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Untangling the Branches: An Analysis of Congressional Standing in the Wake of United States v. Windsor

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I. Introduction

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act ("ACA") into law.[1] The law sent ripples through American politics, with Democrats claiming a victory for healthcare reform, while Republicans claimed that the law would be a certain disaster once its provisions were implemented.[2] Among the most controversial provisions that the ACA contained was the employer mandate, requiring that employers with fifty or more employees provide healthcare coverage to those employees by December 31, 2013.[3] Despite being one of the law's most ardent supporters, the Obama Administration unilaterally postponed enforcement of the employer mandate for employers with more than one hundred employees until 2015.[4] Additionally, the Administration unilaterally postponed enforcement of the mandate for employers with between fifty and ninety-nine employees until 2016.[5] Not surprisingly, the Administration's decision not to enforce the mandate reignited controversy over the bill.[6] This time, however, the controversy did not focus on the bill's

[1] Patient Protection and Affordable Care Act, H.R. 3590, 11th Cong. §1513 (2010).
[2] Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html?module=Search&mabReward=relbias%3Ar%2C%7B%222%22%3A%22RI%3A14%22%7D.
[3] Patient Protection and Affordable Care Act, H.R. 3590, 11th Cong. §1513(d) (2010).
[4] *Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015,*
[5] *Id.*
[6] Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST (Feb. 10, 2014), http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html.

contentious provisions. Rather, it focused on the President's decision to change the date of enforcement for the aforementioned provisions without congressional approval.[7]

On July 30, 2014, in response to the postponement, the United States House of Representatives voted 225–201 to authorize Speaker John Boehner to sue President Obama for abusing his authority.[8] Congressional Republicans argued that the decision was a breach of the President's constitutional duty to ensure that the law be faithfully executed.[9] The President's decision and its aftermath have added to the centuries-old debate about the scope of the executive's authority.

A complementary issue, and perhaps one with even more importance due to its wider applicability, is the question of what lengths Congress may go to in order to rein in an executive that has abused his or her authority. The notion of Article III courts refereeing disputes between the executive and legislature has been accepted relatively recently.[10] Under previous Supreme Court precedent, such a suggestion would be unthinkable.[11] However, the United States Supreme Court's finding of standing in *United States v. Windsor* may signal a change in the winds.[12]

Part II of this article will examine the history of legislative standing, examining the origins and development of the doctrine through case law and the competing views of the purposes underlying the doctrine. Additionally, it will examine the United States Supreme

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[7] Michael R. Crittenden & Colleen McCain Nelson, *House Votes to Authorize Boehner to Sue Obama*, WALL ST. J. (July 30,2013), http://online.wsj.com/articles/house-votes-to-authorize-boehner-to-sue-obama-1406760762.
[8] *Id.*
[9] *Id.*
[10] *See* Barnes v. Kline, 757 F.2d 21, 41 (D.C. Cir. 1984) (Bork, J., dissenting) ("The phenomenon of litigation directly between Congress and the President concerning their respective constitutional powers and prerogatives is a recent one.").
[11] *See id.* (describing the different views of the purposes underlying standing doctrine).
[12] United States v. Windsor, 133 S. Ct. 2675 (2013).

Court's decision in *United States v. Windsor* and the potential consequences it may have for congressional suits. Part III will examine arguments for and against legislative standing against the President. Finally, Part IV will argue that the expansive view of standing that would allow Congress to sue the President has no place in our constitutional system. Rather, it bypasses the constitutionally required court in which such disputes are meant to be handled: the United States Senate.

II. Historical Overview

Article III of the Constitution extends judicial power only to "Cases" and "Controversies."[13] Because of this, courts require plaintiffs to have standing in order to bring suit in federal court.[14] A plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete and particularized and actual or imminent; (2) that there is a causal connection between the injury and conduct complained of—that is, the injury must be fairly traceable to a challenged action of the defendant and not the result of the independent action of third party not before the court; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[15] The injury in fact element has been the subject of controversy in legislative standing cases thus far.[16] The dispute arises from a disagreement over whether a legislative plaintiff can even be injured *solely* in his or her capacity as a legislator.[17]

The Supreme Court has also qualified the doctrine, noting several additional limits to it. The doctrine is "founded in concern about the proper -- and properly limited -- role of the courts

[13] U.S. CONST. art. III, §2
[14] *See* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982).
[15] United States. v. Windsor, 133 S. Ct. 2675, 2686 (2013) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).
[16] *See* Coleman v. Miller, 307 U.S. 433, 59 S. Ct. 972 (1939).
[17] *Id.*

in a democratic society."[18] When the alleged injury is a generalized grievance suffered by all, or a large group of citizens, the harm alone does not warrant jurisdiction.[19] Rather, the proper means for remedy of general grievances is the democratic political process.[20] When suing under a statute or constitutional provision, the plaintiff's complaint must fall within the "zone of interests" that are protected by that statute or constitutional provision.[21] This means that a claimant has standing when they have been aggrieved by the type of action that is prohibited by a statute.[22] Additionally, parties are generally limited to injuries that they have suffered and usually may not bring suit for injuries suffered by third parties.[23] The concern behind the "no third party" requirement is that, when parties sue to redress injuries to third parties, "the courts would be called upon to decide abstract questions of wide public significance, even though other governmental institutions may be more competent to address the questions and judicial intervention may be unnecessary to protect individual rights."[24] Third party standing may be allowed where the plaintiff demonstrates that his or her right to relief bears a "close relationship" with the aggrieved party's right to relief and there is a hinderance to the aggrieved party's ability to remedy his or her wrong.[25] A plaintiff may also sue on behalf of a class, so long as he or she possesses the same interest and suffers the same injury as the rest of the class.[26]

Alongside the doctrine of standing are the additional doctrines of justiciability: political question and ripeness. Additionally courts have developed the doctrine of equitable discretion (also known as remedial discretion). Courts use these doctrines to qualify and limit standing

