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### Justice Scalia's Other Standing Legacy

Felicia A. Burton

*College of William and Mary - School of Law, SSRNeditor@wm.edu*

Tara Leigh Grove

*University of Alabama - School of Law, tgrove@law.ua.edu*

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# WILLIAM & MARY LAW SCHOOL

## JUSTICE SCALIA'S OTHER STANDING LEGACY

**Tara Leigh Grove**  
William & Mary Law School

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## Justice Scalia's Other Standing Legacy

Tara Leigh Grove†

Everyone in the legal community knows about *Lujan v Defenders of Wildlife*.<sup>1</sup> Indeed, few decisions in Article III standing jurisprudence are as noteworthy (or as notorious) as Justice Antonin Scalia's opinion for the Court in *Lujan*, which restricted Congress's power to confer standing on private individuals.<sup>2</sup> The Court held that Article III requires plaintiffs to assert a "concrete injury" and accordingly struck down a citizen-suit provision that permitted "any person" to bring suit to enforce federal environmental law.<sup>3</sup>

*Lujan* has provoked significant academic commentary (much of it critical).<sup>4</sup> But another line of opinions may prove, in the long run, to be equally significant. Scalia was also (indeed, perhaps more) skeptical of a very different type of litigant: government institutions. Suits brought by, and between, federal and state governments are a growing breed. Just to offer a few examples: In *United States v Windsor*,<sup>5</sup> the federal executive faced off against

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† Professor of Law, William and Mary Law School; Visiting Professor, Harvard Law School. I am grateful to Curt Bradley, Aaron Bruhl, Neal Devins, Vicki Jackson, Alli Larsen, Henry Monaghan, Jonathan Nash, and Jim Pfander for helpful comments on earlier drafts. I also appreciate the suggestions of participants at a faculty workshop at William and Mary Law School.

<sup>1</sup> 504 US 555 (1992).

<sup>2</sup> See id at 571–78 (holding that private individuals must demonstrate concrete injury and that Congress could not through a citizen-suit provision confer standing on "any person" to enforce the Endangered Species Act). See also James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 *British J Am Legal Stud* 85–107 (2017) (emphasizing the considerable impact of Scalia's opinion in *Lujan*).

<sup>3</sup> *Lujan*, 504 US at 571–78.

<sup>4</sup> See, for example, Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 *Mich L Rev* 163, 235 (1992) (arguing that "Congress can create standing as it chooses and, in general, can deny standing when it likes"). See also Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 *BU L Rev* 159, 174–77 (2011) (discussing aspects of the debate over *Lujan*). My prior work has defended the Court's decision. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 *U Pa J Const L* 781, 831–33 (2009) (arguing that "Congress may not confer standing via citizen-suit provisions that transfer to private parties the Executive Branch's duty to see that federal law is obeyed") (quotation marks omitted). But that is not my focus here.

<sup>5</sup> 133 S Ct 2675 (2013).

the House of Representatives over the constitutionality of the Defense of Marriage Act<sup>6</sup> (DOMA).<sup>7</sup> In *Massachusetts v Environmental Protection Agency*<sup>8</sup> and *Texas v United States*,<sup>9</sup> state governments brought suit to contest the executive branch's failure to enforce federal environmental and immigration law, respectively.<sup>10</sup> And in *United States House of Representatives v Burwell*,<sup>11</sup> one chamber of Congress challenged the federal executive's implementation of the Patient Protection and Affordable Care Act<sup>12</sup> (ACA).<sup>13</sup>

Scalia objected to this new crop of intergovernmental disputes for many of the same reasons he advocated limits on private party standing. In both lines of cases, the Justice was driven by an overriding concern about restraining federal judicial power. Thus, in *Lujan*, Scalia urged that standing requirements "identif[y] those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches," and thereby confine "the Third Branch" to its proper sphere.<sup>14</sup> He emphasized the same point in government standing cases: "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.' It keeps us minding our own business."<sup>15</sup>

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<sup>6</sup> Pub L No 104-199, 110 Stat 2419 (1996), codified at 1 USC § 7.

<sup>7</sup> *Windsor*, 133 S Ct at 2683–84. After the executive branch declined to defend DOMA, the House of Representatives intervened to defend the law. *Id.* The Supreme Court held that the executive had standing to appeal a lower-court decision invalidating DOMA (despite its refusal to defend the law) and did not comment on the House's standing. See *id.* at 2686, 2888. But Scalia and Justice Samuel Alito separately debated the House's standing. See *id.* at 2698 (Scalia dissenting); *id.* at 2711 (Alito dissenting). I discuss *Windsor* in more detail in Part II.A.

<sup>8</sup> 549 US 497 (2007).

<sup>9</sup> 787 F3d 733 (5th Cir 2015), *aff'd* by equally divided court, 136 S Ct 2271 (2016).

<sup>10</sup> See *Massachusetts*, 549 US at 505–06 (upholding state standing in a suit challenging the EPA's failure to regulate motor vehicle emissions); *Texas*, 787 F3d at 748–54 (upholding state standing to challenge the federal executive's Deferred Action for Parents of Americans and Lawful Permanent Residents program).

<sup>11</sup> 130 F Supp 3d 53 (DDC 2015).

<sup>12</sup> Pub L No 111-148, 124 Stat 119 (2010).

<sup>13</sup> See *Burwell*, 130 F Supp 3d at 57–58 (upholding the House's standing to challenge the executive branch's alleged misuse of appropriated funds, but denying standing to challenge the executive's delays in implementing the ACA).

<sup>14</sup> *Lujan*, 504 US at 576. See also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U L Rev 881, 881 (1983) ("[T]he judicial doctrine of standing is a crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance.").

<sup>15</sup> *Arizona State Legislature v Arizona Independent Redistricting Commission*, 135 S Ct 2652, 2695 (2015) (Scalia dissenting) (citation omitted), quoting *Allen v Wright*, 468 US 737, 750 (1984). See also *Arizona State Legislature*, 135 S Ct at 2694 (Scalia

This emphasis on judicial overreach drove much of Scalia's jurisprudential philosophy. He was perplexed by what he saw as the modern Supreme Court's "Never Say Never Jurisprudence," that is, the Court's apparent unwillingness to "admit[] that some matters—*any* matters—are none of its business."<sup>16</sup> But in his effort to rein in the federal judiciary, Scalia may have overlooked a deeper problem. In upholding government standing claims, the federal judiciary has not imposed itself on unwilling participants. On the contrary, in recent decades, federal and state government institutions have invited (indeed, urged) the federal courts to resolve their disputes, rather than settling their issues through the political process.

