LITIGIOUS LEGISLATORS: *HOUSE V. BURWELL* AND THE JUSTICIABILITY OF CONGRESSIONAL SUITS AGAINST THE EXECUTIVE BRANCH*

I. INTRODUCTION

On July 30, 2014, the United States House of Representatives adopted House Resolution 676, authorizing Speaker of the House John Boehner, on behalf of the House, to sue Executive officials in the Obama administration over the Affordable Care Act (ACA).[1] In the resulting suit, the House claimed that Secretary of Health and Human Services Sylvia Burwell, Secretary of the Treasury Jacob Lew, and their respective departments unconstitutionally amended the ACA by delaying the implementation and narrowing the scope of the employer mandate, and unconstitutionally spent billions of unappropriated dollars to fund the "Section 1402 Cost-Sharing Offsets."[2] This suit, *United States House of Representatives v. Burwell*,[3] is the latest in a litany of legal and political tactics that House Republicans have used to oppose the ACA and to attempt to force its repeal or revision.[4] More broadly, it has the potential to be a landmark case for constitutional standing jurisprudence. Never before has an entire House of Congress brought a suit against the executive branch.[5]

Throughout history, parties, politicians, and others have brought lawsuits against Presidents and executive branch officials. These include famous cases

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1. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 63 (D.D.C. 2015).

2. *Id.* Section 1402 of the ACA requires insurance companies to provide reduced-cost insurance coverage to certain qualifying policyholders. The federal government will then reimburse the insurers for the cost of these reductions with funds from the treasury. *Id.* at 60. In addition, § 1401 created a tax credit to assist certain households with the cost of insurance premiums. The tax credits are paid directly to the insurance companies, who then reduce the premiums charged to the insured households accordingly. *Id.*

3. 130 F. Supp. 3d 53 (D.D.C. 2015).

4. Emma Dumain, *House Votes to Sue Obama*, ROLL CALL (July 30, 2014, 6:30 PM), http://blogs.rollcall.com/218/house-votes-to-sue-president-obama/?dcz=emailalert [https://perma.cc/G32P-ASR6].

5. Louis Jacobson, *Nancy Pelosi says U.S. House has never sued a sitting President in all of U.S. history*, POLITIFACT (Jul. 31, 2014, 11:34 AM), http://www.politifact.com/truth-o-meter/statements/2014/jul/31/nancy-pelosi/nancy-pelosi-says-us-house-has-never-sued-sitting-/ [https://perma.cc/5VJ7-L43L].

such as *United States v. Nixon*[6] and *Clinton v. Jones*,[7] as well as less famous ones, such as one case in which a Mississippi state senator sued President Kennedy, while he was in office, for injuries the senator sustained in a car accident that involved the President's driver.[8]

President Obama has been sued particularly frequently, beginning with a number of suits from citizens challenging the legitimacy of his candidacy under the natural born citizen clause[9] and continuing with lawsuits challenging his use of executive power.[10] Unlike suits brought by individuals or state entities—or even suits brought by the United States—suits in which the plaintiffs are legislators, working in their official capacities, present unique legal issues. The D.C. Circuit Court of Appeals has developed a standing doctrine that applies specifically to these cases. The Supreme Court has decided several such cases, but has not developed a clear doctrine. This Comment argues that the Supreme Court's piecemeal precedent is ultimately dangerous and that the Court should follow the D.C. Circuit's lead in articulating a clear framework to address justiciability in suits brought by congressional plaintiffs.

In support of that argument, this Comment provides an overview of the development of legislator standing doctrine in the D.C. Circuit and the Supreme Court and analyzes what that doctrine means for the unprecedented *Burwell* case.[11] Section II explains the constitutional concepts of justiciability and the standing doctrine and explores the history of legislator standing. The scope of justiciability analysis in this Comment will be limited to standing, only discussing other elements of justiciability as they relate. Section III applies the current doctrine and its precedents to *Burwell* and proposes an improved framework for considering standing in legislator-plaintiff cases.

II. OVERVIEW

The doctrine of legislative standing seeks to decide when, if ever, members of the legislative branch may utilize the judiciary to challenge the constitutionality of executive branch actions. The doctrine encompasses Article

6. 418 U.S. 683 (1974). The Supreme Court ruled that President Nixon must comply with a congressional subpoena to turn over documents and tapes in connection with the Watergate scandal. Sebastian Payne, *Republicans v. Obama – and other times the president has been sued*, WASH. POST (July 11, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/11/republicans-v-obama-and-other-lawsuits-against-presidents/ [https://perma.cc/PXF6-49L2].

7. 520 U.S. 681 (1997). An Arkansas state employee who had worked for President Clinton when he was governor sued for sexual harassment while he was president. Payne, *supra* note 6.

8. Payne, *supra* note 6. Kennedy settled out of court for $17,500. *Id.*

9. *See* Stephen Parks, *The Birthers' Attacks and the Judiciary's Article III "Defense" of the Obama Presidency*, 38 S.U. L. REV. 179, 181–83 (2011) (detailing some of the "birther movement's" legal attacks on the legitimacy of Obama's presidency).

10. *See, e.g.*, David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html?_r=0 [https://perma.cc/RL68-YLTU] (reporting on suit by states challenging Obama's 2014 executive action on immigration).

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

III standing and separation of powers considerations, as well as other prudential justiciability requirements. Part II.A outlines the constitutional tenets underpinning legislative standing, and Part II.B provides an overview of D.C. Circuit and Supreme Court opinions regarding legislative standing. Lastly, Part II.C synthesizes the precedents, summarizes the current doctrine, and analyzes two recent cases that may affect future interpretations of legislative standing.

A. Justiciability and the Doctrine of Standing

Article III, Section 2 of the Constitution limits the jurisdiction of the federal judiciary to "cases" or "controversies" that arise under certain enumerated categories.[12] From this limitation, the Supreme Court has developed four main doctrines that determine whether a case is "justiciable"—in other words, whether it presents an appropriate case or controversy enabling it to be heard by a federal court.[13] These four doctrines—standing, mootness, ripeness, and the political question doctrine—have become the central limitations on federal jurisdiction.[14] According to the Supreme Court, the requirement that "a litigant . . . have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines."[15]

The Supreme Court classifies some aspects of justiciability as constitutional mandates coming directly from Article III and others as "judicially self-imposed limits" on the Court's power.[16] Since the latter prudential limits are not constitutionally mandated, but come from the Justices' own concerns about limiting the power of the judiciary, they are more flexible in their application

12. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

13. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.3, at 48 (4th ed. 2011); Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J. L. & PUB. POL'Y 209, 213–14 (2001).

14. Arend & Lotrionte, *supra* note 13, at 214; *see* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). Some commentators additionally list the prohibition against advisory opinions as a doctrine of justiciability. *See, e.g.*, CHEMERINSKY, *supra* note 13, at 48. By contrast, others see the entire case or controversy requirement and the doctrines of standing, ripeness, mootness, and political question, as essentially ensuring that the court not give opinions in cases in which there is no genuine dispute between the parties—which would be advisory opinions. *Id.* at 59.

15. Allen v. Wright, 468 U.S. 737, 750 (1984). Because standing, and justiciability in general, are matters of jurisdiction, they are the threshold issues in every case. Arend & Lotrionte, *supra* note 13, at 215. A court may raise the question of standing at any point in the proceedings, without prompting or consent from the parties. CHEMERINSKY, *supra* note 13, at 62.

16. *Allen*, 468 U.S. at 751; CHEMERINSKY, *supra* note 13, at 48.

than the Article III requirements.[17]

1. The Requirements of Standing

The Supreme Court has acknowledged three bedrock requirements for a plaintiff to have standing.[18] First, the plaintiff must have suffered a "concrete" and "particularized" injury to a judicially cognizable interest; this is known as an "injury in fact."[19] Second, the injury must be "fairly traceable" to the challenged action of the defendant.[20] Third, it must be "likely" that the injury will be "redressed by a favorable decision."[21]

In order to satisfy the injury in fact requirement, a plaintiff must show that he or she has personally suffered "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[22] The Supreme Court has strictly enforced this requirement and has routinely dismissed cases where the injury is not sufficiently specific or personal.[23] In cases in which a private citizen is the plaintiff, the Court has repeatedly enforced a prohibition against generalized grievances.[24] A

17. For example, prudential restraints can be overridden at the direction of Congress. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit." (citations omitted)); *see also* Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

18. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Each of the requirements had been articulated in previous opinions, but *Lujan* was the first time the Court explicitly declared these three elements the "irreducible constitutional minimum of standing." *Id.* at 560.

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

20. *Allen*, 468 U.S. at 751.

21. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

22. *Bennett*, 520 U.S at 167.

23. Ryan McManus, Note, *Sitting in Congress and Standing in Court: How Presidential Signing Statements Open the Door to Legislator Lawsuits*, 48 B.C. L. REV. 739, 742–43 (2007); *see, e.g.*, Raines v. Byrd, 521 U.S. 811, 829–30 (1997) (dismissing suit against the executive branch brought by members of Congress for lack of a sufficiently particularized injury); *Allen*, 468 U.S. at 737 (denying standing to plaintiffs who claimed that they were stigmatized by IRS tax exemptions to private schools that discriminated on the basis of race because their claimed stigmatic injury was too abstract); Roe v. Wade, 410 U.S. 113, 128 (1973) (finding the injury claimed by one of the companion plaintiffs insufficient; the married couple claimed that their marital happiness was injured because a law prohibiting abortion confined them "to the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy" (internal quotation marks omitted)). *But see, e.g.*, Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153–54 (2010) (finding that organic alfalfa growers were sufficiently injured by deregulation of genetically modified varieties of alfalfa to invoke standing due to the risk of cross-contamination from modified varieties growing nearby); Craig v. Boren, 429 U.S. 190, 194 (1976) (finding sufficient injury where beer distributor plaintiff claimed she was injured by a drinking age law because it limited the number of her legal customers). *See also* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 635 n.2 (1985) [hereinafter Nichol, *Abusing Standing*] (providing examples of cases where standing was liberally granted despite less than concrete injuries).

24. *See* CHEMERINSKY, *supra* note 13, § 2.5.5, at 91 (exploring the idiosyncrasies of the prohibition, and concluding that "if the plaintiff alleges a violation of no specific constitutional right,

plaintiff does not have standing when the harm he or she asserts is "a generalized grievance shared in substantially equal measure by all or a large class of citizens."[25]

The next two components of standing, traceability and redressability, in some ways can be viewed as "two facets of a single causation requirement."[26] Traceability requires a "causal nexus" between the plaintiff's injury and the allegedly unlawful action.[27] Redressability requires that the prospect of the plaintiff obtaining relief from a favorable ruling be more than "speculative."[28]

In addition to the bedrock Article III requirements of injury, traceability, and redressability, the Supreme Court has identified several prudential standing limitations.[29] According to the Court, these requirements are not found in the text of Article III but are narrower, "judicially self-imposed limits on the exercise of federal jurisdiction."[30] These limits include a prohibition against generalized grievances,[31] a requirement that the plaintiff's claims are based only on his own rights and do not arise from the rights of another,[32] and a requirement that the claim is within the "zone of interests" protected by the statute in question.[33] Mootness, ripeness, and the political question doctrine are also generally considered prudential justiciability issues. Because they are prudential and not constitutionally required, their application is subject to judicial discretion.[34] In addition, Congress has the power to override prudential considerations by statute.[35]

but instead claims an interest only as a taxpayer or a citizen in having the government follow the law, standing is not allowed").

25. Warth v. Selden, 422 U.S. 490, 499 (1975) (internal quotation marks omitted).

26. *Allen*, 468 U.S. at 753 n.19 (quoting C. WRIGHT, LAW OF FEDERAL COURTS § 13, at 68 n.43 (4th ed. 1983)).

27. *Id.* at 788–89 n.6; *see also* Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973) (denying standing because "appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention").

28. *Allen*, 468 U.S. at 752; *see* Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (finding that plaintiff challenging affirmative action in medical school admissions lacked standing because he could not show that "but for the existence of its unlawful special admissions program," he would not have been admitted).

29. *See* CHEMERINSKY, *supra* note 13, at 48; McManus, *supra* note 23, at 743.

30. *Allen*, 468 U.S. at 751.

31. Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 120 (1979) (Rehnquist, J., dissenting); Warth v. Seldin, 422 U.S. 490, 499 (1975). However, more recently the Court has indicated that the ban on generalized grievances may be constitutional, not prudential. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–77 (1992).

32. *See* United Food and Commercial Workers Local 751 v. Brown Grp., 517 U.S. 544, 557 (1996) (discussing the bar against third-party standing); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278 n.6 (1984) (defining *jus tertii*, or third-party standing).

