

Notes and Comments

WILL THE REAL LAWMAKERS PLEASE STAND UP: CONGRESSIONAL STANDING IN INSTANCES OF PRESIDENTIAL NONENFORCEMENT

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ABSTRACT—The Take Care Clause obligates the President to enforce the law. Yet increasingly, presidents use nonenforcement to unilaterally waive legislative provisions to serve their executive policy goals. In doing so, the President’s inaction takes the practical form of a congressional repeal—a task that is solely reserved for Congress under the Constitution. Presidential nonenforcement therefore usurps Congress’s unique responsibility in setting the national policy agenda.

This Note addresses whether Congress has standing to sue in instances of presidential nonenforcement to realign and reaffirm Congress’s unique legislative role. In answering this question, this Note examines legislative standing precedent and argues that the Supreme Court’s reasoning supports a finding of congressional institutional standing. This Note further contends that it is normatively preferable for the judiciary to police the boundaries of each branch of government in instances of executive nonenforcement and apply the Constitution’s mandate that the President take care that the laws be faithfully executed. This maintains separation of powers and prevents one branch from unconstitutionally aggregating the power of another.

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[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.

—*Allen v. Wright*, 468 U.S. 737, 752 (1984)

INTRODUCTION

It is 2028. Although the Democrats have controlled Congress and the presidency for the past eight years, a new Republican President has just taken office. Between 2020 and 2028, the Democrats achieved many of their goals, passing a wide range of legislation—from campaign finance to gun reform—that has all passed constitutional muster. Despite the Republicans’ success in the presidential election, Democrats still control the House and Senate by a bare majority.

Nevertheless, the President has already promised to veto new legislation unless it fits with Republican priorities. She has also denounced the Democrats’ legislation over the past eight years, and has stated she will

do everything in her power to reverse the damage it perpetuated. To start, she has already refused to enforce the Public Safety and Gun Violence Reform Act. Criminals will be deterred from public acts of violence if they think their victims are armed. Therefore, she argues, the Executive Branch will refuse to prosecute the public carrying of arms and the ban on high-capacity magazines. At Republican rallies, she has even hinted that she may refuse to enforce the legislation entirely.

Democrats condemn the President's actions as unconstitutional, if not tyrannical, and as a breach of her executive duties to enforce the law. They argue that she has become a legislature unto herself, and has disregarded the separation of powers principles inherent in our structure of government.

But what can be done to compel the President to enforce the law? Are the Democrats forced to patiently wait out the end of her presidency, or may Congress sue to realign and reaffirm Congress's unique legislative role?

Article II, Section 3 of the United States Constitution states that “[the President] shall take Care that the Laws be faithfully executed.”¹ The Take Care Clause was enacted against the historical backdrop of English kings like James II, who frequently used executive power to implement policy goals against the expressed will of Parliament by simply not enforcing Parliament's legislation.² The Framers, leery of the historical monarchical abuses that had occurred in England, would not have considered the President's authority to entail policymaking through inaction.³ The Take Care Clause was intended to curb this power by imposing a duty to enforce—not dispense or suspend—the law.

Yet, today we return to this old problem: executive inaction. Increasingly, the Executive uses nonenforcement to unilaterally waive and delay certain provisions of legislation to serve the Administration's policy goals. This sets a dangerous precedent, threatening separation of powers, whereby the President usurps Congress's unique responsibility of setting the national policy agenda. But does Congress as an institution have standing to sue the Executive when she does not enforce a statute's text?

¹ U.S. CONST. art. II, § 3.

² See, e.g., *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 15 (2013) [hereinafter *2013 Hearing*] (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 805–06 (2013); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 690–91 (2014).

³ See Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1651–52 (2008); Price, *supra* note 2, at 731.

Although legislative standing has been generally addressed in scholarship,⁴ legal scholarship has neglected to address whether Congress has standing to sue when the Executive fails to enforce the law.⁵ Further, at the writing of this Note, no scholars have addressed congressional standing in light of the Supreme Court's recent legislative standing decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. Because the injury determines the remedy, it is first necessary to assess if there is a congressional injury, and if there is such an injury, ascertain what that particular injury is.

This Note argues that Supreme Court precedent and the reasoning of lower federal courts support a finding of congressional standing in instances of presidential nonenforcement. This Note further argues that it is normatively preferable for Congress to have standing because it needs a way to assert its unique legislative role and reorient the balance of powers in the event that a president exceeds constitutionally outlined powers and unilaterally nullifies duly enacted legislation.

Part I of this Note analyzes the Take Care Clause and the duties that it obligates the President to perform, and demonstrates that presidents are increasingly using nonenforcement as a means of setting national policy. Part II discusses the case law surrounding congressional standing, including three Supreme Court decisions and multiple federal circuit court decisions interpreting the Supreme Court's holdings on legislative standing. Part III concludes that Congress has standing to sue the President in instances of executive nonenforcement. This Part also addresses potential concerns with granting congressional standing and demonstrates why a lawsuit is the best option for Congress to reaffirm its unique legislative role. Part IV then discusses the political question doctrine and suggests that the courts are the most appropriate branch to police the boundaries of the political branches when they go awry and when political remedies are inadequate.

⁴ See, e.g., 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 (2001); 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 (2007); David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205 (2001); Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 HARV. L. REV. 1741 (1999).

⁵ But see Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 584–89 (2012), for a discussion on presidential interpretation and congressional standing when the President does not enforce the law because he “deems it unconstitutional.”

I. EXECUTIVE DUTY

A. *Take Care Clause*

The Framers enacted the Take Care Clause to guard against executive abuses that were frequent in England.⁶ The Framers feared an executive like the monarch who unilaterally suspended and dispensed the law.⁷ The English monarch's suspension powers allowed the monarch to single-handedly nullify the law at whim or "tear to pieces acts of parliament at pleasure."⁸ Suspensions rendered the entirety of the law void until the Crown lifted the suspension—many times after a significant period of time had passed.⁹ Similarly, the Crown's dispensing power authorized "license[s] to transgress"¹⁰ acts of parliament by handing out "dispensations"—a type of document that allowed favored individuals to commit unlawful activity, while maintaining enforcement proceedings against others.¹¹ Thus, fearful that executive tyranny would repeat itself in the American colonies, the Framers enacted the Take Care Clause to impose an enforcement duty on the Executive.¹²

⁶ President George Washington, recognizing the duty that the Take Care Clause imposed, said, "It is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to [that duty]." Letter from George Washington, President, to the Secretary of the Treasury (Sept. 7, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON 143, 144 (John C. Fitzpatrick ed., 1939); see also Delahunty & Yoo, *supra* note 2, at 796–99, 799 n.97 (citing WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147–50 (2d ed. 1829)).

⁷ See Price, *supra* note 2, at 689–92.

⁸ EDGAR SANDERSON, A HISTORY OF THE BRITISH EMPIRE 249 (1882).

⁹ Prakash, *supra* note 3, at 1650–51.

¹⁰ Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597-1689*, 29 AM. J. LEGAL HIST. 197, 198–99 (1985).

¹¹ *Id.*

¹² See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 726 n.113 ("[The Take Care Clause] supposedly was the Constitution's analogue to the English and state constitution prohibitions on dispensing and suspending the laws."); Price, *supra* note 2, at 693 ("At the Constitutional Convention, the delegates unanimously rejected a proposal to grant the President suspending authority."); see also Delahunty & Yoo, *supra* note 2, at 802 & n.124 (citing JAMES WILSON, *Of the Executive Department*, in 2 COLLECTED WORKS OF JAMES WILSON 873, 878 (Kermit L. Hall & Mark David Hall eds., 2007)). George Washington stated "that the legislature 'alone ha[s] authority to suspend the operation of laws.'" Price, *supra* note 2, at 731 (alteration in original) (quoting Alexander Hamilton, Draft of a Proclamation Concerning Opposition to the Excise Law (Sept. 7, 1792), in 12 THE PAPERS OF ALEXANDER HAMILTON 330, 331 n.1 (Harold C. Syrett & Jacob E. Cooke eds., 1962); see also FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 4–5 (1994) (noting the importance of English constitutionalism on the Framers' theories on Executive power). For the Court's affirmation of the President's enforcement duty, see *Office of Personnel Management v. Richmond*, 496 U.S. 414, 435 (1990), which noted that "[t]he Executive Branch does not have the dispensing power on its own and should not be granted such a power by judicial authorization."

The Take Care Clause states that the President “shall take Care that the Laws be faithfully executed.”¹³ The location of the Take Care Clause in Section 3, instead of Section 2, of Article II of the Constitution is evidence that the clause imposes a duty upon the President¹⁴ and does not simply give the President an additional grant of power.¹⁵ Section 2 states that the President “shall have Power” and then lists several powers unique to the President.¹⁶ Section 3, however, does not mention the word “power,” but rather lists several duties.¹⁷ In three of the four Clauses in Section 3, the Framers listed the duties of the President, enumerating that the President “shall” give to Congress “Information of the State of the Union,” “shall receive Ambassadors and other public Ministers,” “shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”¹⁸ In only one instance in Section 3 does the text not impose a duty, stating the President’s prerogative that in “extraordinary Occasions”

¹³ U.S. CONST. art. II, § 3.

¹⁴ See, e.g., Prakash, *supra* note 12, at 722 (“The Faithful Execution Clause imposes a duty of faithful law execution on the only officer who enjoys the executive power.”).

¹⁵ U.S. CONST. art. II, §§ 2–3; see, e.g., Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL’Y 63, 68 (2014) (discussing the significance of the location of the Take Care Clause in the establishment of a duty, not a grant of power).

¹⁶ Section 2 states:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. CONST. art. II, § 2.

¹⁷ Section 3 states:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, § 3.