But therein lies a potentially greater threat to the constitutional separation of powers. Building on prior work,<sup>17</sup> this Essay suggests that the rise in "government versus government" lawsuits is a symptom of two related (and, to my mind, troubling) developments in our constitutional separation of powers. First, there has been an ever-increasing reliance on the judiciary to settle controversial issues. Second, there has been a corresponding decline of faith in the political process. To the extent these trends continue—and courts become embroiled in more and more political disputes—that may not bode well for the long-term independence of "the Third Branch." Standing restrictions, after all, are designed not only to constrain the federal courts but also to protect them.

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dissenting) ("Disputes between governmental branches or departments regarding the allocation of political power do not in my view constitute 'cases' or 'controversies' committed to our resolution by Art. III, § 2, of the Constitution.").

<sup>16</sup> *Sosa v Alvarez-Machain*, 542 US 692, 750 (2004) (Scalia concurring) (making this comment in a case allowing the federal judiciary to hold that some customary international-law claims are actionable under the Alien Tort Statute).

<sup>17</sup> My earlier articles advocated limits on government standing. The arguments rest primarily on constitutional text, structure, history, and doctrine. But those articles also suggest that there are important prudential reasons to be wary of government standing. This Essay expands on that line of thinking. See Tara Leigh Grove, *Standing outside of Article III*, 162 U Pa L Rev 1311, 1314–16 (2014) (arguing that Article II and Article I help define the scope and limits of executive and legislative standing to represent the United States); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 Cornell L Rev 851, 857 (2016) (arguing that states have broad standing to protect state law, including in suits against the federal government, but no "special" power—that is, no greater power than private parties—to challenge the federal executive's implementation of federal law); Tara Leigh Grove and Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L Rev 571, 627–28 (2014) (arguing that structural principles, particularly bicameralism and the separation of law enactment from law implementation, "help explain why the House and the Senate have standing to enforce committee subpoenas but lack standing to defend federal laws").

## I. SCALIA ON THE "NEW" GOVERNMENT STANDING

This Essay focuses on the rise in intergovernmental disputes and the accompanying effort to expand government standing. To be sure, government litigants often do have standing to bring suit in federal court. For example, governments can suffer concrete injuries in fact just like private parties—if, for example, someone breaches a contract with the government or trespasses on government-owned land.<sup>18</sup> Moreover, governments are in some respects “special” litigants, who can invoke federal jurisdiction even when private parties cannot. The Supreme Court has long recognized that a government (at least when represented by its executive branch)<sup>19</sup> may enforce or defend its laws, absent any showing of concrete injury.<sup>20</sup> That is, in sharp contrast to a private party, a government official often has standing simply to “see[ ] that the law is obeyed.”<sup>21</sup>

Recent cases, however, have pushed on these traditional boundaries of government standing. In *Windsor*, for example, the executive claimed standing not only when it defended but also when it *refused* to defend a federal statute.<sup>22</sup> In *Burwell*, a

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<sup>18</sup> See generally, for example, *United States v Estate of Hage*, 810 F3d 712 (9th Cir 2016) (holding that the plaintiff was liable to the United States for trespassing on federal lands).

<sup>19</sup> The Supreme Court has also suggested that a state legislature may have standing to defend state law on behalf of a state, although private parties lack such standing. See *Arizonans for Official English v Arizona*, 520 US 43, 65 (1997) (“[S]tate legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State’s interests.”), citing *Karcher v May*, 484 US 72, 82 (1987). There is considerable debate as to whether a chamber of Congress may represent the United States in court. I have argued that is not permissible. See Grove, 162 U Pa L Rev at 1353–65 (cited in note 17).

<sup>20</sup> See *United States v Raines*, 362 US 17, 27 (1960) (holding that the federal executive branch has standing to enforce civil rights laws, at least when authorized by Congress); *In re Debs*, 158 US 564, 583–84, 599–600 (1895) (upholding executive standing to prevent interference with the transport of US mail); *Maine v Taylor*, 477 US 131, 137 (1986) (upholding state standing to defend state law on the ground that “a State clearly has a legitimate interest in the continued enforceability of its own statutes”). See also *Alfred L. Snapp & Son v Puerto Rico*, 458 US 592, 601 (1982) (recognizing state standing to protect such sovereign interests).

<sup>21</sup> *Federal Election Commission v Akins*, 524 US 11, 24 (1998) (holding that private plaintiffs lack standing to assert “abstract” “generalized grievance[s]” like “the interest in seeing that the law is obeyed”). See also *Lujan*, 504 US at 573–74:

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

<sup>22</sup> See *Windsor*, 133 S Ct at 2684–89.

chamber of Congress asserted that it was “injured”—and could sue the federal executive—when the executive (allegedly) misapplied federal law.<sup>23</sup> And in *Massachusetts* and *Texas*, state governments claimed “special” standing not simply to enforce and defend their own state laws but also to challenge the federal executive’s handling of federal law.<sup>24</sup> This new crop of intergovernmental litigation is my focus in this Essay and, as described below, was of deep concern to Justice Scalia.

Scalia first expressed his discomfort with government standing as a judge on the DC Circuit. The court of appeals at that time permitted legislators to assert certain “institutional injuries”—that is, claims of harm to their official powers or duties. For example, the court found that a group of senators “suffered injury in fact” when President Jimmy Carter terminated a treaty without Senate consent.<sup>25</sup> In a 1984 concurrence in *Moore v United States House of Representatives*,<sup>26</sup> then-Judge Scalia declared: “Such a dispute has no place in the law courts.”<sup>27</sup> “[N]o officers of the United States, of whatever

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<sup>23</sup> See *Burwell*, 130 F Supp 3d at 57–58.

<sup>24</sup> See *Massachusetts*, 549 US at 505–06, 518 (upholding state standing in a suit challenging the EPA’s failure to regulate motor vehicle emissions); *Texas*, 787 F3d at 743, 748–54 (upholding state standing to challenge the federal executive’s Deferred Action for Parents of Americans and Lawful Permanent Residents program).

<sup>25</sup> See *Goldwater v Carter*, 617 F2d 697, 701–03 (DC Cir 1979) (“By excluding the Senate from the treaty termination process, the President has deprived each individual Senator of his alleged right to cast a vote that will have binding effect on whether the Treaty can be terminated.”). See also *Kennedy v Sampson*, 511 F2d 430, 433–36 (DC Cir 1974) (holding that an individual senator had standing to challenge the president’s pocket veto of a bill that the senator supported). Notably, a plurality of the Supreme Court later dismissed the suit in *Goldwater* as presenting a nonjusticiable political question and did not reach the standing issue. See *Goldwater v Carter*, 444 US 996, 1002–06 (1979) (Rehnquist concurring in the judgment).

<sup>26</sup> 733 F2d 946 (DC Cir 1984). In *Moore*, eighteen members of the House of Representatives brought suit to challenge the Tax Equity and Fiscal Responsibility Act of 1982 as a violation of the Origination Clause. See *id* at 948. The panel majority found that the plaintiffs had standing but dismissed their suit under the equitable discretion doctrine that the court of appeals at the time applied to legislative standing. See *id*. See also *id* at 951–52 (“The appellants allege a specific injury in fact to a cognizable legal interest: the deprivation of an opportunity to debate and vote on the origination of [the statute] in the House.”).