33. CHEMERINSKY, *supra* note 13, at 62; *see* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) (requiring that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

34. CHEMERINSKY, *supra* note 13, at 48.

35. *See, e.g.*, *Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons

2. Goals of Standing Analysis

Jurists and scholars have long debated the true purpose behind justiciability doctrines in general and the standing requirements in particular.[36] Standing doctrine, like all requirements for federal court adjudication, was judicially created.[37] It has evolved over time with regard to both the Supreme Court's interpretation of Article III's "case or controversy" requirement and the Court's own judgment regarding prudent judicial administration.[38] The Supreme Court has oscillated between two dueling notions of its purpose: The more formalist view holds that standing is rooted in separation of powers, while the more pragmatic view sees standing as ensuring that courts receive an adversarial presentation of the issues.[39]

The Supreme Court's holdings that separation of powers considerations are the root of the standing analysis reflect a formalist view.[40] The purpose of the standing analysis, in this view, is to ensure that the judiciary is not overstepping its constitutionally defined jurisdiction, which is limited to cases and controversies under Article III.[41] A competing, more pragmatic perspective is that the purpose of the standing requirement is to promote judicial efficiency and improve judicial decision making.[42] In this light, the focus of the standing analysis is on whether the plaintiff is the proper party to bring the action.[43] A plaintiff who has a personal stake in the controversy is more likely to have the motivation and knowledge to fully represent her interests, providing the court with all the necessary information and arguments to make an informed decision.[44]

who otherwise would be barred by prudential standing rules.").

36. *See, e.g.*, Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990) (arguing that the central goal should be to prevent and redress violations of federal law by government and government officials); Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46–47 (1961) (arguing that justiciability doctrines should be malleable, with the goal of allowing judges as much discretion as possible to decide what cases to hear); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 102 (1984) (arguing for more rigid justiciability doctrines and less discretion for judges).

37. CHEMERINSKY, *supra* note 13, at 48.

38. *Id.*

39. Baker v. Carr, 369 U.S. 186, 204 (1962); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434–35 (1987); Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 964–66 (1995).

40. Sargentich, *supra* note 39, at 433; Tanielian, *supra* note 39, at 967.

41. U.S. CONST. art. III, § 2, cl. 1.

42. *See, e.g.*, *Baker*, 369 U.S. at 204 (concluding that standing requires that a plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

43. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 100 (1968) (characterizing the central question of the standing analysis as "whether a particular person is a proper party to maintain the action").

44. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 (2015) (The plaintiff's personal stake in the controversy ensures that the "dispute . . . 'will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'"

The 1962 case, *Baker v. Carr*,[45] is the most frequently cited authority for this adversarial presentation purpose of standing. It held that the "gist of the question of standing" is whether "appellants [have] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[46] Under this view, separation of powers was not the main focus of the standing inquiry.[47] However, beginning with the 1984 case *Allen v. Wright*,[48] the Court began to view the separation of powers consideration as inextricably tied to the standing analysis.[49] Although criticized by some scholars as arbitrary,[50] this emphasis on safeguarding separation of powers has gained traction with the Court.[51]

Justice Antonin Scalia was one driver behind this evolution.[52] Justice Scalia argued that standing was the most important manifestation of the separation of powers principle and an essential safeguard against the federal courts overstepping their constitutionally defined role.[53] Even decades before becoming a Justice, Scalia believed that the Court unduly loosened and at times disregarded the standing analysis and that such disregard would "inevitably

(quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982))); *see, e.g.*, Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 72 (1978); Warth v. Seldin, 422 U.S. 490, 498 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction . . . ." (quoting *Baker*, 369 U.S. at 204)); United States v. Students Challenging Reg. Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973) (stressing importance of personal injury to litigant in creating standing, because such injury "gives a litigant direct stake in the controversy"); Sierra Club v. Morton, 405 U.S. 727, 731 (1972) (stating that standing turns on "[w]hether a party has a sufficient stake in an otherwise justiciable controversy"); *Flast*, 392 U.S. at 100 ("The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems . . . .").

45. 369 U.S. 186 (1962).

46. *Baker*, 369 U.S. at 204.

47. *See, e.g.*, *Flast*, 392 U.S. at 100 ("The question whether a particular person is a proper party to maintain [a particular] action does not, by its own force, raise separation of powers problems . . . .").

48. 468 U.S. 737 (1984).

49. *Allen*, 468 U.S. at 752 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."). *But see, e.g.*, *id.* at 767 (Brennan, J., dissenting) (quoting *Flast* in arguing that standing analysis does not always turn on separation of powers issues).

50. *See, e.g.*, Nichol, *Abusing Standing*, *supra* note 44, at 653–54 (arguing that the Court's introduction of separation of powers considerations into the standing analysis had no precedent and represented one more instance of the Court's continued habit of manipulating standing to fit various unrelated purposes).

51. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 819–20 (1997) (quoting *Allen*, and then saying that "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.").

52. *See* Tanielian, *supra* note 39, at 972 ("Justice Scalia, more than any other modern justice, has defined the formalist pole of the Supreme Court's separation of powers jurisprudence.").

53. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U. L. REV. 881, 881–82 (1983) ("My thesis is that the judicial doctrine of standing is a crucial and inseparable element of that principle [of separation of powers] . . . .").

produce . . . an over-judicialization of the process of self-governance."[54] The remedy, according to Scalia, was an increased focus on the injury requirement, making sure that "the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large."[55]

In recent years, some Supreme Court opinions have indicated a shift back toward the view of adversarial presentation as the primary purpose of the standing requirement, although they have not explicitly rejected separation of powers as an additional goal.[56] In the 2015 case *Arizona State Legislature v. Arizona Independent Redistricting Committee*,[57] the majority concluded its standing analysis by asserting that the plaintiff's personal stake in the controversy was sufficient to ensure that the "dispute . . . 'will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action'"—therefore, standing was satisfied.[58]

B. History of Legislative Standing

Legislative standing doctrine has mostly been developed by the D.C. Circuit, with intermittent guidance from a few key Supreme Court cases.[59] This Part will provide a brief history of the relevant cases from both courts, focusing on the attempts to develop a cohesive doctrine.

1. The Supreme Court on Legislative Standing: *Coleman v. Miller*

The Supreme Court has addressed the question of legislator standing only a handful of times, the first in the 1939 case *Coleman v. Miller*.[60] In *Coleman*, members of the legislature of the State of Kansas sued to enjoin the actions of

54. *Id.* at 881.

55. *Id.*

56. *See, e.g.*, Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 (2015) (The plaintiff's personal stake in the controversy ensures that the "dispute . . . 'will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" (second omission in original) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc. 454 U.S. 464, 472 (1982))); United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker*, and characterizing adversarial presentation as a prudential consideration); Massachusetts v. EPA, 549 U.S. 497, 517 (2007) ("[Standing] preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." (omission in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring))). For an examination of the majority opinion in *Arizona* and Justice Scalia's dissent regarding its treatment of standing, see *infra* Part II.C.2. For an examination of the Court's treatment of justiciability in *Windsor*, see *infra* Part II.C.1.

57. 135 S. Ct. 2652 (2015) (internal quotation marks omitted).

58. *Ariz. State Leg.*, 135 S. Ct. at 2665 (second omission in original) (quoting *Valley Forge Christian Coll.*, 454 U.S. at 472.)

59. Arend & Lotrionte, *supra* note 13, at 222.

60. 307 U.S. 433 (1939).

the secretary of state of Kansas, among other state officials.[61] The issue centered on the Kansas legislature's voting process in deciding whether to ratify a proposed amendment to the U.S. Constitution.[62] The Kansas Senate had forty senators, and their votes on the ratification resolution were evenly split.[63] The lieutenant governor, as presiding officer of the Senate, cast the deciding vote in favor of the amendment, and a majority of the Kansas House of Representatives approved it.[64]

The twenty senators who had voted against the amendment, joined by three members of the House, brought suit, challenging the right of the lieutenant governor to cast the deciding senate vote.[65] The plaintiffs sought to erase the Senate's endorsement of the resolution and restrain the secretary of state from authenticating the resolution as approved.[66] After the Kansas Supreme Court rejected the plaintiffs' arguments, the U.S. Supreme Court granted certiorari.[67] The Court held that the plaintiff legislators did have standing.[68] If the plaintiffs' facts and constitutional reasoning were correct, then they had suffered an injury to the effectiveness that their votes rightfully should have had in the ratifying process under the U.S. Constitution.[69]

Although *Coleman* was decided long before the Court declared injury, traceability, and redressability as the core foci of the standing analysis,[70] the Court nonetheless considered whether the plaintiffs were injured, whether the injury was caused by the executive's allegedly unconstitutional action, and whether the requested relief could redress the injury.[71] The Court implicitly addressed injury in fact, asserting that the "senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."[72] The Court also addressed traceability, stating that by allowing the lieutenant governor to cast the tie-breaking vote, the state had "denied [the senators'] right and privilege. . . . to have their votes given effect."[73] The plaintiffs' requested relief, essentially erasing the approval of the amendment, would redress the injury by effectuating the intended outcome of the senators' votes.[74]

The opinion also exemplifies another important aspect of the standing

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

62. *Id.* at 435.

63. *Id.* at 436.

64. *Id.*

65. *Id.*

66. *Id.*

67. Arend & Lotrionte, *supra* note 13, at 219.

68. *Coleman*, 307 U.S. at 438.

69. *Id.*

70. The Court first declared these three requirements the constitutional minimum in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). For an explanation of these requirements, see *supra* notes 18–21 and accompanying text.

71. *Coleman*, 307 U.S. at 451–56.

72. *Id.* at 438.

73. *Id.*

74. *Id.* at 436.

analysis. "[W]hen the court assesses standing, it assumes the plaintiff's claims on the merits are correct."[75] In considering standing in *Coleman*, the Court assumed that allowing the lieutenant governor to cast the tie-breaking vote was unconstitutional, as the plaintiffs alleged. Thus, the Court noted that the senators' votes had been "overridden and virtually held for naught although *if they are right in their contentions* their votes would have been sufficient to defeat ratification."[76] The Court ultimately denied the plaintiffs' claims on the merits,[77] but the fact that the senators were not "right in their contentions" did not preclude them from having standing.

In the seventy-seven years since it was decided, courts and commentators have intermittently questioned *Coleman*'s precedential value.[78] But every subsequent Supreme Court decision touching on legislator standing engages with *Coleman* in some way, as its reasoning provides the foundation for the doctrine.[79]

2. Legislator Standing in the D.C. Circuit Before *Raines v. Byrd*

Until *Raines v. Byrd*[80] in 1997, *Coleman* remained the only Supreme Court case that addressed legislator standing and institutional injury. During the intervening decades, however, the D.C. Circuit heard and decided numerous cases on the issue. Beginning in the 1970s, the D.C. Circuit saw an influx of cases from federal legislators challenging actions of the executive branch; this trajectory stemmed from congressional disagreement with executive action regarding Vietnam.[81] From the 1973 D.C. Circuit decision in *Mitchell v. Laird*[82]

75. Arend & Lotrionte, *supra* note 13, at 217.

76. *Coleman,* 307 U.S. at 438 (emphasis added).

77. *Id.* at 456.

78. It is not clear from the Court's opinion in *Coleman* that the lead opinion had a majority of support on the court. *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2696 (2015) (Scalia, J., dissenting) (calling *Coleman* "a peculiar case that may well stand for nothing," and detailing the peculiarities in the opinions and other arguments against *Coleman*'s precedential value); Raines v. Byrd, 521 U.S. 811, 822 n.5 (1997); *see also, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 109–10 (5th ed., 2007) (characterizing the majority's holding as dismissing the case as a political question, and noting that three justices joined the opinion finding standing, while four joined one that said the plaintiffs lacked standing). In addition, *Coleman* may not apply to similar suits originally brought in federal court, since the Court's decision that the plaintiffs had standing rested partially on a prior determination by the Kansas Supreme Court that they had standing under state law. *See* Jason A. Derr, Comment, Raines, Raines *Go Away: How Presidential Signing Statements and Senate Bill 3731 Should Lead to a New Doctrine of Legislative Standing*, 56 CATH. U. L. REV. 1237, 1247–48 (2007) (discussing the questions left unanswered by *Coleman* that make it unhelpful precedent for cases like *Raines*).

79. *See, e.g.*, *Ariz. State Leg.*, 135 S. Ct. at 2665; United States v. Windsor, 133 S. Ct. 2675, 2713 (2013) (Alito, J., dissenting); *Raines*, 521 U.S. at 822.

80. 521 U.S. 811.

