹⁴ Its decision "require[d] no more than an interpretation of the Constitution."¹¹⁵

¹⁰³ See *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring in the judgment). Then Associate-Justice Rehnquist commanded three votes in *Goldwater*, not the four additional votes he needed. See *infra* notes __ and accompanying text.

¹⁰⁴ See *Raines v. Byrd*, 521 U.S. 811 (1997). See *infra* notes __ and accompanying text.

¹⁰⁵ See *Powell v. McCormack*, 395 U.S. 486 (1969).

¹⁰⁶ See *id.* at 490.

¹⁰⁷ U.S. Const. art. I, § 5.

¹⁰⁸ *Powell v. McCormack*, 266 F. Supp. 354, 359-60 (D.D.C. 1967).

¹⁰⁹ *Powell v. McCormack*, 395 F.2d 577, 593-96 (D.C. Cir. 1968).

¹¹⁰ *Powell*, 395 U.S. at 549-50. Justice Abe Fortas, himself embroiled in scandal, did not participate in the case and resigned the month before it issued. See *Justice's Resignation First Under Impeachment Threat*, in *CQ ALMANAC* 1969, at 136-37 (25th ed., 1970), <http://library.cqpress.com/cqalmanac/cqal69-1247815>.

¹¹¹ See *id.* at 550.

¹¹² See *id.* at 518-548.

¹¹³ *Id.* at 548-49. This led some commentators to opine that the prudential factors had receded in importance. See Barkow, *supra* note __, at 269 (observing that "[p]rudential factors had no bearing on the Court's decision," which left "some to question whether that strand of the doctrine had died completely"); Tushnet, *supra* note __, at 1213 n.51 (noting that "it would not have been difficult to say that deciding the merits of the question presented in *Powell v. McCormack* would express a lack of respect for the House of Representatives, and yet the Court did not do so").

¹¹⁴ *Powell*, 396 U.S. at 548.

¹¹⁵ *Id.*

A divided Burger Court muddied these waters in *Goldwater v. Carter*,¹¹⁶ in which then-Associate Justice Rehnquist articulated a starkly different view of the judicial function. In 1978, President Carter announced that the United States would recognize the People’s Republic of China as the sole government of China and withdraw from its Mutual Defense Treaty with Taiwan.¹¹⁷ Senator Barry Goldwater and fourteen other members of Congress filed suit in district court seeking declaratory and injunctive relief to prevent the President from terminating the treaty without congressional consent.¹¹⁸ The district court ruled that the President could not unilaterally terminate a treaty without the advice and consent of the Senate or the approval of both houses of Congress.¹¹⁹ The D.C. Circuit, sitting *en banc*, reversed.¹²⁰ Like the district court, the *en banc* majority found the matter justiciable, but it concluded that the Constitution did not require the President to involve Congress in the withdrawal from a treaty.¹²¹ The Supreme Court vacated the D.C. Circuit’s opinion in a terse, two-sentence order and remanded to the district court with instructions to dismiss the complaint.¹²² In the accompanying separate opinions, the Court split 4-4 on whether the case presented a political question.¹²³

Then-Associate Justice Rehnquist wrote an opinion for himself and three colleagues expressing the view that the case was “political,” and thus “nonjusticiable, because it involve[d] 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.”¹²⁴ He made much of the Constitution’s silence regarding treaty abrogation and found that, where the Constitution did not spell the answer out, the judiciary lacked manageable standards.¹²⁵ He saw no special role for the Court to “settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests.”¹²⁶ Although Rehnquist found no fifth vote, his vision of the political question doctrine and the judicial role deviated sharply from the confident approach taken in *Powell*. Two coordinate branches had squared off over whether the Constitution permitted one of them to act without involving the other, and

¹¹⁶ 444 U.S. 996 (1979).

¹¹⁷ See *Goldwater v. Carter*, 617 F.2d 697, 700 (D.C. Cir. 1979) (*en banc*).

¹¹⁸ See Complaint for Declaratory and Injunctive Relief at 1-2, *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979) (Civ. A. No. 78-2412). Although the Supreme Court did not appear to question the Senators’ standing to bring the suit, there was contemporaneous discomfort with the courts having a role in resolving the dispute. See, e.g., 125 CONG. REC. 32527 (1979) (statement of Sen. Javits) (stating that he was “very unhappy . . . to see the procedures of the Senate and the relationships between the Senate and the President under the Constitution determined by a court”). See generally Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 242-43 (1981) (describing judges’ “acute[]” awareness of the “the problems inherent in these suits.”).

¹¹⁹ *Goldwater v. Carter*, 481 F. Supp. 949, 965 (D.D.C. 1979).

¹²⁰ See *Goldwater*, 617 F.2d at 709.

¹²¹ See *id.*

¹²² 444 U.S. 996, 996 (1979).

¹²³ See *id.* Justice Marshall simply concurred in the result, joining no other opinions, and thus did not show his hand.

¹²⁴ *Id.* at 1002 (Rehnquist, J., concurring in the judgment).

¹²⁵ See *id.* at 1003 (Rehnquist, J., concurring in the judgment).

¹²⁶ *Id.* at 1004 (Rehnquist, J., concurring in the judgment).

Rehnquist, with three colleagues, was prepared to throw up his hands and declare the federal judiciary powerless to resolve the dispute.¹²⁷

He faced formidable counterargument. On the other side, Justice Powell¹²⁸ sharply denied the case involved a nonjusticiable political question.¹²⁹ Powell argued that the case “concern[ed] only the constitutional division of power between Congress and the President” and “only requires us to apply normal principles of interpretation.”¹³⁰ He pointed to other separation-of-powers cases, like *Powell*, in which the Court had manifested “willingness . . . to decide whether one branch of our Government has impinged upon the power of another” and saw no reason to deviate from that course.¹³¹ That the Constitution’s text did not clearly resolve the matter was of no moment; it was the Court’s role to engage in “interstitial” analysis, an ordinary method of constitutional interpretation.¹³² Justice Blackmun, joined by Justice White, dissented on the grounds that he wanted to hear the case, thus agreeing that the case was justiciable.¹³³ Justice Brennan, in dissent, charged Justice Rehnquist with “profoundly misapprehend[ing]” the political question doctrine, which had no application to “the antecedent question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power.”¹³⁴

Although Rehnquist’s *Goldwater* rallying cry lost traction over the next couple of cases,¹³⁵ he was able to set aside this role of boundary cop, writing as Chief, in *Nixon v. United*

¹²⁷ Professor Harlan Cohen colorfully noted that Rehnquist “scrunch[ed] all six [of the *Baker* factors] into a ball, finding that the issue was left to the other branches of government in part because there was no clear constitutional answer and in part because foreign relations and national security raised particular concerns about policy space, embarrassment, finality, and speaking with one voice.” Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 13 (2017).

¹²⁸ Justice Powell had supplied the fifth vote to vacate on the basis that the matter was unripe before the Senate voted on a resolution disapproving the President’s actions. *See Goldwater*, 444 U.S. at 996, 998 (Powell, J., concurring).

¹²⁹ *See id.* at 999 (Powell, J., concurring).

¹³⁰ *Id.* (Powell, J., concurring).

¹³¹ *Id.* at 1001 (Powell, J., concurring).

¹³² *Id.* at 1000 (Powell, J., concurring).

¹³³ *Id.* at 1006 (Blackmun, J., dissenting in part).

¹³⁴ *Id.* at 1006-07 (Brennan, J., dissenting).

¹³⁵ The next litigants to cry “political question” in the separation-of-powers sphere garnered not a single vote for nonjusticiability. In the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1), Congress had authorized the Immigration and Naturalization Services (INS) to suspend deportation proceedings upon a showing of “extreme hardship” but required the attorney general to submit a report of the suspension to Congress, which either house had the power to override. *See id.* § 1254(c)(2). Jagdish Rai Chadha obtained such a suspension, and the House passed a resolution vetoing it and ordering his deportation. He appealed the order to the Ninth Circuit, which found the legislative veto provision unconstitutional and suspended Chadha’s deportation, 634 F.2d 408, 418-19 (9th Cir. 1980), and the Supreme Court affirmed. 462 U.S. 919 (1983). The 7-2 majority acknowledged that the Constitution confers plenary authority on Congress over naturalization in Article I but firmly claimed its role in keeping Congress within its constitutional boundaries. *See id.* at 941-43. “[T]he presence of constitutional issues with significant political overtones,” the Court reasoned, neither triggers the political question doctrine nor permits a court to evade its responsibility to ascertain whether a coordinate branch has overstepped its authority. *Id.* at 942-43. Justice White and then-Associate Justice Rehnquist dissented on the merits but had no quibble with the Court’s determination that the matter was justiciable. *See id.* at 1002 (White, J., dissenting), 1013-16 (Rehnquist, J., dissenting). *See also* *Unnited States v. Munoz-Flores*, 495 U.S. 385 (1990) (“[T]he fact that one institution of Government has

States.¹³⁶ In *Nixon*, the Court held that the political question doctrine precluded jurisdiction over a challenge to the Senate’s impeachment proceedings of a federal judge.¹³⁷ Admittedly, *Nixon* was “perhaps the most powerful case” for application of the doctrine given the involvement of a federal judge,¹³⁸ and the result was unanimous. Walter Nixon, convicted of bribery, filed suit in federal court challenging a Senate rule that permitted a Senate committee, rather than the full Senate, to hold evidentiary hearings in his impeachment trial.¹³⁹ Nixon argued that the Senate rule violated the Senate’s obligation under Article I, section 3 to “try” all impeachments.¹⁴⁰ The Court’s various opinions reflected sharp divisions on the approach to the political question doctrine, but significantly, the Chief again favored the most limited-to-nonexistent role for federal courts. He concluded that the Constitution had given the Senate “sole” power to try impeachments, the word “try” was too vague to give rise to judicially manageable standards, and judicial involvement of any kind in impeachment proceedings was inconsistent with the constitutional scheme.¹⁴¹ Justice Souter, concurring in the judgment, sought to reserve a role for the judiciary in the event the Senate exceeded its discretion, for example by adjudicating impeachments via coin toss.¹⁴² The Chief’s opinion removed the topic completely from the judicial purview, rejecting even that outer boundary patrol role. *Nixon* was the Rehnquist Court’s last pronouncement on the political question doctrine.

The political question doctrine under the Rehnquist Court reflects a steady push and pull amongst its members between the belief in a Court singularly suited to patrol the outer boundaries of coordinate branch power and the far more reticent view, championed by Rehnquist himself, that coordinate branches are best left to their own devices. Rehnquist’s proffered *Goldwater* approach signaled his belief that, where the Constitution itself provides no clear answer, the judiciary is ill-suited to step into the fray. That view commanded insufficient votes in 1979, but by 1993, the idea that, at least in certain cases, the judiciary ought to have no role in delineating the outermost boundaries of congressional authority – even in the face of Justice Souter’s hypothesized dereliction of constitutional duty – found an additional five. The Court’s enthusiasm for playing the role as arbiter-in-chief, delineator of lines, left the nineties in some doubt, and lower courts took heed. After *Nixon*, the Supreme Court avoided the political question doctrine altogether for nearly two decades, rejecting petitions for certiorari even as lower courts increasingly invoked it.¹⁴³

mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy. . . .”)

¹³⁶ 506 U.S. 224 (1993).

¹³⁷ *See id.* at 237-38.

¹³⁸ Barkow, *supra* note ___, at 273.

¹³⁹ *See Nixon*, 506 U.S. at 227-28.

¹⁴⁰ *See id.* at 228.

¹⁴¹ *See id.* at 229-35. Justice White, joined by Justice Blackmun, wrote an opinion reminiscent of the Henkin approach. He would have reached the merits but concluded that the Senate had not exceeded its constitutionally-conferred discretion in trying Nixon. *See id.* at 239 (White, J., concurring in the judgment).

¹⁴² *See id.* at 253-54 (Souter, J., concurring in the judgment).

¹⁴³ *See, e.g.*, Taylor v. Kellogg, Brown & Root Servs., Inc., 658 F.3d 402, 407, 411-12 (4th Cir. 2011) (holding that political question doctrine precluded a serviceman’s suit against a private business for injuries sustained on base); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011)

b. Standing in Separation-of-Powers Cases

The Rehnquist Court's one and only direct pronouncement on institutional standing, *Raines v. Byrd*,¹⁴⁴ was a doozy, and it continues to reverberate and shape the landscape today. Understanding *Raines* requires some context.

The Court first encountered legislative standing in 1939 in *Coleman v. Miller*.¹⁴⁵ *Raines* begrudgingly preserved *Coleman*,¹⁴⁶ so it is an important first piece of the puzzle. In *Coleman*, the Kansas senate had split 20-20 on a vote to ratify the Child Labor Amendment to the U.S. Constitution.¹⁴⁷ The lieutenant governor had provided a tie-breaking vote to ratify the amendment, and the twenty senators who had voted against ratification filed suit in state court challenging the lieutenant governor's right to participate.¹⁴⁸ The state supreme court upheld the tie-breaking vote, and the U.S. Supreme Court granted certiorari.¹⁴⁹ The Court found the senators had standing because their votes "would have been sufficient to defeat ratification," and, having not led to that defeat, thus had been "held for naught."¹⁵⁰ The Court determined that the

(invoking political question doctrine to avoid resolving Federal Tort Claims case after bombing of Sudanese factory); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262-1264 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007) (holding that political question doctrine precludes claims against United States for support of 1970 Chilean coup); *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007) (using political question doctrine to avoid resolving claim relating to depopulation of island to create Diego Garcia military base); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1031 (10th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) (applying political question doctrine to preclude plaintiffs' challenge to the Colorado Airspace Initiative); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir.), *cert. denied*, 534 U.S. 1039 (2001) (invoking political question doctrine to avoid deciding what is a "treaty" requiring Senate ratification); *New Jersey v. United States*, 91 F.3d 463, 469-70 (3d Cir. 1996) (using political question doctrine to avoid resolving state to recover costs incurred in educating and incarcerating illegal immigrants). *See generally* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1925 (2015) (observing that lower courts "have applied this doctrine especially generously, even in the context of statutory interpretation and international law"); Mulhern, *supra* note __, at 106-07 (noting that lower courts have invoked the doctrine to avoid resolving divisive issues and that the Supreme Court avoided entering the fray by denying certiorari).

¹⁴⁴ 521 U.S. 811 (1997).

¹⁴⁵ 307 U.S. 433 (1939).

¹⁴⁶ *See Raines*, 521 U.S. at 823-24.