<sup>27</sup> *Moore*, 733 F2d at 957 (Scalia concurring in result). See also *id* at 959 (Scalia concurring in result), quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 170 (1803):

[W]e sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those [disputes] . . . harm[] private rights, it is no part of our constitutional province, which is “solely, to decide on the rights of individuals.”

Branch, . . . have a judicially cognizable private interest” in “their governmental powers.”<sup>28</sup>

Scalia maintained this antagonism toward government standing throughout his career on the Supreme Court. He joined the Court's opinion in *Raines v Byrd*,<sup>29</sup> which held that a group of legislators lacked standing to challenge the Line Item Veto Act<sup>30</sup> and (much like Scalia's opinion in *Moore*) strongly questioned whether government officials could ever allege an “injury to official authority or power.”<sup>31</sup> Likewise, Scalia endorsed Chief Justice John Roberts's dissenting opinion in *Massachusetts*, which insisted that the state lacked standing to object to the federal agency's implementation of federal environmental law.<sup>32</sup> But Scalia's most emphatic declarations on government standing came in 2013 and 2015, when he dissented from the Supreme Court's exercise of jurisdiction in *Windsor* and *Arizona State Legislature v Arizona Independent Redistricting Commission*.<sup>33</sup>

*Windsor* involved a challenge to DOMA, which prohibited the federal government from recognizing same-sex marriages for purposes of federal law.<sup>34</sup> The case raised questions of both executive and legislative standing. The Court held that the executive had standing to appeal a lower-court decision invalidating DOMA,<sup>35</sup> even though the executive declined to defend the law, and in fact insisted that the statute “violat[e]d

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<sup>28</sup> *Moore*, 733 F2d at 959 (Scalia concurring).

<sup>29</sup> 521 US 811 (1997).

<sup>30</sup> Pub L No 104-130, 110 Stat 1200 (1996).

<sup>31</sup> *Raines*, 521 US at 814, 817, 821, 826, 829–30. See also *id* at 821 (emphasizing that “appellees’ claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete”). The Court emphasized that historical practice cut strongly against such a claim. See *id* at 826–28 (asserting that in past “confrontations between one or both Houses of Congress and the Executive Branch,” involving the president's removal power, the pocket veto, and the legislative veto, “no suit was brought on the basis of claimed injury to official authority or power”; instead, the issues were brought to the judiciary by “plaintiff[s] with traditional Article III standing”). The Court did “attach some importance” to the fact that the legislators’ challenge was not approved by their respective chambers; instead, the House and Senate counsel opposed the suit. *Id* at 829–30. But the Court did not opine on whether the institutions would have had standing.

<sup>32</sup> *Massachusetts*, 549 US at 549 (Scalia dissenting) (stating that he joined Roberts's dissenting opinion “in full, and would hold that this Court has no jurisdiction to decide this case because petitioners lack standing”).

<sup>33</sup> 135 S Ct 2652 (2015).

<sup>34</sup> *Windsor*, 133 S Ct at 2682.

<sup>35</sup> *Id* at 2686 (“[T]he United States retains a stake sufficient to support Article III jurisdiction on appeal.”).



the fundamental constitutional guarantee of equal protection.”<sup>36</sup> The *Windsor* majority did not rule on the standing of the House of Representatives, which intervened in the litigation to defend the law in place of the executive.<sup>37</sup> But Justice Samuel Alito separately argued that the House had standing to appeal.<sup>38</sup> He reasoned that the House of Representatives had suffered an “injury in fact” because the lower-court decision striking down DOMA “limited Congress’ power to legislate.”<sup>39</sup>

Scalia disagreed on both counts. He argued that the Court lacked jurisdiction over the executive’s appeal because there was no adversity between the executive and the private plaintiff Edith Windsor; both sought the invalidation of DOMA.<sup>40</sup> (Although Scalia focused on the lack of adverseness, I have elsewhere argued that the primary jurisdictional obstacle was standing: the executive branch lacks standing to appeal when it refuses to defend a federal law.)<sup>41</sup> But Scalia was equally dismissive of the idea that the House of Representatives might have standing to defend DOMA in the executive’s stead. He scoffed at Alito’s assertion that the lower-court decision had “impair[ed] Congress’ legislative power” by striking down the federal law.<sup>42</sup> Scalia insisted that “the impairment of a branch’s

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<sup>36</sup> Brief for the United States on the Merits Question, *United States v Windsor*, Docket No 12-307, \*12 (US filed Feb 22, 2013) (available on Westlaw at 2013 WL 683048).

<sup>37</sup> See *Windsor*, 133 S Ct at 2688.

<sup>38</sup> Id at 2714 (Alito dissenting) (“[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.”).

<sup>39</sup> See id at 2712–13 (Alito dissenting).

<sup>40</sup> Id at 2700–01 (Scalia dissenting) (“Article III requires not just a plaintiff (or appellant) who has standing to complain but an *opposing party* [to create a] controversy.”).

<sup>41</sup> See Grove, 162 U Pa L Rev at 1335–45 (cited in note 17). There are reasons to doubt Scalia’s assertion that “adverseness” is an Article III requirement. See id at 1336–38 (urging that such a requirement would enable a defendant to defeat a plaintiff’s case simply by not mounting any defense, and thereby bar default judgments); James E. Pfander and Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-contentious Jurisdiction*, 124 Yale L J 1346, 1416–40 (2015) (arguing, based on historical evidence, that Article III does not require “adverse parties” in all cases). But see Martin H. Redish and Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U Chi L Rev 545, 546–48, 563–88 (2006) (contending that Article III requires at least some adverseness between the parties).

<sup>42</sup> *Windsor*, 133 S Ct at 2703–05 (Scalia dissenting). See also id at 2712–13 (Alito dissenting).

powers alone . . . does not, and never has” sufficed for standing purposes.<sup>43</sup>

In *Arizona State Legislature*, the Supreme Court held that the state legislature had standing to protect its institutional interest in regulating the electoral process.<sup>44</sup> The majority found that the Elections Clause, which allows a state legislature to regulate the “times, places and manner”<sup>45</sup> of federal elections, (arguably) gave that body an institutional interest in controlling the process; thus, the Arizona legislature was “injured” when its state constitution transferred that power to an independent commission.<sup>46</sup> Once again, Scalia was incensed. Much as he had in *Moore* and *Windsor*, the Justice insisted: “Disputes between governmental branches or departments regarding the allocation of political power do not . . . constitute ‘cases’ or ‘controversies’ committed to our resolution by Art. III.”<sup>47</sup>

Throughout these opinions, Scalia was driven by a concern about judicial overreach. He complained that the majority in *Windsor* found jurisdiction because it was “eager—*hungry*—to tell everyone its view of the legal question at the heart of this case.”<sup>48</sup> The majority “envision[ed] a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere ‘primary’ in its role.”<sup>49</sup> Likewise, authorizing legislative standing—as Alito sought to do—would “similarly elevate[ ] the

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<sup>43</sup> Id at 2703–04 (Scalia dissenting) (insisting that the reasoning of *Raines* foreclosed legislative standing: “The opinion spends three pages discussing famous, decades-long disputes between the President and Congress . . . that would surely have been promptly resolved by a Congress-vs.-the-President lawsuit if the impairment of a branch’s powers alone conferred standing to commence litigation. But it does not, and never has”).