¹⁸ *Id.*; see e.g., Cruz, *supra* note 15, at 68–69 (noting the contrasting purposes of Section 2 versus Section 3).

the President “may” convene both houses of Congress.¹⁹ The Framers thus distinguished between the President’s duties and the President’s prerogative by using contrasting language like “shall” and “may” within the same Section. Nevertheless, the Take Care Clause expressly states that the President “shall”—not may—“take Care that the Laws be faithfully executed,”²⁰ imposing a duty upon the Executive, which the Supreme Court has affirmed.²¹

Contrary to the Crown’s suspension and dispensation powers, the Take Care Clause confines the President to faithfully enforce laws passed by Congress, depriving the President of the freedom to make unilateral policy choices as the English Crown once had.²² This constitutional duty to enforce, and not make, the law undoubtedly upholds the rule of law, reinforcing the norm that the United States is a “government of laws, and not of men.”²³ Therefore, despite partisan disagreements with the substance or wisdom of the congressionally enacted law, the President is bound to both obey and execute the law.²⁴

¹⁹ U.S. CONST. art. II, § 3; *see, e.g.*, Cruz, *supra* note 15, at 69.

²⁰ U.S. CONST. art. II, § 3. Further, the President’s duty to execute the law is enforced by the oath of office every President takes. Upon being sworn in, each President states: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 8; *see also* 2013 Hearing, *supra* note 2, at 17 (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School). The order of the Clauses in Article II is significant. The presidential oath precedes the Take Care Clause, establishing the President’s duty to perform his executive function. The clause following the Take Care Clause allows for the impeachment and removal of the President, further suggesting the importance of the President’s duty to faithfully execute laws passed by Congress and the consequences for failing to uphold this duty. *See* 2013 Hearing, *supra* note 2, at 16; *see also* U.S. CONST., art. II, §§ 3–4.

²¹ *See* Morrison v. Olson, 487 U.S. 654, 690 (1988) (noting that the Take Care Clause imposes a “constitutionally appointed duty”); Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804) (stating that it is the “high duty” of the President to “take care that the laws be faithfully executed”).

²² *See* Delahunty & Yoo, *supra* note 2, at 798–808.

²³ *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see also* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014) (discussing the threat of unchecked presidential inaction on separation of powers).

²⁴ RAWLE, *supra* note 6, at 147–50. The Constitution’s authorization of the veto gives the President the ability to partake in the legislative process and have his objections recognized before a bill becomes a law. *See* U.S. CONST. art. I, § 7, cl. 2. However, after the bill becomes law, the President must enforce the law under the Take Care Clause. *See* Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding the line item veto unconstitutional); *see also* John T. Pierpont, Jr., Note, *Checking Executive Disregard*, 84 ST. JOHN’S L. REV. 329, 337–41 (2010) (arguing that executive disregard, or the failure to enforce the law, is unconstitutional under *Clinton v. City of New York* because it repeals or amends a valid statute without going through the formalistic process of bicameralism and presentment). Further, if Congress overrides the President’s veto, yet the President nevertheless chooses to not enforce the law, the President renders Congress’s constitutional ability to override the President’s veto worthless. *See id.*

B. Steel Seizure and Separation of Powers

The Court affirmed the duty of the President to submit to congressionally enacted law in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*).²⁵ Due to an impending strike from U.S. steel workers during the Korean War, President Truman issued an executive order, directing the Secretary of Commerce to operate the nation's steel mills.²⁶ President Truman justified his actions by citing the gravity of the national security risk that would be created by ceasing the production of steel that was necessary to make weapons.²⁷ However, the steel companies argued that the seizure was illegal because neither Congress nor the text of the Constitution authorized the President's actions.²⁸

The Court rejected President Truman's argument, holding that under the Take Care Clause, the President does not have inherent presidential power, but rather his actions must be authorized by statute or the text of the Constitution.²⁹ The Court similarly recognized the distinct role of Congress in creating policy and legislation, rejecting the President as a policymaker.³⁰ Instead, the Take Care Clause reinforces the distinct roles of each branch of government. The Court stated that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."³¹ Further, the Court interpreted the Take Care Clause as a duty, not an additional grant of power.³²

In Justice Jackson's widely accepted concurrence, he outlined a tripartite framework for understanding the proper exercise of executive authority. When the President acts with Congress's authorization, the President's power is at its greatest.³³ "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his

at 354. Understanding the Take Care Clause as a duty is thus the only reading of the Constitution that does not render the veto and congressional override provisions of the Constitution meaningless.

²⁵ 343 U.S. 579 (1952).

²⁶ *Id.* at 582.

²⁷ *Id.* at 582–84.

²⁸ *Id.* at 583.

²⁹ *Id.* at 585.

³⁰ *Id.* at 587–88 ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.").

³¹ *Id.* at 587.

³² *See id.* at 660 (Clark, J., concurring in the judgment) (discussing *Little v. Bareme*, 6 U.S. (2 Cranch) 170 (1804)); *see also* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 ("It is [the President's] responsibility to take care that the laws be faithfully executed.").

³³ *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring).

own independent powers” as he has received no congressional directive.³⁴ However, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress his power is at its lowest ebb . . . for what is at stake is the equilibrium established by our constitutional system.”³⁵ Thus, under Justice Jackson’s framework, when the President acts contrary to Congress’s expressed will, his power is unconstitutional under his Take Care Clause duties.

C. Prosecutorial Discretion

Although the Take Care Clause imposes the duty on the President to faithfully enforce the law, the President nevertheless retains discretion in enforcing the law. Prosecutorial, or executive, discretion is the power of an “official charged with enforcement of the law to exercise selectivity in the choice of occasions for the law’s enforcement.”³⁶ This discretion is noted by Article II, Section 3’s use of the word “faithfully” modifying “execut[ion],” recognizing that it might not be within the President’s limited power to fully enforce every law passed by Congress.³⁷ But the crux of the prosecutor’s decision not to prosecute is a contextual, case-by-case assessment.³⁸ Executive discretion is necessary because the Executive is tasked with applying broad, general congressional directives to particular cases, all the while maintaining the spirit of the congressional enactment.³⁹ As the D.C. Circuit stated: “The power to decide when to investigate, and when to prosecute, lies at the core of the Executive’s duty to see to the faithful execution of the laws”⁴⁰

Although the Executive may retain the power not to enforce, the exercise of this discretion cannot invalidate the duty imposed by the Take Care Clause to enforce the law. In other words, the discretion given by the word “faithfully” cannot render the duty to “take care” void.⁴¹ The Executive Branch thus oversteps into Congress’s territory when it “uses enforcement discretion to categorically suspend enforcement or to license

³⁴ *Id.* at 637.

³⁵ *Id.* at 637–38.

³⁶ Roger P. Joseph, Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 130 (1975).

³⁷ See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed”); see also Price, *supra* note 2, at 698 (elucidating the term “faithfully” and recognizing the limitations on enforcement allowed by the word).

³⁸ See Cruz, *supra* note 15, at 76.

³⁹ See Price, *supra* note 2, at 675–76.

⁴⁰ *Cnty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986).

⁴¹ See Cruz, *supra* note 15, at 76–77.

particular violations.⁴² To maintain this discretionary balance, the refusal to prosecute cannot be a “categorical, prospective suspension” of a statute, harkening back to the Crown’s suspension and dispensation abuses.⁴³ In keeping with the historical understanding of the Take Care Clause, the Executive may only refuse enforcement of the law based on “equitable, case-specific considerations.”⁴⁴ Prosecutorial discretion is limited,⁴⁵ and courts have a role in policing the boundaries of prosecutorial discretion.⁴⁶

But proper executive discretion and executive nonenforcement should be delineated. Although the Take Care Clause undoubtedly leaves room for discretion, it does not give the President the power to unilaterally disregard statutory provisions or entire statutes⁴⁷ based on her own policy predilections.⁴⁸ Rather, prosecutorial discretion requires a case-by-case assessment of the equity involved in enforcing the law against particular plaintiffs—not a complete abandonment of enforcement.⁴⁹ Indeed, courts should be capable of making the delineation between the categorical suspension of a statute or its provisions (implicating executive inaction) versus nonenforcement on a case-by-case basis (implicating prosecutorial discretion).⁵⁰

⁴² See Price, *supra* note 2, at 676.

⁴³ *Id.* at 760.

⁴⁴ See *id.* at 676.

⁴⁵ See, e.g., *Bragan v. Poindexter*, 249 F.3d 476, 481 (6th Cir. 2001) (stating that prosecutorial discretion is not “unfettered” (quoting *United States v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989))).

⁴⁶ See, e.g., *United States v. Smith*, 178 F.3d 22, 25 n.1 (1st Cir. 1999) (noting certification is subject to prosecutorial discretion, but courts have the authority to review the discretion in instances where bad faith is alleged); *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1264–65 (10th Cir. 1999) (applying a good faith standard in adjudicating a prosecutorial inaction), *abrogated on other grounds by United States v. Duncan*, 242 F.3d 940 (10th Cir. 2001).

⁴⁷ See Cruz, *supra* note 15, at 78.

⁴⁸ Furthermore, in *INS v. Chadha*, the Supreme Court struck down the one-House legislative veto, holding that for a legislative act to be constitutional, it must satisfy the formalistic requirements of presentment and bicameralism. 462 U.S. 919, 955–59 (1983). By unilaterally waiving a statute or its provisions, the Executive does not submit to the constitutional formalistic process of bicameralism and presentment required for repealing laws. See *id.*

⁴⁹ See, e.g., Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985) (“[T]he executive has the power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe. . . . But there is a distinction between *exercising such discretion* and *refusing to carry out obligations* that Congress has imposed on the executive. The distinction turns, here as elsewhere, on interpretation of the substantive statute. Although there will be difficult intermediate cases, the ‘take Care’ clause does not authorize the executive to fail to enforce those laws of which it disapproves.” (emphasis added)).

⁵⁰ Further, a court’s ability to parse this distinction may be aided by assessing the budget and resources that have been congressionally allocated towards enforcement. This will help determine whether the Executive’s nonenforcement was in good faith. See Randy Barnett, *The President’s Duty of Good Faith Performance*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 12, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/12/the-presidents-duty-of-good-faith-performance/>

D. *The Modern Problem of Presidential Nonenforcement*

Executive inaction is increasingly taking center stage in American politics.⁵¹ To appeal to constituents, both presidents and presidential candidates have claimed that they will not enforce certain provisions of duly enacted laws.⁵² Presidential inaction is increasingly used as a tool to curry constituent favor, despite the fact that a law has satisfied the requirements of bicameralism and presentment.⁵³ In effect, executive inaction takes the policymaking abilities out of the hands of Congress, placing it in the hands of the Executive.