[18] Warth v. Seldin, 422 U.S. 490, 498 (1975).
[19] *Id.* at 499.
[20] *Id.*
[21] Allen v. Wright, 468 U.S. 737, 750 (1984).
[22] *See* Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153–54 (1970).
[23] Warth v. Sedin, 422 U.S. 490, 498 (1975).
[24] *Id.* (citing Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 222 (1974)).
[25] Kowalski v. Tesmer, 543 U.S. 125, 130 (2004).
[26] Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 216 (1974).

doctrine—that is, the court cannot hear a case or should discretionarily decline to hear a case, even where standing exists, because of other concerns. Each doctrine is based on a separate concern about courts intervening in various issues. Equitable discretion, for example, is based on the idea that if a legislator could obtain relief from his or her fellow legislators via the political process, a court should decline to hear the case because it would be inequitable to do so.[27] The political question doctrine, on the other hand, rests on the concept that courts cannot hear cases where the issue is not a legal right, but is instead a political one to be resolved by the other branches of government.[28] Finally, ripeness focuses on whether the matter is "sufficiently immediate and concrete to justify judicial consideration."[29]

Although standing doctrine itself may be laid out in several sentences, its application has been anything but straightforward. Thus far, courts have applied the rules inconsistently—particularly in the legislative plaintiff context—leaving disagreement and confusion in the wake of their application.

One of the earliest United States Supreme Court cases to address the issue of legislative standing was *Coleman v. Miller*.[30] In *Coleman*, twenty Kansas state legislators sued the Lieutenant Governor of Kansas, alleging that their votes on a resolution ratifying a constitutional amendment were nullified when the vote split evenly and the Lieutenant Governor of Kansas

[27] *See* Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981) ("[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action."); *see also* Dellums v. Bush, 752 F. Supp. 1141, 1148 (D.D.C. 1990) ("The doctrine is said to evidence the "concern for the separation of powers" raised when a member of Congress asks the Court to rule on the constitutionality of a statute merely because he failed to persuade a majority of his colleagues of the wisdom of his views.").
[28] *See* Baker v. Carr, 369 U.S. 186 (1962).
[29] *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 (6th ed. 2009).
[30] Coleman v. Miller, 307 U.S. 433 (1939).

cast the tie-breaking vote, thereby passing the resolution.[31] Several members of the Court were persuaded by the vote nullification theory, holding that legislative plaintiffs have standing due to a "direct and adequate interest in maintaining the effectiveness of their votes."[32] Nevertheless, the opinion did not address the efficacy of the ratification, dismissing the case under the political question doctrine.[33]

The decision prompted Justices Frankfurter, Black, Douglas, and Roberts to concur, partially disagreeing with the opinion and adhering to the view that federal courts do not have standing to hear such disputes.[34] According to Justice Frankfurter, the controversy was a matter of political action rather than private damages because the alleged injury pertained to the plaintiffs as representatives, rather than in their private capacity.[35] Justice Frankfurter noted that, "[n]o matter how seriously infringement of the Constitution may be called into question, [the Court] is not a tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to us all."[36] Justices Butler and McReynolds dissented in the case, finding that sufficient standing and justiciability existed for the Court to hear the case.[37] Despite the peculiar vote count (three justices finding standing *but no* justiciability, four finding no standing and no justiciability, and two finding standing *and* justiciability), federal courts have cited to *Coleman* to find that legislative plaintiffs have standing to sue.[38]

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[31] *Id.*
[32] *Id.* at 438.
[33] *Id.* at 450.
[34] *Id.* at 460 (Frankfurter, J., concurring).
[35] *Id.* at 470.
[36] Coleman v. Miller, 307 U.S. 433, 464 (1939) (Frankfurter, J., concurring).
[37] *Id.* at 470 (Butler, J., dissenting).
[38] *See, e.g.*, Kennedy v. Sampson, 511 F.2d 430, 434 (D.C. Cir. 1977).

Decades later, the D.C. Circuit Court of Appeals decided *Mitchell v. Laird*, in which the court found sufficient standing when thirteen United States congressmen sued the Nixon administration, arguing that President Nixon had exceeded his war powers under the Constitution.[39] Rather than a vote nullification rationale, the court held that Congress's reliance on the court's determination of the constitutionality of the president's actions granted standing simply because it would "bear upon" Congress's decision to impeach the president.[40] The court, however, did not reach the merits of the case, dismissing it in accordance with the same political question rationale that the Supreme Court did in *Coleman*.[41] This broad grant of standing, was subsequently deemed unnecessary for *Mitchell's* ultimate holding and was renounced by the court.[42] Nevertheless, *Mitchell's* holding is indicative of the breadth of legislative standing jurisprudence under decisions like *Coleman*, and illustrates that courts frequently disagree about the boundaries of Article III's standing requirement.

Four years later, the D.C. Circuit Court of Appeals revisited legislative standing in *Kennedy v. Sampson*.[43] In *Kennedy*, a United States Senator sued the Chief of White House Records and the General Services Administration, arguing that President Nixon's veto of the Family Practice of Medicine Act was invalid, and that the act had become law.[44] Citing *Coleman*, the court found that the plaintiff's potential vote nullification was sufficient to confer standing to hear the case.[45] Rather than the three-prong injury test, however, the court examined the plaintiff's standing under both a "logical nexus test" and a zone of interests test that was

[39] Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).
[40] *Id.* at 614.
[41] *Id.* at 614–16.
[42] Harrington v. Bush, 553 F.2d 190, 208 (D.C. Cir. 1977).
[43] Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1977).
[44] *Id.*
[45] *Id.* at 434.

previously used by the Supreme Court in *Association of Data Processing Service Organizations v. Camp*.[46]

The logical nexus test examined whether a "logical nexus" existed between the status asserted by the litigant and the claim sought to be adjudicated. The zone of interests test looked at: (1) whether the plaintiff alleges that the challenged action caused him an injury in fact, and (2) whether that interest sought to be protected is *arguably* within the "zone of interests" to be protected by the statute or constitutional guarantee in question.[47] The court noted that the focus of the standing inquiry is: "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[48]

> Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy" as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[49]