<sup>44</sup> *Arizona State Legislature*, 135 S Ct at 2658–59 (holding that “the Arizona Legislature, having lost authority to draw congressional districts, has standing to contest the constitutionality of Proposition 106”).

<sup>45</sup> US Const Art I, § 4, cl 1.

<sup>46</sup> See *Arizona State Legislature*, 135 S Ct at 2663 (“Proposition 106, which gives the [independent commission] binding authority over redistricting . . . strips the Legislature of its alleged prerogative to initiate redistricting.”). See also US Const Art I, § 4, cl 1.

<sup>47</sup> *Arizona State Legislature*, 135 S Ct at 2694 (Scalia dissenting). See also id at 2695 (Scalia dissenting) (“What history and judicial tradition show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers.”).

<sup>48</sup> *Windsor*, 133 S Ct at 2698 (Scalia dissenting).

<sup>49</sup> Id (Scalia dissenting). See also id (Scalia dissenting) (arguing that “[t]his image of the Court would have been unrecognizable to those who wrote and ratified our national charter,” who wrote limitations into Article III in order to “guard their right to self-rule against [such a] black-robed supremacy”).

Court to the 'primary' determiner of constitutional questions involving the separation of powers."<sup>50</sup> If Congress or the executive could "pop immediately into court, in [its] institutional capacity," to complain about the other branch's interference with its powers, "[t]he opportunities for dragging the courts into disputes hitherto left for political resolution [would be] endless."<sup>51</sup> In *Arizona State Legislature*, Scalia insisted that standing doctrine was designed to prevent such an expansion of the federal judicial power:

That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable "realistic appreciation of the consequences of judicial action." To the contrary. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." It keeps us minding our own business.<sup>52</sup>

## II. RAISING CONCERNS ABOUT GOVERNMENT STANDING

Justice Scalia opposed the expansion of government standing for many of the same reasons that he advocated limits on private-party standing. To Scalia, standing was a way to constrain the federal courts and prevent them from usurping the authority of the political branches. This Essay argues that Scalia was right to be skeptical of government standing, but for deeper reasons than those he articulated. These cases are not simply stories of judicial overreach. In fact, government actors at both the federal and the state levels are often quite eager to refer controversies to the federal judiciary. This Part considers first why political actors might turn to the courts. The next parts then suggest that such reliance on the federal courts reflects

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<sup>50</sup> Id at 2703 (Scalia dissenting):

Though less far reaching in its consequences than the majority's conversion of constitutionally required adverseness into a discretionary element of standing, the theory of that dissent similarly elevates the Court to the "primary" determiner of constitutional questions involving the separation of powers, and, to boot, increases the power of the most dangerous branch: the "legislative department."

<sup>51</sup> Id at 2703–04 (Scalia dissenting) ("Justice Alito's notion of standing will [] enormously shrink the area to which 'judicial censure, exercised by the courts on legislation, cannot extend.'").

<sup>52</sup> *Arizona State Legislature*, 135 S Ct at 2695 (Scalia dissenting), quoting *Allen v Wright*, 468 US 737, 752 (1984).

some worrisome developments in our separation-of-powers scheme—and may have troubling long-term implications for the federal judiciary.

#### A. Why Political Actors Rely on the Courts

It might at first seem odd that elected officials would turn to the federal judiciary to resolve intergovernmental disputes. After all, submitting such issues to the courts would seem to *reduce* the power of the government institutions themselves. Yet there are several reasons why political actors may be inclined to invoke federal jurisdiction.

First, government officials may seek to advance a political agenda through the federal judiciary.<sup>53</sup> The president is especially well positioned to use the courts for this purpose. He not only plays a central role in selecting federal judges<sup>54</sup> but also “[t]hrough control over the Justice Department . . . can exercise significant influence over . . . what arguments are presented” to the courts.<sup>55</sup> Moreover, when the president faces a hostile or divided Congress, he may find that the judiciary is more receptive to his views.<sup>56</sup> *Windsor* illustrates this point. President Barack Obama declared his opposition to DOMA during the 2008 presidential campaign and, once in office, urged Congress to repeal the law.<sup>57</sup> But Congress took little action in response to

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<sup>53</sup> See, for example, Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *Am Polit Sci Rev* 511, 512–13, 516–17 (2002) (discussing the efforts of the Republican Party in the nineteenth century to use the judiciary to advance a pro-business agenda); Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *L & Soc Inquiry* 91, 116 (2000) (arguing that political leaders will empower the judiciary if they believe “the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences”).

<sup>54</sup> See US Const Art II, § 2, cl 2; Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* 6 (Yale 1997) (“[T]he placement of the power of judicial selection with the powers of the president [in Article II] rather than those of Congress suggests that the executive branch is a principal player in the appointment process.”).

<sup>55</sup> See Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History* 196 (Princeton 2007).

<sup>56</sup> See Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 *Or L Rev* 95, 102 (2009) (arguing that the judiciary can be “a vital presidential ally against a recalcitrant Congress”).

<sup>57</sup> See Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* 126, 142 (Oxford 2013).

these requests. The Obama administration had far more success when it took the matter to the Supreme Court, which held that DOMA “violate[d] basic due process and equal protection principles.”<sup>58</sup>

Second, even when government officials do not expect to win in the courts, federal litigation can be a way to curry favor with like-minded voters. This rationale helps explain the rise in lawsuits brought by Congress against the executive branch. Legislators often engage in “position taking”—that is, publicly declaring a stance on a salient issue, without actually attempting to change policy.<sup>59</sup> Lawmakers may take positions by, for example, making speeches, casting votes, or introducing legislation that has little chance of being enacted.<sup>60</sup> Lawsuits can serve this purpose as well. When the Republican-controlled House of Representatives intervened to defend DOMA and (later) sued the Obama administration over its enforcement of the ACA,<sup>61</sup> legislators could rest assured that these lawsuits would score political points with supporters, even if the institution ultimately lost on the merits.

Third, federal litigation can be a convenient way to avoid political responsibility for controversial decisions.<sup>62</sup> If the Supreme Court resolves the issue, then elected officials no longer need to do so. *Windsor*, for example, not only spared the Obama administration from seeking repeal in Congress. The decision also took political pressure off congressional Republicans, who may not have favored repeal, but who also did not want to expend political capital defending an increasingly unpopular statute.<sup>63</sup> Accordingly, many lawmakers likely

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<sup>58</sup> *Windsor*, 133 S Ct at 2686, 2693, 2695–96.