For example, President George W. Bush has been blamed for failing to enforce the law by pursuing “deregulation through enforcement.”⁵⁴ Scholar Daniel Deacon argued that the Bush Administration abused its prosecutorial discretion when it decreased its enforcement of Food and Drug Administration (FDA) violations.⁵⁵ A report by the Minority Staff of the U.S. House of Representatives Committee on Government Reform discovered that while the number of FDA violations had not declined substantially from 2000 to 2005, the number of warning letters the FDA sent decreased by fifty percent.⁵⁶ The Committee’s report found that the FDA declined to follow its field officials’ enforcement recommendations, and when it did act, it “undermined the efforts of field officials through extended delays in acting on the enforcement recommendations.”⁵⁷ Similarly, the Bush Administration has been blamed for its lack of rigor in prosecuting defendants in lawsuits against the Environmental Protection Agency in comparison to previous administrations.⁵⁸

Additionally, presidential candidate Mitt Romney sought to use executive inaction as a tool to advance his policy goals. During the

faith-performance/ [https://perma.cc/F4G2-VYVQ] (comparing the President’s duty to execute the law to the UCC’s duty of good faith enforcement under § 1-304).

⁵¹ See Love & Garg, *supra* note 23, at 1197–98 (discussing several examples of presidential nonenforcement).

⁵² See *id.*

⁵³ See U.S. CONST. art. I, § 7, cl. 2; see also *supra* note 48.

⁵⁴ Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010).

⁵⁵ *Id.* at 808.

⁵⁶ SPECIAL INVESTIGATIONS DIV., MINORITY STAFF OF H. COMM. ON GOV’T REFORM, 109TH CONG., PRESCRIPTION FOR HARM: THE DECLINE IN FDA ENFORCEMENT ACTIVITY, at i (2006).

⁵⁷ *Id.* at 11.

⁵⁸ See Deacon, *supra* note 54, at 809. It should be noted that these examples involving the Bush Administration more closely resemble prosecutorial discretion than complete nonenforcement of a provision or law because there is no indication that the Administration refused to completely enforce the law. A good faith assessment and further research into the Administration’s budget, costs, priorities, and current social problems of the era would help ascertain whether the Administration is guilty of not enforcing the law, or simply setting different priorities from the previous administration.

Republican Presidential Debates of 2012, Governor Romney confidently stated that his first act as President would be to grant all fifty states a waiver from the Affordable Care Act (ACA).⁵⁹ Thus, Governor Romney declared that he would unilaterally refuse to enforce the law, despite the statute's language outlining mandatory state action. Here, Governor Romney appealed to Republican and Libertarian constituents that were decidedly against the ACA.

Surprisingly, President Obama also used nonenforcement to unilaterally alter the ACA's health insurance requirements. The Administration announced that "health insurance issuers may choose to continue coverage that would otherwise be terminated or cancelled, and affected individuals and small businesses may choose to re-enroll in such coverage" despite not complying with the ACA's clear statutory requirements.⁶⁰ Although Congress specifically mandated that the provisions would go into full effect on January 1, 2014,⁶¹ President Obama communicated that he would not enforce the law against many insurance companies until 2016.⁶² The Obama Administration also unilaterally amended the ACA's employer mandate provisions. The employer mandate provisions declared that starting December 31, 2013, all large employers must give their full-time employees and their dependents the ability to enroll in coverage "under an eligible employer-sponsored plan" or pay a tax.⁶³ But the Treasury Department unilaterally changed the date that the penalties would go into effect. The Department declared that it was "extending . . . transition relief to the employer shared responsibility payments. These payments will not apply for 2014. Any employer shared responsibility payments will not apply until 2015."⁶⁴

⁵⁹ Governor Mitt Romney, Republican Presidential Candidates Debate in Ames, Iowa (Aug. 11, 2011), <http://www.presidency.ucsb.edu/ws/index.php?pid=90711> [<http://perma.cc/X8D4-R2KB>] ("And if I'm president of the United States, on my first day, I'll direct the secretary of HHS to grant a waiver from Obamacare to all 50 states.").

⁶⁰ Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, to Insurance Commissioners (Nov. 14, 2013), <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF> [<http://perma.cc/8TC6-N4A8>].

⁶¹ Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256 (2010) ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

⁶² Louise Radnofsky, *Obama Gives Health Plans Added Two-Year Reprieve*, WALL ST. J. (Mar. 5, 2014, 10:53 PM), <http://www.wsj.com/articles/SB10001424052702303369904579421541748450598> [<http://perma.cc/X2NH-FK83>].

⁶³ ACA, § 1513 (codified at 26 U.S.C. § 4980H(a)-(b), (d)).

⁶⁴ Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF TREASURY: TREASURY NOTES BLOG (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx> [<http://perma.cc/X54K-W5KE>].

President Obama also unilaterally suspended federal legislation that outlawed marijuana use.⁶⁵ The Controlled Substances Act creates mandatory minimum sentences for marijuana possession.⁶⁶ Yet the Obama Administration's Department of Justice issued memorandums detailing its reasons for not prosecuting marijuana charges against individuals in states that legalized marijuana,⁶⁷ or against those who use marijuana for medical reasons in accordance with state law.⁶⁸

Similarly, the Obama Administration single-handedly nullified a central provision of the Temporary Assistance for Needy Families (TANF) program that was created by the Personal Responsibility and Work Opportunity Reconciliation Act.⁶⁹ TANF mandated that welfare recipients engage in work within twenty-four months of receiving welfare.⁷⁰ The Obama Administration nevertheless waived TANF work requirements as applied to the states, allowing recipients to receive welfare without abiding by statutory requirements.⁷¹

President Obama also refused to defend Section 3 of the Defense of Marriage Act (DOMA)⁷² when it was contested in federal court.⁷³ Despite the Department of Justice's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," the Administration refused to defend the law.⁷⁴ This

⁶⁵ Controlled Substances Act, 21 U.S.C. § 841 (2012).

⁶⁶ *Id.*

⁶⁷ Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys 1–2 (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf> [<http://perma.cc/RB8L-P9H8>] (directing federal prosecutors to "not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana").

⁶⁸ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Attorneys 3 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<http://perma.cc/3QES-TC4Z>].

⁶⁹ Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of the U.S. Code).

⁷⁰ 42 U.S.C. § 602(a)(1)(A)(ii) (2012).

⁷¹ *See* Memorandum from Earl S. Johnson, Dir., Office of Family Assistance, to States Administering the Temporary Assistance for Needy Families (TANF) Program and Other Interested Parties (July 12, 2012), <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203> [<http://perma.cc/96B3-RNNK>] (providing guidance concerning waiver and expenditure authority under Section 1115 of the Social Security Act).

⁷² Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

⁷³ *See Windsor*, 133 S. Ct. at 2683.

⁷⁴ Letter from Eric H. Holder, Jr., Att'y Gen., Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [<http://perma.cc/NN77-AQP5>].

compelled the House of Representatives to use the Bipartisan Legal Advisory Group to defend the law instead.⁷⁵

When presidents act against Congress by unilaterally waiving statutory provisions or simply not enforcing the law, the President's power is at its "lowest ebb" and threatens the "equilibrium established by our constitutional system."⁷⁶ *Steel Seizure* rejected inherent presidential power and held that the President is obligated to enforce the law.⁷⁷ If this modern trend of nonenforcement continues, administrations will increasingly act in violation of the Take Care Clause, using nonenforcement to further partisan policy goals.

II. CONGRESSIONAL STANDING

As the Executive increasingly nullifies and suspends the law, it should be asked whether Congress as an institution has standing to sue the Executive to enforce the law as written under the Take Care Clause. First, this discussion starts by assessing whether Supreme Court case law supports legislative standing in instances of presidential inaction. This Part will examine the three Supreme Court cases that have addressed Congressional standing: *Coleman v. Miller*, *Raines v. Byrd*, and *Arizona State Legislature v. Arizona Independent Redistricting Commission*. Second, because the Court decided *Arizona State Legislature v. Arizona Independent Redistricting Commission* in June 2015, at the writing of this Note there have been few federal court cases that have applied the Court's recent decision. This Part is thus confined to assess the legal landscape post-*Coleman* and *Raines*. Finally, this Part considers the Boehner lawsuit as an example of a suit involving executive nonenforcement and congressional standing.

A. Article III and Prudential Standing

Standing exists in two forms: Article III standing and prudential standing. The Supreme Court has traditionally outlined three necessary features of Article III standing that plaintiffs must satisfy: injury in fact, causation, and redressability.⁷⁸ An injury must be "concrete and particularized" and "actual or imminent," not merely "'conjectural' or

⁷⁵ Abby Goodnough, *Appeals Court Hears Arguments on Gay Marriage Law*, N.Y. TIMES (Apr. 4, 2012), http://www.nytimes.com/2012/04/05/us/court-hears-arguments-on-defense-of-marriage-act.html?_r=0 [<http://perma.cc/56CL-9NE7>].

⁷⁶ *Steel Seizure*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

⁷⁷ See *supra* text accompanying notes 25–35.

⁷⁸ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

‘hypothetical.’”⁷⁹ To satisfy causation and redressability, plaintiffs must allege an injury that is “fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”⁸⁰ Formerly, prudential standing entailed additional factors, such as a prohibition against generalized grievances, a prohibition against litigating the rights of third parties, and the requirement that the interests of the plaintiff be within the statute’s zone of interests.⁸¹ But in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court eliminated as prudential requirements the zone of interests requirement and the ban on generalized grievances, seemingly considering them as constitutional requirements, and possibly eliminating prudential standing altogether.⁸²

Although it appears that, currently, prudential standing nevertheless entails a prohibition against litigating the rights of third parties, the contours of prudential standing are indeterminate. Whatever the Court defines as prudential standing, however, may be superseded by legislation. Article III standing, on the other hand, is a constitutional requirement that cannot be altered by legislation. Thus, for Congress to have standing, it must, at a bare minimum, satisfy Article III’s standing requirements.

B. Supreme Court Precedent: *Coleman*, *Raines*, and Arizona State Legislature

Three Supreme Court cases directly address congressional standing: *Coleman v. Miller*,⁸³ *Raines v. Byrd*,⁸⁴ and *Arizona State Legislature v. Arizona Independent Redistricting Commission*.⁸⁵

In *Coleman*, twenty of Kansas’s forty state senators voted against the proposed “Child Labor Amendment” to the United States Constitution.⁸⁶ To break the twenty-to-twenty tie, Kansas’s Lieutenant Governor, the presiding officer of the Kansas Senate, cast the tiebreaking vote in favor of the resolution.⁸⁷ The Kansas House of Representatives later adopted the

⁷⁹ *Id.* at 560.