Rather than dismissing the action as a political question, however, the court reached the merits of the case, affirming the lower court's finding that the veto was invalid and that the act had become law.[50]

The D.C. Circuit reaffirmed its *Kennedy* standing approach in *Barnes v. Kline*.[51] The *Barnes* court noted that a dispute between Congress and the President is ready for judicial review

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[46] *Id.*; *see also* Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152-55 (1970).
[47] *Id.*
[48] *Id.*
[49] Kennedy v. Sampson, 511 F.2d 430, 433-34 (D.C. Cir. 1977).
[50] *Id.* at 437.
[51] Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984).

once each branch has asserted its constitutional authority and the branches have reached an impasse.[52]

Several years after *Kennedy*, the D.C. Circuit heard *Riegle v. Federal Open Market Committee*.[53] In *Riegle*, a United States Senator sued several subsidiaries of the Federal Reserve, arguing that a practice whereby boards of directors of Federal Reserve Banks elected representatives to the Federal Reserve violated the Appointment Clause of the Constitution.[54] The plaintiff argued that the practice "deprive[d] him of his constitutional right to vote in determining the advice and consent of the Senate to the appointment of the five Reserve Bank members of the [Federal Open Market Committee]."[55] The court found this argument persuasive.[56]

The decision is not only novel for its holding that United States Senators are injured by a practice that purportedly violates the Appointment Clause, but also because it was the case in which the D.C. Circuit adopted the doctrine of equitable discretion.[57] This was based on a finding that political question doctrine and ripeness ineffectively satisfied prudential concerns that arise with legislative plaintiffs.[58] The court noted that "where a congressional plaintiff has standing to challenge the actions of those acting pursuant to a statute which could be repealed or amended by his colleagues, or where he alleges an injury which could be substantially cured by legislative action, [the] standard would counsel judicial restraint."[59] Because the plaintiff could

[52] *Id.* at 28 (citing Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring)).
[53] Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981).
[54] *Id.* at 875-77; *see also* U.S. CONST. art. II, §2, cl. 2 (requiring that the president appoint United States officers with the advice and consent of the Senate).
[55] Riegle v. Federal Open Market Committee, 656 F.2d 873, 877 (D.C. Cir. 1981).
[56] *Id.* at 878.
[57] *Id.* at 879-82.
[58] *Id.* at 881.
[59] Riegle v. Federal Open Market Committee, 656 F.2d 873, 881 (D.C. Cir. 1981).

obtain redress by passing legislation that would bar the purportedly unconstitutional practice, the court dismissed the case.[60]

The United States Supreme Court revisited its legislative standing jurisprudence in *Raines v. Byrd*.[61] In *Raines*, a group of United States Senators and Congressmen sued the Secretary of the Treasury and the Director of the Office of Management and Budget, claiming that the Line Item Veto Act, which gave the president the power to nullify certain provisions in appropriations bills, was unconstitutional.[62] Distinguishing *Coleman* from *Raines*, the Court held that the plaintiffs' votes were not nullified like the votes in *Coleman* were.[63] Rather, according to the Court, the plaintiffs simply lost a congressional vote and were now claiming an unconstitutional delegation of power to the president.[64] Additionally, Justice Rehnquist noted that an important distinction between *Raines* and *Coleman* was the fact that the plaintiffs in *Raines* could garner sufficient votes in the future to repeal the law or to exempt future appropriations bills from its purview.[65] The opinion, however, did expressly state that:

> It is obvious, then, that our holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (*or enact*) a specific legislative act have standing to sue if that legislative action goes into effect (*or does not go into effect*), on the ground that their votes have been completely nullified.[66]

Raines presented the Court with an opportunity to reconsider the vote-nullification rationale of *Coleman* and to repudiate the lower court decisions that had broadened federal standing jurisprudence. The Court, however, stopped short of any such explicit repudiation. Leaving Coleman intact left questions as to when a legislator's vote is considered "nullified" and

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[60] *Id.* at 882.
[61] Raines v. Byrd, 521 U.S. 811 (1997).
[62] *Id.*
[63] *Id.* at 824.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 823 (emphasis added).

constitutes and injury-in-fact sufficient to confer standing. If a legislator has a "right and a privilege under the Constitution . . . to have their votes given effect," do legislators have the argument that they lost that right when the president unilaterally alters a law that they voted for and passed?[67] Or, does the distinction lie in the fact that *Coleman* involved a law that was enacted despite having enough votes to block it, whereas, when the president refuses to enforce a law, the law has passed and simply isn't being enforced?

Two years after *Raines*, the D.C. Circuit Court of Appeals had the opportunity to address *Raines'* impact on *Kennedy* in *Chenoweth v. Clinton*. In *Clinton*, the court was faced with a challenge to President Clinton's executive order creating the American Heritage Rivers Initiative.[68] Under the order, federal agencies were required to provide support to various local government agencies in preserving certain historically significant rivers and riverside communities.[69] Several legislators brought a bill to end further implementation of the initiative; however, the bill never came to a vote and the legislators challenged the executive order in court, arguing that their right to vote on the initiative had been deprived.[70] Staying faithful to *Raines*, the D.C. Circuit Court of Appeals held that the legislators lacked standing because their injury was identical to that of the plaintiffs in *Raines*.[71] The court, however, declined to disavow *Kennedy*, and took the opportunity to distinguish *Kennedy* from *Raines*, holding that *Kennedy* may still be valid under *Coleman*.[72] According to the court, because the issue in *Kennedy* was the President's pocket veto of a law, and because there were sufficient votes to pass that law

[67] Coleman v. Miller, 307 U.S. 433 (1939) ("We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege.").
[68] Chenoweth v. Clinton, 181 F.3d 112 (1999).
[69] *Id.*
[70] *Id.*
[71] *Id.* at 115.
[72] *Id.* at 116.

before President Nixon vetoed it, *Kennedy* was a valid vote nullification case that was consistent with the reasoning behind *Coleman* and *Raines*.[73] The court seemingly left *Kennedy* alive, with a major question left regarding the extent to which *Raines* undermines it.