¹⁴⁷ *See id.* at 436.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* at 437. The "Opinion of the Court" of Chief Justice Hughes commanded only two votes and rejected the state senators' lawsuit on other grounds. Justice Frankfurter wrote a separate opinion concurring in the judgment in which he, joined by three justices, contended that the state legislators lacked standing. *See id.* at 469-70 (Opinion of Frankfurter, J.). Because the portion of *Coleman* addressing standing did not command a majority, one commentator opined that "*Coleman's* authority as precedent for modern congressional standing cases is problematic." R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?* 62 NOTRE DAME L. REV. 1, 4 (1986). Subsequent to Dessem's article, the Supreme Court put Chief Justice Hughes' opinion on more solid footing in *Raines v. Byrd*, 521 U.S. 811, 822 (1997), and again in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2665 n.13 (2015).

¹⁵⁰ *Id.* at 438. Tara Leigh Grove has argued a different interpretation of *Coleman*. *See* Tara Leigh Grove, *Government Standing*, *supra* note __. Noting that the institutional plaintiffs filed their case in state court, she says "*Coleman* should be understood as a case in which the Supreme Court applied a now-outdated rule of appellate standing to hear a federal constitutional challenge from a state court." *Id.* at 651. Grove cites Frankfurter's concurring opinion, in which he contends that the state legislators would not have had Article III standing in state court and thus should not have had standing on appeal and claims that he articulated what would become the modern rule. *See id.* at 654-55; *see also* William A. Fletcher, *The "Case or Controversy" Requirement in State Court*

senators' interest in "maintaining the effectiveness of their votes" was "plain, direct and adequate"¹⁵¹ and that the case was no "mere intra-parliamentary controversy."¹⁵² Subsequent courts have invoked aspects of *Coleman* to various ends, so there are several features worth noting. First, the votes at issue actually had been cast and the lieutenant governor's vote voided them entirely.¹⁵³ Second, the senate itself did not sue in an institutional capacity. Third, all twenty affected senators sued, and their collected votes, if counted and not subject to the tie break, would have changed the outcome.¹⁵⁴ Finally, the twenty senators' dispute was not with fellow legislators but with the action of an executive actor.¹⁵⁵ The case thus was not an effort to export an intra-senate dispute into the judicial branch.

The Supreme Court's initial encounters with congressional standing after *Coleman* generally found legislator standing unproblematic. The Court saw no justiciability impediment in Adam Clayton Powell, Jr.'s challenge to the House resolution denying him a seat, which is unsurprising given Powell's obvious claim to individual, not institutional, harm.¹⁵⁶ In *Buckley v. Valeo*,¹⁵⁷ plaintiffs challenging the Federal Election Campaign Act of 1971 included a presidential candidate, a sitting U.S. Senator, a potential contributor, and several state parties.¹⁵⁸ Without elaboration, the Court satisfied itself that "at least some of" them had standing, citing *Coleman* amongst other cases.¹⁵⁹ As focused as it was on the justiciability question in *Goldwater*

Adjudication of Federal Questions, 78 CALIF. L. REV. 263, 275-76 (1990) (claiming that Frankfurter's *Coleman* concurrence established the principle that the Supreme Court is bound by Article III even when it fields appeals from state courts that are not). There is definitely room for Grove's argument given the Hughes majority's contrast between *Leser v. Garnett*, 258 U.S. 130 (1922), where the Court reviewed on appeal from state court a challenge to the ratification of an amendment, and *Fairchild v. Hughes*, 258 U.S. 126 (1922), where the Court refused to review a New York voter's federal challenge to ratification of an amendment on the basis that he asserted only a generalized grievance. *Coleman*, 307 U.S. at 440-41. However, Hughes also was at pains to note that the senators had a "plain, direct, and adequate interest in maintaining the effectiveness of their votes," *id.* at 438, and he observed that this interest was more "impressive" than the interests of the litigants in *Leser*. *Id.* at 441. Whether or not *Leser* meant ability to sue in state court automatically conferred standing on appeal to the Supreme Court, then, the Hughes majority arguably found an interest sufficient to satisfy Article III in the invalidation of the senators' votes. See generally John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J. L. & POL. 103, 122 n. 73 (2015) (noting that at time of *Coleman*, "as now, the Court was not always rigorous in distinguishing between constitutional limits on jurisdiction, statutory limits on jurisdiction, and causes of action").

¹⁵¹ *Id.*

¹⁵² *Id.* at 441.

¹⁵³ See *id.* at 438.

¹⁵⁴ See *id.* Matthew Hall has argued that, any *one* of these senators was deprived of the right to have his vote counted and thus even a single senator should have had standing. See Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 30 (2016). As explained *infra*, requiring an outcome-determinative number of participants minimizes the risk of interference in the political process.

¹⁵⁵ See *id.* at 436.

¹⁵⁶ 395 U.S. 486, 517, 547-48 (1969) (concluding that Powell had sought appropriate relief and that the political question doctrine did not preclude review). See also Hall, *supra* note ___, at 24-25 (characterizing *Powell* as a conventional individual standing case).

¹⁵⁷ 424 U.S. 1 (1976).

¹⁵⁸ See *id.* at 7-8.

¹⁵⁹ *Id.* at 12 & n.10. That the Court cited *Coleman* at least *suggests* that the presence of legislators reinforced the claim to standing, but it does not prove it outright.

v. Carter, the Court did not consider standing.¹⁶⁰ In *INS v. Chadha*,¹⁶¹ the Court found that the intervention of the two Houses of Congress as “adverse parties” helped render the dispute justiciable given the INS’s agreement with Mr. Chadha that the legislative veto provision was unconstitutional.¹⁶² In *Bowsher v. Synar*,¹⁶³ the presence of the National Treasury Employees Union, whose standing on behalf of its members was uncontroversial, allowed the Court to bypass the question whether members of Congress also had standing to challenge the Balanced Budget and Emergency Deficit Control Act of 1985.¹⁶⁴

*Raines v. Byrd*¹⁶⁵ represented the Supreme Court’s first direct reencounter with legislative standing since 1939. *Raines* involved a challenge by six members of Congress to the Line Item Veto Act,¹⁶⁶ which enabled the President to “cancel” a spending and tax benefit measure after signing it into law if the President determined that doing so would reduce the federal budget deficit without impairing the national interest.¹⁶⁷ Plaintiffs, four Senators and two members of the House who had voted against the bill, filed suit the day after its passage in district court seeking declaratory and injunctive relief that the line-item veto violated Article I of the Constitution.¹⁶⁸ The district court found their claim of diluted voting power sufficient to confer

¹⁶⁰ See McGowan, *supra* note __, at 256 (observing that the Supreme Court “made no use of the term” standing in its decision, which the author thought suggested that use of standing as a mechanism for judicial restraint “may have passed insofar as these lawsuits are concerned”).

¹⁶¹ 462 U.S. 919 (1983).

¹⁶² *See id.* at 930-31 & n.6.

¹⁶³ 478 U.S. 714 (1986).

¹⁶⁴ *See id.* at 721. The D.C. Circuit faced the lion’s share of suits by members of Congress in the 1970s and 1980s and spent two decades shaping an approach without intervention from on high. The court extended the definition of injury beyond the vote cancellation recognized in *Coleman* to process-based defects and initially held even that individual legislators could have standing to raise institutional claims. In *Kennedy v. Sampson*, Senator Kennedy filed suit against the Administrator of the General Services Administration seeking a declaration that President Nixon’s attempted pocket veto of a bill had not been effective. 511 F.2d 430, 432 (D.C. Cir. 1974). The court rejected the claim that only Congress as a whole, or one of its houses, had standing to challenge the President’s action. *See id.* at 435. The court found sufficient interest to confer standing in the fact that, if the pocket veto was valid, the Senator’s prior vote for the bill had lost its effect without giving him the opportunity to override a conventional veto. *See id.* The D.C. Circuit struggled where the congressional claimant’s issue was primarily with his legislative colleagues, initially denying standing and over time finding standing but invoking equitable discretion to withhold declaratory relief. In *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981), the court found that a senator had alleged injury-in-fact in his inability to provide advice and consent in an appointment where the methods for appointment were creatures of statute. *See id.* at 878-79. After finding standing, though, the court invoked equitable discretion to withhold relief because the plaintiff had ample means of legislative redress. *See id.* at 882. The D.C. Circuit’s inquiry thus conferred standing on individual members of Congress for injuries to their institutional prerogatives but actually allowed suit to proceed only where plaintiff’s problem had its origins outside of Congress. *See, e.g.,* Bliley v. Kelly, 23 F.3d 507, 510 (D.C. Cir. 1994) (upholding standing and refusing to exercise equitable discretion to dismiss where members of Congress challenged actions of the D.C. Council that deprived them of the right to review an act before it took effect, in alleged contravention of the Home Rule Act). The D.C. Circuit reaffirmed the *Kennedy* holding, and refused to exercise equitable discretion, in *Barnes v. Kline*. *See* 795 F.2d 21, 26-30 (D.C. Cir. 1985).

¹⁶⁵ 521 U.S. 811 (1997).

¹⁶⁶ *See id.* at 814.

¹⁶⁷ *See* 2 U.S.C. § 691(a).

¹⁶⁸ *See Raines*, 521 U.S. at 814.

standing and held that the act violated Article I.¹⁶⁹ The Supreme Court took the direct, expedited appeal prescribed by the Act and issued an opinion within thirty days.¹⁷⁰

In an opinion authored by Chief Justice Rehnquist, the Court rejected standing in the broadest possible strokes. The Court distinguished *Powell v. McCormack* as a case involving a representative personally “singled out for specially unfavorable treatment.”¹⁷¹ In *Raines*, instead, the plaintiffs raised a claim that “runs (in a sense) with the Member’s seat,”¹⁷² involved no private rights, and was “wholly abstract and widely dispersed.”¹⁷³ The Court conceded it had recognized an “institutional injury” in *Coleman* but found that case readily distinguishable.¹⁷⁴ *Coleman* applied to situations where “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act . . . sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”¹⁷⁵ The *Raines* plaintiffs had simply voted and lost the battle, and the Court was unwilling to extend *Coleman* to encompass abstract claims of diluted legislative power.¹⁷⁶ The Court buttressed its decision not to extend *Coleman* with history, noting that major separation-of-powers battles in the late 1860s had taken place outside the judicial arena.¹⁷⁷ Without further explanation, the Court cryptically “attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action.”¹⁷⁸ Finally, the Court noted that the plaintiffs had political remedies and that its decision did not foreclose challenge by an individual who suffered particularized injury by operation of the act.¹⁷⁹

Commentators received *Raines* as a near-shutdown of congressional standing, except in situations that mirrored the *Coleman* or *Powell* facts or, perhaps, in cases where the entire House

¹⁶⁹ See *id.* at 817. Inasmuch as the injury was inflicted by a statute, the district court’s holding violated the then-prevailing D.C. Circuit approach.

¹⁷⁰ See *id.* at 817-18.

¹⁷¹ *Id.* at 821.

¹⁷² *Id.*

¹⁷³ *Id.* at 829.

¹⁷⁴ See *id.* at 824.

¹⁷⁵ *Id.* at 823.

¹⁷⁶ See *id.* at 826.

¹⁷⁷ See *id.* at 826-27. That President Andrew Johnson did not resort to federal court to challenge the Tenure of Office Act, of course, was quite possibly a function of the absence of general federal question jurisdiction in 1868. Aside from a brief and quickly-retracted dalliance with federal question jurisdiction in the Midnight Judges Act, enacted after the contentious election of 1800, Congress did not confer general federal question jurisdiction on the federal courts until 1875. See Act of Mar. 3, 1875, § 1, 18 Stat. 470. See also *Steffel v. Thompson*, 415 U.S. 452, 463-64 & n.14 (1974) (observing that the Act of 1875 conferred federal question jurisdiction upon lower federal courts “for but the second time in their nearly century-old history”).

¹⁷⁸ *Raines*, 521 U.S. at 829.

¹⁷⁹ See *id.* at 829-30. The near-certainty that a beneficiary of a spending provision “vetoed” by the President would be forthcoming undoubtedly affected the Court’s analysis. The opportunity to resolve the issue arrived the next year with *Clinton v. City of New York*, 524 U.S. 417 (1998). *Raines* thus is a nice example of what Richard Re has called “relative standing”: given the likelihood that a better plaintiff would emerge, the Court had no need to dignify the asserted institutional injury. See Re, *supra* note ___, at 1214-15 (suggesting that, instead of disclaiming injury, the courts ought to view the right to sue as a “scarce resource” and ought to turn away some putative plaintiffs where others, with “weightier” interests, would likely emerge).

or Senate had authorized suit.¹⁸⁰ That *Raines* achieved by different means precisely what Rehnquist had intended in *Goldwater* was no accident; *Raines* was “informed – and indeed virtually controlled – by political question concerns.”¹⁸¹ The D.C. Circuit took heed.¹⁸² In its first post-*Raines* case, *Chenoweth v. Clinton*,¹⁸³ the court confronted a suit filed by several members of Congress challenging the President’s implementation of an environmental program by executive order on the basis that it deprived them of their right to debate and vote on the initiative by legislation.¹⁸⁴ Because the plaintiffs’ primary gripe was with the actions of the President, not their colleagues, the case would have proceeded pre-*Raines*.¹⁸⁵ The post-*Raines* panel found that the case did not mirror *Coleman* facts, and the D.C. Circuit dismissed for want of standing.¹⁸⁶

In *Goldwater*, in the political question doctrine context, and *Raines*, in the standing context, it is possible to find lines of commonality and consistency in the approach of William Rehnquist to disputes amongst coordinate branches. While individually harmed actors, like Powell and Chadha, could find their way into federal court, the institutional actors themselves were relegated to their political remedies. Then-Associate Justice Rehnquist fell short of persuading the necessary number of colleagues in *Goldwater*, and thereafter set the political question doctrine aside until *Nixon*, when he articulated a conception of the doctrine that disclaimed a role for the judiciary even in the outlandish case. In *Raines*, he found his move, and

¹⁸⁰ See, e.g., 13B Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 3531.11.2 (3d ed. 2008) (stating that limits imposed by *Raines*, “drawn from separation-of-powers concerns that mimic political-question doctrine, may well preclude such standing entirely”); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 342 (2015) (noting that *Raines* broadly suggested “that congressional standing may be quite constrained”); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Restraint*, 113 COLUM. L. REV. 1097, 1110 (2013) (observing that, since *Raines*, courts “typically find individual members lack standing”); Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 HARV. L. REV. 1741, 1752 (1999) (stating that *Raines* would at most allow standing on *Coleman* facts or if either or both houses of Congress sued as an institution or specifically authorized members to sue); see also Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court’s Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 354 (1997) (describing “the Court’s characterization of congressional standing as an invitation to interbranch Armageddon”).