⁸⁰ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁸¹ *See id.*

⁸² 134 S. Ct. 1377, 1386–88 (2014).

⁸³ 307 U.S. 433 (1939). For opinions recognizing the precedential value of *Coleman*, see *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2713 (2013) (Alito, J., dissenting); and *Baker v. Carr*, 369 U.S. 186, 208 (1962). *But see Ariz. State Legislature*, 135 S. Ct. at 2696 (Scalia, J., dissenting) (“*Coleman* was a peculiar case that may well stand for nothing.”).

⁸⁴ 521 U.S. 811 (1997).

⁸⁵ 135 S. Ct. 2652.

⁸⁶ 307 U.S. at 435–36.

⁸⁷ *Id.* at 436.

resolution.⁸⁸ Consequently, these twenty state senators, in addition to another state senator and three Kansas house members, filed suit, challenging the authority of the Kansas Lieutenant Governor to cast the tiebreaking vote.⁸⁹ The Supreme Court upheld standing for at least the twenty state senators claiming an institutional injury, yet ruled against them on the merits of the suit.⁹⁰ The Court determined that they had standing because their votes against ratification had been “overridden and virtually held for naught” and they had “a plain, direct and adequate interest in maintaining the effectiveness of their votes.”⁹¹ The Court reasoned that the invalidation of these legislators’ expressed institutional will was sufficient to grant standing.

Then in *Raines*, four U.S. senators and two U.S. congressmen challenged the constitutionality of the Line Item Veto Act.⁹² When Congress voted on the Line Item Veto Act, these members each voted against the measure.⁹³ Despite their objections, a majority of Congress passed the legislation and it was subsequently enacted.⁹⁴ The day after the Act went into effect, these members filed suit against the Secretary of the Treasury and the Director of the Office of Management and Budget.⁹⁵ They claimed that the Line Item Veto Act wrongly diluted their Article I voting power by giving the President the authority to cancel spending and tax measures after the bills were enacted.⁹⁶ They asserted constitutional standing to sue because “[t]his alteration of the legal effect of a Member’s vote is an injury in fact.”⁹⁷

The Supreme Court rejected this argument, holding that these “individual members of Congress [did] not have a sufficient ‘personal stake’ in [the] dispute and [did] not allege[] a sufficiently concrete injury to have established Article III standing” to maintain suit.⁹⁸ The Court distinguished *Coleman*, stating that in contrast to the members in *Coleman*, these members’ “votes were given full effect,” not amounting to vote nullification, but merely alleged “abstract dilution of institutional

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 437, 456.

⁹¹ *Id.* at 438.

⁹² 521 U.S. 811, 814 (1997).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.* at 817.

⁹⁷ Brief for Appellees, *Raines v. Byrd*, 521 U.S. 811 (1997) (No. 96-1671), 1997 WL 251423, at *25.

⁹⁸ *Raines*, 521 U.S. at 830.

legislative power.”⁹⁹ Instead, the Court stated 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.”¹⁰⁰

Additionally, the Court noted that, in contrast to *Coleman*, these members filed suit on an individual basis, not representing their respective Houses.¹⁰¹ Indeed, both Houses opposed their suit.¹⁰² These members also retained an alternative remedy: the Act could be repealed, individual spending bills could be given a statutory exemption, or a plaintiff with an injury in fact resulting from the Act could challenge its constitutionality.¹⁰³

Arizona State Legislature added further analysis to the legislature–plaintiff issue. Arizona voters adopted Proposition 106, a constitutional amendment that took redistricting power away from the Arizona state legislature and gave it to the Arizona Independent Redistricting Commission.¹⁰⁴ After the Commission adopted redistricting maps, the Arizona state legislature brought suit against the Commission, claiming that the map violated the Elections Clause of the U.S. Constitution, usurping the state legislature’s redistricting power.¹⁰⁵

The Supreme Court held that the Arizona Legislature had standing to sue, “having lost authority to draw congressional districts.”¹⁰⁶ Unlike the *Raines* plaintiffs, who did not represent their Houses of Congress, the *Arizona State Legislature* plaintiffs asserted an institutional injury similar to the injury in *Coleman*.¹⁰⁷ In accordance with *Raines*’s vote-nullification standard, the Court reasoned that Proposition 106 would have completely nullified the Arizona legislature’s votes to redistrict.¹⁰⁸ Therefore, the Court

⁹⁹ *Id.* at 824–26.

¹⁰⁰ *Id.* at 823 (interpreting *Coleman*’s holding).

¹⁰¹ *Id.* at 829. It should also be noted that unlike the plaintiffs in *Coleman*, who were Kansas state legislators, the plaintiffs in *Raines* were U.S. legislators. While the Court does not acknowledge this as relevant in its standing analysis, this is a possible distinction that future courts attempting to draw delineations might recognize.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015).

¹⁰⁵ *Id.* at 2658–59.

¹⁰⁶ *Id.* at 2659.

¹⁰⁷ *Id.* at 2664 (“The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers.”).

¹⁰⁸ *Id.* at 2665 (citing *Raines v. Byrd*, 521 U.S. 811, 823–24 (1997)).

ruled that a legislature, as an institution, has standing to sue when its votes are nullified.¹⁰⁹

The Court, however, mentioned in a footnote that *Arizona State Legislature* does not address whether Congress has standing to sue the President.¹¹⁰ The issue thus remains unresolved as to whether Congress as an institution may have standing to challenge the President's actions.

C. *Post-Raines v. Byrd: Legislative Standing Suits in the Circuit Courts*¹¹¹

1. *D.C. Circuit.*—Since *Raines*, various circuit courts have heard legislative standing cases.¹¹² In *Chenoweth v. Clinton*, several U.S. representatives, who did not constitute a majority, filed suit against President Clinton, alleging that his executive order to establish the American Heritage Rivers Initiative was unconstitutional and violated federal legislation.¹¹³ After failing to enact a bill that would have halted implementation of the American Heritage Rivers Initiative, the House members sued to enjoin President Clinton from implementing the initiative.¹¹⁴ The D.C. Circuit, however, denied standing based in part on *Raines*.¹¹⁵ As in *Raines*, the D.C. Circuit reasoned that presidential action that diluted members' authority as legislators was too "widely dispersed" and "abstract" to constitute standing to sue.¹¹⁶ Because a political remedy was available to these House members, the court stated it would seek to avoid "meddl[ing] in the internal affairs of the legislative branch."¹¹⁷ The

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at n.12.

¹¹¹ Because *Arizona State Legislature* was handed down last term, and at the writing of this Note no circuit courts have applied the Court's decision, this Section will only address circuit court cases that have applied *Raines* and *Coleman* because these cases remain good law.

¹¹² I have selected archetypal cases from the D.C. Circuit and Sixth Circuit because these cases provide a greater discussion and analysis of legislative standing in light of *Coleman* and *Raines*. Additionally, the fact patterns of these cases more closely resemble classic legislative suits. For additional circuit court cases discussing legislative standing, see, for example, *Russell v. DeJongh*, 491 F.3d 130, 132 (3d Cir. 2007), denying standing to a Virgin Islands senator for lacking a sufficient injury to challenge the governor's adherence to proper procedure in the judicial appointment process; *Gutierrez v. Pangelinan*, 276 F.3d 539, 544–46 (9th Cir. 2002), analogizing the position of the Governor of Guam to that of the senators in *Coleman* in granting standing; and *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1337 (D.C. Cir. 1999), denying standing to individual Alaskan legislators and the Alaska Legislative Council for not establishing a "personal stake" in the alleged dispute.

¹¹³ 181 F.3d 112, 112–13 (D.C. Cir. 1999).

¹¹⁴ *Id.* at 113.

¹¹⁵ *See id.* at 115.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 116 (alteration in original) (quoting *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984)).

court concluded that because the House of Representatives did not constitute a majority, standing did not exist for lack of an injury in fact.¹¹⁸

Similarly, in *Campbell v. Clinton*, the D.C. Circuit denied standing to thirty-one U.S. congressional representatives who sought a declaratory judgment against President Clinton, claiming that his intervention in Kosovo violated the War Powers Resolution and the War Powers Clause in the U.S. Constitution.¹¹⁹ Before considering the merits, the court considered whether the plaintiffs had sufficiently satisfied the injury in fact element to constitute standing. This analysis centered on determining whether the Executive's action nullified congressional votes. In attempting to ascertain the Supreme Court's definition of "nullification," the court defined the term as "treating a vote that did not pass as if it had, or vice versa."¹²⁰ The court held that the Executive did not nullify these members' votes because they retained alternative legislative remedies.¹²¹ Namely, Congress could limit the President's available funds or legislatively outlaw the use of the U.S. military in Yugoslavia.¹²² As a measure of last resort, Congress could also vote to impeach the President.¹²³ Because Congress could have employed other legislative means to reign in the President's alleged lawless behavior, the D.C. Circuit held that the members' claims of vote nullification did not fit within the "*Coleman* exception to the *Raines* rule," and thus lacked an injury, and therefore standing, to bring the lawsuit.¹²⁴

Institutional—not merely individual—vote nullification is thus central to the D.C. Circuit Court's assessment of legislative standing.¹²⁵ Mere vote "dilution" or a threat to a legislator's ability to exercise voting power is not determinative. The court suggested, however, that the existence of alternative congressional remedies, such as regulation through legislation, decreased funding, and even impeachment, are all factors that decrease the likelihood that the court will find vote nullification that constitutes an adequate injury for standing.

2. *Sixth Circuit*.—The Sixth Circuit has also heard cases regarding legislative standing. In *Baird v. Norton*, a state representative and a state

¹¹⁸ See *id.* at 117.

¹¹⁹ 203 F.3d 19, 19–20 (D.C. Cir. 2000).

¹²⁰ *Id.* at 22.

¹²¹ *Id.* at 23.

¹²² *Id.* Indeed, a concurrent resolution was proposed to require the President to withdraw U.S. troops from the conflict; however, this resolution was defeated. *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 22.