<sup>59</sup> See David R. Mayhew, *Congress: The Electoral Connection* 62 (Yale 2d ed 2004) (“The congressman as position taker is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements.”).

<sup>60</sup> See *id.* at 62–63 & nn 103, 105 (“The ways in which positions can be registered are numerous and often imaginative.”).

<sup>61</sup> See *Burwell*, 130 F Supp 3d at 57–58.

<sup>62</sup> See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud Am Polit Dev 35, 36 (1993) (asserting that “prominent elected officials consciously invite the judiciary to resolve” contentious issues); Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 Am Polit Sci Rev 583, 584 (2005) (“The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.”).

<sup>63</sup> See Klarman, *From the Closet to the Altar* at 126, 161 (cited in note 57) (noting that by March 2011, polls showed that Americans opposed DOMA 51 percent to 34

welcomed the Supreme Court's intervention, whether or not they agreed with the result.

Much like their federal counterparts, state officials can also use litigation to advance their policy goals. In *Arizona State Legislature*, state lawmakers who had lost in the political process sought a different result from the courts.<sup>64</sup> More prominently, state attorneys general often file suit to advance a political agenda—or, at a minimum, to promote a given attorney general's political career. Over the past few decades, the position of state attorney general has become a stepping stone to higher office.<sup>65</sup> (Indeed, one political scientist has suggested that “AG” is often short for “aspiring governor.”)<sup>66</sup> Accordingly, these officials have strong incentives to bring lawsuits that curry favor with state voters.<sup>67</sup> That is undoubtedly why the Massachusetts attorney general pushed for enforcement of federal environmental law in *Massachusetts*,<sup>68</sup> while the Texas Attorney General in *Texas* challenged the Obama administration's immigration program.<sup>69</sup> Conversely, Texas opposed the

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percent and increasingly supported same-sex marriage and asserting that because of this changing political landscape, “the overall Republican response to the administration's [nondefense of] . . . DOMA was far more muted than it likely would have been just a couple of years earlier”).

<sup>64</sup> They were, however, unsuccessful. See *Arizona State Legislature*, 135 S Ct at 2658–59 (concluding that there was no violation of the Elections Clause).

<sup>65</sup> See Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 Rev Polit 525, 538 (1994) (observing that, beginning in the 1980s, the position of state attorney general became “increasingly attractive to a younger, better educated, and more ambitious caliber of attorney”).

<sup>66</sup> Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 Publius 597, 597 (2010).

<sup>67</sup> Existing research suggests that is precisely what state attorneys general do. See Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-state Lawsuits*, 59 Polit Rsrch Q 609, 616 (2006) (concluding, based on an empirical study of consumer litigation, that the litigation choices of state attorneys general were heavily influenced by citizen ideology and in-state interest groups). See also Neal Devins and Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L J 2100, 2145 (2015) (asserting that “ambitious attorneys general have proven adept at expanding their base by launching high-visibility legal challenges”).

<sup>68</sup> See *Massachusetts*, 549 US at 505–06.

<sup>69</sup> See *Texas*, 787 F3d at 743. The case involved the Deferred Action for Parents of Americans and Lawful Permanent Residents program. Id at 743–45. Under the program, the executive would decline to remove undocumented immigrants with close ties to the United States because their children were US citizens or lawful permanent residents. Id. After the passing of Justice Scalia, the Supreme Court affirmed the court of appeals' decision (upholding an injunction against the program) by an equally divided vote. See generally *United States v Texas*, 136 S Ct 2271 (2016).

*Massachusetts* suit,<sup>70</sup> while Massachusetts filed a brief in the *Texas* case, insisting that Obama's program was "lawful, will substantially benefit States, and will further the public interest."<sup>71</sup> Such "position taking" can score points with like-minded voters, regardless of the outcome on the merits.

There are good reasons to assume that government-initiated litigation will only increase in the coming years. Over the past few decades, there has been a significant growth in party polarization.<sup>72</sup> As the two major political parties have become more "internally cohesive" (with Democrats growing more progressive, and Republicans turning more conservative), they have also grown "more ideologically polarized from each other."<sup>73</sup> In this environment, political compromise is challenging. Accordingly, government officials may be increasingly tempted to advance their policy goals through the courts.<sup>74</sup>

Elected officials will also likely be emboldened by the judiciary's recent receptiveness to government standing claims. The federal courts have endorsed standing arguments that might have been unthinkable fifteen years ago. A Supreme Court majority, for example, suggested in *Massachusetts* that state governments are "entitled to special solicitude in our standing analysis."<sup>75</sup> In *Arizona State Legislature*, the Court held that a state legislature has a judicially cognizable "institutional" interest in regulating federal elections.<sup>76</sup> And in *Burwell*, a

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<sup>70</sup> See *Massachusetts*, 549 US at 505 & n 5 (noting that ten states, including Texas, supported the EPA's position).

<sup>71</sup> Amicus Brief of the States of Washington, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and the District of Columbia in Support of Petitioners, *Texas v United States*, Docket No 15-674, \*1 (US filed Mar 8, 2016) (available on Westlaw at 2016 WL 922867).

<sup>72</sup> See Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict within the American Electorate*, 58 *Polit Rsrch Q* 219, 219–20 (2005) ("By the end of the 1980s, partisanship in Congress had risen dramatically and has remained at a high level ever since."); Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 *Polit Sci Q* 5, 6 (2001) (arguing that, in the 1990s, "the stark partisan polarization among the parties' politicians . . . accelerated").

<sup>73</sup> Brewer, 58 *Polit Rsrch Q* at 219–20 (cited in note 72).

<sup>74</sup> At a minimum, elected officials may increasingly use litigation as a means of "position taking." See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 *Nw U L Rev* 737, 765 (2011) ("Position taking is especially common in today's politically polarized Congress.").

<sup>75</sup> *Massachusetts*, 549 US at 519–21.

<sup>76</sup> See *Arizona State Legislature*, 135 S Ct at 2663–64 ("The Arizona Legislature . . . is an institutional plaintiff asserting an institutional injury.").

federal district court concluded that the House suffered an injury in fact when the federal executive allegedly misspent federal funds.<sup>77</sup> The trend is unmistakable: despite Scalia's admonitions, many federal courts now treat "[d]isputes between governmental branches or departments regarding the allocation of political power" as "cases" and "controversies" under Article III.<sup>78</sup>

## B. Intergovernmental Litigation as Symptom

This account suggests that in accepting jurisdiction in cases like *Windsor*, *Massachusetts*, and *Arizona State Legislature*, the Supreme Court has not imposed itself on unwilling elected officials. Instead, these officials have invited the judiciary to resolve intergovernmental disputes. Accordingly, Scalia seems to have misdiagnosed the source of the problem. But he still had good reason to raise concerns about government standing. Government-initiated lawsuits seem to be a symptom of two related (and troubling) developments in the constitutional separation of powers. There is an increasing tendency to rely on the courts to resolve controversial issues and a corresponding decline in faith in the democratic process.