81. Arend & Lotrionte, *supra* note 13, at 222. In addition, the uptick in suits brought by congressional plaintiffs may have been influenced by the Court's assertion of injury in fact as the modern standard for standing, *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970), since it was easier for members of Congress to assert standing under the newer test. Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 252–53 (1981).

through the Supreme Court's next decision on the issue in *Raines* in 1997, the D.C. Circuit developed and refined its own jurisprudence on legislator standing. Building on the limited guidance of the Supreme Court in *Coleman*, it attempted at least three distinct approaches to the doctrine: the "bears upon" test, the vote nullification theory, and the doctrine of equitable discretion.[83]

a. Mitchell v. Laird *and the "Bears Upon" Test*

In *Mitchell*, the court found that thirteen members of the House of Representatives had standing to sue President Nixon for taking military action in Southeast Asia without congressional authorization, even though the representatives themselves had not suffered specific injury.[84] The court had applied the "bears upon" test.[85] Under this analysis, the representatives had a right to ask the court whether the executive actions were constitutional because the answer would bear upon the performance of their jobs—if unconstitutional, they would likely vote to deny appropriations or even impeach.[86] This "bears upon" test was widely criticized by other circuits[87] because decisions based on such reasoning could potentially be advisory opinions, in violation of the Constitution's case or controversy requirement.[88]

The representatives had argued a different theory in their briefs. They contended that military action without explicit authorization from Congress "unlawfully impair[ed] and defeat[ed] plaintiffs' Constitutional right, as members of the Congress . . . to decide whether the United States should fight a war."[89] The court dismissed this argument in the course of its standing analysis, stating that Congress does not have the "*exclusive* right to decide whether the United States should fight *all* types of war."[90] The claim that the Executive had usurped powers constitutionally granted to the legislature reflects the type of injury that the circuit court would require under later iterations of its legislator standing doctrine.[91]

82. 488 F.2d 611 (D.C. Cir. 1973).

83. *Mitchell*, 488 F.2d at 611; *see also* McManus, *supra* note 23, at 747. See *infra* Parts II.B.2.i–iii for a discussion of each of these approaches.

84. *Mitchell*, 488 F.2d at 613. Although the court found standing, it dismissed the case as a nonjusticiable political question. *Id.* at 616.

85. *Id.* at 614; *see* THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 967 (2d ed. 1993) (coining the name "bears upon" test).

86. *Mitchell*, 488 F.2d at 614.

87. *See* Arend & Lotrionte, *supra* note 13, at 223–24; *see, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973) (rejecting the bears upon test because it effectively calls for advisory opinions); Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975) (rejecting the *Mitchell* approach to legislator standing because an individual legislator's interest will almost always be "too generalized to provide a basis for standing.").

88. U.S. CONST. art. III, § 2, cl. 1; *see Holtzman*, 484 F.2d at 1307; Arend & Lotrionte, *supra* note 13, at 223.

89. *Mitchell*, 488 F.2d at 613 (internal quotation marks omitted).

90. *Id.*

91. *See infra* Part II.B.2.ii.

b. Vote Nullification

Less than a year after *Mitchell*, the D.C. Circuit articulated a new approach to legislator standing that relied on an allegation of injury similar to the one they dismissed in *Mitchell*. In the 1974 case, *Kennedy v. Sampson*,[92] Senator Ted Kennedy challenged the constitutionality of the President's use of the executive power known as the "pocket veto" to deny a piece of legislation passed by Congress.[93]

The court held that Kennedy had standing,[94] but it did not rely on the "bears upon" test. Instead, the court said that if the President unconstitutionally prevented duly approved legislation from becoming law, as alleged, such an act would constitute an injury to the Senator "by denying him the effectiveness of his vote as a member of the United States Senate."[95] This alleged harm fell within the "zone of interests" protected by Article I, Section 7 of the Constitution.[96]

The *Kennedy* opinion marked the beginning of the D.C. Circuit's development of the "vote nullification" approach. The idea that lawmakers suffer cognizable injury when legislation that they voted for fails to be enacted (or legislation that they *did not* vote for *is* enacted) appeared previously in *Coleman*, though it was not as clearly articulated.[97] The D.C. Circuit further

92. 511 F.2d 430 (D.C. Cir. 1974).

93. *Kennedy*, 511 F.2d at 430. The pocket veto is a political move that allows the President to avoid signing a bill into law without issuing an outright veto. Once the President receives a bill passed by Congress, if he has not signed it into law or vetoed it within ten days, it becomes law without his signature. If, however, Congress is not in session when those ten days are up, the President may put the bill aside without taking any action. U.S. CONST. art. I, § 7, cl. 2; *Pocket veto*, U.S. SENATE: GLOSSARY, http://www.senate.gov/reference/glossary_term/pocket_veto.htm [https://perma.cc/S5KA-ZPDV]. Because he does not explicitly veto the bill, by using a pocket veto, the President denies Congress the opportunity to override his veto through a supermajority of votes. In this case, President Nixon used a pocket veto to deny approval to legislation while Congress was on its December recess. Senator Kennedy contended that the Constitution did not allow for a pocket veto to be used during a holiday recess in the middle of a session, but only when Congress was between sessions. *Kennedy*, 511 F.2d at 430; *see also* JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42388, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 9–10 (2014) (describing when a president can pocket veto a bill).

94. *Kennedy*, 511 F.2d at 433.

95. *Id.* at 434 (quoting Complaint at 15, Kennedy v. Sampson, 364 F. Supp. 1075 (D.D.C. 1973) (Civ. A. No. 1583-72)).

96. *Id.* The court compared the facts of *Kennedy* favorably to *Coleman*, even though the *Coleman* plaintiffs included all of the legislators whose votes had allegedly been nullified. Although Senator Kennedy's individual injury was "indirect or derivative" of the direct injury to the entire legislature, the court said that to have standing, a plaintiff need only be "among the injured," not "the most grievously or directly injured." *Id.* at 435 (second quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). It noted that the functional purpose of the standing requirement is to ensure that the parties are sufficiently adverse and invested in their respective positions to effectively argue each side, so that the dispute is clearly delineated. *Id.* (citing Flast v. Cohen, 392 U.S. 83, 102 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962)). An individual legislator seeking to "protect the effectiveness of his vote," was sufficiently adverse "with or without the concurrence" of other legislators, as long as the claim focused on "a particular dispute about specific legislation." *Kennedy*, 511 F.2d at 435–36.

97. *See* Coleman v. Miller, 307 U.S. 433, 446 (1939).

refined the vote nullification idea in 1977 with *Harrington v. Bush*,[98] when it clarified that the executive's improper implementation or other illegal action regarding enforcement of legislation that Congress passed did not nullify Congress's votes.[99]

Harrington explicitly rejected *Mitchell*'s "bears upon" test and emphasized that legislators should be treated the same as any other litigant for the purposes of standing.[100] It stated that the "crucial inquiry" is the same as that of a general standing analysis—whether the plaintiff has suffered a concrete injury in fact.[101] The *Harrington* congressman plaintiff claimed that he was personally injured by allegedly illegal CIA activities because they violated laws he had helped pass.[102] In response, the circuit court rejected the notion that legislators have a special interest in the proper administration of the laws once enacted.[103] The potential for vote nullification ends once the legislature's votes are given their full weight, usually once an Act is signed into law by the President. The Congressman's injury from the CIA breaking existing law was the same one shared by all citizens and taxpayers when laws are violated or money is wasted.[104] It is "a 'generalized grievance about the conduct of government' which lacks the specificity to support a claim of standing."[105]

The D.C. Circuit put a finer point on the theory of vote nullification in the 1979 case, *Goldwater v. Carter*.[106] For nullification to amount to injury in fact, the court said, it must represent "a complete nullification or withdrawal of a voting opportunity," referred to as "disenfranchisement."[107] Under *Goldwater*, in order for an executive act to constitute disenfranchisement, it must completely deprive the legislators of legislative remedy.[108]

In this case, Senator Barry Goldwater challenged the President for terminating an international treaty without seeking approval from Congress.[109] Senator Goldwater's specific, concrete injury was that he was denied the opportunity to vote on the treaty's termination.[110] By the court's analysis,

98. 553 F.2d 190 (D.C. Cir. 1977).

99. *Harrington*, 553 F.2d at 213; *see* McManus, *supra* note 23, at 750–71.

100. *Harrington*, 553 F.2d at 204–06.

101. *Id.* at 205–06.

102. *Id.* at 202–04.

103. *Id.* at 204.

104. *Id.* at 213–14.

105. *Id.* at 214 (quoting Flast v. Cohen, 392 U.S. 83,106 (1968)). For more on the prohibition against generalized grievances, see *supra* notes 23–24 and accompanying text.

106. 617 F.2d 697 (D.C. Cir. 1979) *vacated* 444 U.S. 996 (1979).

107. *Goldwater*, 617 F.2d at 702.

108. *Id.*; *see* McManus, *supra* note 23, at 751 ("[F]or executive action to amount to disenfranchisement it must completely deprive the legislators of any legislative remedy.").

109. *See Goldwater*, 617 F.2d at 702.

110. *Id.* The Constitution requires that treaties be made (and, by implication, terminated) only with the approval of a two-thirds majority of the Senate. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

terminating the treaty without a Senate vote constituted disenfranchisement because it deprived the senators of their constitutionally granted opportunity to advise and consent, and once the treaty was terminated, there was nothing Congress could do to remedy or reverse that action.[111]

This disenfranchisement approach eventually came under criticism, most notably from the Chief Judge of the D.C. Circuit, Carl McGowan.[112] In an influential article, McGowan spotlighted contradictions between the holdings in *Harrington* and *Goldwater*.[113] McGowan pointed out that in a general standing analysis, plaintiffs are not required to have exhausted all other options for redressing their injury before seeking judicial remedy.[114] However, *Goldwater* held that in order for disenfranchisement to amount to injury in fact, there must be no legislative remedy available.[115] This creates an additional standing requirement for legislator plaintiffs, despite *Harrington*'s insistence that there was no such special standard.[116] To avoid creating legislator-specific standing requirements, McGowan advocated for courts to apply a new "doctrine of equitable discretion."[117]

c. Equitable Discretion

In the 1981 case, *Riegle v. Federal Open Market Committee*,[118] the D.C. Circuit heeded McGowan's advice and adopted the doctrine of equitable discretion.[119] This doctrine dictates that where a congressional plaintiff has means for redress through the legislative process and there is potential for a private plaintiff to bring a similar suit, the court should exercise its discretion to dismiss the action as non-justiciable, though the plaintiff may have standing.[120]

Riegle concerned a challenge by Senator Donald Riegle to the procedure for appointing members to the Federal Open Market Committee; he claimed it violated the Appointments Clause of the Constitution and his right as a senator

111. *See id.* at 703 (declaring that the President's actions completely deprived the Senate of the opportunity to vote on the matter).

112. McGowan, *supra* note 81, at 254–56.

113. *Id.*

114. *Id.* at 254–55 ("There is no general requirement that a private litigant employ self-help before seeking judicial relief . . . . [A]n ordinary plaintiff, having suffered injury in fact within the contemplation of the law he invokes, is entitled to his day in court.").

115. *Goldwater,* 617 F.2d at 702; McGowan, *supra* note 81, at 254.

116. Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977); McGowan, *supra* note 81, at 254. As such, after *Harrington* and *Goldwater*, the test for whether a member of the legislature had standing in the D.C. Circuit had three elements: (1) the plaintiff must have suffered an injury in fact, (2) such injury must be to an interest within the scope intended to be protected by the statute or constitutional provision the plaintiff invokes, and (3) the injury must be such that there is no remedy available through the legislative process. McGowan, *supra* note 81, at 255.

117. McGowan, *supra* note 81, at 262; *see* Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir. 1981).

118. 656 F.2d 873 (D.C. Cir. 1981).

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

120. *See id.* at 882.

to advise and consent to executive branch appointments.[121] The D.C. Circuit acknowledged that its previous approach to legislator standing was contradictory.[122] To address this, it removed separation of powers concerns and the associated legislator-specific requirements from the core standing analysis.[123]

After holding that Senator Riegle satisfied the core standing requirements—injury to a legally protected interest, causation, and redressability—the court addressed separation of powers concerns through the new doctrine of equitable discretion.[124] The doctrine of equitable discretion functioned as an additional prudential justiciability consideration separate from the standing analysis.[125] Senator Riegle had standing, but because his injury could be relieved by amending the legislation and because a private citizen or corporation could bring a similar suit, the court exercised its discretion to dismiss his claim as non-justiciable.[126]

In reaching this conclusion, the D.C. Circuit stated that the standing analysis was not the appropriate vehicle to address separation of powers concerns arising in congressional plaintiff cases.[127] In the court's view, the prudential doctrine of equitable discretion addressed those concerns more appropriately than standing or any of the existing prudential justiciability doctrines.[128] The D.C. Circuit continued to use the doctrine of equitable discretion until the Supreme Court finally reexamined the issue in *Raines v. Byrd*.[129]

3. *Raines v. Byrd* and the D.C. Circuit's Attempts to Apply It

In 1997, the Supreme Court addressed congressional standing to sue the executive branch in *Raines*.[130] The Court acknowledged the D.C. Circuit's jurisprudence on the topic but did not take the opportunity to comment on its

121. *Id.* at 876–77.