¹²⁵ This rule was seemingly affirmed in the Court's recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2664 (2015).

senator contested the approval of gaming compacts between the state and four Indian tribes, arguing that the state legislature followed unconstitutional procedures in approving the compacts.¹²⁶ The Sixth Circuit rejected their argument, denying both legislators standing.¹²⁷ The court stated that “[f]or legislators to have standing as legislators, then, they must possess votes sufficient to have either defeated or approved the measure at issue.”¹²⁸ Because both state legislators were not joined by a majority of their respective chambers, their claim did not amount to vote nullification, rather, their votes were merely diluted by the procedure.¹²⁹ According to the court, vote dilution is not enough to grant standing.¹³⁰ The court noted, however, that if the lawsuit had been joined by a majority of other members, under *Coleman*’s rule, it would have granted standing because the members’ votes would have been sufficient to defeat the legislation.¹³¹ Because neither legislator could demonstrate that their individual votes would have defeated the gaming compacts if the constitutionally required procedure had been followed, the Sixth Circuit denied standing.¹³²

D. Legislative Suits over Nonenforcement: The Boehner Suit

Cases granting institutional legislator standing are sparse.¹³³ However, cases granting standing as a result of legislators suing over executive nonenforcement of a statute are almost absent from the federal docket. The Boehner lawsuit is the prime example of this kind of lawsuit.¹³⁴

In November of 2014, in a suit spearheaded by John Boehner, the U.S. House of Representatives sued Sylvia Burwell in her official position as Secretary of the U.S. Department of Health and Human Services and Jacob Lew in his official capacity as Secretary for the U.S. Department of the

¹²⁶ 266 F.3d 408, 409 (6th Cir. 2001).

¹²⁷ *Id.* at 413.

¹²⁸ *Id.* at 412.

¹²⁹ *Id.* at 412–13. Similar to the D.C. Circuit’s rule on vote nullification, this rule was seemingly affirmed by the Supreme Court’s recent decision in *Arizona State Legislature*, 135 S. Ct. at 2665.

¹³⁰ *Baird*, 266 F.3d at 412–13.

¹³¹ *Id.* Furthermore, this reasoning was reflected in *Arizona State Legislature* in its distinction of *Coleman* and *Raines*. See *Ariz. State Legislature*, 135 S. Ct. at 2664 (“In concluding that the individual Members lacked standing, the Court ‘attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress.’” (alteration in original) (quoting *Raines v. Byrd*, 521 U.S. 811, 829 (1997))).

¹³² *Baird*, 266 F.3d at 413.

¹³³ *But see, e.g., Ariz. State Legislature*, 135 S. Ct. at 2652; *Coleman v. Miller*, 307 U.S. 433 (1939).

¹³⁴ *U.S. House of Representatives v. Burwell*, No. 14-1967 (RMC), 2015 WL 5294762 (D.D.C. Sept. 9, 2015).

Treasury.¹³⁵ A House vote of 225–201 approved a House Resolution to initiate a lawsuit.¹³⁶ Part of the House’s claim concerned the unilateral delay of the employer mandate provisions of the ACA.¹³⁷ The House predicated its legal claim on the structure of the U.S. government, arguing that the defendants “usurp[ed] the House’s legislative authority” when they unilaterally changed or “effectively . . . amended” the date that the penalties would go into effect.¹³⁸ The House stated that it would “continue to be injured” due to the defendants’ violation of “Article I, section 1, which vests in the Congress ‘[a]ll legislative Powers,’ and Article I, section 7, clause 2, requiring passage by both the House and Senate, and then presentment to the President.”¹³⁹

Before the House filed suit, Professor Elizabeth Price Foley testified before the House Judiciary Committee to assess whether the House would have standing to sue.¹⁴⁰ She argued that the President’s failure to execute the law establishes an injury in fact.¹⁴¹ Applying *Coleman*, she argued that the President’s refusal to execute the ACA as statutorily outlined nullifies the law.¹⁴² Foley contended that the President’s failure to enforce the law not only nullifies that particular provision, but also reduces the power of Congress to pass future legislation.¹⁴³ This affects these legislators’ singular votes and “is the nullification of the legislature as [the] legislature.”¹⁴⁴ This rises above *Raines*’s voter dilution standard to the level of an institutional harm, exceeding the injury in fact standard under *Coleman*.¹⁴⁵ Unlike in *Raines*, where a group of legislator plaintiffs decided to take their policy disagreements to court, according to Foley, here “the legislature *qua* legislature is concretely opposed to the action of the executive.”¹⁴⁶ The

¹³⁵ Complaint at 3, *U.S. House of Representatives v. Burwell*, No. 14-1967 (RMC), 2015 WL 5294762 (D.D.C. Sept. 9, 2015). Whether legislators sue the President or the heads of departments appears to be immaterial to the court’s standing analysis. This inquiry, however, is beyond the scope of this Note. For a discussion on lawsuits against the President, see Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997).

¹³⁶ Complaint, *supra* note 135, at 5.

¹³⁷ *Id.* at 14. For an overview of the employer mandate’s delay, see *supra* text accompanying notes 63–64.

¹³⁸ Complaint, *supra* note 135, at 23–24.

¹³⁹ *Id.*

¹⁴⁰ *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 61 (2014) [hereinafter *2014 Hearing*] (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law).

¹⁴¹ *Id.* at 72.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Court's decision in *Arizona State Legislature*, granting the Arizona legislature as an institution standing, seemingly affirmed Foley's thesis: the House plaintiff, as an institution, now may have standing to sue.¹⁴⁷

Shortly after *Arizona State Legislature* was decided, in September of 2015, the U.S. District Court for the District of Columbia granted standing to the U.S. House of Representatives to challenge the Executive's withdrawal of Treasury funds in the absence of a congressional appropriation authorizing this withdrawal.¹⁴⁸ The court noted that the House's "Non-Appropriation Theory" alleged a violation of Article I, Section 9, Clause 7 of the U.S. Constitution.¹⁴⁹ Article I, Section 9, Clause 7 grants Congress the exclusive power over the purse, giving Congress the sole ability to adopt laws to appropriate Treasury funds.¹⁵⁰ The court applied *Raines* and *Arizona State Legislature*, arguing that a suit initiated by an institution, such as the House, does not allege an injury that is "too widely dispersed," but alleges an injury that "affect[s] all members of Congress in the same broad and undifferentiated manner."¹⁵¹ The Executive's actions in bypassing Congress to "spend funds however it pleases," thus constituted a concrete and particularized harm to the House.¹⁵² The court therefore granted the House standing to redress this harm.¹⁵³

The court, however, further held that the House lacked standing to challenge the Treasury's alleged amendment to the ACA's employer mandate provisions.¹⁵⁴ The court categorized the House's complaint based on the employer mandate not in terms of executive nonenforcement, but in terms of executive "extra-statutory action."¹⁵⁵ The court concluded that the House alleged not a constitutional violation, as in the House's Non-Appropriation Theory, but a statutory violation.¹⁵⁶ This constituted a generalized injury as "every instance of an extra-statutory action by an Executive officer might constitute a cognizable constitutional violation,

¹⁴⁷ See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664–65 (2015) (recognizing institutional standing).

¹⁴⁸ *U.S. House of Representatives v. Burwell*, No. 14-1967 (RMC), 2015 WL 5294762, at *1 (D.D.C. Sept. 9, 2015).

¹⁴⁹ *Id.* at *13.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *14 (quoting *Kucinich v. Bush*, 236 F. Supp. 2d 1, 7 (D.D.C. 2002); then citing *Raines v. Byrd*, 521 U.S. 811, 821 (1997); and then citing *Ariz. State Legislature*, 135 S. Ct. at 2664).

¹⁵² *Id.* at *13.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.* at *18.

¹⁵⁶ *Id.*

redressable by Congress through a lawsuit.¹⁵⁷ Additionally, the court noted that the House's alleged injury could not be properly redressed under Article III; a ruling in favor of the House would only provide the "'psychic satisfaction' of knowing 'that the Nation's laws are faithfully enforced.'"¹⁵⁸ The court therefore held that the House did not allege a concrete and particularized harm, and consequently denied standing as to this issue.¹⁵⁹

Although the court did not adopt a theory of standing in instances of executive nonenforcement, the court also did not reject this theory of standing. Rather, the court failed to adopt Foley's proposed theory of executive nonenforcement, conceptualizing the Executive's delay of the employer mandate provisions as "extra-statutory" executive action instead.¹⁶⁰ It thus remains undecided as to whether a legislative body may have standing to sue in instances of executive nonenforcement.

III. APPLYING COURT PRECEDENT

On theoretical grounds, executive nonenforcement adulterates our government of separation of powers because the Executive usurps Congress's legislative and policy roles when determining which laws should be enforced. Even from a functionalist perspective, in cases of nonenforcement, Congress has not delegated or provided an "intelligible principle" to guide the Executive's use of legislative power.¹⁶¹ Rather, the President aggregates legislative power to himself at the expense of Congress by unilaterally repealing (through nonenforcement) duly enacted acts of Congress. Indeed, the use of executive authority against the express will of Congress is unconstitutional under *Steel Seizure* as the President's power is at its "lowest ebb."¹⁶² From a formalist perspective, the argument is even stronger: the President's exercise of legislative power in unilaterally repealing various acts of Congress violates the text of the Constitution and amounts to an unconstitutional delegation of legislative power.¹⁶³ The Executive thus has a duty under the Take Care Clause to enforce the law, and a failure to do so should be corrected.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)).

¹⁵⁹ *Id.* at *19.

¹⁶⁰ *See id.* at *18.

¹⁶¹ *See* *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (alteration in original) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

¹⁶² *Steel Seizure*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹⁶³ *See* *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

This discussion starts by assessing whether the aforementioned case law supports legislative standing in cases of presidential inaction. Applying the holdings and language from these cases, this Part concludes that, in instances of executive nonenforcement, these holdings support a finding of congressional standing under Article III.