¹⁸¹ Wright *et al.*, *supra* note __, at § 3531.11.2; see also James A. Turner, Comment, *The Post-Medellin Case for Legislative Standing*, 59 AM. U. L. REV. 731, 753 (2010) (observing that, while *Raines* did not address the political question doctrine, “part of the reason the Court rejected standing for the legislators was because of the political nature of their claim”); Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPPERDINE L. REV. 1, 49 (2016) (noting that the *Raines* Court borrowed heavily from political question jurisprudence and that the opinion shows that “denial of standing can perform political question’s function of diverting plaintiffs to the legislative arena”). Lower courts have linked *Raines* and *Goldwater* in denying legislative suits. See, e.g., *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2, 10-11 (D.D.C. 2002) (rejecting legislators’ challenge to President Bush’s unilateral withdrawal from the Anti-Ballistic Missile Treaty because they lacked standing under *Raines* and the issue presented a political question under Rehnquist’s plurality opinion in *Goldwater*).

¹⁸² Some commentators assumed that the Supreme Court used *Raines* to “send a message to the D.C. Circuit.” See Devins & Fitts, *supra* note __, at 361.

¹⁸³ 181 F.3d 112 (D.C. Cir. 1999).

¹⁸⁴ See *id.* at 113.

¹⁸⁵ The court noted that Congress had the power prospectively to terminate the program if it was so inclined and thus concluded that the issue was susceptible of political resolution. See *id.* at 116. Pre-*Raines*, the D.C. Circuit would probably have fielded *Chenoweth* on the merits.

¹⁸⁶ See *id.* at 117.

in broad strokes, borrowing heavily from his own political question jurisprudence, sought to eliminate institutional actors as party plaintiffs almost entirely.

D. Justiciability, Separation of Powers, and the Roberts Court

Chief Justice Roberts clerked for then-Associate Justice Rehnquist in the 1980-1981 term,¹⁸⁷ a year after *Goldwater v. Carter*, and though he assuredly was steeped in Rehnquist's views of the judiciary and its proper role in navigating inter-branch disputes, Roberts' own views since assuming his position in September 2005 – at least in the political question context – have charted a different course, somewhat defiantly reclaiming a role for the federal judiciary.

a. The Political Question Doctrine: Reembracing the Boundary Cop

In the years between *Nixon v. United States*¹⁸⁸ and 2012, the lower courts routinely invoked the political question doctrine, particularly in the foreign policy context, to avoid separation-of-powers disputes between coordinate branches, while the Supreme Court stayed out of the fray.¹⁸⁹ In 2012, in the absence of a circuit split, the Supreme Court changed course.¹⁹⁰ In *Zivotofsky I*,¹⁹¹ the Court confronted a clash between Congress and the executive branch over the recognition of Jerusalem. Congress had passed a statute requiring the State Department, upon request, to record the place of birth of a baby born in Jerusalem as “Israel.”¹⁹² This requirement flatly contravened the State Department's manual, which ordered that the birthplace be recorded as Jerusalem, specifically instructing that passport officials “not write Israel or Jordan.”¹⁹³ In signing the statute into law, President George W. Bush claimed that it unconstitutionally interfered with the executive branch's recognition power and indicated he would not enforce it.¹⁹⁴ Menachem Zivotofsky, born in Jerusalem after the act's passage, challenged the State Department's refusal to designate his birthplace as Israel.¹⁹⁵ The district court deemed the case a nonjusticiable political question,¹⁹⁶ and the D.C. Circuit affirmed.¹⁹⁷ The panel majority concluded that Zivotofsky had asked the court to “call into question the President's exercise of the recognition power.”¹⁹⁸

¹⁸⁷ See Biskupic, *supra* note __, at 52.

¹⁸⁸ 506 U.S. 224 (1993).

¹⁸⁹ See *supra* note __ and accompanying text.

¹⁹⁰ Without a circuit split, and with Zivotofsky losing – and thus the executive prerogative prevailing – in both the panel majority and in Judge Edwards' concurrence, the Court's grant of certiorari was extremely surprising, leading Professor Harlan Cohen to surmise that “a large majority of the Justices (only Justice Breyer dissented) wanted to discipline the lower courts in their use of the political question doctrine.” Cohen, *supra* note __, at 433.

¹⁹¹ 566 U.S. 189 (2012).

¹⁹² Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

¹⁹³ 566 U.S. at 191-92.

¹⁹⁴ See Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 38 Weekly Comp. Pres. Doc. 1658, 1659 (Sept. 30, 2002). This is an example of the executive branch exercising self-help to counter a perceived incursion on its authority.

¹⁹⁵ 566 U.S. at 192-93.

¹⁹⁶ *Zivotofsky v. Sec. of State*, 511 F. Supp. 2d 97, 103 (D.D.C. 2007).

¹⁹⁷ *Zivotofsky v. Sec. of State*, 571 F.3d 1227, 1232-33 (D.C. Cir. 2009).

¹⁹⁸ *Id.* at 1232.

In “broad and sweeping terms,”¹⁹⁹ the Supreme Court reversed in an opinion authored by Chief Justice Roberts.²⁰⁰ The Court saw the issue as whether the statute was a constitutional exercise of legislative authority or whether it “impermissibly intrude[d] upon Presidential powers under the Constitution”²⁰¹ – a classic question of boundary-drawing. Examining the constitutionality of a statute and determining whether one coordinate branch of government “is aggrandizing its power at the expense of another branch,” the Court announced, is an appropriate exercise of judicial authority that dates back to *Marbury*.²⁰² The Court found that the parties’ arguments in the case “sound[ed] in familiar principles of constitutional interpretation,” requiring “careful examination of textual, structural, and historical evidence”; this exercise, the Court confirmed, is precisely “what courts do.”²⁰³

A case of “far-reaching significance,”²⁰⁴ *Zivotofsky I* firmly defended the Court’s role in situations of inter-branch conflict, taking us back to first principles and to Chief Justice Marshall’s vision in *Marbury*. It set to rest the confusing undercurrents exposed in *Goldwater* and the various opinions in *Nixon*. Significantly, the Court found jurisdiction in a case even though it was decidedly not simple,²⁰⁵ even though it involved no clear-cut constitutional rule,²⁰⁶ and even though it touched on a “delicate subject.”²⁰⁷ Unlike Rehnquist and his cohort in *Goldwater*, the Court was unfazed by the fact that the Constitution was silent on the subject of recognition power.²⁰⁸ Remarkably, the Court did not even cite *Goldwater*. Instead, it manifested comfort making “interstitial” inferences and bringing to bear traditional methods of interpretation.²⁰⁹ The case required the Court to draw difficult lines between the various foreign affairs powers meted out by the Constitution in somewhat overlapping fashion to two different institutional actors. The Court was unmoved by the dominant argument in *Nixon v. United States* that the Constitution, in conferring power on the President to receive ambassadors and foreign ministers, had made an unreviewable textual commitment of authority to another branch.²¹⁰ Finally, the Court cited only two of the *Baker v. Carr* factors – textual commitment of authority

¹⁹⁹ Sitaraman & Wuerth, *supra* note ___, at 1925.

²⁰⁰ 566 U.S. 189, 201 (2012).

²⁰¹ *Id.* at 196.

²⁰² *Id.* at 197 (quoting *Freitag v. Comm’r*, 501 U.S. 868, 878 (1991)).

²⁰³ *Id.* at 201.

²⁰⁴ Sitaraman & Wuerth, *supra* note ___, at 1925.

²⁰⁵ See *Zivotofsky I*, 566 U.S. at 201 (“To say that Zivotofsky’s claim presents issues the Judiciary is competent to resolve is not to say that reaching a decision in this case is simple.”).

²⁰⁶ “A constitutional rule is a constitutional norm whose scope of application is not *expected* to be subject to reasonable disagreement.” Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1652 (2016). Greene characterized *Zivotofsky* as a case involving “constitutional standards.” *Id.* at 1699. The relative roles of Congress and the President in foreign affairs, he reasoned, “become easier rather than harder to answer on contact with subsequent political and social practices.” *Id.*

²⁰⁷ *Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2081 (2015).

²⁰⁸ See *id.* at 2084-85 (“Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere.”).

²⁰⁹ Cf. *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring) (parting company with Justice Rehnquist, who believed that constitutional silence meant a lack of judicially manageable standards, because the Court could engage in “interstitial analysis”).

²¹⁰ See *Zivotofsky I*, 566 U.S. at 197.

to another branch and the presence or absence of judicially manageable standards²¹¹ -- thus signaling that more prudential reasons for staying its hand, such as concern for institutional legitimacy or reticence to intrude on other branches, held little force.²¹²

The Court dramatically reaffirmed its comfort policing boundaries in *Trump v. Mazars USA, LLP*.²¹³ Writing for the Court to resolve a dispute between Congress and the President over the issuance of congressional subpoenas, Chief Justice Roberts noted that Presidents and Congress had spent two centuries working out such disputes themselves, hashing them out “in the ‘hurly-burly, the give-and-take of the political process.’”²¹⁴ Though Rehnquist had cited similar history in *Raines* to justify the conclusion that the federal judiciary should play a limited role in the event of breakdown,²¹⁵ the Roberts opinion chastised the parties a bit for their recalcitrance, noted that the controversy “is the first of its kind to reach the Court,” and then proceeded to resolve it, rejecting both sides’ proffered standards and laying out a series of principles circumscribing congressional authority that specifically contemplated a role for the federal courts.²¹⁶ Once again, the Court seemed unfazed by the imprecise constitutional underpinnings of the subpoena power and the absence of a precedential lodestar; recognizing a breakdown in the political process, the Court dove in and provided roadmapping principles for sorting it out.²¹⁷

Reaching out in the absence of a circuit split to take *Zivotofsky I*, after nineteen years in which the Court had looked the other way, Chief Justice Roberts wrote for a unanimous Court and announced the arrival of a new sheriff in town. *Mazars* makes the distinct approaches of the Rehnquist and Roberts Courts obvious. Harkening back to first principles, Roberts has reclaimed an “emphatic” role for the federal judiciary in resolving litigation concerning the constitutional authority of the other branches, the “political implications” that troubled his forebear seemingly be damned.²¹⁸

²¹¹ See *id.* at 195.

²¹² See Ryan C. Williams, *The Guarantee Clause*, 132 HARV. L. REV. 602, 604 (2018) (observing that *Zivotofsky I*, in looking only to the first two *Baker v. Carr* factors, “continued the trend of diminishing [the political question doctrine’s] scope”); Sitaraman & Wuerth, *supra* note __, at 1925-26 (characterizing *Zivotofsky I* as “abandon[ing] the multi-factor *Baker v. Carr* test”). See also Note, *Political Questions, Public Rights, and Sovereign Immunity*, 30 HARV. L. REV. 723, 725 (2016) (observing that the Court “conspicuously” omitted “those categories most identified with prudence”).

²¹³ See 140 S. Ct. 2019, 2031 (2020).

²¹⁴ *Id.* at 2029. The Court had called for supplemental briefing on the justiciability question, and the parties had all agreed the case did not present a political question. See <https://www.scotusblog.com/case-files/cases/trump-v-mazars/>.

²¹⁵ See *Raines v. Byrd*, 521 U.S. 811, 826-27 (1997).

²¹⁶ See *Mazars*, 140 S. Ct. at 2031, 2035-36.

²¹⁷ See *id.* at 2035-36.

²¹⁸ *Zivotofsky I*, 566 U.S. at 196 (“At least since *Marbury v. Madison*, . . . we have recognized that when an Act of Congress is alleged to conflict with the Constitution, ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’ That duty will sometimes involve the ‘[r]esolution of litigation challenging the constitutional authority of one of the three branches,’ but courts cannot avoid their responsibility merely ‘because the issues have political implications.’”) (citations omitted).

b. Standing to Assert Separation-of-Powers Challenges

Despite announcing a bolder conception of its own role in *Zivotofsky I*, one with which Chief Justice Rehnquist would not have agreed, the Roberts Court has largely contented itself with Rehnquist's handiwork in *Raines*, tap-dancing around it in a couple of cases and bending over backwards to incentivize individual litigants to tee up separation-of-powers issues instead.

In a series of indirect confrontations with congressional standing, the Roberts Court has consistently worked within the *Raines* construct. In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (“AIRC”),²¹⁹ the Court found that a state legislature had standing to make an Elections Clause challenge to the redistricting plan of an independent state commission created by popular referendum.²²⁰ The case distinguished *Raines* in three ways. First, the entire legislature was suing as institutional plaintiff to vindicate an institutional interest²²¹ – a fact to which the Delphic *Raines* Court had attached “some importance.”²²² Second, conferring the task of redistricting on an independent commission necessitated wresting it from the state legislature altogether and thus rendered the legislature's putative votes on redistricting “a complete nullity,” as in *Coleman*.²²³ Third, the case did not involve Congress and thus did not implicate the separation-of-powers concerns that may have undergirded *Raines*.²²⁴ The opinion did not link these three points of distinction or suggest that all were necessary components to its conclusion.

A litigation role for Congress also emerged in *United States v. Windsor*.²²⁵ The Obama administration's refusal to defend the Defense of Marriage Act (DOMA)²²⁶ on appeal prompted the Bipartisan Legal Advisory Group (BLAG) of the House to intervene and defend the constitutionality of DOMA before the Supreme Court.²²⁷ In considering DOMA's constitutionality, the Court requested argument on the question whether BLAG had standing to appeal the case.²²⁸ The Court ultimately sidestepped the question because it concluded that the government's obligation to pay a tax refund in the event the challengers prevailed gave it the requisite stake in the proceedings.²²⁹ Invoking *INS v. Chadha*,²³⁰ the Court noted that BLAG's presence in the case ensured “sharp adversarial presentation” and found it unnecessary to decide

²¹⁹ 135 S. Ct. 2652 (2015).

²²⁰ *See id.* at 2659.

²²¹ *See id.* at 2664.

²²² *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

²²³ *AIRC*, 135 S. Ct. at 2665.

²²⁴ *See id.* n.12.

²²⁵ 570 U.S. 744 (2013).

²²⁶ 110 Stat. 2419 (1996).

²²⁷ *See id.* at 753-54. BLAG is a standing body of the House of Representatives charged with directing the House Office of General Counsel. At the time of *Windsor*, House rules gave BLAG a consultant/advisory role but did not authorize it to act on behalf of the House. *See* H.R. Rule II.8, 112th Cong. (2011). In response to *Windsor*, the House amended its rules to make clear that BLAG “speaks for, and articulates the institutional position of, the House in all litigation matters.” H.R. Rule II.8, 114th Cong. (2015).

²²⁸ *See id.* at 755.

²²⁹ *See id.* at 757-58.