122. *Id.* at 877. The doctrine created an additional standing requirement for legislator plaintiffs regarding self-help, while claiming that the analysis for legislators was the same as for all other plaintiffs. For more details on this critique, see *supra* notes 111–116 and accompanying text.

123. *Id.* at 878.

124. *Id.* at 879.

125. *Id.* at 880–81.

126. *See id.* at 882.

127. *Id.* at 880.

128. *Id.* at 880. It based this suggestion both on McGowan's criticism and on the implications of the Supreme Court's decision overturning *Goldwater v. Carter*, 444 U.S. 996 (1979). In holding that *Goldwater* did not pose a justiciable question, the Supreme Court relied on political question doctrine and ripeness, ignoring standing altogether. *Riegle*, 656 F.2d at 880 ("If, as the ultimate disposition of *Goldwater v. Carter* suggests, the Supreme Court does not believe that the standing doctrine is capable of reflecting the prudential concerns raised by congressional plaintiff suits, this court ought not persist in the attempt to make it do so."). The *Riegle* court said that neither political question nor ripeness doctrine were "sufficiently catholic in formulation or flexible in application to resolve the prudential issues arising in congressional plaintiff cases," and thus introduced equitable discretion. *Id.* at 881.

129. 521 U.S. 811 (1997).

130. *Raines*, 521 U.S. 811.

doctrine nor develop its own.[131] Instead, the Court distinguished *Raines* from the two relevant Supreme Court precedents[132] and denied standing on narrow factual grounds, leaving many unanswered questions.

a. Raines v. Byrd

In *Raines*, the Court held that a group of House and Senate members did not have standing to sue executive branch officials for executing the Line Item Veto Act.[133] The Act allowed the President to cancel individual provisions of appropriations bills before signing the bills into law, subject to certain limitations.[134] After the Act became effective in 1997, a group of four senators and two representatives brought suit,[135] arguing that the Act was an unconstitutional delegation of power that altered the balance of powers between the branches.[136] Echoing the *Coleman* reasoning about legislators' "interest in maintaining the effectiveness of their votes,"[137] the plaintiffs argued that the Act changed the legal and practical effect of their future votes on appropriations bills.[138]

The Court focused on the fact that plaintiffs' alleged injury was to their interests as legislators.[139] The Court clarified its holding from *Coleman*, delineating a narrow scenario in which the Supreme Court may recognize vote

131. *See id.* at 820 n.4.

132. *Id.* at 820–24.

133. *Id.* at 829–30.

134. Line Item Veto Act of 1996, 2 U.S.C. § 691(a) (Supp. 1997), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998). The President could cancel any items of discretionary spending or limited tax benefits from appropriations bills he signed, as long as such cancellation would reduce the federal budget deficit, would not impair any essential government functions, and would not harm the national interest. *Id.*

135. The Act provided a right of action for "[a]ny Member of Congress or any individual adversely affected by [this Act]," 2 U.S.C. § 692(a)(1), and provided for direct appeal from the district court to the Supreme Court, § 692(b); *Raines*, 521 U.S. at 814–16.

136. *Raines*, 521 U.S. at 816.

137. Coleman v. Miller, 307 U.S. 493, 438 (1939).

138. *Raines*, 521 U.S. at 816. The district court held that the plaintiffs had standing and granted their motion for summary judgment after finding the Act unconstitutional. *Id.*

139. *Id.* at 821–22. According to the Court, injuries to legislators in their personal capacities often constitute injury in fact. *Id.* at 820–21. The Court distinguished *Powell v. McCormack*, 395 U.S. 486 (1969). *Raines*, 521 U.S. at 820–21. In *Powell*, the plaintiff was an individual member of Congress who was elected by his constituents but was excluded from the House of Representatives by other members. *Powell*, 395 U.S. at 489. The Court said that the representative had been sufficiently concretely injured in his *personal* capacity to result in a finding of standing. *Id.* at 496. In contrast, the *Raines* plaintiffs explicitly sued in their *official* capacity, and their institutional injury was to their interests as members of Congress. *See Raines*, 521 U.S. at 821. To illustrate the distinction, the Court explained:

> If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs . . . with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power.

Id.

nullification as cognizable institutional injury: "[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[140] Applying this analysis, the Court found that the facts in *Raines* did not amount to vote nullification.[141]

First, the Court emphasized that the *Coleman* holding concerned a vote by the legislators that had actually taken place but was not honored.[142] In *Raines*, the Court found that plaintiffs' votes against the Act had been given their full effect; the plaintiffs were simply outvoted.[143] Second, the Court rejected the plaintiffs' interpretation of *Coleman* that any change to the effectiveness of legislators' votes may constitute injury.[144] The *Raines* plaintiffs had argued that they were injured because the Line Item Veto Act altered the effectiveness of their votes on all future appropriations bills. The Court held that this "abstract dilution of institutional legislative power" did not rise to the level of nullification required by *Coleman*.[145]

Raines marked the first time the Supreme Court addressed the standing of *federal* legislators alleging *institutional* injury.[146] Despite its narrow holding, aspects of the *Raines* opinion provide clues to the Court's views on legislator standing. For example, the Act explicitly provided a right of action for members of Congress to challenge its constitutionality.[147] The Court stated that such a statutorily granted right "eliminates any prudential standing limitations" but cannot erase the pure Article III requirements of injury, traceability, and redressability.[148] Since the Court explicitly acknowledged that prudential concerns were off the table, the factors it does discuss should be considered rooted in Article III.

In an important footnote, the Court noted that a suit brought by federal legislators might present separation of powers concerns not present in *Coleman*, which involved state legislators.[149] But because insufficient injury was

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

141. *Id.* at 823–24.

142. *Id.* at 824.

143. *Id.*

144. *Id.*

145. *Id.* at 826. This holding becomes clearer when one remembers that *Coleman* was decided long before *Data Processing* made injury in fact the essential question of standing. At the time of *Coleman*, standing to invoke appellate jurisdiction depended on showing that the plaintiff had an adequate legal interest in the controversy; hence the Court's assertion that the senator plaintiffs had a "plain, direct and adequate interest in maintaining the effectiveness of their votes" was dispositive. *Coleman*, 307 U.S. at 438. In *Raines*, the Court was looking for not only an adequate interest, but also a concrete and particularized injury to that interest. *See* 521 U.S. at 820.

146. *Raines*, 521 U.S. at 820.

147. *Id.* at 815–16, 820 n.3; Line Item Veto Act of 1996, 2 U.S.C. § 692(a)(1) (Supp. 1997), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

148. *Raines*, 521 U.S. at 818–19, 820 n.3. The Court especially emphasized the importance of finding a personal, concrete, particularized, and "legally and judicially cognizable" injury. *Id.* at 819.

149. *Id.* at 824 n.8.

dispositive, the Court did not need to address such concerns in *Raines*.[150] Despite the Court's expressed view that separation of powers considerations are inherent in the traditional standing analysis,[151] this footnote seems to acknowledge that the congressional-plaintiff/executive-defendant scenario requires considerations extraneous to the usual analysis.[152]

In summarizing its reasoning, the Court noted the lack of injury, lack of historical precedent, and two additional points.[153] First, the Court attached "some importance" to the fact that neither House of Congress authorized the plaintiffs' suit.[154] Second, it noted that members of Congress had an adequate remedy through legislative action and that a private plaintiff could still challenge the Act's constitutionally.[155] These points reflect the D.C. Circuit's doctrine of equitable discretion, by which the court would dismiss a congressional plaintiff's claim despite its meeting the core constitutional requirements.[156] The D.C. Circuit treated equitable discretion as a prudential consideration,[157] but the fact that the Court notes these factors with prudential considerations off the table suggests that the Court may consider them constitutionally required. Since the Court decided *Raines* on different grounds, it is not clear where the Supreme Court thinks these factors fit in.[158]

Because *Raines* involved a congressional plaintiff claiming institutional injury, it addressed many of the issues that the D.C. Circuit had been struggling with over the course of its legislative standing jurisprudence. However, most of the answers given by the Supreme Court did not fit with the D.C. Circuit's approach. In subsequent cases, the circuit court would attempt to reconcile its jurisprudence with *Raines*.

150. *Id.*

151. *See id.* at 819–20 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." (quoting Allen v. Wright, 468 U.S. 737, 752 (1984))).

152. The majority goes on to cite a number of analogous instances in history where an allegedly unconstitutional act of Congress altered the powers of the legislative or executive branch, arguing that the Presidents, executive branch officials, or members of Congress never brought suit in those cases because it was so clearly outside the jurisdiction of the judiciary. *Id.* at 827–28. The Court's use of this argument here seems to suggest that the reason for the lack of standing was not that they were not sufficiently injured, but that an injury of this type can never confer standing. At least one of the Justices has expressed support for such a bright-line rule. *See* Moore v. U.S. House of Representatives, 733 F.2d 946, 956–57 (D.C. Cir. 1984) (Scalia, J., concurring) (arguing that constitutional commands, not discretion, dictate denying standing to legislative plaintiffs).

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

154. *See id.* at 829, 829 n.10.

155. *Id.* at 829.

156. Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981). For a brief discussion of *Riegle* and the creation of the doctrine of equitable discretion, see *supra* Part II.B.2.iii.

157. See supra Part II.B.2.iii for a discussion of equitable discretion.

158. *See* Arend & Lotrionte, *supra* note 13, at 260–61 (exploring the questions left unanswered by the Court's narrow decision in *Raines*, including (1) "does the *Coleman* principle apply only to *state* legislators?"; (2) "how many legislators must bring suit in order for standing to obtain?"; (3) "must the action be authorized by Congress or a particular House?"; and (4) "what if there were no other remedies available to members of Congress or private plaintiffs?").

b. Application of Raines *in the D.C. Circuit*

After the Supreme Court's decision in *Raines*, the D.C. Circuit's doctrine of legislator standing was once again in question.[159] Within two years, two new suits—*Chenoweth v. Clinton*[160] and *Campbell v. Clinton*[161]—allowed the circuit to reassess its approach to legislator standing.

In *Chenoweth*, three members of Congress challenged the constitutionality of President Clinton's executive order to establish a new historic and environmental preservation program, the American Heritage Rivers Initiative (AHRI).[162] The circuit court denied the plaintiffs standing, holding that the claimed injury was a mere dilution of their power and did not rise to the level of nullification required under *Raines*.[163]

In its *Chenoweth* opinion, the circuit court considered what the Supreme Court's *Raines* ruling meant for the circuit's legislative standing doctrine. It compared the Supreme Court rule from *Raines* to its own prior doctrines of vote nullification and equitable discretion. The circuit court evaluated the *Chenoweth* facts separately under equitable discretion and the rule from *Raines* and found that they reached the same result under each doctrine.[164] The difference between deciding *Chenoweth* under the doctrine of equitable discretion and the rule from *Raines* showed in the motion to dismiss stage. Under *Raines*, the plaintiffs were not sufficiently injured to have standing.[165] Under equitable discretion, the plaintiffs met the injury, traceability, and redressability requirements, but because the injury could be redressed politically, equitable discretion required their claim to be dismissed.[166] Next, the circuit court evaluated its vote nullification theory as exemplified in *Kennedy*[167] compared to the nullification rule expressed by the Supreme Court in *Raines*.[168] They found that the *Kennedy*

159. The Supreme Court did not directly overturn the D.C. Circuit in deciding *Raines*. The D.C. Circuit made no decision in *Raines* because the Line Item Veto Act provided for a direct, expedited appeal from the district court to the Supreme Court. 2 U.S.C. § 692(b) (Supp. 1997) (direct appeal to Supreme Court). However, in holding that the plaintiffs had standing, the district court relied on the D.C. Circuit's doctrine. *Raines*, 521 U.S. at 816 ("[The D.C. Circuit] 'has repeatedly recognized Members' standing to challenge measures that affect their constitutionally prescribed lawmaking powers.'" (quoting Byrd v. Raines, 956 F. Supp. 25, 30 (1997) (citing, *e.g.*, Michel v. Anderson, 14 F.3d 623, 625 (D.C. Cir. 1994); Moore v. U.S. House of Representatives, 733 F.2d 946, 950–52 (D.C. Cir. 1984)))).

160. 181 F.3d 112 (D.C. Cir. 1999).

161. 203 F.3d 19 (D.C. Cir. 2000).

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

163. *Id.* The claim was that the plaintiffs were injured because "the President's issuance of the AHRI by executive order, without statutory authority therefore, deprived [the plaintiffs] of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of the NEPA." *Id.* (alteration in original) (internal quotation marks omitted).

164. *Chenoweth*, 181 F.3d at 116.

165. *Id.*

166. *Id.* at 116.