A. Applying Supreme Court Precedent to Instances of Executive Nonenforcement: Coleman and Raines

Under *Coleman*, a majority of Congress has standing to sue when the President does not enforce a duly enacted, unambiguous statute.¹⁶⁴ When the President refuses to enforce a statute, she “overrid[es]” and holds “for naught” the legislature’s votes.¹⁶⁵ The majority of the House or Senate has “a plain, direct and adequate interest in maintaining the effectiveness of their votes,” and the President, by nonenforcement, completely eliminates this effectiveness, satisfying the *Coleman* standard.¹⁶⁶

Courts would be able to distinguish *Raines* in cases of executive nonenforcement. Unlike *Raines*, legislative votes that are not enforced are not given “full effect,” thus constituting “vote nullification,” not merely “abstract dilution of institutional legislative power.”¹⁶⁷ Further, presidential inaction seems to exceed the *Coleman* standard. At least in *Coleman*, the legislators’ votes were considered, but ultimately defeated by the Lieutenant Governor’s final tiebreaking vote. In cases of presidential nonenforcement, however, Congress’s validly cast votes receive no consideration, rendering them invalid or as if they were never cast. This therefore exceeds *Coleman*’s standards for granting standing, for the Executive’s actions further delegitimize Congress as an institution.

Moreover, legislative standing does not require both the Senate and the House to be represented in the lawsuit.¹⁶⁸ Thus, a suit similar to the Boehner lawsuit, where only the House as an institution is represented, can proceed under *Coleman*, so long as the unenforced legislation has been previously enacted into law.¹⁶⁹ However, for a congressional suit based on presidential inaction to be successful, it cannot be filed on an individual basis. Rather, a House or Senate majority must challenge executive

¹⁶⁴ 307 U.S. 433, 446 (1939).

¹⁶⁵ *See id.* at 438.

¹⁶⁶ *See id.*

¹⁶⁷ 521 U.S. 811, 824–26 (1997).

¹⁶⁸ *See Coleman*, 307 U.S. at 446 (granting legislator standing for at least twenty state senators).

¹⁶⁹ *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2664–65 (2015) (affirming *Coleman* in holding that the legislature as an institution has standing to sue).

inaction under *Raines* and *Arizona State Legislature*.¹⁷⁰ As a matter of policy, this would theoretically help to cabin strike suits by individual disgruntled members, though it might still encourage strike suits from different parties that occupy a majority in Congress.

For a court to grant legislative standing, however, alternative remedies cannot be available to individual members.¹⁷¹ But alternative remedies in cases of nonenforcement are not obvious. *United States v. Windsor* explores some of these remedies.¹⁷²

In *Windsor*, the Executive enforced the law but refused to defend the constitutionality of the Defense of Marriage Act (DOMA) in court.¹⁷³ In Justice Alito's dissenting opinion, he affirmed the Court's decision in *Coleman*, stating that "because legislating is Congress' central function, any impairment of that function is a . . . grievous injury."¹⁷⁴ He argued that the Executive nullified the House of Representatives votes because the House "was a necessary party to DOMA's passage" and "the House's vote would have been sufficient to prevent DOMA's repeal."¹⁷⁵ Justice Alito thus considered there to be only one proper solution: granting Congress standing when the President refuses to defend the law.

Justice Scalia took a different approach, however. In Justice Scalia's dissenting opinion in *Windsor*, he lambasted the notion that "Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws."¹⁷⁶ Instead, Justice Scalia argues that Congress's "only recourse is to confront the President directly" by rejecting presidential appointments, eliminating congressional funding, or even impeaching the President.¹⁷⁷ Justice Scalia concluded that this should be left "to a tug of war between the President and the Congress," and in these types of cases, the judiciary should be relegated to the sidelines.¹⁷⁸

But Justice Scalia's alternative remedies skew the balance of powers towards the Executive, aggregating more power to the President and slowly

¹⁷⁰ See *id.*; *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

¹⁷¹ Cf. *Raines*, 521 U.S. at 829 (denying individual members of Congress standing "neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)").

¹⁷² 133 S. Ct. 2675 (2013).

¹⁷³ *Id.* at 2684.

¹⁷⁴ *Id.* at 2713 (Alito, J., dissenting).

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* at 2703 (Scalia, J., dissenting).

¹⁷⁷ *Id.* at 2702, 2704–05.

¹⁷⁸ *Id.*

stripping Congress of its powers. Fundamentally, this sets a presumption against nonenforcement and incentivizes the President to continue threatening nonenforcement to coerce Congress into actualizing the President's will. Mandating that *Congress* take additional action because the *President* has failed to perform his duty implicitly affirms the President's actions.¹⁷⁹ Requiring Congress to impeach, cut funding, deny appointments, or reaffirm a bill places the burden on Congress to act to compel the President to perform duties already owed to Congress and to the U.S. public.¹⁸⁰ Rather, as with contracts, the breaching party should be the party required to make amends to the party that has fulfilled its duties—not the other way around. The presumption should simply be in favor of enforcement, and Congress should not have to reaffirm its commitment to duly enacted legislation by freezing budgets, refusing appointees, or impeaching the President.

Reenacting a law is also difficult if the makeup of the Senate or House is different. Requiring Congress to submit to the legislative process a second time would invite the President to act with the hope that, by the time Congress has to reaffirm the statute, the makeup of Congress is more favorable to the President's party. Additionally, requiring Congress to reenact a law could severely destabilize the rule of law. For instance, if a law has been duly enacted and enforced by a former President, the next administration could simply refuse to enforce a law that the people have come to rely upon. This would threaten the rule of law because it would give the Executive the sole power to alter the country's entire legal landscape every four or eight years. The people's faith in the law would thus be diminished because the ability to predict and order life around the law could be dramatically changed by the whims of a single person. This harkens back to the very purpose the Take Care Clause was enacted: to restrict the Executive's suspension and dispensation power.¹⁸¹

Furthermore, if Congress must resort to these alternative remedies, it will likely thwart the structure of our democracy because it will skew political accountability. Instead of holding the President accountable for failing to execute the law, if the Court mandates that Congress must

¹⁷⁹ See *2014 Hearing*, *supra* note 140, at 93 (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law) (implying that alternative remedies “tilts the balance of powers unfairly toward the Executive” and creates a “perverse rule of law”).

¹⁸⁰ *Id.* at 93–94. Indeed, even if Congress did enact another law, affirming the former, there is no guarantee that the President would then enforce the law the second time around—or third or fourth or fifth time around. See *id.* at 93 (“Asking Congress to re-enact a law it has already enacted—hoping the President will faithfully execute it the second time around—is both inefficient and tilts the balance of powers unfairly toward the Executive . . .”).

¹⁸¹ See *supra* text accompanying notes 6–12.

exercise these alternative remedies, the electorate might see Congress as the troublemakers and therefore hold Congress, instead of the President, accountable through the electoral process. Resorting to these alternative remedies—instead of directly confronting the Executive with a lawsuit—may thus undermine the democratic process, which is premised on the principle of political commitment: holding elected representatives accountable for their actions.¹⁸²

Justice Scalia's alternative remedies also make enforcement of the law harder.¹⁸³ Requiring Congress to defund the very law the President has failed to enforce, or defund other congressionally enacted laws in order to compel the President to enforce the law is counterproductive.¹⁸⁴ If Congress desires to have its laws enforced, Congress should not be required to engage in self-defeating actions.¹⁸⁵

Similarly, impeachment proceedings are an extreme remedy to presidential nonenforcement. Courts should not encourage impeachment "as a[] preferable alternative to a peaceful judicial determination of constitutional parameters."¹⁸⁶ Primarily, the President may be a popular president whose performance is exemplary in every other area.¹⁸⁷ Judicial intervention is preferable to impeachment because it addresses the President's particular area of wrongdoing, instead of broadly attacking the President and, in effect, throwing the baby out with the bathwater. Further, even if Congress successfully impeaches the President, there is no guarantee that the next President would then enforce the law.¹⁸⁸

Invoking impeachment as an alternative remedy also does not square with the Court's reasoning in *Coleman*.¹⁸⁹ Instead of resorting to the courts, the Kansas legislature could have impeached the Lieutenant Governor for improperly breaking the senate's tied vote.¹⁹⁰ However, the Court recognized that impeachment would not have remedied the nullification injury.¹⁹¹ Thus, contrary to Justice Scalia's suggestion that impeachment is

¹⁸² See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 136 (1995).

¹⁸³ *2014 Hearing*, *supra* note 140, at 93 (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law).

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 93–94.

¹⁸⁸ *Id.* at 94.

¹⁸⁹ *See id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

a viable remedy for presidential misbehavior, impeachment should only be invoked in dire circumstances where judicial intervention has failed.¹⁹²

Additionally, remedies provided by private plaintiffs are unlikely.¹⁹³ It is uncertain whether an individual private plaintiff could sue over nonenforcement because the injury would be a generalized grievance shared by the rest of the population.¹⁹⁴ Even if the grievance were not generalized, a plaintiff would have to further argue that she is concretely harmed by the Executive's *absence* of action. Unlike Congress's loss of voting power, private plaintiffs have not lost anything they once had.¹⁹⁵ It is thus unlikely that the Court would hold that the *absence* of an action constitutes particular, concrete harm, giving a private plaintiff standing in instances of executive nonenforcement. Therefore, when the President fails to enforce the law, alternative remedies are inadequate.¹⁹⁶

B. Applying the Circuit Courts' Reasoning to Instances of Executive Nonenforcement

1. D.C. Circuit.—Because of the dearth of doctrine and unclear tests, federal courts have struggled to interpret the Supreme Court's precedent in *Raines* and *Coleman*. But even in the D.C. Circuit, which has been hesitant to grant standing to Congress, instances of presidential nonenforcement seem to satisfy the standards the D.C. Circuit has erected.

Vote nullification, not merely dilution, is required to establish standing. Vote nullification occurs when a vote has been "overridden and virtually held for naught"¹⁹⁷ or when "a vote that did not pass [is treated] as if it had, or vice versa."¹⁹⁸ Cases of nonenforcement exceed mere "dilution," as congressional action is annulled, canceled, or never actualized. Instances of executive nonenforcement fall squarely into this definition because the President treats votes that passed as if they had not

¹⁹² See *id.* at 93 ("[I]mpeachment . . . should be a *very last resort* . . .").

¹⁹³ See *id.* at 83–87.