Most government officials (and members of the public) today view the federal judiciary—and particularly the Supreme Court—as the ultimate arbiter of constitutional and other legal questions.<sup>79</sup> This reliance on the judiciary began over a century

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<sup>77</sup> See *Burwell*, 130 F Supp 3d at 57–58:

The House sues, as an institutional plaintiff, to preserve its power of the purse and to maintain constitutional equilibrium between the Executive and the Legislature. If its non-appropriation claims have merit . . . the House has been injured in a concrete and particular way that is traceable to the [executive] and remediable in court.

The court, however, found that the House could not sue simply over the executive's implementation of federal law. See *id.* ("[T]he House's claims that [the executive] improperly amended the Affordable Care Act concern only the implementation of a statute, not adherence to any specific constitutional requirement. The House does not have standing to pursue those claims.").

<sup>78</sup> *Arizona State Legislature*, 135 S Ct at 2694–95 (Scalia dissenting).

<sup>79</sup> This Essay does not seek to defend or endorse judicial supremacy as a normative matter. The point is only that, as a descriptive matter, our society seems to defer to the Supreme Court on constitutional questions. See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 14 (Farrar, Straus, and Giroux 2009) (arguing that "the American people have decided to cede [this power] to the Justices"); Whittington, *Political Foundations* at 5 (cited in note 55) ("Through much of American history, presidents have found it in their interest to defer to the Court. . . . The strategic calculations of political leaders lay



ago and solidified in the mid-to-late twentieth century.<sup>80</sup> By the 1970s, many federal lawmakers assumed that “legal and constitutional questions . . . can ultimately be answered only by the Supreme Court.”<sup>81</sup>

To be sure, many members of the Court have endorsed this vision of their role (including, at times, Scalia himself).<sup>82</sup> But contrary to Scalia's suggestion in *Windsor*, it is not simply a Court majority that envisions itself as the primary expositor of the Constitution.<sup>83</sup> That vision of the Court's role seems to dominate our constitutional culture. As a result, government institutions may seek a judicial resolution of legal (especially constitutional) issues not simply because it is politically expedient to do so but because it does not occur to them that the issues can be resolved in any other way.

This development helps explain both why elected officials invite the judiciary to adjudicate intergovernmental disputes and why the judiciary accepts those invitations. Both the political branches and the Third Branch believe the judiciary is in charge of answering legal questions. But there is a second development that may also explain why the federal judiciary recently has been inclined to accept government standing claims: a loss of faith in the political process.

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the political foundations for judicial supremacy.”); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 S Ct Rev 103, 147 (“[T]he modern Congress typically treats the Court as the exclusive authority over constitutional issues.”).

<sup>80</sup> See Barry Friedman and Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 Colum L Rev 1137, 1172–82 (2011) (describing how the Court's role as “supreme” vis-à-vis the political branches began to take hold in the mid-twentieth century); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 Colum L Rev 929, 948–78 (2013) (describing how, beginning in the late nineteenth century, lawmakers increasingly viewed the Court as the ultimate arbiter of constitutional and other legal questions).

<sup>81</sup> *Judicial Tenure Act*, S Rep No 95-1035, 95 Cong, 2d Sess 9 (1978) (“Since the legal and constitutional questions raised by [the bill], as amended, can ultimately be answered only by the Supreme Court of the United States, it would unduly extend the Committee of the Judiciary's report to set forth all supporting and opposing views and all historical precedents.”).

<sup>82</sup> See *United States v Morrison*, 529 US 598, 616 n 7 (2000) (“No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”); *Cooper v Aaron*, 358 US 1, 18 (1958) (arguing that “the federal judiciary is supreme in the exposition of the law of the Constitution”). Scalia joined the Court's opinion in *Morrison*, as well as other decisions limiting Congress's power under § 5 of the Fourteenth Amendment to enforce constitutional guarantees. See, for example, *City of Boerne v Flores*, 521 US 507, 524 (1997) (emphasizing that “this Court has had primary authority to interpret” the Bill of Rights).

<sup>83</sup> *Windsor*, 133 S Ct at 2697–98 (Scalia dissenting).

The decline in confidence in political institutions, particularly Congress, began in the mid-to-late twentieth century, and voter cynicism has only grown more acute in recent years.<sup>84</sup> Indeed, polls in early 2017 suggested that voter confidence in Congress and the presidency was at an all-time low.<sup>85</sup> Recent political science research suggests that this loss of confidence is partly due to the increasing polarization in Congress.<sup>86</sup> Although many voters may appreciate the partisan maneuvering of their own representative, they are frustrated by Congress's apparent inability to get anything done.<sup>87</sup>

There is no reason to assume that the federal judiciary is unaffected by this loss of faith in political institutions. Judges, after all, are voters, too. Accordingly, federal judges may view it as their civic duty to settle disputes that political officials have (seemingly) proven incapable of resolving themselves.

Notably, Scalia rejected this cynical vision of the political process. That may help explain why he was also comfortable rejecting broad claims of government standing. As the Justice stated in *Windsor*:

To be sure, if Congress cannot invoke our authority in the way that Justice Alito proposes, then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is *designed* for confrontation. That is what “[a]mbition . . . counteract[ing] ambition” is all about. If majorities in both Houses of Congress care enough about

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<sup>84</sup> See Samuel C. Patterson and Gregory A. Caldeira, *Standing Up for Congress: Variations in Public Esteem since the 1960s*, 15 *Legis Stud Q* 25, 26 (1990) (asserting that public esteem for Congress generally declined from the 1960s through the 1980s).

<sup>85</sup> See Riley Brands, *Congress' Job Approval 19% at Start of New Session* (Gallup, Jan 13, 2017), archived at <http://perma.cc/G9PQ-2HKW> (“The 115th U.S. Congress begins its term with a 19% job approval rating, similar to the level measured for the institution in recent years and in line with the 18% to 20% ratings it received in the final months of 2016.”); David Wright, *Gallup Poll: Trump Approval Rating at New Low* (CNN Politics, Feb 13, 2017), archived at <http://perma.cc/59C5-LR4P> (noting that only 40 percent of Americans approved of President Donald Trump's job performance, while 55 percent disapproved, and that this approval rating was significantly lower than that of other recent presidents during their first weeks in office).

<sup>86</sup> See Mark D. Ramirez, *The Dynamics of Partisan Conflict on Congressional Approval*, 53 *Am J Polit Sci* 681, 692 (2009) (“Public esteem for Congress diminishes when political parties unite in Congress to represent their partisan constituencies.”).