167. Kennedy v. Sampson, 511 F.2d 430, 436 (1974).

168. *Chenoweth*, 181 F.3d at 116–17.

facts fit under the narrowed vote nullification definition that the Court expressed in *Raines*.[169] As such, the D.C. Circuit said the essence of its legislator standing doctrine may survive *Raines*, since the outcome of its key decisions would not change under the new precedent.[170] But it would have to do away with equitable discretion as a separate doctrine and instead deal with separation of powers concerns within the core standing analysis.[171]

In its most recent legislator standing case, *Campbell*, the D.C. Circuit attempted to articulate a new principle consistent with *Raines*, taking into account its own precedent.[172] The result was an extremely restrictive doctrine. In *Campbell*, the court framed the *Raines* decision as a nearly complete prohibition on standing for legislative plaintiffs asserting institutional injury, with *Coleman* creating a very narrow exception when legislators' votes have been completely nullified.[173]

With regard to the *Coleman* exception, the court acknowledged that it was "not readily apparent what the Supreme Court meant by [completely nullified]"[174] and attempted to honor the Court's intention by requiring an almost exact replication of *Coleman*'s facts, an even narrower interpretation than the Supreme Court made in *Raines*.[175] The *Campbell* court asserted that the key to understanding what the Supreme Court meant by "completely nullified" in *Coleman* was the fact that the dispute was over a state ratification vote on an amendment to the United States Constitution, a very uncommon situation.[176] Once the amendment was ratified by the State of Kansas, there was no system or procedure in place, legislative or otherwise, for the State to reverse or counteract that ratification.[177]

According to the D.C. Circuit in *Campbell*, nullification for the purposes of legislative standing requires the same level of complete irreversibility present in *Coleman*.[178] If this standard were applied to all previous legislative institutional

169. *Id.* at 116–17 ("[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified." (quoting Raines v. Byrd, 521 U.S. 811, 823 (1997))). Senator Kennedy and the others who voted in favor of the bill in question in that case were "legislators whose votes would have been sufficient to . . . enact . . . a specific legislative Act," and therefore had standing to sue when the President's allegedly unconstitutional pocket veto prevented that Act from going into effect, on the ground that their otherwise sufficient votes for the bill were completely nullified. For further explanation of *Kennedy* and the pocket veto, see *supra* Part II.B.2.ii.

170. *Chenoweth*, 181 F.3d at 116–17.

171. *Id.* ("*Raines*, therefore, may not overrule *Moore* so much as require us to merge our separation of powers and standing analyses.").

172. Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000). *See generally* Arend & Lotrionte, *supra* note 13, at 271–72 (analyzing and critiquing the court's approach in *Campbell*).

173. *See Campbell*, 203 F.3d at 20–21.

174. *Id.* at 22.

175. *Id.* at 22–23.

176. *Id.*

177. *See id.*

178. *Id.*

injury cases in the D.C. Circuit, it seems that only *Goldwater* might survive.[179]

C. Current Legislative Standing Jurisprudence

While the D.C. Circuit has not been presented with another legislative standing case since *Campbell* in 2000, two recent Supreme Court opinions have touched on the topic. In the 2013 *United States v. Windsor*[180] plurality decision, two influential dissents discussed standing for a congressional committee. In 2015, the Supreme Court granted certiorari to a legislator standing case from the Arizona Supreme Court.[181] In *Arizona*, the Court built on the D.C. Circuit's standing doctrine and shed light on Supreme Court precedent.

While the Court was deciding *Arizona*, the House of Representatives was in the process of bringing a suit in the U.S. District Court for the District of Columbia, alleging unconstitutional spending by the executive branch of funds not appropriated by Congress, among other allegations, in connection with the ACA.[182] This marked the first time that an entire house of Congress would be the plaintiff in a suit against the executive.[183] These cases, explained in greater detail in this Part, constitute the most current constituent pieces of legislative standing doctrine.

1. *United States v. Windsor* and Standing for BLAG

Windsor involved a challenge to section 3 of the federal Defense of Marriage Act (DOMA), which defined "spouse" for the purposes of federal laws and regulations to mean a person in a heterosexual legal marriage. This effectively excluded same-sex couples who were legally married in states that allowed such unions from federal benefits that applied to heterosexual married couples.[184] While the suit was pending, the Department of Justice notified the district court that it agreed that section 3 of DOMA was unconstitutional, that it would not defend the suit, and that it would nonetheless continue to enforce

179. *See* Arend & Lotrionte, *supra* note 13, at 268 ("In *Goldwater*, once the President had terminated a treaty, neither the Senate, nor the House of Representatives, nor both together, could re-conclude a treaty with Taiwan."). However, the Supreme Court dismissed *Goldwater* as a political question. Goldwater v. Carter, 444 U.S. 996, 1002 (1979).

180. 133 S. Ct. 2675 (2013).

181. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015). The D.C. district court has denied standing in a number of cases; none of which have been appealed, perhaps because of the restrictiveness of the *Campbell* ruling. *See, e.g.*, Kucinich v. Obama, 821 F. Supp. 2d 110, 115–120 (D.D.C. 2011) (denying standing to a group of members of the House of Representatives suing to challenge the Obama administration's use of military force in Libya on the grounds that their alleged injury was "purely institutional," and there was no vote nullification); Kucinich v. Bush, 236 F. Supp. 2d 1, 4–18 (D.D.C. 2002) (denying standing to thirty-two members of Congress who brought suit to challenge President Bush's unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty without the approval of Congress; presenting an in-depth explanation and interpretation of the legislative standing doctrine in the D.C. Circuit post-*Campbell*; and holding that legislator plaintiffs did not have the requisite injury under *Raines*, so the issue was a political question under *Goldwater*).

182. U. S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 63 (D.D.C. 2015).

183. Jacobson, *supra* note 5.

184. *Windsor*, 133 S. Ct. at 2683, 2685.

DOMA until the case was decided.[185] This gave Congress an opportunity to intervene and defend the constitutionality of its legislation. Once the Supreme Court granted certiorari, the House of Representatives passed a resolution authorizing the Bipartisan Legal Advisory Group (BLAG), a committee of the House, to represent the House in *Windsor* in order to defend DOMA's constitutionality.[186]

The Supreme Court majority found that despite the Department of Justice not actively defending the case and because the executive branch was still enforcing DOMA, there was sufficient injury and adverseness to invoke standing.[187] With that, the majority did not address whether BLAG, representing Congress, had standing.[188] In dissenting opinions, Justice Alito and Justice Scalia both addressed BLAG's standing and came to divergent answers.[189]

Justice Alito argued that Congress, as represented by BLAG, had standing to appeal the Second Circuit's decision finding section 3 of DOMA unconstitutional because that decision "impair[ed] Congress' legislative power by striking down an Act of Congress."[190] He compared the facts to *Coleman*, noting that the votes in favor of DOMA in the House of Representatives were sufficient to pass the bill and would have been sufficient to prevent a legislative repeal.[191] However, in *Coleman*, the representatives' votes were "held for naught" by the circuit court's ruling, and the decision had left them with no legislative remedy.[192] Justice Alito also distinguished *Raines*. The *Raines* plaintiffs were individual representatives without institutional endorsement, while BLAG's representation was authorized by a vote of the full House.[193] In addition, unlike the legislator plaintiffs in *Coleman* and *Windsor*, the *Raines* plaintiffs were not the "pivotal figures" whose votes allegedly should have been sufficient to change the outcome.[194]

Justice Alito also relied on the Supreme Court's holding in *INS v. Chadha*.[195] In *Chadha*, the Court found that a court of appeals decision finding legislation creating a one-house veto unconstitutional had injured Congress by limiting its power to legislate.[196] As such, the Court granted the House and the Senate standing to submit petitions defending the legislation.[197] In addition, the Supreme Court in *Chadha* asserted that it had "long held that Congress is the proper party to defend the validity of a statute" when the government agency

185. *Id.* at 2683–84.
186. *Id.* at 2712 (Alito, J., dissenting); H.R. Res. 5, 113th Cong. § 4(a)(1)(B) (2013).
187. *Windsor*, 133 S. Ct. at 2685–88.
188. *Id.* at 2688.
189. *See id.* at 2703–05, 2712–14 (Scalia, J., dissenting; Alito, J., dissenting).
190. *Id.* at 2713 (Alito, J., dissenting).
191. *Id.*
192. *Id.* (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).
193. *Id.*
194. *Id.* at 2714.
195. *Id.* at 2712–13 (citing *Chadha*, 462 U.S. 919).
196. *Id.* (citing *Chadha*, 462 U.S. 919).
197. *Id.*

usually responsible for enforcing the statute agrees with the plaintiffs.[198] Justice Alito concluded that, "in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so."[199]

Justice Scalia, on the other hand, firmly rejected this conclusion, saying that allowing Congress standing in such situations would permit Congress to "hale the Executive before the courts . . . to correct a perceived inadequacy in the execution of its laws."[200] This would be in opposition to the historical requirement that only a person "whose concrete interests were harmed by that alleged failure" could bring the President before the courts for failure to faithfully execute the laws.[201]

In his dissent, Justice Scalia argued that the executive branch's choice not to defend a statute does not leave Congress without legislative recourse.[202] Instead, if it has enough votes, Congress has "innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding."[203] Such direct political confrontation, according to Justice Scalia, was what the drafters of the Constitution intended.[204]

2. *Arizona State Legislature v. Arizona Independent Redistricting Commission*

In *Arizona*, the Arizona legislature challenged the constitutionality of a voter initiative that, to address partisan gerrymandering, took away redistricting authority from the Arizona legislature and vested it in an independent commission, the Arizona Independent Redistricting Commission (AIRC).[205] The legislature claimed that allowing an independent commission to control redistricting violated the Elections Clause of the U.S. Constitution, which requires that the legislature of each state determine the method of holding elections in that state.[206] The Supreme Court in *Arizona* held that the legislature had standing to bring the suit but denied the plaintiffs' claims on the merits.[207]

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

199. *Windsor*, 133 S. Ct. at 2714 (Alito, J., dissenting).

200. *Id.* at 2703 (Scalia, J., dissenting).

201. *Id.*

202. *Id.* at 2704–05.

203. *Id.* at 2705. Justice Scalia added parenthetically, "Nothing says 'enforce the Act' quite like '. . . or you will have money for little else.'" *Id.* (omission in original).

204. *Id.* at 2704.

205. *Ariz. State Leg.*, 135 S. Ct. at 2658. Partisan gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Id.*

206. *Id.* at 2659. "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.

207. *Ariz. State Leg.*, 135 S. Ct. at 2659. On the merits, the Court said that the U.S. Constitution does not grant exclusive control over the redistricting process to the state's elected legislature. *Id.* at 2663. Whoever has the power to create law under the state constitution may control redistricting for

The Court found that the voter initiative concretely injured the legislature by taking away its constitutional right to initiate redistricting.[208] In holding that the legislature had standing, the Court found that lawmakers had no alternative means of combatting the results of the initiative.[209] The Court distinguished this case from *Raines*, noting that the Arizona legislature was "an *institutional plaintiff*," as opposed to a group of individual legislators, "asserting an *institutional injury*, and it commenced this action after authorizing votes in both of its chambers."[210] The Court also compared the facts to *Coleman*, stating, "Proposition 106 [the ballot initiative], together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan."[211] The focus on the legislature's complete inability to redress the injury through legislative action fits the super-narrow requirement of complete nullification under *Raines*, espoused by the D.C. Circuit in *Campbell*.[212]

Justice Ginsburg's majority opinion in *Arizona* stressed that the purpose of the standing requirement is to ensure adversarial presentation of the issues.[213] Her discussion of standing concluded that "[t]his dispute, in short, 'will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.' Accordingly, we proceed to the merits."[214] This conclusion clearly indicates the majority's belief that as long as the parties are sufficiently adverse, the goals of standing have been met. Justice Scalia vehemently disagreed in his dissenting opinion.[215] He flatly denied that the purpose of the standing doctrine could be "merely to assure that we will decide disputes in concrete factual contexts" and reiterated that the sole purpose of the standing doctrine is to limit the jurisdiction of the Court—"[i]t keeps us [the

the state under Article I, Section 4. *Id.* at 2671.

208. *Id.* at 2663 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

209. *See id.* at 2663.

210. *Id.* at 2664 (emphasis added). One might interpret the fact that the Court emphasized these aspects of *Raines* to support the idea that they were important parts of the analysis in that case. But the Court quickly noted that these differences were not dispositive in *Raines*. *Id.*

211. *Id.* at 2665 (second alteration in original) (quoting Raines v. Byrd, 521 U.S. 811, 823–24 (1997)).

212. Raines v. Byrd, 521 U.S. 811, 832 (1997) (finding that because the injury was not a complete nullification of a group of legislators' decisive notes, it was not concrete enough to meet the standing requirements); Campbell v. Clinton, 203 F.3d 19, 22–24 (D.C. Cir. 2000) (interpreting *Raines* as a narrow exception in which the plaintiffs failed because they continued to enjoy ample legislative power after their votes).