²³⁰ 462 U.S. 919, 939 (1983).

whether BLAG had standing on its own behalf.²³¹ Justice Alito, joined by Justice Thomas, argued in dissent that BLAG had standing in its own right.²³² He saw BLAG as the authorized representative of the House, unlike the six individual legislators in *Raines*, and wrote that, in refusing to defend the statute, the government was holding a majority of the House’s pro-DOMA votes “for naught.”²³³

Most recently, the Supreme Court addressed legislative standing in *Virginia House of Delegates v. Bethune-Hill*,²³⁴ which asked whether the Virginia House of Delegates, one half of the Virginia General Assembly, could intervene to appeal a decision invalidating a legislative districting plan as an impermissible racial gerrymander.²³⁵ The Court noted that the case did not present *Coleman* vote-nullification issues but rather “the constitutionality of a concededly enacted redistricting plan.”²³⁶ Without *Coleman* facts, the key asserted distinction from *Raines* was that the Virginia House itself, an official body, was seeking to litigate. Because the Virginia House represented only a *part* of the General Assembly charged with redistricting authority, the Court found the situation distinguishable from that in *AIRC*, in which both the Arizona House and Senate had filed suit.²³⁷ The Court determined that this “mismatch” between the body seeking to litigate and the body whose votes were purportedly undermined made this case more like the six individual members suing in *Raines*.²³⁸ The Court concluded that “[o]ne House of [a] bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process.”²³⁹ Justice Alito, joined this time by three, again dissented and would have found standing.²⁴⁰ He argued that *Raines* “rested heavily on federal separation-of-powers concerns, which are notably absent here.”²⁴¹

To date, the Roberts Court has paid lip service to *Raines* on multiple occasions, frequently finding points of distinction, but has not confronted congressional standing head-on. Perhaps because of existing obstacles to suits by institutional actors, the Court has instead preferred individual litigants in fielding separation-of-powers questions. The Court has entertained several kinds of claims that Congress has infringed on the power of the judicial branch. Individual litigants have repeatedly pressed claims that Congress has unconstitutionally conferred Article III business on Article I actors.²⁴² The Court has fielded claims that Congress

²³¹ *Windsor*, 570 U.S. at 761-62.

²³² *See id.* at 807 (Alito, J., dissenting).

²³³ *Id.* at 806-07 (Alito, J., dissenting).

²³⁴ 139 S. Ct. 1945 (2019).

²³⁵ *See id.* at 1949-50.

²³⁶ *Id.* at 1954. The Court did not purport to limit *Coleman* in *Virginia House*; it simply found the case inapplicable given the absence of vote nullification.

²³⁷ *See id.*

²³⁸ *Id.* at 1953-54.

²³⁹ *Id.* at 1956.

²⁴⁰ *See id.* (Alito, J., dissenting). Justice Alito was joined by Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh.

²⁴¹ *Id.* at 1958 (Alito, J., dissenting).

²⁴² *See, e.g.,* *Wellness Int’l Network v. Sharif*, 135 S. Ct. 1932, 1942 (2015) (holding that non-Article III bankruptcy courts may hear private rights claim if parties consent); *Stern v. Marshall*, 564 U.S. 462, 487-88 (2011) (holding that non-Article III bankruptcy court may not hear traditional private rights claim where it is not acting as an adjunct).

has impermissibly dictated the rules of decision in a pending case.²⁴³ Finally, the Court has encountered challenges to congressional efforts to strip the federal courts of jurisdiction.²⁴⁴ In each of these cases, the issues were raised by individual litigants, who grounded their claims in individual assertions that Congress was interfering with their right to have an Article III judge adjudicate their dispute.

With increasing alacrity, the Roberts Court has also decided cases involving claims that Congress has infringed on the discretion or power of the executive branch or that the executive branch has infringed upon an authority of Congress. The Court has entertained claims that a decision maker in a coercive proceeding was not appointed in a manner consistent with the Appointments Clause.²⁴⁵ Relatedly, the Court has also heard a challenge to congressional restriction on the President's removal power.²⁴⁶ As *Zivotofsky II*²⁴⁷ itself reflects, the Court has entertained claims that Congress has interfered with executive authority over foreign affairs.²⁴⁸ The Court has heard challenges that the President has acted in derogation of or without adequate legislative authority.²⁴⁹ Finally, the Court has fielded challenges to the President's use of recess appointments.²⁵⁰ In each of these cases, the Roberts Court has relied on individual litigants to bring the claims within its purview.

*Lucia v. Securities and Exchange Commission*²⁵¹ reflects the lengths to which the Court has gone to ensure that separation-of-powers claims come to the federal courts.²⁵² After agreeing with Raymond Lucia that the administrative law judge who presided over his hearing on

²⁴³ See, e.g., *Patchak v. Zinke*, 138 S. Ct. 897, 902-03 (2018) (upholding provision of Gun Lake Trust Land Reaffirmation Act that directed court to dismiss pending action); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317, 1326 (2016) (upholding congressional authority to amend law that applies to pending cases, even when it is outcome determinative, so long as Congress does not say, in *Smith v. Jones*, “Smith wins”).

²⁴⁴ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that provision of Military Commission Act barring federal court jurisdiction to hear habeas corpus actions of Guantanamo detainees violated Suspension Clause).

²⁴⁵ See, e.g., *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, Nos. 18–1334, 18–1475, 18–1496, 18–1514 and 18–1521, 2020 WL 2814298, *3 (June 1, 2020) (holding that members of board authorized to file bankruptcy proceedings on behalf of Puerto Rico were not “officers of the United States”); *Lucia v. Sec. & Exchange Comm’n*, 138 S. Ct. 2044, 2049 (2018) (holding that SEC administrative law judges are “inferior officers” within the meaning of the Appointments Clause). Professor Gillian Metzger has noted that, under the Roberts Court, “[t]he federal appointments process is having its proverbial day in the sun.” See Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1608 (2015).

²⁴⁶ See, e.g., *Seila Law LLC v. Consumer Finance Protection Bureau*, No. 19-7, https://www.supremecourt.gov/opinions/19pdf/19-7_n6io.pdf (June 29, 2020) (striking down restrictions on removal of CFPB director); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding that Sarbanes-Oxley Act's dual for-cause restrictions on removal of members of the Public Company Accounting Oversight Board violate the Constitution).

²⁴⁷ 135 S. Ct. 2076 (2015).

²⁴⁸ See *id.* at 2086 (holding that President exercises exclusive power of recognition).

²⁴⁹ See, e.g., *Medellin v. Texas*, 552 U.S. 491, 525-26 (2008) (holding that President lacks power to convert non-self-executing treaty into self-executing one absent authority from Congress).

²⁵⁰ See *NLRB v. Noel Canning*, 573 U.S. 513, 550 (2014) (invalidating the President's appointments during *pro forma* sessions as inconsistent with the Recess Appointments Clause).

²⁵¹ 138 S. Ct. 2044 (2018).

²⁵² In *Ryder v. United States*, the Court had allowed that individual litigants making timely separation-of-powers challenges are entitled to a judgment on the merits and “whatever relief may be appropriate,” as “any other rule would create a disincentive to raise Appointments Clause challenges.” 515 U.S. 177, 182-83 (1995)

securities violations was an inferior officer whose appointment violated the Appointments Clause,²⁵³ the *Lucia* Court clarified what appropriate relief might look like. Recognizing the ease with which the underlying defect in a particular administrative law judge’s appointment could be cured and the fact that the properly appointed administrative law judge would almost certainly render the same decision, the Court held that *Lucia* needed a new hearing before a different administrative law judge.²⁵⁴ In so doing, the Court forthrightly admitted both its goal of creating “incentives” to raise Appointments Clause challenges and the fact that the defect had had no impact whatsoever on *Lucia*’s initial hearing.²⁵⁵ The next section will criticize this reliance; for present purposes, the important point is descriptive, not normative: the Court has had to engage in some contortion in order to slake its appetite for cases, even going so far as to incentivize litigants it could not otherwise count on to care.

II. The Myriad Problems of Relying Exclusively on Individual Litigants

The Roberts Court has embraced the role of federal courts as boundary cops, disdaining the approach taken by Chief Justice Rehnquist, without reexamining the role of institutional players. This approach would make good sense if the Court could *defensibly* rely exclusively on individual litigants. However, reliance on individual litigants as opposed to institutional actors to bring separation-of-powers claims into the federal courts occasionally gives rise to doctrinal incoherence. This section flags several ways in which the Court is doing something in this separation-of-powers context that is hard to square with what it has said in others.

A. Individuals Frequently Lack Litigable Interests²⁵⁶ in the Structural Constitution

Reliance on individual litigants to raise separation-of-powers violations is often problematic because their claims to individual harm due to the separation-of-powers violations they assert are difficult to justify. Here, it is important to distinguish claims of entitlement to an Article III decision-maker from other separation-of-powers claims, like the claim to a validly-

²⁵³ See *Lucia*, 138 S. Ct. at 2053-54.

²⁵⁴ *Id.* at 2055.

²⁵⁵ *Id.* at 2055 & n.5.

²⁵⁶ Ann Woolhandler and Caleb Nelson introduced this term, see Woolhandler & Nelson, *supra* note __, at 709, 717-19. James Pfander described “litigable interest” as the “requir[ement] that plaintiffs who wish to invoke the judicial power set up a claim of right (an ‘interest’) in accordance with the forms prescribed by law (‘litigable’).” See Pfander, *supra* note __, at 224. Commentators have lamented the Court’s frequent confusion of the question whether plaintiff has standing with the question whether plaintiff has a right of action. See Henry P. Monaghan, *A Cause of Action, Anyone? Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1817 (2016); Nelson, *supra* note __, at 777-83. For my purposes, it is a useful proxy for injury-in-fact because many individual assertions of separation-of-powers claims arise as defenses to enforcement proceedings, rather than as initial actions where the individuals are party plaintiffs. See *Seila Law LLC v. Consumer Finance Protection Bureau*, No. 19-7 https://www.supremecourt.gov/opinions/19pdf/19-7_n6io.pdf, slip op. at 9; As others have noted, the terms “standing” and “cause of action” are very much related in this context and frequently used interchangeably. See Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL OF RIGHTS J. 209, 211 (2014); Huq, *supra* note __, at 1515 n. 321.. The concepts are obviously interrelated; a defendant who unsuccessfully asserts a separation-of-powers claim in defense will need to establish the requisites of standing in order to appeal. See *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (“To ensure a case remains ‘fit for federal-court adjudication,’ the parties must have the necessary stake not only at the outset of litigation, but throughout its course.”). Where an individual lacks a legally protectable interest, she suffers no harm from an adverse judgment and should lack Article III standing to pursue that appeal.

appointed regulatory enforcement body. In the former situation, the individual’s interest has a longstanding pedigree, and in the latter, it does not.

Where Congress encroaches on the power of the federal judiciary in violation of Article III, individuals subject to non-Article III decision makers have a straightforward claim to legally cognizable harm.²⁵⁷ Litigants maintaining that they are entitled to Article III adjudication of their claims raise a particularized claim about the identity of the decision maker in their case because the special features of Article III judges – the salary protection and life tenure guaranteed by Article III – are vital to the substantive legitimacy of the outcome and have consistently been described in individual-protective terms. In the Federalist 78, Alexander Hamilton argued that the independence of the federal judiciary was an “essential safeguard” to protect individuals against judges “unwilling to hazard the displeasure” of the political branches.²⁵⁸ Cases have repeatedly reflected this core value. *Wellness International Network, Ltd. v. Sharif*²⁵⁹ stated outright that “[t]he entitlement to an Article III adjudicator is ‘a personal right.’”²⁶⁰ In *Stern v. Marshall*, Pierce Marshall objected to adjudication of a tortious interference counterclaim in non-Article III bankruptcy proceedings.²⁶¹ The Court, per Chief Justice Roberts, agreed, finding that structural protections inherent in the separation of powers “protect the individual” as well as each respective branch.²⁶² The Court explained that the federal courts’ insulation from the political process was designed “to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the ‘[c]lear heads . . . and honest hearts’ deemed ‘essential to good judges.’”²⁶³ The key features differentiating Article III judges from non-Article III judges are indispensable to a fair, impartial determination of the litigant’s own claim, and common sense and tradition both buttress the idea that the

²⁵⁷ The federal judiciary is also singularly ill-suited for self-help. See Huq, *supra* note __, at 1443-44 (claiming that “the only constitutionally salient institution that lacks the capacity to lodge objections in court on structural constitutional grounds is the Article III judiciary itself”); Pozen, *supra* note __, at 21-22 (noting that “judicial self-help plays only a modest role in our constitutional system”). As Huq noted, “[j]udges, simply stated, do not often sue.” *Id.* at 1521. *But cf.* *Beer v. United States*, 696 F.3d 1172, 1177-78, 1186 (Fed. Cir. 2012) (invalidating acts of Congress that diminished federal judicial compensation as violative of Article III’s Compensation Clause in class action filed by federal judges).

²⁵⁸ Federalist 78, at 465-66 (A. Hamilton) (Clinton Rossiter ed., 1961). Chief Justice Marshall, addressing the Virginia Convention, stated, “[t]he Judicial Department comes home in its effects to every man’s fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or controul him but God and his conscience?” PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30 616 (statement of Chief Justice Marshall); see also *O’Donoghue v. United States*, 298 U.S. 516, 532 (1933) (quoting Marshall).

²⁵⁹ 135 S. Ct. 1932 (2015).

²⁶⁰ *Id.* at 1944. See also *Peretz v. United States*, 501 U.S. 923, 929 n.6 (1991) (noting the importance of the “personal right to an Article III adjudicator”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (characterizing “Article III’s guarantee of an impartial and independent federal adjudication” as “a personal right”); *Glidden v. Zdanok*, 370 U.S. 530, 536 (1962) (finding that requirement of an Article III adjudicator “relates to basic constitutional protections designed in part for the benefit of litigants”).

²⁶¹ See 564 U.S. 462, 471-72 (2011).

²⁶² *Id.* at 483.

²⁶³ *Id.* at 484 (quoting 1 Works of James Wilson 363 (J. Andrews ed.1896)).

individual litigant suffers an individualized injury by its threatened deprivation that is redressable by a decision in his favor.²⁶⁴

Reliance on individual litigants is more problematic in other separation-of-powers cases, where individuals' claims of right, and claims to harm, can be more attenuated.²⁶⁵ Where the individual's claim is that a regulatory body is acting against her in a way that the Constitution *does not permit*, the claim of harm is straightforward, and the individual has a privilege against the regulatory action in question.²⁶⁶ But the claimed separation-of-powers violation in cases challenging incursions on the executive and legislative branches frequently has no such obvious or pedigreed link to a personal interest, and it is widely understood that litigants asserting many claims as defenses in coercive non-judicial proceedings cannot show, indeed do not even attempt to show, that the claimed defect actually tainted the proceeding's substantive outcome.²⁶⁷

Outside of the Article III context, for example, the right to a properly appointed regulatory actor or decision maker has not historically been seen as an entrenched personal freedom. The traditional method of challenging an office holder's appointment was through a statutory *quo warranto* action, an action undertaken by the state or a designated representative in which the validity of an office holder's title was the only issue.²⁶⁸ Courts employed the *de facto*

²⁶⁴ See Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 302 (1990) (contending that "Article III protects the rights of litigants precisely through its creation of judicial independence"). The same pattern holds in the judicial finality context. For example, in *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), defendant Spendthrift Farm, had prevailed when the plaintiff's securities action was dismissed as time-barred. *See id.* at 214. Plaintiff opted not to appeal, and the judgment became final. *See id.* The act of Congress purporting to reopen plaintiff's suit impermissibly interfered with the finality of this decision and brought Spendthrift Farm back into the cross-hairs. *See id.* at 225-26. To the extent that final resolution by an Article III decision maker is an individual right, Spendthrift Farm suffered individualized, concrete harm when it could not rely on the finality of a decision by the apolitical judicial branch. Other contexts in which the Court has fielded questions about incursions on its own prerogative give rise to similar analysis.