<sup>87</sup> See Laurel Harbridge and Neil Malhotra, *Electoral Incentives and Partisan Conflict in Congress: Evidence from Survey Experiments*, 55 *Am J Polit Sci* 494, 495 (2011) (arguing that “although the public as a whole may express a desire for greater bipartisanship in Congress as an institution, not all groups wish to see individual members compromising. . . . [S]trong partisans in the electorate . . . incentivize members to engage in partisan conflict”).

the matter, they have available innumerable ways to compel executive action without a lawsuit.<sup>88</sup>

Federal lawmakers may “confront” the executive by, for example, investigating possible executive wrongdoing, threatening to withhold appropriations, and (at the extreme) impeachment.<sup>89</sup> Likewise, state legislators have significant political clout in their own states (to complain about, for example, a transfer of power to an independent commission). Federal and state officials can also engage in media campaigns to win public support for their positions. As Scalia suggested, by denying standing to government institutions, federal courts make room for this political process to work itself out (warts and all). By contrast, “[p]lacing the Constitution’s entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor.”<sup>90</sup>

### C. A Cautionary Note on Government Standing

My past work has argued that the structural Constitution significantly limits the power of the federal executive, the federal legislature, and the states to invoke federal jurisdiction.<sup>91</sup> Although the Constitution does give the federal and state governments “special” standing to enforce and defend their own laws, government standing does not (in my view) extend much beyond those contexts. But, for now, I put to one side the structural case against broad government standing. This Essay raises more prudential concerns about the recent increase in, and acceptance of, intergovernmental disputes.

Notably, many scholars have welcomed these disputes—and the corresponding expansion of government standing.<sup>92</sup> It is easy

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<sup>88</sup> *Windsor*, 133 S Ct at 2704 (Scalia dissenting), quoting Federalist 51 (Madison), in *The Federalist* 347, 349 (Wesleyan 1961) (Jacob E. Cooke, ed).

<sup>89</sup> For an illuminating discussion of Congress’s power to investigate the executive, see generally Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U Chi L Rev 1083 (2009).

<sup>90</sup> *Windsor*, 133 S Ct at 2705 (Scalia dissenting).

<sup>91</sup> See note 17. My earlier articles did not, however, address one important issue: whether federal and state government entities have standing to assert “institutional injuries.” I take on that issue in separate work. See generally Tara Leigh Grove, *Can Institutions Be Injured?* (unpublished manuscript, 2017) (on file with author).

<sup>92</sup> To be sure, scholars endorse government standing for somewhat different reasons and with different degrees of enthusiasm. Nevertheless, the general trend among scholars is to favor broad government standing. For scholarship supporting state standing, see, for example, Calvin Massey, *State Standing after Massachusetts v EPA*, 61 Fla L Rev 249, 276 (2009) (arguing that states can “ensure that executive

to see the allure. In an era of partisan gridlock, with public faith in the political process at an all-time low, it seems wise to rely on the one institution of government that seems to be functioning reasonably well: the judiciary.<sup>93</sup>

But this preference for litigation seems to rest on an assumption that the judiciary will remain unchanged, even as a fundamentally new crop of lawsuits comes its way. There are good reasons to question this premise. To the extent that courts become embroiled in more and more political controversies, that may have a significant impact on the functioning of the judiciary itself.

Intergovernmental litigation differs from private-party actions in important ways. For starters, government-initiated lawsuits seem likely to pull the judiciary into disputes at a much earlier stage. This point is most clearly illustrated by claims of “institutional injury.” Under the Supreme Court’s analysis in *Arizona State Legislature*, a state institution is injured and can bring suit as soon as the state constitution transfers one of its powers to another entity.<sup>94</sup> Likewise, the district court in *Burwell* found that a chamber of Congress suffered injury and could sue the executive branch as soon as it (allegedly) misspent federal funds.<sup>95</sup> As Scalia suggested, under this reasoning, a government institution “can pop immediately into court, in [its] institutional capacity,” to complain about another entity’s interference with its powers.<sup>96</sup> Either chamber of Congress may, for example, sue “whenever the President refuses to implement

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discretion is confined within the boundaries of the Constitution and federal law”). For discussions of legislative standing, see Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S Cal L Rev 1, 27–28 (2016) (advocating legislative standing to vindicate an “institutional injury”); Bradford C. Mank, *Does a House of Congress Have Standing over Appropriations? The House of Representatives Challenges the Affordable Care Act*, 19 U Pa J Const L 141, 144 (2016) (arguing “in favor of institutional congressional standing . . . to defend core constitutional authority possessed by Congress” but not to challenge “how the executive branch implements a particular federal statute”); Jonathan Remy Nash, *A Functional Theory of Constitutional Standing*, 114 Mich L Rev 339, 343–44 (2015) (advocating congressional standing to sue the executive branch in a variety of settings).

<sup>93</sup> Notably, public confidence in the federal judiciary is strong as compared to other federal institutions. See Joseph Daniel Ura and Patrick C. Wohlfarth, “An Appeal to the People”: *Public Opinion and Congressional Support for the Supreme Court*, 72 J Polit 939, 945–46 (2010) (“[O]ver the last three decades, confidence in the Supreme Court has been consistently higher than confidence in Congress and [ ] this difference has generally increased over time.”).

<sup>94</sup> See *Arizona State Legislature*, 135 S Ct at 2659.

<sup>95</sup> See *Burwell*, 130 F Supp 3d at 69–77.

<sup>96</sup> *Windsor*, 133 S Ct at 2703–04 (Scalia dissenting).

a statute he believes to be unconstitutional, [or] whenever he implements a law in a manner that is not to Congress's liking"; the president may, in turn, "sue Congress for its erroneous adoption of an unconstitutional law" that undermines executive power "or perhaps for its protracted failure to act on one of his nominations."<sup>97</sup>

Some commentators may favor a system in which constitutional disputes are resolved more quickly by the judiciary. In an important essay, Professor Jamal Greene argues that the Supreme Court should at times "grant institutional standing to public organs" and "engage in abstract review" of structural constitutional questions.<sup>98</sup> Greene points in particular to *National Labor Relations Board v Noel Canning*,<sup>99</sup> which involved the scope of the president's recess appointments power.<sup>100</sup> That issue of presidential power had been a subject of debate between Congress and the president for two centuries.<sup>101</sup> Yet the Supreme Court did not take up the issue until 2014, after a private party with a concrete injury brought suit.<sup>102</sup> Greene asserts that, in many cases, such "delays are not the happy by-product of political constitutionalism; they are serious

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<sup>97</sup> Id at 2704 (Scalia dissenting). This Essay does not mean to suggest that courts have upheld these specific institutional standing claims. In *Burwell*, the district court found that the House of Representatives lacked standing simply to challenge the executive's implementation of federal law. See *Burwell*, 130 F Supp 3d at 57–58. But Scalia's examples do underscore that governments might get into court much more quickly, if they were permitted to assert claims of "institutional injury."