213. For a brief explanation of the conflicting purposes for the standing analysis espoused by the Supreme Court, see *supra* Part II.A.2.

214. *Ariz. State Leg.*, 135 S. Ct. at 2665–66 (omission in original) (footnote omitted) (citation omitted) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).

215. *See id.* at 2695 (Scalia, J., dissenting). Justice Thomas joined in Justice Scalia's dissenting opinion on standing, and both justices, along with Justice Alito, joined Chief Justice Roberts' dissent on the merits. *Id.* at 2694, 2677.

justices] minding our own business."[216]

Arizona represents the most recent precedent on legislator standing from either the Supreme Court or the D.C. Circuit. By the time *Arizona* was decided, *Burwell* (a federal legislator standing case) was already pending at the district court level.[217] In a footnote seemingly addressing *Burwell*, the *Arizona* majority made clear: "The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here."[218] The note quotes the "especially rigorous" language from *Raines*.[219] Although the Court was obviously cautious about the *Arizona* decision's implications for *Burwell*, one can infer some guidance as to how the Court might approach *Burwell* on appeal through a close reading of the opinion, as discussed below.

3. Current State of Legislative Standing in the D.C. Circuit and Supreme Court

The D.C. Circuit's current doctrine of legislative standing for institutional injury can be summarized as follows: institutional injury may be sufficient injury in fact when there has been complete nullification of the legislature's votes, and the resulting action is irreversible through the legislative process.[220] There is no separate separation of powers consideration. Instead, the core requirements are "especially rigorous" when reaching the merits would threaten the balance of powers.[221]

Over the course of four cases addressing legislative standing—*Coleman*, *Powell v. McCormack*,[222] *Raines*, and *Arizona*—the Supreme Court has revealed very little about how it would view a case like *Burwell*. A court has never before granted standing for an entire house of Congress for an alleged injury inflicted by the executive. *Powell*, on which the district court relied, involved an individual legislator claiming personal injury inflicted by other members of Congress.[223] *Coleman* and *Arizona* both concerned institutional plaintiffs alleging injury by another branch of the government—but at the state level.[224]

216. *Id.* at 2695 (Scalia, J., dissenting). With Justice Scalia's passing, his absence from the Court may allow the "adversarial presentation" view of standing doctrine espoused by the majority to gain even more traction in future cases. However, it is also possible that a newly appointed justice would hold similarly strict views on the purpose of standing and separation of powers.

217. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57–58 (D.D.C. 2015). See *supra* Section I for an introduction to the facts of *Burwell*, and *infra* Part II.C.4 for an in-depth analysis of the case.

218. *Ariz. State Leg.*, 135 S. Ct. at 2665 n.12.

219. *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 819–20 (1997)).

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

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

222. 395 U.S. 486 (1969).

223. *Powell*, 395 U.S. at 489–93.

224. *See Ariz. State Leg.*, 135 S. Ct. 2652 (alleging injury by the executive branch through the Arizona secretary of state and the state's independent congressional redistricting commission);

Raines is the only case brought by a federal legislator where the Supreme Court has addressed institutional injury.[225] As such, the guidance regarding *institutional injury* to an *institutional plaintiff* at the federal level is sparse at best.

In order for the Supreme Court to grant standing in a federal legislator-plaintiff case, two unanswered questions would need to be addressed. First, who is the appropriate plaintiff to bring a claim of institutional injury to the federal legislature? Second, what facts would establish sufficient injury in fact?

The Court shed light on the first question in *Arizona.* The Court implied that the injury alleged dictated the appropriate plaintiff.[226] Personal injury is clearly sufficient to invoke standing for an individual legislator in his or her personal capacity.[227] Similarly, the Court has repeatedly indicated in *state* legislature cases that institutional injury may only be alleged by institutional plaintiffs.[228] The Court has not indicated whether such precedents apply to cases by *federal* legislator plaintiffs, but it is safe to assume that if federal legislators may sue the executive at all, the injuries required would be at least as narrow as those for state legislators based on *Raines*. In relevant part, *Raines* stated that "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[229]

In *Arizona*, the Court implied that *Raines* failed because the plaintiffs were "six *individual Members* of Congress,"[230] while the injury was "[w]idely dispersed" and "necessarily [impacted] all Members of Congress . . . equally."[231] The Court noted with approval that *Arizona*, by contrast, involved "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers."[232] Similarly, in denying standing in *Raines*, the Court "attach[ed] some importance to the fact that [the plaintiffs had] not been authorized to represent their respective Houses of Congress."[233]

Taken together, *Arizona* and *Raines* indicate that the Court would likely require a prospective federal legislative plaintiff to be an institutional plaintiff

Coleman v. Miller, 307 U.S. 433 (1939) (alleging injury by the Lieutenant Governor of Kansas, who was a member of the executive branch).

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

226. *Ariz. State Leg.*, 135 S. Ct. at 2663–664.

227. *See Powell*, 395 U.S. at 498–99 (refusing to dismiss suit because the injury of not being paid a salary due to an allegedly unconstitutional House resolution was sufficient to grant standing to bring suit in an individual capacity).

228. *Ariz. State Leg.*, 135 S. Ct. at 2664 (allowing the Arizona legislature to allege an institutional injury caused by the independent congressional redistricting commission); *Coleman*, 307 U.S. at 437–38 (recognizing standing for senators alleging an institutional injury where the Lieutenant Governor was the final vote on a resolution).

229. *Raines*, 521 U.S. at 819–20.

230. *Ariz. State Leg.*, 135 S. Ct. at 2664.

231. *Id.* (second alteration and omission in original) (quoting *Raines*, 521 U.S. at 829, 821).

232. *Id.*

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

who is authorized to sue by his or her legislative body. Considering the Court's repeated reference to the "rigorous application" of the injury requirement and separation of powers considerations implicated by such a suit, it is safe to assume that any allowance of standing would be at least as narrow as for state legislative plaintiffs.[234]

Regarding the necessary level of injury, the D.C. Circuit interpreted *Coleman* and *Raines* to mean that standing for legislative plaintiffs alleging institutional injury requires complete irreversibility.[235] In *Arizona*, the defendant AIRC and the United States, as amicus, echoed that D.C. Circuit interpretation by arguing that the Arizona legislature's injury was not sufficient because it was not completely irreversible—the legislature had not voted or taken any action overridden by the AIRC.[236] Denying these arguments, the Supreme Court found that it was not necessary for the legislature to have attempted actions against the AIRC that would have been futile.[237]

A provision of the Arizona Constitution forbids the legislature from adopting any measure that supersedes a voter initiative, and another provision requires the secretary of state to implement the AIRC's redistricting plan and no other.[238] Therefore, "[t]o establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State's fundamental instrument of government."[239] This seems to imply that an institutional injury is sufficiently irreversible when attempts to counteract it would be "unavailing."[240] In other words, it is not necessary for the legislature to engage in meaningless actions to prove their injury is not speculative.[241]

Arizona provides insight into the modern Court's views on issues unaddressed since *Coleman* in 1939. However, the impact of the decisions involving state legislatures remains unclear as it relates to the standing analysis for congressional plaintiffs. But the doctrine has recently continued its evolution. Less than four months after the Supreme Court decided *Arizona*, the United States District Court for the District of Columbia applied this new precedent to a unique congressional plaintiff case—the House of Representatives' lawsuit against the Obama administration.

4. *U.S. House of Representatives v. Burwell*

On September 9, 2015, Judge Rosemary Collyer of the United States

234. *See, e.g.*, *id.* at 824 n.8 ("[S]eparation-of-powers concerns present in [a similar suit brought by federal legislators] were not present in *Coleman* . . . .").

235. *Ariz. State Leg.*, 135 S. Ct. at 2663–64; Campbell v. Clinton, 203 F.3d 19, 22–23 (D.C. Cir. 2000).

236. *See Ariz. State Leg.*, 135 S. Ct. at 2663.

237. *Id.*

238. *Id.* at 2664.

239. *Id.*

240. *See id.* at 2663.

241. *Id.*

District Court for the District of Columbia ruled that the U.S. House of Representatives, as a legislative body, has standing to challenge the executive branch's expenditure of funds without proper legislative appropriation.[242] The funds in question were spent by the Department of Health and Human Services in support of the ACA.[243] The House alleged two theories of injury: (1) that the executive violated Article I, Section 9, Clause 7 of the U.S. Constitution by spending money not validly appropriated by Congress (the "Non-Appropriation Theory"); and (2) that the executive unilaterally amended the ACA without congressional consent by its enforcement choices, specifically by delaying implementation of the so-called employer mandate (the "Employer-Mandate Theory").[244]

Judge Collyer dismissed the House's allegations under the Employer-Mandate Theory for lack of standing, finding that if the executive amended the ACA through implementation as the House claimed, it amounted to no more than an error in enforcement—a statutory violation too general to constitute injury in fact to the House of Representatives.[245]

The Non-Appropriation Theory alleged that Congress had not designated any funds in the 2014 budget for reimbursements to insurers under Section 1406 of the ACA, but that the Department of Health had used funds designated for other purposes under the ACA to make the section 1402 payments anyway.[246] The House alleged that by doing so, the executive "divested [Congress] utterly and completely of its most defining constitutional function"—the power of the purse.[247] Judge Collyer agreed, and found that such a constitutional violation "would inflict a concrete, particular harm upon the House for which it has standing to seek redress."[248]

Relying on *Arizona*, the court distinguished the House in *Burwell* from the *Raines* plaintiffs, emphasizing that the House as an institution "can obtain a remedy for the 'institutional' injury that the *Raines* Court found 'too widely dispersed' when asserted by only a few members."[249] The court declined to address whether the House's votes had been nullified within the meaning of *Coleman* because "the House suffers a sufficiently concrete and particularized injury by its displacement from the appropriations process."[250]

Recall that in *Chenoweth*, the 1999 D.C. Circuit case, the court rejected the notion that prudential separation of powers concerns should be analyzed separately from the core requirements of standing.[251] This followed the Supreme

242. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 58 (D.D.C. 2015).
243. *Id.* at 57.
244. *Id.* at 69–70.
245. *Id.* at 75–76.
246. *Id.* at 62–63.
247. *Id.* at 70.
248. *Id.*
249. *Id.* at 71–72 (quoting Kucinich v. Bush, 236 F. Supp. 2d 1, 7 (D.D.C. 2002)).
250. *Id.* at 73.
251. Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999).

Court in *Raines* and the Court's repeated assertion that consideration of separation of powers is inherent in the standing analysis.[252] Notably, in *Burwell*, Judge Collyer refused to view separation of powers as a component of the standing analysis.[253] Instead, she viewed separation of powers as a prudential limit on justiciability, not a jurisdictional requirement of Article III standing.[254] She supported this assertion with a quote from *Powell*: "[T]he doctrine of separation of powers is more properly considered in determining whether the case is 'justiciable.'"[255] This seemingly ignored the many post-*Powell* cases where the Supreme Court stated the opposite.[256]

In a footnote, Judge Collyer acknowledged the Supreme Court's statement in *Allen* that "the law of Art. III standing is built on a single [basic] idea—the idea of separation of powers."[257] She distinguished *Burwell* by pointing out that in *Allen* and other cases treating separation of powers as the essence of standing, the Court focused on limiting federal jurisdiction to Article III cases and controversies.[258] The separation of powers issue in *Burwell*, however, concerned the balance of powers between the legislative and executive branches, not limitations on the judiciary.[259] Quoting *Windsor*, Judge Collyer stated that this balance of powers issue was distinct from the Article III standing concerns.[260] As such, she considered prudential separation of powers in a separate justiciability analysis.[261]

Judge Collyer called the Supreme Court's historical arguments against legislative standing in *Raines* "unconvincing."[262] The fact that the legislature and executive had historically refrained from challenging each other's actions in federal court, she stated, did not mean they could not have done so.[263] Further, Judge Collyer seemingly ignored the Supreme Court's assertion in *Raines* that these kinds of disputes were outside the judiciary's role as defined by Article III.[264] *Burwell* was distinguishable from *Raines* because "the rights of the House

252. *See id.*

253. *Burwell*, 130 F. Supp. 3d at 65–66.

254. *Id.*

255. *Id.* at 66 (alteration in original) (quoting Powell v. McCormack, 395 U.S. 486, 512 (1969)).

256. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 752 (1984).

257. *Burwell*, 130 F. Supp. 3d at 66 n.10 (quoting *Allen*, 468 U.S. at 752).

258. *Id.*

259. *Id.*

260. *Id.* at 65 ("The Court must be cautious not to 'elide[] the distinction' between the 'jurisdictional requirements of Article III and the prudential limits on its exercise.'" (alteration in original) (quoting United States v. Windsor, 133 S. Ct. 2675, 2685 (2013)).