¹⁹⁴ See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

¹⁹⁵ See *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); see also *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

¹⁹⁶ In *Raines*, the Court declined to find legislator standing because a private plaintiff, who did not raise a "dispute over the allocation of power between the political branches," could have brought suit (as later occurred in *Clinton v. City of New York*, 524 U.S. 417 (1998)). *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring in judgment). Because the existence of a private plaintiff is unlikely in instances of executive nonenforcement, if a court does not grant standing, the issue will remain entirely unresolved. 2014 *Hearing*, *supra* note 140, at 83, 87 (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law).

¹⁹⁷ *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

¹⁹⁸ *Campbell*, 203 F.3d at 22.

passed. Therefore, under the language and reasoning of *Campbell*, nonenforcement would constitute voter nullification.

As in *Raines*, the presence of alternative remedies factor into the D.C. Circuit's interpretation of vote nullification and weaken the likelihood that the court would grant standing. However, it is uncertain whether this factor is dispositive under *Campbell*, or whether a court would deny standing based solely on these factors, especially given the severity of vote nullification. Nevertheless the same alternative remedies analysis would apply here.¹⁹⁹ In *Campbell*, a resolution was defeated that would have forbidden the President to act, whereas in cases of nonenforcement a statute has already been enacted that depends upon the President's action. Indeed, in instances of nonenforcement, Congress *has* passed a directive instructing the President to act, and therefore should not be required to act again to force the President into compliance. As discussed, this tips the balance of powers further towards the Executive at the expense of Congress and may result in extreme, broad-brushed attempts to secure executive compliance.

However, a dispositive factor in the D.C. Circuit's standing analysis, and subsequently *Arizona State Legislature*'s analysis, centers around the number of members that sued.²⁰⁰ The D.C. Circuit rejected legislator standing because the members suing did not constitute a majority.²⁰¹ But instances in which a majority of Senate or House members sue over presidential nonenforcement seemingly would satisfy the D.C. Circuit and the *Arizona State Legislature*'s standing threshold.

Therefore, according to the D.C. Circuit's reasoning, it is likely that an instance of presidential inaction would satisfy the D.C. Circuit's legislative standing requirements.

2. *Sixth Circuit*.—The Sixth Circuit has taken an approach similar to the D.C. Circuit, emphasizing the amount of votes necessary to constitute vote nullification.²⁰² If a majority of the Senate or House sues over presidential nonenforcement, Congress as an institution has standing because it “possess[es] votes sufficient to have either defeated or approved the measure at issue,” constituting vote nullification, not merely vote

¹⁹⁹ See *supra* text accompanying notes 179–196.

²⁰⁰ See *Campbell*, 203 F.3d at 20, 23 (noting that a resolution to outlaw the use of U.S. forces was defeated 139–290 in Congress, but nevertheless disgruntled members of Congress in the minority sued, seeking a declaratory judgment against the President); *Chenoweth*, 181 F.3d at 117 (stating that “the Representatives do not allege that the necessary majorities in the Congress voted to block the AHRI”); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2664 (2015) (“The Arizona Legislature, in contrast [to *Raines*], is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers.”).

²⁰¹ *Chenoweth*, 181 F.3d at 117.

²⁰² See *Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001).

dilution.²⁰³ It is not necessary for the majority of both houses of Congress to be represented in the action, but rather only a majority from one house to constitute the number of necessary votes.²⁰⁴ Therefore, if the President refuses to enforce the law, a suit from a majority of the Senate or House would possess the necessary votes to constitute vote nullification.

C. Article III Standing for Executive Nonenforcement

This Section contends that congressional lawsuits for executive nonenforcement satisfy the three Article III requirements for standing: (1) injury in fact, (2) causation, and (3) redressability.²⁰⁵ Each of these requirements is discussed below.

1. *Injury in Fact.*—The nullification of a majority of house members' votes constitutes an injury in fact.²⁰⁶ Courts also assess whether the President's action (or lack of action) has reduced Congress's legislative powers as an institution—not merely reduced the powers of individual members.²⁰⁷ In instances of executive nonenforcement, the President's inaction of ignoring the statute's express language takes the practical form of a congressional repeal—a task that is constitutionally solely reserved for Congress. Therefore, because the majority of Congress's votes have been nullified and its power as an institution has been reduced, Congress as an institution is injured by the Executive's dereliction of his duty to enforce duly enacted law.

2. *Causation and Redressability.*—Most courts have not been presented with legislative standing cases in which the injury in fact threshold was satisfied, and thus have not analyzed the other Article III requirements: causation and redressability. In one of the few cases granting standing, however, the Tenth Circuit reasoned that causation and redressability are satisfied when the legislature's authority to make laws is

²⁰³ *Id.*; see also *Ariz. State Legislature*, 135 S. Ct. at 2664–65.

²⁰⁴ *Baird*, 266 F.3d at 412–13 (“Under *Raines*, however, if Baird’s lawsuit had been joined by other members of the Michigan House of Representatives whose total votes (and non-votes) would have been sufficient to defeat the necessary legislation, then this group of lawmakers, like the twenty state senators in *Coleman*, would have had standing as legislators based on vote nullification. If, for example, Baird had been joined by eight of the fifteen members of the Michigan House who did not vote when CR 115 was passed, then their non-votes, coupled with the forty-seven votes actually cast against CR 115, would have been sufficient to defeat the legislation that Baird claims is constitutionally required—i.e., eight of the non-votes, plus forty-seven ‘nay’ votes, effectively equals fifty-five votes against the measure under the Michigan Constitution’s requirement that a majority of all votes is necessary to enact legislation.”).

²⁰⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

²⁰⁶ See *Raines v. Byrd*, 521 U.S. 811, 823 (1997); see also *Ariz. State Legislature*, 135 S. Ct. at 2664–65.

²⁰⁷ See *Campbell v. Clinton*, 203 F.3d 19, 21–23 (D.C. Cir. 2000).

reinstated.²⁰⁸ In *Kerr v. Hickenlooper*, several state legislators challenged the constitutionality of the Taxpayers Bill of Rights (TABOR), an amendment to the Colorado state constitution.²⁰⁹ TABOR was adopted via voter referendum and forbade state and local legislators from increasing tax rates without voter approval.²¹⁰ The court held that these legislators alleged a sufficient injury in fact to grant standing and determined that causation and redressability were likewise satisfied because the nullification of TABOR would give the legislators the ability to directly vote for increased taxes without the threat of invalidation from state voters.²¹¹

By mandating that the President enforce the law, courts reinstate the legislature's authority to make laws, which adequately redresses the legislature–plaintiff's injury. Whereas in *Kerr*, the Tenth Circuit forbade state officers from enforcing the constitutional amendment, here, courts could require executive officers to enforce the law, redressing the plaintiff's injury.²¹²

In *Arizona State Legislature*, the Court also ruled that causation and redressability were satisfied. The Court noted that Proposition 106's conferral of authority to the Commission instead of the state legislature “strips the Legislature of its alleged prerogative to initiate redistricting” and reasoned that the legislature's redistricting power would be remedied by an order enjoining Proposition 106's enforcement.²¹³ Just as the Arizona legislature's allegedly unique power over redistricting would be remedied by a court order enjoining enforcement, Congress's power over legislating would be remedied by a court order mandating executive enforcement.

²⁰⁸ *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem.). Although the Supreme Court vacated *Kerr* in light of *Arizona State Legislature*, this was seemingly done for the lack of an institutional plaintiff. See *Ariz. State Legislature*, 135 S. Ct. at 2664–65. In theory, if Colorado's General Assembly, instead of several individual legislators, initiated a similar lawsuit, the Court would likely grant standing and this same reasoning on causation and redressability could likely be applied. As one of the few cases that discusses causation and redressability in a congressional–plaintiff lawsuit, the Court's causation and redressability analysis is thus still relevant to this discussion, and in the least, serves as a blueprint for future courts that may analyze these requirements of Article III standing. Furthermore, it should be noted that *Arizona State Legislature* did not reverse *Kerr*. At the writing of this Note, the significance of this remand is still unclear.

²⁰⁹ *Kerr*, 744 F.3d at 1161.

²¹⁰ *Id.*

²¹¹ *Id.* at 1171.

²¹² *Cf. id.* It should be noted, however, that this causal link may be weakened when Congress does not sufficiently fund the Executive Branch so that it may execute the law. Therefore, courts could likely only require the Executive Branch to enforce the law in clear-cut cases of Executive nonenforcement—not in cases of permissible prosecutorial discretion. See *supra* note 50 for a discussion of this delineation.

²¹³ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015).

Therefore, according to the language and reasoning of various courts, it would seem that Congress would have standing in instances of presidential inaction.

IV. POLITICAL QUESTION DOCTRINE

It is less certain that the judiciary is the appropriate body to remedy Congress's injury, on the other hand. The courts traditionally have not been eager to involve themselves in such institutional disputes because they do not want to be seen as taking sides in a political war.²¹⁴

This Part responds to these concerns. First, this Part discusses the essence of the political question doctrine and addresses the effect of the political question doctrine on cases initiated by congressional plaintiffs. Lastly, this Part considers the viability of political remedies in instances of executive nonenforcement.

A. The Political Question Doctrine and Legislative Standing

The political question doctrine is a judge-made doctrine that places certain political questions beyond the court's reach, making the action nonjusticiable.²¹⁵ In *Baker v. Carr*, the Court announced a test to determine whether a question is political in nature, reasoning that there must be:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²¹⁶

For the suit to be within the reach of the political question doctrine and thus left to the political process, one of these conditions must exist.²¹⁷

Although the political question doctrine is evaluated independently from the congressional standing analysis, it typically becomes relevant in

²¹⁴ See, e.g., *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912) (holding that the case was not within the Court's jurisdiction "[a]s the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power").

²¹⁵ For a critique of the political question doctrine, see Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985).

²¹⁶ 369 U.S. 186, 217 (1962).