One of the most recent cases to tackle legislative standing is *Kerr v. Hickenlooper*.[74] In *Kerr*, members of the Colorado State Legislature sued Colorado's governor in federal court, claiming that a state constitutional amendment that required voter approval of tax increases violated the federal Constitution's guarantee to a republican form of government.[75] Discussing both *Coleman* and *Raines*, the Tenth Circuit Court of Appeals was persuaded that sufficient standing existed under a vote nullification rationale.[76] Because a legislative vote for a tax increase would be rendered ineffective, the legislators suffered a sufficient injury in fact.[77] The Court noted that, since the case involved a delegation of legislative powers to the citizenry, it did not pose separation of powers concerns.[78]

Interestingly, the court also quoted the DC Circuit Court of Appeals, implying that standing should be denied when legislators possess the "political tools with which to remedy their purported injuries."[79] This, however, seems inapposite to the result in *Kerr* because, under the Colorado State Constitution, the Colorado State Legislature *has* the ability to call a constitutional convention, as well as the ability to propose constitutional amendments for approval via referendum.[80] Therefore, Colorado's legislature possessed the political tools to

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[73] *Id.* at 117.
[74] Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014).
[75] *Id.*
[76] *Id.* at 1163-71.
[77] *Id.* at 1165 ("Under TABOR, a vote for a tax increase is completely ineffective because the end result of a successful legislative vote in favor of a tax increase is not a change in the law.").
[78] *Id.* at 1168.
[79] *Id.* (citing Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999)).
[80] COLO. CONST. art. XIX.

remedy their purported injuries because they possessed the ability to put the constitutional amendment process in motion.[81]

This logic evinces an underlying question regarding the application of equitable discretion doctrine: at what point do legislators no longer possess the tools necessary to remedy their injury? Is the ability to propose an amendment suddenly not a "political tool" that the legislature possesses? *Kerr* demonstrates that equitable discretion fails to draw a principled line for determining in which cases courts should reach the merits because its application has ignored the fact that legislators almost always possess political tools with which to resolve their injuries.

Overall, the legislative standing cases that have emerged since *Coleman v. Miller* indicate an underlying tension in the vote-nullification theory's application. Although the trend has been to deny standing where the legislative plaintiffs have political remedies for their alleged injuries, cases like *Kennedy* and *Kerr* seem to swim against the current. The plaintiffs in those cases had institutional remedies for their injuries: in *Kennedy*, the plaintiff could have reintroduced the Family Practice of Medicine Act for congressional reconsideration, and in *Kerr*, the legislators could have sought to repeal the amendment. This then raises the question of why the courts choose to find standing in these cases when the equitable discretion doctrine would counsel that the courts dismiss them.

B. The Competing Philosophies of Standing

The legislative standing cases thus far indicate two starkly different philosophies regarding the purposes underlying standing doctrine.[82] These philosophies can be separated into

[81] United States. v. Windsor, 133 S. Ct. 2675 (2013).
[82] RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72 (6th ed. 2009).

two categories: the dispute resolution model and the law declaration model.[83] The dispute resolution model is rooted in the notion that courts exist to resolve disputes between aggrieved litigants.[84] Courts, then, are left with the *incidental necessity* of having to interpret the Constitution and expound its meaning to remedy a legal wrong.[85] Under this dispute resolution view, the "Case or Controversy" requirement embodies the notion of separation of powers and is "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[86] Therefore, courts have required "concrete controversies" between adverse parties.[87]

Starkly opposite to this model, is the law declaration model that seems to be driving decisions like *Kennedy* and *Kerr*. Instead of seeing courts as necessary referees in disputes between wronged parties, proponents of the law declaration model view the courts as resolvers of constitutional conflicts.[88] Interpreting the Constitution is not merely an incidental function of resolving legal disputes, but is one of the court's primary duties in and of itself.[89] Because of this, courts do not require proper aggrieved litigants to bring a case; rather, they wait for the "best litigant available" to sue.[90] Although the Supreme Court expressly disavowed the law declaration model in *Valley Forge Christian College v. Americans United for Separation of*

[83] *See id.* (describing the dispute resolution model and law declaration model).
[84] *Id.*
[85] *Id.*
[86] Allen v. Wright, 468 U.S. 737, 750 (1984).
[87] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (citing Baker v. Carr 369 U.S. 186, 204 (1962)) ("The plaintiff must have a 'personal stake in the outcome' sufficient to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions.'").
[88] *Id.*
[89] RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73 (6th ed. 2009).
[90] See Barnes v. Kline, 759 F.2d 21, 52 (D.C. Cir. 1984) (Bork, J., dissenting).

Church and State,[91] a non-legislative standing case, its recent decision in *United States v. Windsor* may signal a change in course.

C. Enter: *United States v. Windsor*

United States v. Windsor centered around the constitutionality of the Defense of Marriage Act ("DOMA"), which defined "marriage" under federal law as between one man and one woman.[92] The plaintiff, the surviving spouse of a same-sex couple who was denied certain federal tax benefits that heterosexual couples would have received, sued the federal government, arguing that DOMA violated the equal protection component of the Fifth Amendment.[93] Although the Obama Administration continued to enforce DOMA, the Department of Justice refused to actually defend the law in court, agreeing that it was unconstitutional.[94] The Administration refused to give the plaintiff her refund, even though both lower courts had ruled in her favor.[95] Desiring to defend DOMA's constitutionality, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") sought to intervene.[96]

Windsor presented a problem for the Court. The Constitution's "Case" or "Controversy" requirement demands adverse parties; however, both the Department of Justice and the plaintiff sought the same result: DOMA to be declared unconstitutional.[97] The Court held that the Department of Justice satisfied Article III's standing requirements because it retained a "sufficient stake" in the case because if it lost, it would suffer the "real economic injury" of

[91] Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 489 (1982) ("This philosophy has no place in our constitutional scheme.").
[92] United States v. Windsor, 133 S. Ct. 2675 (2013); *see also* 1 U.S.C.A. § 7 (1996).
[93] *Id.* at 2683.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 2685.

having to pay the plaintiff.[98] Nevertheless, the Court found a *prudential* problem inherent in the executive's position: the fact that the defendant agreed with the plaintiff's position created the risk that the Court would be adjudicating a case between friendly parties, rather than a "real, earnest and vital controversy."[99] So, to remedy this defect, the Court set its sights on BLAG.