261. *Id.* at 79–81. In a separate justiciability analysis, the judge combined the executive's separation and balance of powers arguments against standing with the political question doctrine. The judge held that the issue was not a political question because it can be decided under existing "standards for constitutional review of Executive actions, and the "mere fact that the House of Representatives is the plaintiff" was not enough to make it a "'political' dispute." *Id.* at 80.

262. *Id.* at 80.

263. *Id.* Judge Collyer also dismissed arguments drawn from Justice Scalia's dissenting opinion in *Windsor*, emphasizing that the dissent was not binding precedent. *Id.*

264. *See* Raines v. Byrd, 521 U.S. 811, 828–29 (1997) (noting that the American system does not

as an institution to litigate to protect its constitutional role has [sic] been recognized in other contexts in the 20th century."[265] However, *Burwell* does not cite any examples of such recognition.[266] After distinguishing its circumstances from *Raines*, *Burwell* nonetheless found that the institutional standing for the House "was most specifically foreseen, if not decided, in *Raines* and *Arizona*."[267]

Judge Collyer's distinguishing *Raines* from *Burwell* presumably rested on the fact that the House of Representatives voted to authorize the *Burwell* suit,[268] while in *Raines* the Supreme Court "attach[ed] some importance" to the fact that the plaintiffs' respective houses opposed their actions.[269] *Raines*, however, did not indicate whether such lack of authorization was dispositive.[270] Though this distinction is notable, in other ways, *Burwell* closely parallels *Raines.*[271]

In May 2016, the court ruled in favor of the House on the merits. [272] Judge Collyer enjoined the executive to stop spending under section 1402 until Congress explicitly appropriates funds for that purpose, but stayed the injunction pending appeal.[273] If and when the case reaches the circuit court, a different outcome on standing is likely. Notwithstanding Judge Collyer's assertion that the House of Representatives' "displacement from the appropriations process" was sufficient injury regardless of vote nullification,[274] vote nullification remains the *only* actionable institutional injury acknowledged by the D.C. Circuit.[275] Under the D.C. Circuit's doctrine of legislative standing, as expressed in *Campbell*, the court requires a showing that the House of Representatives has been completely denied the opportunity to exercise a constitutionally guaranteed power, in this case, the power of purse, and that such denial cannot be remedied through the legislative process.

III. DISCUSSION

In this Section, Part III.A offers a critique of the district court's standing decision in *Burwell* and proposes an alternative analysis under the D.C. Circuit's

grant standing to the executive against the legislative branch).

265. *Burwell*, 130 F. Supp. 3d at 80 n.29.

266. *Id.*

267. *Id.* (citations omitted) (first citing Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2664–65 (2015); then citing *Raines*, 521 U.S. at 829–30).

268. *See Burwell*, 130 F. Supp. 3d at 80–81.

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

270. *Id.* at 829–30 ("Whether the case would be different if any of these circumstances were different we need not now decide.").

271. See *infra* Part III.B for an analysis of the similarities between these cases and the argument that the House should not have standing in *Burwell* under Supreme Court precedent.

272. U.S. House of Representatives v. Burwell, Civ. A. No. 14-1967 (RMC), 2016 WL 2750934, at *19 (D.D.C. May 12, 2016) ("The Court will grant summary judgment to the House of Representatives and enter judgment in its favor. The Court will also enjoin any further reimbursements under Section 1402 until a valid appropriation is in place.").

273. *Id.*

274. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 73 (D.D.C. 2015).

275. *See* Campbell v. Clinton, 203 F.3d 19, 22–24 (D.C. Cir. 2000).

legislator standing doctrine. Part III.B analyzes *Burwell* under Supreme Court precedent. Finally, Part III.C recommends a new framework for deciding federal legislator plaintiff cases.

A. No Standing Under D.C. Circuit Doctrine

If *Burwell* reaches the D.C. Circuit, the court should deny standing under its post-*Raines* congressional standing doctrine expressed in *Campbell*, which requires complete nullification. The House's alleged injury—that the executive branch usurped their constitutional right to control appropriations[276]—simply does not amount to complete nullification.

First, the facts alleged do not fit the narrow vote nullification rule that the D.C. Circuit defined in *Chenoweth*—granting standing where votes sufficient to pass an act were ignored or where an act with insufficient votes in its favor was adopted.[277] Instead, in *Burwell*, the plaintiffs allege that the executive branch acted outside its authority and infringed on a duty that the Constitution assigns to Congress.[278] This injury is comparable to the one the D.C. Circuit rejected in *Chenoweth*.[279] In both *Chenoweth* and *Burwell*, the plaintiffs alleged that "the President denied them their proper role in the legislative process"[280] (in *Chenoweth* by creating legislation through executive order,[281] and in *Burwell* by spending funds without appropriations),[282] "and, consequently, diminished their power as Members of . . . Congress."[283] As the *Chenoweth* court stated, this is mere dilution, not nullification.[284]

Second, the alleged injury does not meet the D.C. Circuit's *Campbell* requirement that the harm be irreversible by legislative action.[285] If the executive branch is in fact improperly spending unappropriated funds, Congress has several methods of recourse. For example, with approval of both houses, they could restrict the use of the funds,[286] or they could pass a resolution prohibiting the use of federally appropriated funds on a specific program.[287] The facts

276. *Id.* at 70.

277. Chenoweth v. Clinton, 181 F.3d 112, 116–17 (D.C. Cir. 1999).

278. *Burwell*, 130 F. Supp. 3d at 70.

279. *Chenoweth*, 181 F.3d at 115.

280. *Id.* at 113.

281. *Id.*

282. *Burwell*, 130 F. Supp. 3d at 70.

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

284. *Id.* at 115.

285. Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000).

286. JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R41634, LIMITATIONS IN APPROPRIATIONS MEASURES: AN OVERVIEW OF PROCEDURAL ISSUES (2014); *see, e.g.*, *Burwell*, 130 F. Supp. 3d at 62 n.8.

287. For example, since 1976, Congress has included language in every appropriations measure, known as the Hyde Amendment, which explicitly bans the use of federal funds for abortions. Julie Rovner, *Abortion Funding Ban Has Evolved Over the Years*, NPR (Dec. 14, 2009, 6:00 AM), http://www.npr.org/templates/
story/story.php?storyId=121402281 [https://perma.cc/9UYG-F6KX]. For an exploration of the various

alleged by the House neither fit the pattern for vote nullification nor have the level of irreversibility required for complete nullification under *Campbell*. Therefore, an appeal to the D.C. Circuit would almost certainly result in a denial of standing.

B. No Standing Under Supreme Court Precedent

Under Supreme Court precedent, a court should deny standing for the House of Representatives in *Burwell* because the alleged injury is not sufficiently concrete and can be redressed by legislative action. In addition, although the House as a whole authorized the suit, it still may not be an appropriate institutional plaintiff.

The institutional injury alleged in *Burwell* is not concrete or irreversible enough to satisfy the constitutional injury-in-fact requirement as defined in *Coleman*, *Raines*, and *Arizona*. By spending funds appropriated for one purpose under the ACA to support a different initiative under the Act, the Department of Health allegedly undercut Congress's control over spending in much the same way that the Line Item Veto Act did in *Raines*—where the court held the injury insufficient to invoke standing.[288] Under the Line Item Veto Act, the President's power to cancel certain provisions of an appropriations bill meant that the federal budget would not necessarily apply in the manner approved by Congress.[289] In *Burwell*, where the Department of Health and Human Services spent funds for a related but not explicitly appropriated purpose, the harm was essentially the same—the executive branch did not follow Congress's plan.[290] In *Raines*, the Court called this injury an "abstract dilution of institutional legislative power" that did not amount to sufficient vote nullification.[291]

Further, the loss of appropriations power alleged in *Burwell* could be redressed by congressional action, as explained below, and was therefore not sufficiently irreversible under *Arizona*. In *Raines*, the Supreme Court highlighted the fact that under the Line Item Veto Act, Congress had the power to pass "disapproval bills" that would override any cancellations made by the President,[292] that Congress had the power to repeal the Act by the usual procedures, and that a majority of Senators and members of Congress could vote

legislative tactics used to defund Planned Parenthood and prohibit the use of federal funds for abortions, including the Hyde amendment, see Mary Ziegler, *Sexing* Harris*: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701 (2012). At issue in *Burwell* is not an affirmative legislative measure to defund, but the absence of a specific appropriation of the funds in question for the particular use the Department of Health and Human Services put them to. 130 F. Supp. 3d at 61–62.

288. *Burwell*, 130 F. Supp. 3d at 59–60; *cf.* Raines v. Byrd, 521 U.S. 811, 816–17, 829–30 (1997) (explaining how, although the district court held that the Line Item Veto Act constituted an "unconstitutional delegation of legislative power to the President," the injury was not "sufficiently concrete" to establish standing).

289. *Raines*, 521 U.S. at 824–25.

290. *See Burwell*, 130 F. Supp. 3d at 62.

291. *Raines*, 521 U.S. at 826.

292. *Id.* at 815.

to "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act."[293] As such, the *Raines* plaintiffs' injury did not constitute complete nullification.[294]

The alleged injury in *Burwell* can be viewed as the executive branch claiming the power to spend funds for a different purpose than they were appropriated within the same legislative program. Similar to the Line Item Veto Act in *Raines*, Congress retained the ability to exempt an appropriation from this power by explicitly restricting particular funds or by passing a resolution declaring the intention not to fund a specific program.[295] While legislator plaintiffs are not required to take legislative actions to counteract the injury when such actions would be unavailing,[296] the injury requirement is not satisfied where the harm could be remedied through the regular legislative process, as it could be in *Burwell*.[297]

Finally, the House of Representatives may not be an appropriate institutional plaintiff. A majority of the House of Representatives voted to authorize the *Burwell* suit.[298] However, it is not clear whether authorization from one house of Congress is sufficient for standing when the alleged injury is a nullification of the entire Congress's appropriations power. When *Raines* alleged that the Line Item Veto Act injured the plaintiff legislators' constitutional powers by diluting the effectiveness of their votes on appropriations bills,[299] the Court said that that injury "necessarily damage[d] all Members of Congress and both Houses of Congress equally."[300] By the same logic, the alleged injury to Congress's appropriations powers in *Burwell* would damage the House and the

293. *Id.* at 824.

294. *Id.* It is appropriate here to note that for the purposes of the standing analysis, the court must take plaintiffs "at their word" with regard to their alleged injury. *Id.* at 825. The standing analysis asks, if they have in fact suffered the injury they claim, whether such injury is sufficient. It leaves determination of the merits of their claim for the next stage. *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2663 (2015) ("Proposition 106, . . . strips the Legislature of its alleged prerogative to initiate redistricting. . . . Although we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts, one must not 'confus[e] weakness on the merits with absence of Article III standing.'" (alteration in original) (internal cross-reference omitted) (quoting Davis v. United States, 131 S. Ct. 2419, 2434 (2011))). In *Arizona*, the Court held that the Arizona legislature did have standing based on the injury alleged but found on the merits that they had not in fact suffered that injury. *Id.* With regard to the Line Item Veto Act, the Court denied members of Congress standing to challenge the Act in *Raines*, but later declared the Act unconstitutional in a suit brought by private citizens and the city of New York. Clinton v. City of New York, 524 U.S. 417, 448 (1998).

295. JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R41634, LIMITATIONS IN APPROPRIATIONS MEASURES: AN OVERVIEW OF PROCEDURAL ISSUES 2 (2014); *see, e.g.*, *Burwell*, 130 F. Supp. 3d at 62 n.8.

296. See *supra* Part II.C.2 for my interpretation of how the majority opinion in *Arizona* came to this conclusion.

297. *See Raines*, 521 U.S. at 829.

298. *Burwell*, 130 F. Supp. 3d at 63.

299. *Raines*, 521 U.S. at 816–17. For a more detailed discussion of *Raines*, see *supra* Part II.B.3.i.

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

Senate equally, but *Burwell* was only authorized by the House. [301] For this reason, the Court may find that the House has no standing without authorization from the Senate.

In conclusion, the House of Representatives' injury in *Burwell* is mainly theoretical. Practically speaking, Congress can prevent funds from being spent on the cost-sharing offsets in the future by taking more explicit legislative action. Therefore, the Supreme Court would likely find *Raines* controlling and would therefore deny standing.