²¹⁷ *Id.*

congressional standing cases where standing is granted.²¹⁸ In *Coleman*, the Court did not reach a conclusion regarding the applicability of the political question doctrine on suits initiated by legislator plaintiffs.²¹⁹ Instead, the Court allowed the lawsuit to proceed, refraining from dismissing the suit on nonjusticiability grounds.²²⁰ Suits initiated by congressional plaintiffs, therefore, are not per se barred by the political question doctrine, and indeed, courts have upheld legislative suits regardless of the political question doctrine's relevance. The reach of the political question doctrine on legislative suits, however, is still being shaped.²²¹

B. *The Inadequacy of Political Remedies*

In 2014, Senator Ron Johnson filed a lawsuit against the President for requiring legislators and their staff to enroll in the new Affordable Care Act exchanges.²²² In *Johnson v. United States Office of Personnel Management*, a district judge dismissed Senator Johnson's suit for lack of standing.²²³ The court reasoned that "there is nothing in the Constitution stipulating that all wrongs must have remedies, much less that the remedy must lie in federal court. In fact, given the Constitution's parsimonious grant of judicial authority, just the opposite is true."²²⁴ Rather, the judge stated that the political process is the best remedial tool.²²⁵

²¹⁸ See, e.g., *U.S. House of Representatives v. Burwell*, No. 14-1967 (RMC), 2015 WL 5294762, at *21–22 (D.D.C. Sept. 9, 2015) (granting the U.S. House of Representatives standing and dismissing political question doctrine concerns); *Kerr v. Hickenlooper*, 744 F.3d 1156, 1175–76 (10th Cir. 2014) (maintaining that the legislators' suit was not barred by the political question doctrine), *vacated on other grounds*, 135 S. Ct. 2927 (2015) (mem.). But see *Baird v. Norton*, 266 F.3d 408 (6th Cir. 2001) (not discussing the political question doctrine because the court dismissed the legislators' suit for lack of standing); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (dismissing the legislator's suit for lack of standing and not discussing the political question doctrine in the majority opinion); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) (holding that legislators lacked standing and not discussing the political question doctrine).

²¹⁹ *Coleman v. Miller*, 307 U.S. 433, 447 (1939) (finding legislator standing and discussing the relevance of the political question doctrine, but ultimately concluding that the "Court is equally divided" on the issue and therefore "expresses no opinion upon that point").

²²⁰ *Id.*

²²¹ See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015) ("[A] suit between Congress and the President would raise separation-of-powers concerns . . .").

²²² Ryan Lovelace, *Senator Ron Johnson Appealing his Decision that Dismissed His Lawsuit Against President Obama*, NAT'L REV.: THE CORNER (Aug. 4, 2014, 3:56 PM) <http://www.nationalreview.com/corner/384547/senator-ron-johnson-appealing-decision-dismissed-his-lawsuit-against-president-obama> [<http://perma.cc/DMB2-GXE6>].

²²³ No. 14-C-0009 (E.D. Wis. July 21, 2014), *aff'd*, 783 F.3d 655 (7th Cir. 2015).

²²⁴ *Id.* at 17.

²²⁵ *Id.* at 17–18.

Along those same lines, in *Arizona State Legislature*, Justice Scalia criticized the majority's decision, which conferred standing to the Arizona legislature.²²⁶ According to Scalia, political disputes between different branches of government do not constitute "cases" or "controversies."²²⁷ Rather, the Constitution only authorizes the courts to decide disputes regarding the rights of individuals.²²⁸ As an early commentator on the American government and Constitution, Alexander de Tocqueville noted the role of the judiciary in adjudicating private disputes. De Tocqueville reasoned that by confining courts to preside over an individual's trial, "legislation is protected from wanton assaults and from the daily aggressions of party spirit."²²⁹ If a judge confronted legislators, a judge would unnecessarily involve himself in the political process because "he would sometimes be afraid to oppose [the legislator]; and at other times party spirit might encourage him to brave it at every turn."²³⁰ Instead, the American system keeps judges at bay: A judge is called into the political sphere "independently of his own will" and "[t]he political question that he is called upon to resolve is connected with the interests of the parties."²³¹ Judges therefore intervene in the political process to adjudicate cases only insofar as they must resolve the constitutional violations and bring justice to remedy the party's alleged injury.²³²

Illustrating de Tocqueville's point, Justice Scalia discusses examples of separation of powers cases, which if the majority is correct, "took an awfully circuitous route to get here."²³³ Indeed, in these cases, an institutional body such as the President or the Senate could have directly sued the other branch of government to obtain relief.²³⁴ Instead, the Court heard cases on behalf of injured private plaintiffs.²³⁵ Justice Scalia's analysis thus hinges on the availability of a private plaintiff to bring suit to address the injury.

²²⁶ 135 S. Ct. at 2694 (Scalia, J., dissenting).

²²⁷ *Id.*

²²⁸ *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

²²⁹ *Id.* (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (Phillips Bradley ed., 1945)).

²³⁰ *Id.* (quoting DE TOCQUEVILLE, *supra* note 229, at 102).

²³¹ *Id.* (quoting DE TOCQUEVILLE, *supra* note 229, at 103).

²³² *See id.* (quoting DE TOCQUEVILLE, *supra* note 229, at 103).

²³³ *Id.* at 2695 (first discussing *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); then discussing *Wellness Int'l Network, Ltd., v. Sharif*, 135 S. Ct. 1932 (2015); and then discussing *NLRB v. Canning*, 134 S. Ct. 2550 (2014)).

²³⁴ *Id.*

²³⁵ *See id.*

But a private plaintiff is unavailable in instances of executive nonenforcement.²³⁶ Although the cases Justice Scalia mentions took a circuitous route, in instances of nonenforcement, there is simply no route to relief unless the Court grants Congress standing. The cases Justice Scalia references were rightly brought by private plaintiffs and kept the judiciary from unnecessarily involving itself in the political arena, but when the Executive refuses to enforce the law and no private plaintiff exists, the judiciary is likewise relegated to the outskirts of the political arena. In instances of executive nonenforcement, judges are therefore called to enter into the public square in limited circumstances, independently of their will and only insofar as they adjudicate the rights of the injured party.²³⁷ Similar to a suit by a private plaintiff, aggressions of the party spirit would be curbed because the judiciary would not be called upon to attack the wisdom of legislation, but simply to interpret and apply the Constitution's mandate that the President take care of the laws.²³⁸

Further, it is the duty of the judiciary to police the boundaries of each branch of government to maintain separation of powers and prevent one branch from unconstitutionally aggregating the power of another.²³⁹ Indeed, majoritarian branches should not be their own arbitrators.²⁴⁰

In cases of presidential nonenforcement, political remedies have already been attempted and failed. Specifically, by electing their representatives, the people have already spoken through their representatives that they desire the enforcement of certain legislation. For this reason, it seems unreasonable to require that the citizenry wait until the next election cycle to remove the President for failing to enforce the law.²⁴¹ Similar to the problems entailed in requiring a majoritarian remedy such as

²³⁶ See *supra* text accompanying notes 193–196.

²³⁷ See DE TOCQUEVILLE, *supra* note 229, at 102–03.

²³⁸ See *id.*

²³⁹ *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (“[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”); REDISH, *supra* note 182, at 3–4; Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991) (describing the role of the judiciary to police the branches from exercising authority outside their constitutionally delineated powers).

²⁴⁰ See REDISH, *supra* note 182, at 170 n.28 (“But our nation’s founders consciously rejected the British system by choosing to adopt a formal, written, countermajoritarian constitution. The function of formally controlling the majoritarian branches by means of a written constitution would thus be undermined absent judicial review.”); Redish & Cisar, *supra* note 239, at 493–94 (“Because of its uniquely insulated position, the judiciary is especially suited to enforce the provisions of a counter-majoritarian Constitution.” (footnote omitted)).

²⁴¹ Although the length of litigation is typically long and may not even be complete by the next election cycle, in the very least, the threat or the initiation of a lawsuit would encourage presidents to enforce the law.

impeachment, a president may otherwise preform her job well, so requiring the political process to remove the President would be too broad a solution to remedy the particular instance of nonenforcement.²⁴²

Any solution whereby Congress must act again to affirm its desire to have the Executive enforce the law wrongly sets a presumption in favor of nonenforcement. Once it is established as precedent that Congress must reaffirm its already expressed will, then the question becomes quantitative and qualitative—how many times must Congress reaffirm itself or how much has Congress demonstrated its desire for enforcement? This would construct a new presumption that unless Congress *really* expresses its desire to have the laws enforced, the Executive is under no obligation to enforce the law.²⁴³ This, however, reads the Take Care Clause entirely out of the Constitution and returns us to an era where the Executive retained the tyrannical powers of suspension and dispensation of the laws.²⁴⁴ Political remedies are therefore inadequate for addressing executive nonenforcement.

Finally, judicial intervention in political disputes is not novel. Courts have previously reviewed inaction with the school desegregation cases, mandating executive action without usurping executive functions.²⁴⁵ Just as ordering executive action in the past has succeeded, court-ordered executive action in instances of presidential nonenforcement could succeed as well.

CONCLUSION

The Take Care Clause imposes a duty on all presidents to faithfully enforce the law. The President cannot act as a policymaker by dispensing or suspending the law. Amending and repealing legislation is a role solely reserved for Congress. With increasing frequency, however, presidents and presidential candidates have aggregated legislative power to themselves, in effect repealing laws by failing to enforce them. Congress thus needs a way to assert its unique legislative role and reorient the balance of powers that the Executive has skewed towards itself.

The nonmajoritarian branch—the courts—should take on this responsibility. On a doctrinal level, federal courts precedent indicates that the courts would grant congressional standing in instances of presidential

²⁴² See *supra* text accompanying notes 186–191.

²⁴³ See *2014 Hearing*, *supra* note 140, at 93 (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law).

²⁴⁴ See *supra* text accompanying notes 6–12.

²⁴⁵ Sunstein, *supra* note 49, at 671 n.108 (1985) (first citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); and then citing *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955)).

nonenforcement. By not enforcing duly enacted legislation, the Executive nullifies legislators' votes because it treats votes that should have gone into effect as if they did not go into effect. This surpasses mere voter dilution, constituting vote nullification, and thus establishing an injury in fact. Courts may redress this injury by mandating that the Executive enforce the law as written. Therefore, injury, causation, and redressability are satisfied, establishing congressional standing.

On a policy level, the courts provide specified recourse, defining and addressing the parameters of the Executive's misconduct without resorting to extreme and broad-brushed remedies. Courts also have the capacity to delineate between executive discretion, as applied equitably on a case-by-case basis, and executive nonenforcement, which takes the form of a unilateral waiver of a provision or statute without regard to the merits of the circumstance. Courts should therefore grant institutional standing to Congress to protect the separation of powers inherent in our Constitution and uphold Congress's unique legislative role.