The Court stated that a consideration under the "prudential standing" inquiry was whether the parties assured the adversarial presentation of the issues.[100] Citing *INS v. Chadha*, the Court found that BLAG's intervention in defense of the law satisfied the adverseness problem.[101] Within its prudential standing analysis, the Court indicated a concern that, if it declined standing, "extensive litigation" would ensue in lower courts.[102] The majority elaborated by stating that "[r]ights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent," adding that "the very term 'prudential' counsels that it is a proper exercise of the court's responsibility to take jurisdiction."[103] The Court then declared DOMA unconstitutional.[104]

The Court's reasoning, however, was problematic. In dissent, Justice Scalia pointed out a major difference between *Chadha* and *Windsor*: in *Chadha*, the houses of Congress sought to intervene because an institutional power that they possessed, the ability to veto the INS's decision not to deport an illegal immigrant, was threatened.[105] In *Windsor* Congress simply

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[98] *Id.* at 2687.
[99] *Id.*
[100] *Id.*
[101] *Id.*; *see* INS v. Chadha, 462 U.S. 919 (1983) (holding that Article III's Case or Controversy requirement was satisfied even though both the parties wanted a law, which gave either house of Congress the ability to veto the INS's decision not to deport an illegal immigrant, invalidated.).
[102] United States v. Windsor, 133 S. Ct. 2675, 2688 (2013) ("Were this Court to hold that prudential issues require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue.").
[103] *Id.*
[104] *Id.*
[105] *Id.* at 2700 (Scalia, J., dissenting).

desired to defend the constitutionality of a law.[106] Additionally, prudential considerations have traditionally been used to deny standing where it otherwise existed between the original parties.[107] The *Windsor* majority, however, found that BLAG, *an intervening party*, satisfied the adverseness problem that existed between the original parties.[108] In doing so, the Court treated adverseness as a "prudential consideration" that could be satisfied by an intervening party, rather than a requirement that needed to be satisfied by the original parties.[109] Adverseness was essentially relegated to a mere element that could be ignored whenever courts deemed it "prudent" to do so.[110]

The Court also seemed to overlook the injury-in-fact problem inherent in *Windsor*. The plaintiff received a judgment in her favor when she won below.[111] Therefore, she no longer suffered an injury that needed remedy. And, although the government was required to pay a tax refund to the plaintiff, the government was asking the court to *affirm* the judgment.[112] Therefore, both parties already received what they had wanted and neither was injured. Non-existent injury notwithstanding, the majority continued its analysis.

The Court concluded its standing examination by stating that it did not have to reach the question of whether or not BLAG would have standing to defend the law without the executive representing the United States in the litigation because the Article III standing and prudential

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[106] *Id.*
[107] *Id.*
[108] *Id.* at 2688 (majority opinion).
[109] *Id.* at 2702; *see also* Warth v. Seldin, 422 U.S. 490 (1975) ("[The standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential *limitations* on its exercise.") (emphasis added).
[110] Windsor, 133 S. Ct. at 2701 (Scalia, J., dissenting) ("I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a "prudential" aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to "prudential" status is a wondrous device, enabling courts to ignore the requirement whenever they believe it "prudent"—which is to say, a good idea.)").
[111] *Id.* at 2684 (majority opinion).
[112] Brief for the United States on the Merits Question at 54, United States v. Windsor, 133 S. Ct. 2676 (2013) (No. 12-307).

standing requirements were both satisfied.[113] Only Justice Alito, in dissent, stated that BLAG had standing under a vote-nullification theory, arguing that Congress is injured when a law that it passed is declared unconstitutional.[114]

In dicta, the majority added that:

> with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.[115]

Additionally, the majority expressed a concern that the Court's "primary role in determining the constitutionality of a law" would become secondary to the president's if it declined to hear the case.[116] They added that this would "undermine the clear dictate of the separation-of powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is."[117]

With a tone of judicial supremacy, these statements express concerns about the policy implications of declining to hear the case. The opinion seems light on constitutional justifications for granting standing, but heavy on policy concerns about the consequences of not granting it. The majority reasoning appears to be wholly in line with the law declaration model's justifications of standing doctrine. Rather than desiring to resolve a concretely adverse dispute, the majority seemed much more eager to reach and resolve the question DOMA's

[113] Windsor, 133 S. Ct. at 2688 ([T]he Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.").
[114] *Id.* at 2712 (Alito, J., dissenting).
[115] *Id.* at 2689 (majority opinion).
[116] *Id.*
[117] *Id.*

constitutionality. In effect, the holding throws the constitutional adverseness requirement out the window, making it more a factor than a necessary element.[118]

Windsor raises a perplexing question regarding the current status of legislative standing jurisprudence: if the legislature can satisfy standing's adverseness requirements when it is not an aggrieved party, might it then have standing to sue when it is not an aggrieved party? The underlying logic of such a proposition smacks of the law declaration model of standing. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Supreme Court explicitly rejected the law declaration model; however, *Windsor's* reasoning seems to breathe some life back into it.[119] After all, the United States is the aggrieved party if a lower court rules against it, and the executive branch, namely the Attorney General, is tasked with representing the United States in court.[120] By finding that BLAG was a *sufficient* party to defend the suit, *Windsor*, seems to implicitly adopt the law declaration model that the Court had previously rejected. Indeed, the majority even explicitly describes its primary role as resolving constitutional disputes.[121] The question then remains: where does legislative standing jurisprudence really stand?