²⁶⁵ See Henry Paul Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 312 (1984) ("Even if the litigant has 'standing' to raise these claims because his 'interests' are implicated, many of these structural challenges have been thought by some commentators not to involve the litigant's rights in any straightforward sense."). To be sure, the framers described the Constitution's commitment to enumerated powers as protective of individual rights. *See* The Federalist No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing "the Constitution . . . itself, in every rational sense, and to every purpose" as a Bill of Rights); *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PENN. L. REV. 1513, 1516 (arguing that the Constitution's separation of powers scheme protects individual rights against tyrannical majorities) (1991). However, the structural Constitution protects individual rights writ large, not the rights of any particular individual.

²⁶⁶ *See, e.g.*, *Clinton v. City of New York*, 524 U.S. at 423 (President's unconstitutional line-item veto canceled a specific spending item that would have benefited plaintiff); *INS v. Chadha*, 462 U.S. 919, 926-28 (1983) (Congress's unconstitutional legislative veto revoked the Attorney General's decision to allow an immigrant to remain in the United States). In that case, the individual has a privilege against punishment or sanction for her conduct, and the injury to the individual is more readily cast in terms of individual harm.

²⁶⁷ The *Lucia* Court forthrightly admitted that the administrative law judge, once properly appointed, "could be expected to reach all the same judgments." 138 S. Ct. at 2055 n.5. Most recently, the Court acknowledged in *Sela LLC v. Consumer Finance Protection Bureau*. *See* 591 U.S. ___ (2020) (slip op. at 9-10) ("We have held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority.").

²⁶⁸ *See* Kathryn A. Clokey, Note, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1124 (1985). A *quo warranto* action against a wrongly-appointed federal officer traditionally was initiated by the U.S. Attorney General or a rival claimant, proceeding by leave of the court. *See id.* The D.C. Circuit

officer doctrine to exempt defects in title and appointment from collateral attack by people displeased with their actions “[f]or over five hundred years.”²⁶⁹ In 1886, the Court based the doctrine in “policy and necessity,” indicated that “[o]ffices are created for the benefit of the public,” and stated that “endless confusion” would result if private parties were permitted in every proceeding to call their title into question.²⁷⁰ Admittedly, the Supreme Court (per Chief Justice Rehnquist), declined to invoke the *de facto* officer doctrine in *Ryder v. United States* and accorded a court martial defendant a new hearing before a properly constituted military appellate tribunal in 1995.²⁷¹ In doing so, the Court was likely influenced by the nature of the proceedings; while military courts have always operated outside the purview of Article III,²⁷² Professor Stephen I. Vladeck has noted that “the U.S. military justice system has increasingly come to resemble ordinary civilian courts in recent years, at least in criminal cases.”²⁷³ So, too, Chief Justice Rehnquist’s disaffection with institutional standing may have played a role; the *Ryder* Court openly admitted its concern was with incentivizing litigants to raise such claims (as the Roberts Court later did in *Lucia*).²⁷⁴ The Court did not suggest that its reasoning was grounded in due process or systemic legitimacy, and it left prior cases that had relied on the *de facto* officer doctrine in the Appointments Clause context intact.²⁷⁵ The point here is not to

criticized the *quo warranto* mechanism as “an extremely difficult and uncertain remedy” in *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984). Federal Rule of Civil Procedure 81 replaces the traditional *quo warranto* writ with complaint and motion practice. Fed. R. Civ. P. 81.

²⁶⁹ Note, *The “De Facto” Officer Doctrine*, 63 COLUM. L. REV. 909, 909 (1963) (hereinafter, “*Columbia Note*”); see also Clokey, *supra* note __, at 1125 (recounting origin of doctrine as early as 1431). The Supreme Court even relied on the doctrine to reject collateral claims by incarcerated inmates that their Article III judges had technical defects in their appointments. See, e.g., *Ex parte Ward*, 173 U.S. 452, 454 (1899) (characterizing the *de facto* officer doctrine as a “well-settled rule” that precluded a habeas petitioner’s challenge to the appointment of the federal judge presiding over his trial); *McDowell v. United States*, 159 U.S. 596, 601-02 (1895) (stating “the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public”). In *Nguyen v. United States*, 539 U.S. 69 (2003), however, the Court characterized these as merely technical defects and affirmed that deprivation of an Article III judge is different. See *id.* at 77-80. The *Nguyen* Court declined to invoke the *de facto* officer doctrine when a Ninth Circuit panel reviewing an appeal from the District Court of Guam concededly included a non-Article III judge, again underscoring the importance of an Article III decision maker to the legitimacy of the underlying result. See *id.* at 77.

²⁷⁰ *Norton v. Shelby County*, 118 U.S. 425, 441-42 (1886). See also Albert Constantineau, A TREATISE ON THE DE FACTO DOCTRINE 6 (1910) (indicating that permitting individuals to challenge the authority of officers on the basis of defective titles would encourage “insubordination and disorder of the worst kind” that “might at any time culminate in anarchy”).

²⁷¹ 515 U.S. 177, 183-84 (1995).

²⁷² See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 935 (2015).

²⁷³ *Id.* at 941. *Ryder* came eight years after *Solorio v. United States*, 483 U.S. 435 (1987), a case Vladeck terms “the most significant U.S. military justice development of the past half-century.” Vladeck, *supra*, at 962. *Solorio* held that a member of the armed forces could be tried by court martial even for offenses that were not connected to service. See 483 U.S. at 436. By 1995, then, criminal justice in military courts was looking ever-more like regular justice, and the *Ryder* Court thus may have seen petitioner’s injury in individual terms and found an implicit analogy to the Article III cases.

²⁷⁴ See *id.* at 183 (“Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.”).

²⁷⁵ See *id.* at 184. In the October 2019 term, the Supreme Court took up the *de facto* officer doctrine in *Aurelius Investment, LLC v. Puerto Rico* (No. 18-1475), but ultimately sidestepped the question by concluding that there was no underlying Appointments Clause violation. See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, Nos. 18-1334, 18-1475, 18-1496, 18-1514 and 18-1521, 2020 WL 2814298, *12 (June 1, 2020)

debate the *de facto* officer doctrine but to state, more modestly, that if *Spokeo v. Robins*²⁷⁶ and *TransUnion LLC v. Ramirez*²⁷⁷ instruct us to look to historical practice as a guide in recognizing the concreteness of claims, finding an individual litigable interest in many separation-of-powers cases runs into the distinct problem that until quite recently, the actions of defectively appointed non-Article III entities who exercised *de facto* authority were unassailable at law.

While these litigants conceivably could frame their litigable interest as a right to a validly-constituted regulatory body, that argument is not particularly persuasive. It is a second-cousin of the “valid rule” requirement, famously described by Professor Henry Paul Monaghan.²⁷⁸ Per Monaghan, the rule of law, grounded in due process, requires “that the Constitution forbid[] the imposition of sanctions except in accordance with a constitutionally valid rule, whether or not the defendant's conduct is itself constitutionally privileged.”²⁷⁹ The argument would have to be that no one can be sanctioned for violating a perfectly constitutional statute by someone who appears to be, but actually is not, constitutionally entitled to say so. It wrenches Monaghan’s formulation out of context to apply this principle not to the substantive rule by which a litigant is judged but to a defect in the appointment of the decision maker. This “defective messenger” argument seems less obviously to offend the rule of law – after all, the claimant has by all accounts violated the rule, and the rule by all accounts validly proscribes the claimant’s conduct. The difference between the regulatory arrangement claimants seek and the regulatory arrangement claimants were provided lacks implications for the legitimacy or outcome of the substantive result.²⁸⁰ Our system has never aspired to such perfection, particularly given age-old reliance on the *de facto* officer doctrine, and Huq has criticized invocation of the valid rule doctrine in this context as a “post hoc classification of outcomes.”²⁸¹

Individuals might alternatively press these claims without showing individual injury if we can classify them as “structural errors” requiring automatic reversal even in the absence of

²⁷⁶ 136 S. Ct. 1540 (2016). See *supra* notes ___ and accompanying text.

²⁷⁷ 141 S. Ct. 2190 (2021).

²⁷⁸ See Monaghan, *supra* note ___, at 285; see also Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (1981) (“Under ‘conventional’ standing principles, a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law.”).

²⁷⁹ Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 196 (1989). Justice Ginsburg, joined by Justice Breyer, endorsed this principle in her concurrence in *Bond v. United States*. 564 U.S. 211, 226 (2011) (Ginsburg, J., concurring). Professor Richard Fallon has argued that the valid rule principle is “fundamental” and that its “roots lie in the history and structure of the Constitution and in the deeper values that the Constitution serves.” Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1331 (2000).

²⁸⁰ See Huq, *supra* note ___, at 1451.

²⁸¹ See *id.* at 1454. We accept harmless error doctrine to overlook non-structural constitutional defects in criminal trials; our tolerance for imperfection in that context certainly suggests aspiration to perfection in the less weighty administrative context may be questionable. See Monaghan, *Harmless Error*, 1989 SUP. CT. REV. at 200 (observing, in criminal context, that “the Court’s animating principle is that error free proceedings cannot be an inexorable demand”).

demonstrable harm.²⁸² But this approach, too, is hard to justify. In *Landry v. FDIC*,²⁸³ the D.C. Circuit wrestled with the absence of provable harm in an Appointments Clause case and concluded that such challenges, termed “structural” at times by the Supreme Court,²⁸⁴ might in fact represent “structural errors.”²⁸⁵ The *Landry* court took the Supreme Court’s use of the term “structural” to describe the *nature* of the claim, arising as it does as an inference from the Constitution’s structure, and borrowed it to explain the absence of any traditionally-understood injury or individual interest. The key to the *Landry* court’s analysis was that litigants in these kinds of cases might never be able to demonstrate harm, and there is a built-in circularity to the court’s conclusion.²⁸⁶ The Supreme Court itself has never found structural error in the civil context.²⁸⁷ Certainly, calling these kinds of errors “structural” would be a marriage of convenience that would allow the Court to dodge the absence of real injury; on the other hand, these claims do not fit naturally or logically with other structural errors like total deprivation of counsel in a criminal case,²⁸⁸ systematic exclusion of people of a certain race from petit²⁸⁹ or grand juries,²⁹⁰ or a biased trial judge,²⁹¹ all of which present questions of “grave constitutional trespass”²⁹² that “seriously affect[] the fairness, integrity, or public reputation” of criminal proceedings.²⁹³ Again, the five hundred years during which the *de facto* officer doctrine routinely permitted courts to overlook defects in the appointment or title of office holders and insulate them from collateral attack tend to undercut the argument that these kinds of defects represent structural error, at least as we have previously understood the term.²⁹⁴

The first difficulty with relying on individuals to raise separation-of-powers challenges, then, is that only sometimes do they have what we have traditionally recognized as a litigable

²⁸² See, e.g., *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The term “structural error” has its origins in *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). In the portion of his opinion that was for the Court, Chief Justice Rehnquist differentiated “trial error[s],” which are subject to harmless error analysis, from “structural defects in the constitution of the trial mechanism,” like deprivation of the right to counsel, a biased judge, and exclusion of black jurors from the grand jury pool. *Id.*

²⁸³ 204 F.3d 1125 (D.C. Cir. 2000).

²⁸⁴ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (describing doctrine of separation of powers as a “structural safeguard”).

²⁸⁵ *Landry*, 204 F.3d at 1131. See also *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 793 F.3d 111, 123 (D.C. Cir. 2015) (citing *Landry* for the proposition that “an Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown”).

²⁸⁶ See *Landry*, 204 F.3d at 1131. In *Weaver v. Massachusetts*, the Court did say that it occasionally finds structural error when “the effects of the error are simply too hard to measure.” 137 S. Ct. 1899, 1908 (2017). The Court cited for this principle *Vasquez v. Hillery*, 474 U.S. 254 (1986), in which the Court found structural error in the systematic exclusion of prospective grand jurors of defendant’s race from the grand jury pool because such errors struck at “fundamental values of our system and our society as a whole” and constituted “grave constitutional trespass.” *Id.* at 262. Given the *Vasquez* citation, it is difficult to read *Weaver* for the proposition that the mere immeasurability of impact of any error makes it structural.

²⁸⁷ See *Al Haramain Islamic Found. v. U.S. Dept. of Treasury*, 660 F.3d 1019, 1041 (9th Cir. 2011).

²⁸⁸ *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963).

²⁸⁹ *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

²⁹⁰ *Vasquez*, 474 U.S. at 260-64.

²⁹¹ *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

²⁹² *Vasquez*, 474 U.S. at 262.

²⁹³ *Johnson v. United States*, 520 U.S. 461, 469-70 (1997).

²⁹⁴ See *Columbia Note*, *supra* note ___, at 909.

personal right. The special features of an Article III judge have long been conceptualized as protective of the individual and give rise to litigable rights and interests, while the harm suffered by individuals subject to defectively appointed regulatory decision makers traditionally has not. Efforts to analogize to the “valid rule” concept or to label these errors “structural” and vindicable absent any showing of harm require great leaps. The Court has assumed litigants’ ability to raise separation-of-powers claims in a defensive posture but has spent little effort to explain why this is so. If concrete individual interests are a function of history or common sense, as *Spokeo* and *TransUnion* instruct, the Court’s practice of relying on individuals to raise these claims is difficult to square with existing jurisprudence.