C. Proposed Method for Analyzing Justiciability of Congressional Plaintiff Suits

Part III.A and III.B conclude that both D.C. Circuit doctrine and Supreme Court precedent dictate denying the House of Representatives standing in *Burwell*. This leaves open the question whether a congressional plaintiff may ever have standing to challenge the actions of the executive branch. Put differently, if the facts of *Burwell* satisfied the requirements of *Arizona* and *Raines*—perhaps (echoing *Arizona*) if the President, by executive order, were to create an independent commission to control the appropriations process—would a suit by the House of Representatives be justiciable? If such a suit could not be dismissed for insufficient injury, causation, or redressability, the Court would have to confront the additional considerations it has alluded to but sidestepped in past legislative standing opinions.[302]

Examining the merits in a case that calls for the Court to rule on the allocation of power between two coequal branches would raise important separation of powers concerns.[303] However, the courts have not clearly defined

301. In order to become effective, an appropriations bill must pass both houses of Congress. JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R41634, LIMITATIONS IN APPROPRIATIONS MEASURES: AN INTRODUCTION 9–10 (2014). However, the House of Representatives has a uniquely strong relationship with the appropriations process, as all appropriations bills must originate in the House. U.S. CONST. art. I, § 7, cl. 1; *cf.* Moore v. U.S. House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984) ("The appellants claim a specific injury in their official capacities as members of the House by the nullification of their right to originate, by debate and vote, a bill for raising revenue prior to legislative action by the Senate.") *cert. denied* 469 U.S. 1106 (1985). As such, the Court may find that abrogation of Congress's power over appropriations is a sufficiently concrete injury when alleged by the House as a body, without being joined by the Senate.

302. *See, e.g.*, Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 n.12 (2015) ("The Court's standing analysis, we have noted, has been 'especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" (alteration in original) (quoting *Raines*, 521 U.S. at 811)); *Raines*, 521 U.S. at 833 (Souter, J., concurring) ("[R]espect for the separation of powers requires the Judicial Branch to exercise restraint in deciding constitutional issues by resolving those implicating the powers of the three branches of Government as a 'last resort.'" (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982))).

303. *See, e.g.*, *Ariz. State Leg.*, 135 S. Ct. at 2665 n.12 ("The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. . . . [A] suit between Congress and the President would raise separation-of-powers concerns absent here."); *Raines*, 521 U.S. at 832 n.3 (Souter, J., concurring) ("*Coleman* . . . involved a suit by state legislators

those concerns or laid out an analysis. Are these considerations part and parcel of the standing analysis, as Justice Scalia insisted? Or do they require a new prudential doctrine, as the D.C. Circuit attempted with equitable discretion? The remainder of this Comment will attempt to answer these questions by proposing a framework for analyzing the justiciability of congressional plaintiff suits.

As Judge Collyer noted in her *Burwell* opinion, congressional plaintiff cases raise two related but distinct separation of powers concerns—limiting federal jurisdiction and maintaining checks and balances.[304] This separation informs a standing analysis aimed at limiting the federal courts' jurisdiction to Article III cases or controversies.[305] On the other hand, cases where a legislative branch plaintiff challenges an executive branch action raise concerns more closely related to the checks and balances aspect of separation of powers.

In order to effectively address both concerns, the Court should consider congressional plaintiff cases under a framework that separates the checks and balances concerns from the core requirements of standing. The Court should remove consideration of whether it is appropriate for the Supreme Court to decide a case on the merits when doing so "would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional" from the standing analysis and instead address it subsequently as a prudential consideration of justiciability.[306] This approach serves the dual purposes of the standing requirement and will clarify the elements of the Court's justiciability analysis. The parties and the public are more likely to view as legitimate a decision based on a clear framework, an important consideration because congressional plaintiff cases like *Burwell* are often rooted in partisan disputes.

In keeping with the Court's opinions in *Windsor* and *Arizona*, the first stage of the analysis should be focused on the core requirements of injury, causation, and redressability, and should treat these as bright-line rules.[307] If the core requirements are satisfied, the Court should next look to prudential considerations to ensure that the case is appropriate for judicial consideration. At this stage, the Court might consider ripeness, political question doctrine, and checks and balances concerns. This approach would be similar to the D.C. Circuit's doctrine of equitable discretion.[308] It would allow the core standing analysis to further its dual purposes—limiting the jurisdiction of the judicial branch and ensuring adverse presentation of the issues—through the three clear requirements of injury, causation, and redressability, without the amorphous checks-and-balances-related separation of powers concerns clouding the analysis.

that did not implicate . . . the separation-of-powers concerns raised in this case.").

304. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 66 n.10 (D.D.C. 2015).

305. U.S. CONST. art. III, § 2.

306. *Raines*, 521 U.S. at 819–20.

307. United States v. Windsor, 133 S. Ct. 2675, 2685–86 (2013).

308. *See* Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981) (introducing the doctrine of equitable discretion).

Under this proposed framework, the Court would first determine whether the plaintiff meets the three core constitutional requirements of standing.[309] When analyzing injury, the court should look for complete nullification or abrogation of power, including a lack of reasonable legislative remedies, as set forth in *Raines* and *Arizona*.[310] Once the Court finds the core requirements satisfied, it should then turn to prudential considerations, including the checks-and-balances aspect of separation of powers, the proper role of the judiciary, and the risk to the legitimacy of the judiciary by entering interbranch political struggles.[311]

This proposed framework is not a radical departure from the Court's previous decisions, but instead a clarification. It more transparently indicates which factors really drive the Court's decisions on congressional standing.

For example, in the injury analyses in *Raines* and *Arizona*, the Court examined whether legislative remedies were reasonably available.[312] In determining that the plaintiffs were not sufficiently injured in *Raines*, the majority emphasized that after the Line Item Veto Act was enacted, Congress still had the power to pass or reject appropriations bills, could still repeal the Act by a majority vote, and could vote to exempt any given bill or specific provision in a bill from the Act.[313] Conversely, in *Arizona*, the Court supported its finding of sufficient injury with a showing that prescriptions of the Arizona Constitution would make any attempt by the legislature to circumvent the AIRC "unavailing."[314]

In *Raines*, the Court's discussion of the lack of historical precedent and its assertion that the plaintiffs' claims fell outside of the traditional role of the courts amounted to a prudential consideration. The majority noted that the role of the federal judiciary is to protect the rights of "individual citizens and minority groups against oppressive or discriminatory government action. . . . not some amorphous general supervision of the operations of government."[315] The majority also noted that "public esteem for the federal courts" is maintained by ensuring that the Courts stay within that role.[316]

In his concurring opinion in *Raines*, Justice Souter illuminated the concern that the majority attempted to address through historical analysis.[317] He characterized the dispute as "an interbranch controversy about calibrating the legislative and executive powers."[318] He asserted that if the Court were to

309. *See supra* Part II.A.1.

310. *See supra* Parts II.B.3.i, II.C.2.

311. *See supra* Part II.C.3.

312. Arizona State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2663–65 (2015); Raines v. Byrd, 521 U.S. 811, 829 (1997).

313. *Raines*, 521 U.S. at 824.

314. *Ariz. State Leg.*, 135 S. Ct. at 2663.

315. *Raines*, 521 U.S. at 829 (quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

316. *Id.*

317. *Id.* at 833 (Souter, J., concurring).

318. *Id.*

intervene, it would "risk damaging the public confidence that is vital to the functioning of the Judicial Branch by embroiling the federal courts in a power contest nearly at the height of its political tension."[319] While both the majority and Justice Souter claim that the decision turned on the core standing requirements, the fact that both opinions felt the need address to these balance of power concerns separately and at length shows that they do not fit naturally under injury, causation, or redressability.

Formally removing the checks and balances consideration from the core standing analysis is preferable to the Court's previous approaches for the reasons detailed below. It will increase the credibility of the Court in such cases; it will eliminate unnecessary and inconsistent policy considerations; and it will minimize the risk of unintended consequences in future cases.

First, such a clarified framework would benefit judicial esteem by combatting allegations of political motivation. A decision by the Court to abstain from deciding a case such as *Burwell* risks being viewed as political almost as much as a decision to hear the case. In today's highly polarized political climate, anything the Court decides regarding a contentious political dispute will be viewed as partisan.[320] By basing its decision on a clearly delineated, multistage analysis, the Court can guard against this perception. As both Justice Souter and the majority emphasized in *Raines*, the judiciary's power as an unelected branch should align with the public's view of the Court as objective and unbiased.[321]

In addition, by limiting the standing analysis to its core requirements, the Court can avoid overstretching standing doctrine as it has in the past.[322] Throughout the Court's history, various policy concerns have been jammed into the standing analysis.[323] In an influential critique of *Allen*, scholar Gene Nichol argued that by making standing a catchall, the Court risked rendering it meaningless.[324]

Finally, the Court's current approach to the legislative standing analysis risks tying its hands for future cases. This Article's approach avoids this. In several cases, the Court has held that a legislator plaintiff lacks standing because of insufficient injury or some other defect to the core requirements specific to that plaintiff and those facts.[325] By doing so, the Court implies that these specific defects are the only barrier keeping Congressional plaintiffs out of court, when

319. *Id.* (citation omitted).

320. *See generally* William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 320 (2008) (putting a highly polarized political climate into historical context, and discussing the dangers of such polarization to the judiciary). *Id.* at 320 ("If judges act, or are perceived as acting, on behalf of a particular party or in furtherance of its agenda, the political temperature is bound to rise, and the consequences are likely to be negative.").

321. *Raines*, 521 U.S. at 828–29, 833–34; *see, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 201–268 (1962).

322. Nichol, *Abusing Standing*, *supra* note 44, 657–58.

323. *Id.* at 658.

324. *Id.* at 637.

325. *See, e.g.*, *Raines*, 521 U.S. at 829 (denying standing because of insufficient injury, while also mentioning other less concrete considerations).

in reality the Court's concerns regarding Congressional suits against the executive are much larger. Separation of powers concerns and historical arguments played a significant role in *Raines*, but the majority ultimately rested its holding on insufficient injury, leaving the lack of historical precedent and concerns about the proper role of the Court undefined in impact.[326] After the *Raines* Court held the injury insufficient in part because the entire House of Representatives had not approved the suit, House Republicans recalibrated accordingly, and they held an authorizing vote before bringing *Burwell*.[327] The same separation of powers concerns and lack of historical precedent are raised in *Burwell* as in *Raines*, but the Court said those concerns were not dispositive. Insufficient injury was dispositive, and the plaintiffs will argue that issue is solved by the authorizing vote. Until the Court clearly defines separation of powers concerns as an additional prudential consideration, it will be stuck continually finding new defects in the legislator plaintiffs' injury or causation. This approach will leave the door open for future legislator plaintiffs whose cases don't involve the same defects in the core requirements but raise the exact same separation of powers concerns. Delineating balance of powers as a separate consideration will allow the Court to handle legislator-plaintiff cases in a more transparent and credible way.

One potential criticism of this proposed framework is that it gives Congress the power to bypass the separation of powers considerations and guarantee itself standing by creating a statutory right of action. If the Court defines the balance of powers considerations as prudential and not rooted in the Constitution, they can be overridden by an act of Congress.[328] In *Raines*, Congress had created an explicit right of action under the Line Item Veto Act for any of its members seeking to challenge the Act's constitutionality.[329] The Court acknowledged that such an explicit grant by Congress does away with any prudential standing concerns.[330] This may explain why the *Raines* majority and Justice Souter's concurrence lumped the separation of powers concerns into the core standing analysis. If they had acknowledged them as prudential, they would have had to set them aside altogether because of the congressional grant.

While this proposal may mean giving congressional plaintiffs more access to the federal courts, such access is not a significant threat to separation of powers. Congress can only explicitly grant a right of action to itself or another plaintiff to challenge a particular piece of legislation. As the Court noted in *Raines*, the fact that Congress has explicitly granted itself such right of action "significantly lessens the risk of unwanted conflict with the Legislative Branch."[331] On the other hand, Congress cannot create a right of action to challenge anything other

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

327. *See id.* at 829–30. See *supra* text accompanying notes 1–4 for more information on the House of Representatives' authorizing vote.

328. *See supra* notes 34–35 and accompanying text.

329. *Raines*, 521 U.S. at 820 n.3.

330. *Id.*

331. *Id.*

than its own legislation, for example, executive actions. For this reason, defining balance of powers considerations as prudential will not threaten their applicability to disputes between Congress and the executive branch.

IV. CONCLUSION

Congressional standing cases are some of the most difficult and important cases that come before the Supreme Court. They pose an existential threat to the judicial branch because they place the Court in the middle of tense political battles. The standing analysis in congressional plaintiff cases invokes the most central ideals of our constitutional system—limited powers and checks and balances. Although there may be some set of facts under which Congress, as an institution, has been deprived of its constitutional powers such that judicial intervention is appropriate, careful application of stringent requirements and prudent exercise of judicial discretion is necessary when deciding the justiciability of such cases.

After decades of struggling to articulate a standard for congressional standing, the D.C. Circuit has adopted a narrow and strictly applied test under *Campbell*, which appropriately deters purely political interbranch disputes. If the House Republicans' suit against the executive branch in *Burwell* reaches the Supreme Court, the Court should use the opportunity to adopt a clear approach, similar to the D.C. Circuit's, for deciding the justiciability of congressional plaintiff cases. I propose a framework that first determines whether the plaintiff has standing using a strict analysis of injury, causation, and redressability; it then turns to the prudential aspects of justiciability, including the balance of power concerns inherent in interbranch disputes.