III. Taking a Stand on Legislative Standing

Tension in current legislative standing jurisprudence is attributable to two distinct conceptions of why standing exists in the first place. Courts seem split between the dispute

[118] United States v. Windsor, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting) ("[T]he majority seeks to dismiss the requirement of party-adverseness as nothing more than a 'prudential' aspect of the sole Article III requirement of standing.").
[119] *See* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 489 (1982) ("This philosophy has no place in our constitutional scheme.").
[120] 16 Stat. 162 (1870) ("And the Attorney-General may, whenever he deems it for the interest of the United States, conduct and argue any case in which the government is interested, in any court of the United States, or may require the solicitor-general or any officer of his Department to do so.").
[121] *Windsor*, 133 S. Ct. at 2688.

resolution model and the law declaration model. Critics of the dispute resolution model approach argue that, by denying standing to legislative plaintiffs, courts are aggrandizing the role of the Executive.[122] The argument is that judicial intervention is necessary to restore the balance when the Executive oversteps his or her boundaries.[123] Such a problem is clearly presented when the president refuses to act on his or her purported duty to enforce the law. In such a context, the President has a constitutionally mandated duty to enforce what is a valid, democratically passed law. If he or she is fails to do so, the court should step in and declare the duty to do so. However, what this argument assumes is that the President will comply with the court's decision. Nothing in the Constitution gives the judiciary the ability to enforce its decisions and compel the president to do so, and the Supreme Court has even held that courts lack the power to issue an injunction against the President.[124]

In the words of Justice Scalia, "if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress's statute, what then? Only Congress can bring him to heel by … what do you think? Yes: a direct confrontation with the President."[125] Indeed, although a judgment against the President may parade itself around as an avoidance of confrontation, when the President refuses to enforce that judgment, it is anything but. The confrontation is unavoidable and Congress is left exactly where it started: stomping its feet while the president does as he or she pleases anyway. Litigation against the President, therefore, has little—if any—practical benefit.

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[122] *See* Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. Pitt. L. Rev. 63, 119 (1992).
[123] *Id.*
[124] THE FEDERALIST NO. 78 (Alexander Hamilton) ("[The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."); see also State of Mississippi v. Johnson, 71 U.S. 475, 501 (1866) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.").
[125] United States v. Windsor, 133 S. Ct. 2675, 2705 (Scalia, J., dissenting).

Moreover, such an exceedingly robust conception of the judiciary has no constitutional foundation. Keen to the nature of inter-governmental disputes, the Framers not only foresaw the possibility of such disputes, but in fact designed a government based around them.[126] Additionally, although the courts that have adopted the law declaration model of standing have done so relatively recently, the general underlying rationale is far from novel and early interpretations of the "Cases or Controversies" requirement expressly rejected such an approach.[127] Our constitutional history evinces a clear fear of judicial overreach. The fact that the judiciary's members are un-elected and appointed for life alone shows the potential for self-empowerment and abuse of authority.[128] After all, if the argument is that the executive, *who is subject to elections*, has abused his or her power, what makes the judiciary, *which is unelected and serves for life*, any less inclined to abuse theirs?

Nevertheless, proponents of the law declaration model dismiss the judicial overreach argument.[129] They say that the dispute resolution model of standing ignores the realities of modern American government because the Framers could not have foreseen the vast expansion that has occurred since our founding.[130] While the Framers certainly could not have envisioned the specific expansive government and post-industrial, electronic age of today, the idea of an

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[126] *See* THE FEDERALIST NO. 51 (James Madison) ("But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.").

[127] *See* Barnes v. Kline, 759 F.2d 21, 54 (D.C. Cir. 1984) (Bork, J., dissenting) (citing The Honorable John Marshall, Speech to the United States House of Representatives, 18 U.S. (5 Wheat.) Appendix at 3, 16 (1820) ("A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary.")).

[128] U.S. CONST. art III.

[129] *See* Meyer, *supra* ("[T]his position confines the judiciary to the place envisioned by the Framers in 1787, and ignores the vast changes that have taken place in all three branches in the post-industrial world.").

[130] *Id.* ("[T]he size and power of the executive and legislative branches have grown beyond anything that the Framers contemplated.").

abusive executive was far from unforeseen. As evidenced by their own statements, the Framers understood that abuse of power by the executive was to be expected and they equipped the Constitution with the means by which to constrain him or her.[131] Unsurprisingly absent from the Constitution was the Legislature's ability to take the Executive to court.[132] Congress already possesses the tools with which to rein in an out of control executive so that the judiciary would never have to intervene.[133]

Despite the lack of constitutional footing, the argument nevertheless persists under the guise that judicial intervention somehow aids the separation of powers.[134] The astounding part of this argument is not its conclusion, but its irony, for it stands for the proposition that the separation of powers must be violated in order to be preserved. In support of the argument, some proponents of judicial intervention in disputes between the President and Congress cite *New York v. United States*, contending that these cases stand for the proposition that judicial enforcement of federalism demonstrates the efficacy and desirability of judicial enforcement of separation of

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[131] *See, e.g.*, THE FEDERALIST NO. 77 (Alexander Hamilton) ("Does [the structure of the executive department] also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?").

[132] *Id.*

[133] *See* U.S. CONST. art I, §2, cl. 5 (granting the House of Representatives the power to begin impeachment proceedings); *see also* U.S. CONST. art. I, §3, cl.6 (giving the Senate the authority to try impeachments); *see also* U.S. CONST. art. IV (explaining the procedures by which to amend the Constitution).

[134] David B. Rivkin, Jr. & Elizabeth Price Foley, *How Five Colorado Democrats May Have Paved the Way for Congress to Sue the Administration*, THE DAILY CALLER (Mar. 13, 2014, 12:50 PM), http://dailycaller.com/2014/03/13/how-five-colorado-democrats-may-have-paved-the-way-for-congress-to-sue-the-administration/, ("Without judicial resolution of such disputes, the Constitution's separation of powers is but a paper tiger.").

powers at the federal level.[135] Such a contention, however, necessarily presumes that a legislative plaintiff, when the president refuses to enforce a law, has the same type of injury as the plaintiff in *New York v. United States* did. *New York*, however dealt with a law that forced the state of New York to take title to radioactive waste produced in its state and exposed the state to damages if the state failed to do so.[136] There was no question that such a law sufficiently injured the plaintiff, as the state would have to take title to the waste and the law made them liable for failure to do so promptly.[137] In fact, the issue was not even raised.[138] The *separation of powers* concerns present in judicial intervention between the president and Congress are distinctly different from the *federalism* concerns present in *New York v. United States*. One deals with disputes between separate and coequal branches at the same level, while the other deals with disputes between the state and federal governments.