B. The Court’s (*Sub Silentio*) Creation of a Private Attorney General Mechanism Is Inconsistent with Case Law

The Supreme Court’s efforts to generate incentives for these litigants, too, are problematic and out of step with what the Court has said in other contexts. In *Ryder v. United States*,²⁹⁵ the Court allowed that individual litigants making timely separation-of-powers challenges are entitled to a judgment on the merits and “whatever relief may be appropriate,” as “any other rule would create a disincentive to raise Appointments Clause challenges.”²⁹⁶ The *Lucia* Court, recognizing the ease with which the underlying defect in a particular administrative law judge’s appointment could be cured and the fact that the properly appointed administrative law judge would almost certainly render the same decision, afforded *Lucia* a new hearing before a different administrative law judge.²⁹⁷ The *Lucia* Court did not mention the valid rule doctrine, harmless error, structural error, or standing in its analysis. *Lucia* evinces the Court’s desire to provide a lane for certain separation-of-powers challenges and reflects a Court that is not terribly concerned about how or why it is, exactly, that individual litigants like *Ryder* and *Lucia* are well-situated to bring them.²⁹⁸

Thirty-five years ago, Professor Monaghan likened the empowerment of individuals to assert separation-of-powers claims to recognition of a private attorney general,²⁹⁹ and *Lucia* aptly demonstrates his point. The Court has conferred a possible bounty – a second bite at regulatory proceedings for the disappointed litigant – on individual claimants in an effort to drum up lawsuits that primarily serve other, more institutional interests. Monaghan acknowledged that Congress could create and confer such bounties under its Article I powers, but questioned, “what

²⁹⁵ 515 U.S. 177 (1995).

²⁹⁶ *Id.* at 182-83.

²⁹⁷ *Lucia*, 138 S. Ct. 2044, 2055 (2018). Before *Lucia*, Professor Kent Barnett argued that the Court’s remedies for individual litigants raising structural challenges were “inconsequential,” leaving the prevailing litigant “incurr[ing] significant costs only to end up where it began.” Kent Barnett, *To the Victor Goes the Toil – Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 485 (2014). I do not take issue with that contention; I take issue with the idea that these litigants had injuries that required remedy in the first place.

²⁹⁸ Most recently, in *Seila Law LLC v. Consumer Finance Protection Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court, per Chief Justice Roberts, relied exclusively on past practice to permit litigants to challenge the constitutionality of an officer’s removal restriction. *See id.* Again, the Court did not engage the question why this is so.

²⁹⁹ *See* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 313 (1984).

is the source of judicial authority to license such suits on the Court’s own motion?”³⁰⁰ Monaghan speculated that the Court might be creating constitutional common law.³⁰¹ Perhaps so. But indulging in constitutional common law to create remedies in this area is difficult to square with the Court’s modern reticence to imply constitutional remedies in other contexts.³⁰² The Court has clearly communicated that implied constitutional remedies under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,³⁰³ for example, are a relic of an “ancien regime” whose expansion is now a “disfavored’ judicial activity.”³⁰⁴ This retreat from the implication of remedies not prescribed by Congress is grounded in a conception of the judicial power.³⁰⁵ The Court has repeatedly forsworn the creation of remedies to effectuate its own “policy” preferences,³⁰⁶ and its unexamined willingness to “have one last drink”³⁰⁷ – or more – in this context is remarkable.

It is also difficult to square with prior statements the Court has made about the judicial power to create private attorney general mechanisms, specifically.³⁰⁸ In *Alyeska Pipeline Services Co. v. Wilderness Society*,³⁰⁹ the Court held that federal courts cannot, absent legislative authority, provide attorneys’ fees to victorious private attorneys general, for fear that they will end up giving effect to their own “substantive law preferences and priorities.”³¹⁰ Certainly, there is a distinction between the provision of attorneys’ fees and the requirement that a prevailing litigant get a new hearing before a different decision maker. However, the problem in *Alyeska Pipeline* was the Court substituting its own will to prefer some litigants and claims over others, and this is how commentators have understood it. Professor Judith Resnik read in *Alyeska Pipeline* the proposition that “the Supreme Court forbade judges from selecting litigants to reward for entering courts in pursuit of public norm enforcement.”³¹¹ Professor Owen Fiss noted “the Court’s insistence in *Alyeska Pipeline* that any expansion of the concept of the private attorney general would require specific statutory authorization.”³¹²

³⁰⁰ *Id.* at 313-14.

³⁰¹ *See id.* at 314-15.

³⁰² Implied constitutional remedies peaked within a few years of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and have been in retreat ever since. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017) (stating that modern Court looks for statutory “intent to create a private remedy” and without that, “courts may not create one”) (internal quotation marks omitted).

³⁰³ 403 U.S. 388 (1971).

³⁰⁴ *Ziglar*, 137 S. Ct. at 1855-57.

³⁰⁵ *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (stating that without statutory intent to create a private remedy, “a cause of action does not exist and courts cannot create one”).

³⁰⁶ *Id.* at 287.

³⁰⁷ *Id.*

³⁰⁸ Indeed, Monaghan observed in 2016 that the Roberts Court “seems completely inhospitable to any freestanding notion of the private attorney general.” Henry P. Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1815 n. 57 (2016).

³⁰⁹ 421 U.S. 240 (1975).

³¹⁰ *Id.* at 263-64 & n.39.

³¹¹ Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2139 (2000).

³¹² Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1074 n.9 (1984). *See also* Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 259 (1976) (stating, after *Alyeska Pipeline*, that judicial creation of a private attorney general remedy would “invade the province of Congress”).

The Court’s effort to incentivize these litigants by creating a bounty is questionable absent statutory authority. At the same time that other implied constitutional remedies are on the wane, the Court has taken a uniquely active stance in this context, reaching out to ensure itself a steady diet of a particular, favored claim.

C. Individuals Will Be Challenged to Present Certain Separation-of-Powers Claims

In addition to its tension with conventional notions of the judicial power, reliance on individuals to raise separation-of-powers claims also can give rise to substantive gaps. Not every unconstitutionally appointed officer, for example, acts in a manner that subjects individuals to enforcement proceedings or coercive action. In these cases, no individual litigants can come forward, and barring institutional actors from court may mean the courts have no mechanism for policing inter-branch boundaries at all.

Take, for instance, the unsuccessful challenges to the composition of the Federal Reserve System’s Federal Open Market Committee (FOMC). The FOMC controls the nation’s money supply and is arguably “the country’s most important agency.”³¹³ Blessed both with “extraordinary independence and relative opacity,”³¹⁴ the FOMC uses the purchase and sales of government securities in the open market as a tool to control the nation’s interest rates.³¹⁵ The FOMC’s decisions and actions in the market have a significant effect on the U.S. economy.³¹⁶ Per the statute, the FOMC is comprised of the seven members of the Board of Governors, all nominated by the President and confirmed by the Senate for fourteen-year terms, the president of the Federal Reserve Bank of New York, and four other regional presidents on a rotating basis.³¹⁷ Regional presidents are appointed by a board of directors selected by private banks and the Board of Governors.³¹⁸ At any given time, therefore, five voting members of the FOMC have not been appointed by the President or a Head of Department. Whether this arrangement actually violates the Appointments Clause is beyond the scope of this article; however, the claim that the regional president members of the FOMC exercise “significant authority” sufficient to put them into the “Officer,” rather than “lesser functionary,” category is certainly credible after *Lucia v. SEC*.³¹⁹

In *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*,³²⁰ the D.C. Circuit fielded a challenge to the composition of the FOMC by a non-profit organization and 800 other corporations, businesses, and individuals claiming harm due to

³¹³ David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBLEMS 157, 157 (2015).

³¹⁴ *Id.* at 159.

³¹⁵ See generally <https://www.federalreserve.gov/monetarypolicy/fomc.htm> (last visited Aug. 13, 2019) (describing role of FOMC in setting monetary policy).

³¹⁶ See Ben S. Bernanke & Alan S. Blinder, *The Federal Funds Rate and the Channels of Monetary Transmission*, 82 AM. ECON. REV. 901, 903 (1992) (concluding that monetary policy has measurable effect on real economy).

³¹⁷ See 12 U.S.C. § 263.

³¹⁸ See *id.* § 304.

³¹⁹ See *Lucia v. SEC*, 138 S. Ct. 2044, 2051-53 (2018) (employing but declining to elaborate upon the concise “significant authority” test set out in *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

³²⁰ 766 F.2d 538 (D.C. Cir. 1985).

“devastatingly high interest rates” caused by FOMC policies.³²¹ The unanimous panel denied standing. Accepting that high interest rates caused measurable injury, the court found the challenged FOMC members’ influence on any particular policy and the impact of any particular policy on the claimed adverse conditions to be too speculative to support causation.³²² The court rejected the litigants’ effort to analogize their role to that of the litigants in *Buckley v. Valeo*,³²³ reasoning that, “[b]y contrast to the litigants in *Buckley*, the appellants here do not allege they are directly subject to the governmental authority they seek to challenge, but merely assert that they are substantially affected by the exercise of that authority.”³²⁴ The court concluded that, to permit a challenge by anyone “indirectly affected” by a policy would require courts to field “generalized grievance[s] shared in substantially equal measure by all or a large class of citizens.”³²⁵ The court thus held that “litigants have standing to challenge the authority of an agency on separation-of-powers grounds only where they are directly subject to the authority of the agency, whether such authority is regulatory, administrative, or adjudicative in nature.”³²⁶ The composition of an entity charged with policymaking authority that affects vast sectors of the American economy thus eluded challenge by individual actors – even in the face of a credible Appointments Clause claim – because individuals were not provably hurt by the defect and because the body did not directly subject any individuals to its authority.³²⁷

These are not the only separation-of-powers claims that may be difficult for individuals to bring. Shutdown of legislative standing and exclusive reliance on individual litigants may make it difficult for courts to field Emoluments Clause challenges. The Foreign Emoluments Clause of the Constitution prohibits U.S. office holders from “accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state” without “the Consent of the Congress.”³²⁸ The Supreme Court has not elaborated on the meaning of the clause.³²⁹ Designed to avert corruption, the Clause is an effort to prevent officeholders from being “seduced by baubles and titles to put favor toward other countries

³²¹ *Id.* at 540-41.

³²² *See id.* at 542.

³²³ 424 U.S. 1 (1976).

³²⁴ *Id.* at 543.

³²⁵ *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

³²⁶ *Id.*

³²⁷ This is but one example. Professor Jamal Greene notes that one problem with reliance on individual plaintiffs is “the difficulty in reaching a court of any kind in the first instance.” Greene, *supra* note ___, at 135. He cites, for example, the many questionable recess appointments made during intrasession recesses to fill positions like Engraver of the Mint, or Deputy Postmaster, or member of the Corporation for Public Broadcasting, none of which subject individuals to coercive proceedings and all of which would elude individual challenge under the D.C. Circuit’s formulation. *See id.*

³²⁸ U.S. CONST. art I, § 9, cl. 8.

³²⁹ A search of “Emoluments Clause” on Westlaw on May 21, 2021 reflected fifty-nine reported cases, the vast majority of which issued after January 2017. In *United States ex rel. New v. Rumsfeld*, which rejected a serviceman’s claim that the order that he wear a United Nations shoulder patch and headgear while he served on the UN Peacekeeping Force in Macedonia required him to accept a foreign emolument, the court noted that “[p]etitioner has offered (and there appears to be) no Supreme Court precedent defining the scope and application of the clause.” 350 F. Supp. 2d 80, 102 (D.D.C. 2004).

before patriotism.”³³⁰ Corruption, a “‘crucial term’ for the American Framers,” was “discussed more often in the Constitutional Convention than factions, violence, or instability.”³³¹ The Clause gives Congress a textually-committed role in preclearing any foreign gift “of any kind whatsoever,” in the absence of which its receipt is presumably prohibited.³³²

After the inauguration of President Donald Trump, litigants brought three lawsuits challenging his ownership of and participation in an extensive business empire that includes the Trump Tower in New York and the Trump International Hotel in Washington, D.C. These lawsuits each took a different tack in attempting to satisfy the requisites of standing doctrine, with the first filed by a consumer watchdog group and individual litigants alleging increased monitoring costs and competitive injury (“Competitor/Watchdog Complaint”),³³³ the second filed by the state of Maryland and the District of Columbia alleging injury to sovereign and proprietary interests (“State Complaint”),³³⁴ and the third filed by 215 members of Congress alleging institutional injury (“Congressional Complaint”).³³⁵ Reasonable minds can disagree on the standing questions, and each case took a serpentine path. The Second Circuit reversed a decision of the district court denying standing³³⁶ in the Competitor/Watchdog Complaint³³⁷ and subsequently denied a petition for rehearing *en banc*. A Fourth Circuit panel initially granted a petition for mandamus and reversed the district court decision³³⁸ finding standing in the State Complaint,³³⁹ but the *en banc* court reversed the panel decision, finding insufficient “clear and indisputable” basis to invoke the “drastic” remedy of mandamus.³⁴⁰ The Supreme Court granted both petitions for certiorari and remanded with instructions to dismiss as moot after President Biden’s inauguration.³⁴¹ Finally, the D.C. Circuit reversed a district court decision granting

³³⁰ Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 362 (2009). *But see* Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 405-06 (2012) (arguing that the Constitution’s relaxation of the Articles of Confederations’ prohibitions on states receiving foreign gifts signified the Framers were not “‘obsessed’ by the potential for foreign corruption).

³³¹ *Id.* at 352-53.

³³² *See* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 33 (2012).

³³³ *See* Second Amended Complaint, *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 17-cv-00458-RA (S.D.N.Y. filed May 10, 2017) [hereinafter, “Competitor/Watchdog Complaint”].

³³⁴ *See* Complaint, *D.C. v. Trump*, No. 17-cv-01596-PJM (D. Md. filed June 12, 2017) [hereinafter, “State Complaint”]. The increased phenomenon of state litigants suing to enforce federal law has been a singular feature of the Obama and Trump eras. *See generally* Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1233-34 (2019) (cataloging “spate” of recent public interest suits by states); Tara Leigh Grove, *Forward: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883, 1884-85 (noting sharp uptick in state suits against the federal executive under Obama and Trump administrations).

³³⁵ *See* Complaint, *Blumenthal v. Trump*, No. 17-cv-01154 (D.D.C. filed June 14, 2017) [hereinafter, “Congressional Complaint”].

³³⁶ *See* *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 184-87, 188-89 (SDNY 2017).

³³⁷ *See* *Citizens for Responsibility & Ethics in Washington v. Trump*, 953 F.3d 178, 190-94 (2d Cir. 2019) (reversing district court and finding that allegations of competitors plausibly alleged injury-in-fact, causation, and redressability).

³³⁸ *See* *D.C. v. Trump*, 291 F. Supp. 3d 725, 752-53 (D. Md. 2018), *vacated as moot*, 838 F. App’x 789 (4th Cir. 2021).

³³⁹ *See* *D.C. v. Trump*, 928 F.3d 360, 375-77 (4th Cir. 2019).

³⁴⁰ *See* *In re Trump*, 958 F.3d 274, 281, 286-87 (4th Cir. 2020) (*en banc*).