The concept of legislative standing for purely institutional injuries is also incompatible with some of the Supreme Court's earliest precedent. In *Marbury v. Madison*, for example, the Court expressly stated that the "province of the court is, solely, to decide on the rights of individuals."[139] *Marbury* explicitly declared the courts as having to examine the constitutionality of a statute as a necessary and unavoidable condition of deciding the case.[140] The law declaration model of standing, however, sees the exact opposite: in order to decide the

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[135] *See* David B. Rivkin, Jr. & Elizabeth Price Foley, *The Case for Suing the President*, WALL ST. J. (Jul. 30, 2014), http://online.wsj.com/articles/david-b-rivkin-jr-and-elizabeth-price-foley-the-case-for-suing-the-president-1406761584, ("Litigation in federal court is an indispensable way to protect all branches of government against encroachment on their authority.").
[136] New York v. United States, 505 U.S. 144, 175 (1992).
[137] *Id.*
[138] *Id.*
[139] Marbury v. Madison, 5 U.S. 137 (1803).
[140] *Id.* ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."); *see also* Moore v. United States House of Representatives, 733 F.2d 946 (1984) (Scalia, J., concurring) (discussing the law declaration model's inconsistency with Marbury v. Madison).

constitutionality of a statute, the court must decide the case.[141] *Windsor* seems to fall into this latter category, as demonstrated by the Court's standing analysis.[142]

Another result of the judiciary umpiring disagreements that the legislature has with the President is that the converse would be possible as well—that is, the President could sue Congress. Such a proposition is far from a stretch. For example, in *INS v. Chadha*, a private plaintiff sued the United States, challenging the constitutionality of a law that gave either house of Congress the right to veto an executive agency decision to allow a non-citizen to stay in the United States.[143] Under the law declaration model of standing, however, courts need not wait for an individual to be injured by the decision to deport them. The President could simply argue that such a congressional veto on his or her power diminishes his or her executive authority. Should the President decide to sue, he or she could take the case directly to court.

Yet another example would be President Roosevelt's disagreement with the provision of the Lend-Lease Act that gave Congress the authority to evade a presidential veto with a bare majority, rather than the constitutionally required two-thirds vote.[144] Instead of writing a legal opinion that expressed his disagreement, President Roosevelt could have simply taken Congress to court and claimed an injury to his constitutional veto authority.[145] Courts will become the ultimate political referee, with the court system supplementing the checks and balances provided in the Constitution.

Furthermore, doctrines like remedial discretion are proving to be ineffective means of preventing political questions from entering the judicial arena. Proponents of the law declaration

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[141] *Moore*, 733 F.2d at 964 (Scalia, J., dissenting).
[142] United States v. Windsor, 133 S. Ct. 2675, 2688 (2013).
[143] INS v. Chadha, 462 U.S. 919 (1983).
[144] *See* Robert H. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953).
[145] *Id.*

model argue that equitable discretion and other doctrines are an adequate means of preventing political questions from entering the court system.[146] The Tenth Circuit's decision in *Kerr*, however, stands in contrast to this argument.[147] In *Kerr*, the Tenth Circuit, citing *Raines*, acknowledged that standing should be denied where the legislators possessed the political tools necessary to remedy their injury.[148] The Court, however, interpreted *Raines* not to apply.[149] By limiting the rule to "*ordinary* legislative remedies," the Court simply ignored the fact that the legislature did in fact possess the political tools to remedy their injury: they possessed the power to vote on an amendment to the state constitution and submit it for a public referendum.[150]

Although not explicitly stated by the court, the problem in *Kerr* seemed to be that the legislators would likely lose if they submitted an amendment to the public. After all, what is the likelihood that taxpaying citizens would vote for an amendment that takes away their right to veto a tax increase? There is no doctrine that requires that the legislator be able to win by using the available political tools, only that they *possess the political tools necessary to remedy their alleged injury*.[151] Winning and losing are simply part of the political process. *Kerr*, like *Windsor*, evinces a clear desire by the court to hear the constitutional question, rather than a

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[146] *See* Meyer, *supra* ("When a legislator complains that her colleagues have passed an unconstitutional statute (other than one which seeks to delegate to the executive a power accorded Congress), or have held an improper congressional hearing, or have taken some other allegedly improper action that does not rise to the level of a constitutional process injury, courts can properly exercise discretion to deny review on the ground that to do otherwise might constitute unnecessary meddling in the affairs of another branch.").
[147] Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014).
[148] *Id.* at 1168.
[149] *Id.*
[150] *See* COLO. CONST. art. XIX.
[151] *See id.* (The rule from Raines applied because the plaintiffs were not arguing "that the compacts themselves [were] unconstitutional" but instead alleged that "the compacts would have been defeated[] had the constitutionally required procedures been followed."); *see also* Dellums v. Bush, 752 F. Supp. 1141, 1148 (D.D.C. 1990) ("The doctrine is said to evidence the "concern for the separation of powers" raised when a member of Congress asks the Court to rule on the constitutionality of a statute merely because he failed to persuade a majority of his colleagues of the wisdom of his views.").

desire to resolve a dispute and remedy a wrong.[152] And, in order to reach the constitutional question, the court seemed to ignore the precedential boundaries of *Raines*.[153] Ultimately, the inherent flaw in these doctrines is that they are discretionary. Rather than binding courts and ensuring that they will not become forums of political process, the doctrines provide little to no actual barrier against such a result.

IV. The Proper Court

In addition to the aforementioned constitutional barriers to legislative standing, there seems to exist an additional, curiously undiscussed jurisdictional barrier to bringing claims against the President in Article III courts. Article I, Section 3 of the Constitution expressly states that "the Senate shall have the *sole* Power to try all Impeachments."[154] Further, the Senate's "*Judgment* in Cases of Impeachment shall not extend further than removal from Office . . . ."[155] The plain language of the document evinces a clear intention that the Senate be the sole court with jurisdiction to try the president. The notion that the United States Senate is a court is far from controversial given the authority that the Constitution confers.[156]

The Supreme Court's holding in *Nixon v. United States* supports such a proposition.[157] In *Nixon*, a Federal District Court judge had been convicted of making false statements before a

[152] *See* United States v. Windsor, 133 S. Ct. 2675 (2013).
[153] *See* Raines v. Byrd, 521 U.S. 811, 824 (1997) ("It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote.").
[154] U.S. CONST. art I, §3 (emphasis added).
[155] *Id.* (emphasis added).
[156] *See* THE FEDERALIST NO. 66 (Alexander Hamilton) ("A second objection to the Senate, *as a court of impeachments*, is, that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too aristocratic.") (emphasis added).
[157] Nixon v. United States, 506 U.S. 224 (1993).

grand jury.[158] After refusing to resign, the House of Representatives voted to impeach him, and the Senate tried the case and convicted him.[159] On appeal, the Supreme Court held that Senate impeachment convictions and acquittals are not reviewable in Article III courts and the Senate has sole jurisdiction in these matters.[160] The Court partially based this ruling on the language of the Constitution, giving the "sole" authority to try impeachments to the Senate.[161]

Perhaps the argument then is that refusal to enforce the law, or unilaterally changing the law, are not impeachable offenses. Such an argument, however, is tenuous at best. Article II of the Constitution states that "[t]he President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors."[162] While there is certainly debate regarding what the Framers meant by "High Crime" and "Misdemeanor," arguing that the President cannot be impeached for breaching his or her Constitutional duties seems strange.[163] Early English cases demonstrate that impeachment for "High Crimes and Misdemeanors" around the time of the Constitution's ratification included neglect of duty and abuse of official power.[164] Despite the lack of clarity in the exact terminology used, it is clear that impeachment "was adopted as a safety valve, a security against an oppressive or corrupt president . . . ."[165] Surely such a willful violation of the Constitution as unilaterally changing the law, or at least breaching a duty to enforce it, would qualify as such an offense.

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[158] *Id.*
[159] *Id.*
[160] *Id.* at 231.
[161] *Id.*
[162] U.S. CONST. art II, §4.
[163] *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS, 53-102 (Stanley N. Katz ed., Harvard University Press, 1973).
[164] *See id.* at 67-70.
[165] *Id.* at 98; *see also* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS, 104 (Princeton University Press, 1996) ("In short, the debates at the constitutional convention show at least that impeachable offenses were not limited to indictable offenses, but included abuses against the state.").

When *Nixon* is examined in conjunction with the fact that the Framers intended impeachment to be the mechanism by which Congress reined in an abusive Executive, the logical conclusion must be that the Senate has the sole, unreviewable authority to hear cases regarding congressional disagreement with allegedly unconstitutional presidential action.[166] Would it make sense that if the president is violating the Constitution, thereby committing an impeachable act, he or she can just be taken to an Article III court? Given the language of the Constitution, stating that the president "*shall be removed*" by the Senate for committing impeachable acts, the answer must surely be "no."[167] The language of Articles I and II make clear that Article III courts lack the jurisdiction to intervene in inter-branch disputes between Congress and the President.

V. Conclusion

Legislative standing cases reveal a tension among jurists regarding the justifications for standing doctrine, which has led to its inconsistent application. Now, *United States v. Windsor* has thrown an additional element of uncertainty into the current status of legislative standing.[168] Although the Supreme Court declined to expressly state whether the Bipartisan Legal Advisory Group of the House of Representatives had standing to defend a law in its own right, the Court's elastic standing analysis in *Windsor* nevertheless indicates a possible change in jurisprudence.[169] *Winsor*, better known for its holding that the Defense of Marriage Act is unconstitutional, may in fact be the root of a much more fundamental and far reaching proposition: that legislative plaintiff may indeed have standing to sue the president for purported constitutional violations.

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[166] *See* THE FEDERALIST NO. 77 (Alexander Hamilton) ("In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body.").
[167] U.S. CONST. art II, §4 (emphasis added).
[168] United States v. Windsor, 133 S. Ct. 2675 (2013).
[169] *Id.*

Standing doctrine is rooted in the notion that courts exist to resolve concretely adverse disputes between litigants.[170] *Windsor's* broad standing analysis is a direct challenge to this notion.

There is, however, no reason for the inconsistency in the first place. The history of the Constitution's "Case or Controversy" requirement makes it very clear that the law declaration model "has no place in our constitutional scheme."[171] Rather than remaining faithful to the Constitution, the law declaration model of standing takes the courts from their role as neutral declarers of individual rights, interpreting the constitution out of necessity, and makes them regular players in the political process, declaring what the law is whenever they feel it necessary.[172] Some see this as a desirable result.[173] Such a conception, however, gives judges a vast amount of power and shifts the dynamics of our system of checks and balances overwhelmingly to the judiciary. Rather than resolving our problems through our democratically elected representatives and the political process, unelected, life-tenured judges become a primary means of proclaiming resolutions to political disputes. Additionally, Article I's grant of impeachment power to Congress makes very clear that the Courts lack jurisdiction to hear legislative standing cases between the president and Congress because, under the Constitution, Congress has the sole jurisdiction to handle these disputes.[174] For these reasons, the Supreme Court should revisit its legislative standing jurisprudence and explicitly hold that legislative plaintiffs cannot have standing to sue for institutional injuries.

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[170] *See* Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants 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?").
[171] Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 489 (1982).
[172] *See* Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1984) (Bork, J., dissenting).
[173] *See* Meyer, *supra*; *see also* Rivkin, *supra*.
[174] U.S. CONST. art I, §2, cl. 5; U.S. CONST. art. I, §3, cl.6.