³⁴¹ *See* https://www.supremecourt.gov/orders/courtorders/012521zor_3f14.pdf.

standing in the Congressional Complaint, relying entirely on *Raines v. Byrd*.³⁴² The Supreme Court denied the petition for certiorari on October 13, 2020.³⁴³

Whether individual and state plaintiffs, proceeding on a competitor standing theory, can bring Emoluments challenges is difficult to predict, and circumstance afforded no definitive call. However, there may be reasons for skepticism, as even those supportive of competitor standing in this context call it “a complicated and close question.”³⁴⁴ Competitors may face an uphill climb in establishing that they are within a class of plaintiffs whose interests the Emoluments Clause protects. In *Lexmark International, Inc. v. Static Control Components, Inc.*,³⁴⁵ the Court clarified that “zone of interests” is not a standing concept but a conventional inquiry that – in the statutory context, at least – “requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”³⁴⁶ In *Alexander v. Sandoval*,³⁴⁷ the Court put a tight rein on this inquiry, instructing that judges are not to find litigable rights absent clear intent from Congress and “may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”³⁴⁸ *Ziglar v. Abbasi* suggests this same inquiry may be relevant in inferring rights of action under the Constitution.³⁴⁹ It is plausible that the confluence of *Lexmark*, *Sandoval*, and *Ziglar* will lead the Court to deploy an original understanding of the anti-corruption purposes of the Foreign Emoluments Clause to preclude individual competitors from filing suit, at least absent a statute expressly conferring a right of action.³⁵⁰ If institutional actors cannot step into the breach, the Emoluments Clause may be the proverbial parchment barrier.

³⁴² See *Blumenthal v. Trump*, 949 F.3d 14, 18-20 (D.C. Cir. 2020). The congressional plaintiffs did not file a petition for rehearing *en banc* but filed a petition for certiorari on July 6, 2020.

³⁴³ See https://www.supremecourt.gov/orders/courtorders/101320zor_8m58.pdf.

³⁴⁴ See Jed Handelsman Shugerman & Gautham Rao, *Emoluments, Zones of Interest, and Political Questions: A Cautionary Tale*, 45 HASTINGS CONST.Q. 651, 651 (2018).

³⁴⁵ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

³⁴⁶ See *id.* at 127; see also See S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 112 (2014); Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL OF RIGHTS J. 209, 212 (2014).

³⁴⁷ 532 U.S. 275 (2001).

³⁴⁸ *Id.* at 286-87.

³⁴⁹ See 137 S. Ct. 1843, 1856-57 (2017).

³⁵⁰ The district court initially rejected the Competitor/Watchdog Complaint on this ground. See *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 187-89 (SDNY 2017) (“There is simply no basis to conclude that the Hospitality Plaintiffs’ alleged competitive injury falls within the zone of interests that the Emoluments Clauses sought to protect.”). On appeal, the Second Circuit initially indicated that the zone of interests inquiry was unrelated to the standing question or subject matter jurisdiction but went on to find that the competitors’ interests were within the Emoluments Clause’s zone of interests, see *Citizens for Responsibility & Ethics in Washington v. Trump*, 939 F.3d 131, 154-58 (2d Cir. 2019), but the court subsequently amended its decision to delete its discussion of the merits of the zone of interests question, see *Citizens for Responsibility & Ethics in Washington v. Trump*, 958 F.3d 178, 200 n.13 (2d Cir. 2020). Presumably, absent a statutory cause of action, plaintiffs would have an equitable basis for relief. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n. 2 (2010) (noting that equitable relief is a well-established mechanism for preventing entities from acting unconstitutionally); see also *In re Trump*, 958 F.3d 274, 286 (4th Cir. 2020) (noting likely availability of equitable relief in the Emoluments Clause context).

III. Revisiting *Raines*: The Case for Limited Institutional Standing Under Existing Precedent

The role of individuals in vindicating most separation-of-powers values is often problematic, and the Court’s limited conception of institutional standing, laid out in *Raines v. Byrd*³⁵¹ by the *Goldwater v. Carter*³⁵² author, is in tension with the Roberts Court’s repudiation of a sidelined role for the federal judiciary in *Zivotofsky I*³⁵³ and, most recently, in *Trump v. Mazars USA, LLP*.³⁵⁴ To resolve this tension, one can find room in *Raines* for a narrower reading, one that may legitimately be asserted without overruling or engaging in unprincipled “confining.”³⁵⁵ It is possible, consistent with *Coleman*, *Raines*, *AIRC*, and *Virginia House of Delegates*, to permit limited standing by individual institutional actors whose institutional prerogatives, such as votes or rights to appoint, are overridden by a coordinate branch.

First, though, a concession. One can absolutely read *Raines* to nearly eviscerate institutional standing, if one is inclined, and lower courts and commentators that have done so have not acted unreasonably.³⁵⁶ Chief Justice Rehnquist was not messing around. The Court ultimately appeared to preserve *Coleman*’s conclusion that individual legislators could assert institutional injury, but it did so only after a lengthy paragraph poo-pooing the idea altogether.³⁵⁷ The Court disdainfully noted that the case pertained to “state legislators”³⁵⁸ and did its best to put the case into a box.³⁵⁹ The Court drew much insight from the fact that prior clashes among coordinate branches had not played out in federal court.³⁶⁰ The Court’s purpose was plainly to harrumph at the idea of either Congress or the President taking an institutional battle into a judicial forum.³⁶¹ Anyone seeking to put legislative standing into a tiny box consisting of *Powell v. McCormack* and mirror-image *Coleman* facts has ample fodder in *Raines* to do so; anyone unwilling to cede even *Coleman* standing to congressional actors can – as Judge Trevor McFadden³⁶² and Justice Alito³⁶³ did – pick up on the fact that conferring standing on state legislators raises no separation-of-powers concerns. *Raines* can indeed be read broadly, if that is one’s inclination.

³⁵¹ 521 U.S. 811 (1997).

³⁵² 446 U.S. 996 (1979).

³⁵³ 566 U.S. 189 (2012).

³⁵⁴ 140 S. Ct. 2019 (2020).

³⁵⁵ Daniel B. Rice & Jack Boeglin, *Confining Cases to their Facts*, 105 VA. L. REV. 865, 873-74 (2019).

³⁵⁶ See Stern, *supra* note __, at 31 (“Construing *Raines* as tacitly imposing a virtual blanket ban on legislator standing finds support in both precedent and the tenor of the Court’s opinion.”).

³⁵⁷ See *Raines*, 521 U.S. at 821-22.

³⁵⁸ *Id.* at 821-22 (emphasis original). The Court emphasized that *Coleman* involved state legislators even as it disclaimed any need to assess whether that provided a basis for distinguishing the case. See *id.* at 824 n.8.

³⁵⁹ See *id.* at 823.

³⁶⁰ See *id.* at 826-27. Again, this claim is curious because general federal question jurisdiction did not exist until 1875.

³⁶¹ See 521 U.S. at 828.

³⁶² See *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 21 n.8 (D.D.C. 2019).

³⁶³ See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1958 (2019) (Alito, J., dissenting).

But should it? The Roberts Court appears to want these cases and believes it has a role to play when two branches square off in a turf dispute.³⁶⁴ Because of *Raines*, the Court has felt constrained to rely on suits by individuals whose claims to litigable interests are often dubious and whose incentivization rests uneasily with the Court’s understanding of its own authority in other areas.³⁶⁵ *Raines* commanded the majority vote that eluded Chief Justice Rehnquist in *Goldwater v. Carter*; thus, the present Court cannot simply ignore the case (as *Zivotofsky I* ignored *Goldwater*). However, there are ways to read *Raines* that allow institutional actors limited, and systemically beneficial, forms of standing. Setting aside the bluster, *Raines* addressed a particular kind of claim – a comparatively easy claim for the denial of standing – from which other kinds of institutional standing can, and should, be distinguished.

This part proceeds in two sections. First, I make the case that the actual holding of *Raines* is fairly modest. Then, having minimized *Raines*, I will develop the “*Coleman* claim” concept further, making the case for the limited kinds of institutional standing that ought to be permissible.

A. What *Raines* Did and Didn’t Do

It is important at the outset to decouple the holding of *Raines* from its dicta.³⁶⁶ The *Raines* Court relied extensively on dogs that didn’t bark – the fact that past Presidents had not brought suit to enforce limitations on their removal or appointment powers.³⁶⁷ A challenge to the President’s authority to file suit in federal court was not before the *Raines* Court. At a minimum, though it clearly expressed a mood, *Raines* thus says nothing binding or authoritative about executive standing. The ability of the executive branch to resist incursions on its authority by outside actors – hinted at in *FEC v. NRA Political Victory Fund*³⁶⁸ – remains an open question that has not been foreclosed by any Supreme Court decision.³⁶⁹

³⁶⁴ See *supra* notes ___ and accompanying text.

³⁶⁵ See *supra* notes ___ and accompanying text

³⁶⁶ The Court has repeatedly professed that it is not bound by dicta, those portions of its opinion that are unnecessary to the result. See, e.g., *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013) (“Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?”); *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (declaring itself free to set aside dicta in a prior case in which the issue “was not fully debated”); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399-400 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”).

³⁶⁷ 521 U.S. at 826-28. See *Nash*, *supra* note ___, at 356 & n.109.

³⁶⁸ 513 U.S. 88, 93 (1994) (recognizing that it is “undisputed that this is a case ‘in which the United States is interested’”). The Court held that the Solicitor General, not the FEC, was the appropriate entity under statute to petition for certiorari but did not reject the executive branch’s institutional interest in pursuing the appeal. See *id.* at 96-97.

³⁶⁹ See Tara Leigh Grove, *Standing Outside of Article III*, *supra* note ___, at 1326. Grove cites *Director, Office of Workers’ Compensation Programs, Department of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995), for the proposition that the Supreme Court has suggested executive actors lack standing to protect institutional interests. See Grove, *supra* note ___, at 1326. In *Director, Office of Workers’ Compensation Programs*, a unanimous Court held, as a matter of statutory interpretation, that a Director was not a person “adversely affected or aggrieved” within the meaning of the Longshore and Harbor Workers’ Compensation Act (LHWCA). 514 U.S. at 130. The Court noted that other statutes had specifically given executive actors the right to petition for review

Focusing in, then, on congressional standing, it is important to differentiate two kinds of claims – claims where the claimant asserts that his *own* chamber has inflicted institutional injury and claims where the claimant asserts that a *different* branch of government has inflicted an institutional injury. In the former situation, but not the latter, there are obvious mechanisms for self-help, and standing, indeed a role for the judiciary at all, is more problematic.³⁷⁰ *Raines* confronted precisely this situation: a challenge by members of Congress to a statute on which they had just (unsuccessfully) voted.³⁷¹ Such a claim could never be conceptualized in *Coleman* terms because by definition, the members’ votes had counted. There simply were too few of them, and the members had in hand the ability to amend or repeal the statute upon convincing sufficient numbers of their colleagues.³⁷² *Raines* cited the self-help remedies the putative litigants possessed in support of its holding.³⁷³ Again, *Raines* undeniably reflects a shut-it-down mood, but the sole claim before the Court, and thus the sole claim actually addressed, was an intra-chambers dispute, a congressional “own goal” that presented a straightforward case for denial of standing.³⁷⁴ *Raines* did not confront claimed injury at the hands of another, overreaching branch.

Raines also did not say that *Coleman* claims could only be asserted by an entire legislative body, and *AIRC*³⁷⁵ and *Virginia House of Delegates*³⁷⁶ didn’t either. Although the penultimate paragraph in *Raines* attached “some importance” to the fact that plaintiffs had not been authorized to represent their respective houses, the *Raines* Court did not connect this absence of authorization to the *Coleman* claim it had begrudgingly preserved six pages earlier in another section of the opinion.³⁷⁷ Indeed, to do so, it would have had to overrule that portion of

and found the absence of similar language in the LHWCA dispositive. *See id.* The Court suggested that, in the absence of statutory authorization, an executive actor seeking to prevent impairment of a governmental interest might have standing when it had “an interest of an extraordinary nature, extraordinarily impaired.” *Id.* I see the case as a statutory case first and foremost that actually leaves room for standing to pursue institutional harms (even without a statute) in extreme cases.

³⁷⁰ One could argue that legislation is always a self-help possibility, even when the harm comes from an external branch. Relegating Congress to legislative remedies to avoid institutional injury at the hands of an outside actor, though, ignores “the fact that ‘the legislative route is arduous and time-consuming,’ and that consequently, the right asserted may prove to be unenforceable as a practical matter.” Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1648 (1977) (quoting *Kennedy v. Sampson*, 511 F.2d 430, 435 n.17 (D.C. Cir. 1974)) (hereinafter, Note, *Congressional Access*); *see also* Stern, *supra* note __, at 14 (“As a practical matter, the legislative tools theoretically available to counter executive inaction through the political process are likely to prove unavailing.”).

³⁷¹ *See* 521 U.S. at 814.

³⁷² *See* Hall, *supra* note __, at 14 (observing that Congress had inflicted the injury upon itself and “plaintiffs’ quarrel was with their colleagues”).

³⁷³ *See* 521 U.S. at 823.

³⁷⁴ Arguably, it was a clearer case for employing the D.C. Circuit’s strategy of equitable abstention, but I take *Raines* on its terms. *Raines* came two years after *Wilton v. Seven Falls Co.*, in which a unanimous Court had underscored “the breadth of leeway” embedded in the Declaratory Judgment Act’s “statutory commitment to discretion” that permitted just such abstention, 515 U.S. 277, 287 (1995), but the *Raines* Court did not consider that route.

³⁷⁵ 135 S. Ct. 2052 (2015).

³⁷⁶ 139 S. Ct. 1945 (2019).

³⁷⁷ *Id.* at 829. The Court dropped a cryptic footnote citing a decision that a single member of a school board lacked standing to appeal when the entire board had declined to do so, *see Bender v. Williamsport Area Sch. Dist.*, 475 U.S.

Coleman permitting a subset of state senators to bring suit, something the *Raines* Court’s approving reference to individual “legislators” in *Coleman* plainly refuted.³⁷⁸ In *AIRC*, the Court found two bases to distinguish *Raines*. First, the entire Arizona legislature, rather than individual members, had brought suit, and second, the case presented a *Coleman* claim in that legislators, stripped of their ability to vote on districting, could claim practical nullification.³⁷⁹ The Court did not suggest that *both* of these factors were necessary to confer standing.³⁸⁰ The *Virginia House of Delegates* case did not involve a *Coleman* claim at all, a fact the Court emphasized.³⁸¹ Thus, in distinguishing the case from *AIRC* on the basis that only one chamber of the Virginia legislature had sought to appeal, the *Virginia House of Delegates* case did not suggest in any way that participation and authorization of both chambers is a necessary feature of a *Coleman* claim.

Finally, although the *Raines* Court made a footnoted suggestion that it might additionally be able to distinguish *Coleman*, which involved state legislators, because it did not raise the same separation-of-powers concerns, the Court stopped short of deciding the question.³⁸² *AIRC* likewise noted in a footnote that the case dealt with a state legislature, rather than Congress, as an additional point of distinction from *Raines*, but again it did not state that a *Coleman* claim lacked applicability to members of Congress.³⁸³

In *Raines*, then, the Court confronted a simple claim by a handful of individual members of Congress that the statute passed by their colleagues, on which they had just unsuccessfully voted “nay,” was a flawed statute. Their suit transparently sought another bite at a political process that had worked, albeit one that had not ended as they wished.³⁸⁴ The injury they posited, that the line item veto granted to the President trammelled on their institutional prerogatives,

534, 544 (1985), and an 1892 decision in which the Court rejected a Congressman’s challenge to internal House rules governing quorums, *see* *United States v. Ballin*, 144 U.S. 1, 7 (1892).

³⁷⁸ *See* 521 U.S. at 823. *See also* Hall, *supra* note __, at 22 (“*Coleman* held that nullification of a specific legislative vote could constitute an injury sufficient to confer standing on those *individual legislators* whose votes were nullified.”). Hall finds in *Raines* the proposition that injuries to Congress’s institutional prerogatives can be asserted by Congress itself but not by individual members, noting language that the *Raines* plaintiffs’ injuries were “wholly abstract and *widely dispersed*.” *See id.* (quoting *Raines*, 521 U.S. at 829-30) (emphasis added). To me, *Raines*’ preservation of *Coleman*, a suit filed by individual members, suggests that the key point of emphasis was on the “abstract” nature of plaintiffs’ claim of “dilution of institutional legislative power,” in contrast to the comparatively concrete *Coleman* claim of vote nullification. *Raines*, 521 U.S. at 825-26.

³⁷⁹ 135 S. Ct. at 2664-65.

³⁸⁰ Indeed, the *AIRC* Court expressly noted that only twenty of forty state senators had brought suit in *Coleman*. *See id.* at 2665. Hall has argued that, where the legislative prerogative belongs to an entire chamber, as it did in *AIRC*, only that chamber in its entirety should have standing to assert it. *See* Hall, *supra* note __, at 28. I would submit that, where an entire chamber possesses a legislative prerogative, a majority of its members would likewise have standing, as a numerical majority has the power to act on behalf of that chamber. *See infra* notes __ and accompanying text.

³⁸¹ 139 S. Ct. at 1954.

³⁸² *See* 521 U.S. at 824 n.8. As noted, Judge McFadden recently picked up on this distinction. *See* *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 21 n.8 (D.D.C. 2019). Moreover, Justice Alito, joined by three colleagues, dissented in *Virginia House of Delegates* in part because “*Raines* rested heavily on federal separation-of-powers concerns, which are notably absent here.” 139 S. Ct. at 1958 (Alito, J., dissenting).

³⁸³ 135 S. Ct. 2652, 2665 n.12 (2015).

³⁸⁴ This stratagem was reminiscent of that employed by Charles S. Fairchild, who having failed in his political effort to derail the Nineteenth Amendment, sought unsuccessfully to secure the same result by “indirection” in the federal courts. *Fairchild v. Hughes*, 258 U.S. 126, 130 (1922).

diluting their power, was one inflicted by Congress itself. *Raines* begrudgingly left *Coleman* intact and did not circumscribe it to its state context; did not directly connect its preservation of *Coleman* to official authorization by the entire body; and did not say anything binding about standing of other institutional actors. Put simply, *Raines* left quite a bit of room.

B. Chiseling Out the *Coleman* Claim: What Claims Institutional Actors Ought to Be Able to Assert

Room, that is, for a properly-defined federal *Coleman* claim, which ought to have several distinguishing and limiting features drawn from existing precedent and a delimited *Raines*. The federal courts' role should not be to pretermite the political process, and this article does not contend that federal courts should be the place of first resort when coordinate branches overstep. Quite the contrary, the federal courts' role emerges out of necessity when dysfunction overtakes the process and opportunities for self-help and political resolution are not available, a principle reflected most recently in the Court's unflinching examination of a clash over the congressional subpoena power in *Trump v. Mazars*.³⁸⁵ The first resort should always be the "tradition of negotiation and compromise"³⁸⁶; the problem, though, is that the tradition these days is increasingly honored in the breach.

The first thing a cognizable *Coleman* claim needs a proper target. Unlike in *Raines*, a *Coleman* claim must be asserted against a coordinate branch actor, against which the plaintiff presumptively has fewer avenues for self-help, rather than against the plaintiff's own branch. The suit itself may reflect the plaintiff's calculus that the branches are at a political impasse. The federal courts, in such circumstances, are not invited into an unseemly relitigation of a political battle properly waged in another arena; rather, they are asked to draw lines and ensure that each branch is respecting the separation-of-powers scheme anticipated by the framers. In such circumstances, the federal court, as in *Zivotofsky I*, is called upon for "careful examination of the textual, structural, and historical evidence" – that is to say, called to do court-like things.³⁸⁷

Second, a *Coleman* claim must plausibly demonstrate that the defendant actor has usurped an institutional prerogative that is constitutionally allocated to the plaintiff's office, overrunning boundaries and hindering the plaintiff's ability to perform as the Constitution anticipates. In *Coleman*, the tie-breaking actions of the lieutenant governor stripped votes that had already been cast of their effect.³⁸⁸ Despite *Raines*' attempt to cabin *Coleman* to its precise factual context, the Court in *AIRC* made clear that "nullification" is a more capacious concept.³⁸⁹ In *AIRC*, the state legislature challenged the legislative districting plan drawn by an independent redistricting commission, contending that the plan and the commission deprived the state

³⁸⁵ The Court in *Mazars* committed itself "to ensure that we not needlessly disturb 'the compromises and working arrangements'" that – at least in the past – characterized interaction between Congress and the Executive Branch. *Trump v. Mazars USA LLP*, https://www.supremecourt.gov/opinions/19pdf/19-715_febh.pdf, slip op. at 11.

³⁸⁶ *Id.* at 10.

³⁸⁷ *Zivotofsky I*, 132 S. Ct. 1421, 1430 (2012).

³⁸⁸ See *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

³⁸⁹ 135 S. Ct. 2652, 2665 (2015).

legislature of its role in drawing legislative districts in violation of the Elections Clause.³⁹⁰ The state legislature had neither voted on nor submitted its own plan.³⁹¹ The Court found *Coleman* sufficiently analogous because the scheme would nullify, “now or ‘in the future,’” any role for the legislature in the redistricting process.³⁹² It was enough, in other words, that the legislature claimed its prescribed role in the process had been foreclosed; the Court did not need to see or count up actual, already-cast votes. Properly understood, the *Coleman* claim should encompass situations where an institutional actor constitutionally should have some role, and another branch deprives it of the opportunity to play it.

Third, while it is not necessary to a *Coleman* claim that the whole legislative body join the suit, the Court’s precedents support the requirement that there should be a sufficient number of plaintiffs that their participation in the process (from which they were excluded) could have been outcome-determinative. Sound legal and prudential reasons support this limitation, without which the federal courts might become enmeshed in lawsuits filed by individual actors whose claims of injury are insufficiently concrete and for whom political remedies may still exist.³⁹³ Importantly, requiring participation of an outcome-determinative group limits the Court’s intercession to redressable conflicts. Again, the point of permitting institutional standing should be that the political process has broken down; one branch has precluded another from its participatory role and left the other with paltry means of self-help. Requiring sufficient plaintiffs to have changed the outcome comports with the instincts of the *Raines*, *AIRC*, and *Virginia House of Delegates* Courts that the endorsement of the official body matters at the margins.³⁹⁴ However, though participation of the whole body in a lawsuit *suffices* to confer institutional standing, it is not necessary where an outcome-determinative voting bloc has joined, as *Coleman* itself illustrates. *Coleman* involved half of the state senate, all of whom had voted no, and their votes, without the participation of the lieutenant governor, “would have been decisive to defeat ratification.”³⁹⁵ Their claim, in other words, was that the outcome that would have obtained was distorted by the nullification. *AIRC* was a suit filed by the whole legislative body, but nothing in the Court’s opinion precludes the inference that a majority of voting members of each house

³⁹⁰ “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations” U.S. CONST. Art. I, § 4, cl. 1.

³⁹¹ See 135 S. Ct. at 2663-64.

³⁹² *Id.* at 2665.

³⁹³ See Note, *Congressional Access*, *supra* note __, at 1649 (arguing that permitting a single legislator to go to the courts encourages bypass of the political process); Nash, *supra* note __, at 333 (urging that legislative standing be limited to situations where plaintiffs represent enough legislators to affect the outcome to avoid “throw[ing] open the federal courthouse doors to legislators dissatisfied with particular political outcomes”). Thus, a suit like that brought in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), in which a single Senator challenged the President’s pocket veto of a law claiming diminution of the effectiveness of his vote, would not stand. In my view, the injury to the single Senator, as opposed to a voting majority, is too conjectural, as the same result could obtain even had the President acted properly. See Note, *Congressional Access*, *supra* note __, at 1638 (noting “the problem of stating with particularity the injury suffered by the plaintiff”).

³⁹⁴ See *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *AIRC*, 135 S. Ct. 2362, 2664 (2015); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019).

³⁹⁵ 307 U.S. at 438.

could likewise have brought the suit, claiming their right to approve an alternative districting scheme, and thus the result of the process, was likewise distorted.³⁹⁶

Examining the viability of a *Coleman* claim in the Emoluments Clause context makes it more concrete. In *Blumenthal v. Trump*, 172 members of the House and thirty members of the Senate claimed that the President’s receipt of foreign emoluments without congressional consent violated the Constitution, injuring them in their institutional capacities by depriving them of their right to confer or withhold consent.³⁹⁷ They had a proper target: Their quarrel was not with their own chamber; instead, they claimed that an outside actor, the President, was doing something he was powerless to do unless they had specifically authorized him to do it.³⁹⁸ Like the injury in *AIRC*, their claim sounded in vote nullification; by failing to seek consent from Congress, the President had afforded its members no opportunity to vote on consent at all.³⁹⁹ So far so good. However, while their target and their claim sounded in *Coleman* terms, the *Blumenthal* plaintiffs were insufficiently numerous. A majority of voters in both chambers would be required to approve an emolument via a joint resolution⁴⁰⁰; thus, a majority of voters in *either* chamber would have been sufficient to *withhold* approval of an emolument. Had a majority of the House signed onto the Complaint, standing would have been proper. However, with less than a majority from either chamber in the caption, and thus a majority in both chambers not participating in the lawsuit, the *Blumenthal* plaintiffs’ vote nullification claim did not give rise to a tangibly disrupted outcome, thus defeating their claim to standing.

CONCLUSION

A rift amongst the justices as to the appropriate role for the federal judiciary in clashes between coordinate branches evaded repair in *Goldwater v. Carter*⁴⁰¹ and found seeming resolution in *Raines v. Byrd*.⁴⁰² In the Rehnquist era, the Court invoked separation-of-powers to keep itself largely sidelined and was content to leave Congress and the President to their political remedies. With *Zivotofsky I*,⁴⁰³ the Roberts Court reasserted its role in patrolling the boundaries of coordinate branches’ authority and checking them when they intrude upon each other’s prerogatives. Reading the Constitution’s text, drawing inferences from its structure, and considering historical context, the Court reasoned, are “what courts do,” even when the questions are difficult and even when they trench on sensitive areas, like authority to conduct foreign

³⁹⁶ See 135 S. Ct. at 2664-65. In Arizona, a bill passes by a simple majority in each chamber, after which it goes to the governor. See <https://libguides.law.asu.edu/ArizonaLaw/legislativeprocess> (last visited July 7, 2020).

³⁹⁷ See Complaint, *Blumenthal v. Trump*, No. 17-cv-01154, ¶¶ 4-6 (D.D.C. filed June 14, 2017).

³⁹⁸ See Matthew I. Hall, *Who Has Standing to Sue the President Over Allegedly Unconstitutional Emoluments?*, 95 WASH. U. L. REV. 757, 770 (2017) (noting that in the Emoluments Clause context, inaction on the part of either chamber means consent is denied). Hall contends that the right to vote on emoluments is an individual prerogative and would permit standing to a single member. See *id.* at 771-72.

³⁹⁹ See *id.* ¶ 3.

⁴⁰⁰ A joint resolution approving receipt of an emolument appears to be the historical mechanism by which Congress provided consent. See, e.g., J. Res. No. 39, 54th Congress, 29 Stat. 759 (1896) (providing that President Benjamin Harrison “be, and he is hereby, authorized to accept certain medals presented to him by the Governments of Brazil and Spain during the term of his service as President of the United States”).

⁴⁰¹ 444 U.S. 996 (1979).

⁴⁰² 521 U.S. 811 (1997).

⁴⁰³ 566 U.S. 189 (2012).

affairs.⁴⁰⁴ *Trump v. Mazars* solidifies the Court's perception of its role: It is willing to dive into and resolve a conflict between coordinate branches even when their impasse is historic and even when the Constitution provides no clear answers.⁴⁰⁵

While the Roberts Court has asserted its confidence in providing answers in the grey areas where coordinate branches intersect, it has relied primarily on individual litigants to broach these claims. This occasionally works. For example, where Congress has wrested an Article III decision maker from an individual litigant in a private rights case, the individual litigant has suffered the unique harm of losing a decision maker who is insulated from the political process. Outside the Article III context, though, it frequently does not work. Individual litigants suffer no real injury when they are subject to coercive action by someone appointed during an intra-session recess or by an actor other than a head of department. Recognizing this, the Court has creatively imposed bounties for successful litigants, allowing them an additional spin of the wheel, one last chance to obtain a desired substantive outcome that is unrelated to the separation-of-powers violation they have successfully pressed. The Court's liberties with doctrine in this area, and its use of a *de facto* private attorney general mechanism improvised by judicial fiat, are difficult to square with what the Court has done and said in other contexts. Moreover, reliance on individual litigants is spotty. The branches can and frequently do clash and usurp each other's prerogatives in ways that touch no individual litigants at all.

This article flags both the Roberts Court's willingness to take on these claims and the conceptual difficulty with its reliance on individual litigants and urges that age-old limitations on institutional standing deserve another look. Looking directly at the issue before *Raines*, what it preserved, and what the Court has done in related areas since, this article finds room for limited institutional standing where one branch circumvents the role of another branch, leaving it without recourse and unable to perform its constitutionally allocated role in the process, and the number of plaintiffs joined would be sufficient to have changed the result. Admitting that *Raines v. Byrd* reflects a mood disdainful of purported judicial intermeddling that can be read expansively, this article sets that mood aside as a relic of another Court, another era, and another conception of the judicial function.

⁴⁰⁴ *Id.* at 201.

⁴⁰⁵ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029-32 (2020).