<sup>98</sup> Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 Harv L Rev 124, 128 (2014) ("[W]here constitutional disputes concern a rule that specifies the division of powers between governmental institutions, the Court should be permitted to engage in abstract review, to grant institutional standing to public organs, and to bind nonparties to the case."). The goal here is not to directly take on Greene's thoughtful argument for institutional standing, nor to suggest that he would advocate standing in all the cases discussed in this Essay. (Greene states that his proposal would not allow government standing in suits over the president's removal power or over the scope of the executive's implementation of federal law. See id at 149–50 & n 155.) Instead, this Essay mentions Green's analysis because others may share the view that delays in adjudication can be harmful. This Essay suggests that such delays can also greatly benefit the federal courts.

<sup>99</sup> 134 S Ct 2550 (2014).

<sup>100</sup> Id at 2556.

<sup>101</sup> See id at 2561–73 (discussing in detail the historical practice concerning, and debates over, the president's recess appointments power).

<sup>102</sup> See id at 2557 (noting that Noel Canning challenged the makeup of the NLRB as a violation of the Recess Appointments Clause after the Board ruled against the company in a collective bargaining dispute).

side effects of the Court's own traditional decisional procedures."<sup>103</sup>

Delays in judicial decision-making may indeed create challenges. But such delays can also protect the federal judiciary from becoming (too quickly) enmeshed in divisive political battles. A longstanding debate over the president's removal power illustrates this point. In the 1860s, the Republican majority in Congress was at loggerheads with Democratic President Andrew Johnson over the reconstruction efforts in the South.<sup>104</sup> The conflict intensified when Johnson fired Secretary of War Edwin Stanton, in direct defiance of the Tenure of Office Act.<sup>105</sup> (The Act permitted the president to remove such an executive officer only with the approval of the Senate.)<sup>106</sup> This dispute raised an important constitutional question: whether Congress could limit the president's power to remove high-ranking executive officials. But none of the institutional players thought to ask for a judicial resolution of this question. Instead, the House of Representatives impeached Johnson, and the political branches debated the constitutional issue in those impeachment proceedings.<sup>107</sup> The Supreme Court did not rule on the president's removal authority until 1926—when a private party with a concrete injury brought suit.<sup>108</sup>

For the judiciary, this delay in adjudication was likely a very good thing. In the 1860s, congressional Republicans had a contentious relationship with not only Johnson but also the federal judiciary. That Congress assumed it could remove Article III judges outside the impeachment process, supported defiance of federal-court orders, and eliminated the Supreme Court's appellate jurisdiction over a pending case.<sup>109</sup> Had the

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<sup>103</sup> Greene, 128 Harv L Rev at 127 (cited in note 98).

<sup>104</sup> See Saikrishna Prakash, *The Story of Myers and Its Wayward Successors: Going Postal on the Removal Power*, in Christopher H. Schroeder and Curtis A. Bradley, eds, *Presidential Power Stories* 165, 168 (Foundation 2009).

<sup>105</sup> 14 Stat 430 (1867).

<sup>106</sup> See *Myers v United States*, 272 US 52, 250–59 (1926) (Brandeis dissenting) (explaining the history of the Tenure of Office Act).

<sup>107</sup> See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 121–32 (Harvard 1999).

<sup>108</sup> *Myers*, 272 US at 176 (striking down the restriction on the president's removal authority). Congress had repealed the Tenure of Office Act twenty years after the 1860s impeachment battle. *Id.* at 168. *Myers* involved a narrower (and far less contentious) 1876 statute, which provided that the president could remove postmasters only "by and with the advice and consent of the Senate." *Id.* at 106–08.

<sup>109</sup> These episodes are detailed in separate work. See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 Vand L Rev \*1 (forthcoming 2018) (arguing

judiciary been asked to step into the fray over the president's removal authority, that could have fueled additional attacks.

Standing restrictions not only delay litigation but also prevent some issues from reaching the courts at all. Indeed, there are good reasons to presume that no private party would have standing to raise the issues at the heart of several recent intergovernmental disputes. The Supreme Court strongly suggested as much in *Massachusetts*, when it declared that states are "entitled to special solicitude in [the] standing analysis" when they challenge federal agency action (or inaction).<sup>110</sup> Likewise, in *Burwell*, the district court acknowledged that no private party could have brought suit over the federal executive's alleged misuse of appropriated funds.<sup>111</sup>

The examples need not stop there. As Scalia suggested in *Windsor*, expanded government standing could allow additional (and heretofore unimaginable) issues to reach the courts. For example, the president could sue Congress not only "for its erroneous adoption of an unconstitutional law" but perhaps even "for its protracted failure to act on one of his nominations."<sup>112</sup> In other words, in a new world of government standing, Obama might have brought suit against the Senate for failing to act on his nomination of Judge Merrick Garland to fill Justice Scalia's

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that, over time, political actors have rejected certain methods of attacking the federal judiciary and built "conventions of judicial independence").

<sup>110</sup> *Massachusetts*, 549 US at 518, 520 ("It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual."). The Court found that Massachusetts was injured—and could bring suit to challenge the EPA's failure to regulate greenhouse gas emissions—because the state was losing coastline. See *id.* at 520–26 (concluding that the gradual loss of the state's coastline was a "particularized injury" that was traceable to the EPA's failure to regulate, and suggesting that regulation by the EPA could "slow or reduce" global warming as well as the risk to Massachusetts' coastline) (emphasis omitted). That injury—the loss of coastline—at first glance appears to be a concrete injury that a private party could assert. But both the Court's opinion, which repeatedly emphasized the state's "special" status, and the oral argument in the case, indicate that a Court majority would not have granted similar standing to a private party. Most notably, Justice Anthony Kennedy suggested during oral argument that Massachusetts might have "some special standing as a State" that would differentiate it from a "big [private] landowner that owned lots of coastline." See Transcript of Oral Argument, *Massachusetts v. Environmental Protection Agency*, Docket No 05-1120, \*14–15 (US Nov 29, 2006).

<sup>111</sup> See *Burwell*, 130 F Supp 3d at 72–73 ("[B]ecause the House occupies a unique role in the appropriations process prescribed by the Constitution, not held by the ordinary citizen, perversion of that process inflicts on the House a particular injury quite distinguishable from any suffered by the public generally.").

<sup>112</sup> *Windsor*, 133 S Ct at 2704.

seat on the Supreme Court.<sup>113</sup> Perhaps such a lawsuit still seems far-fetched. But a few years ago, it might have seemed far-fetched that the House of Representatives would take the executive branch to court, in part for delaying enforcement of a federal statute that many members of the House sought to repeal. Yet the House brought that suit in *Burwell*.

There is no way, of course, to predict with certainty what kinds of intergovernmental disputes may arise in the future—or what effect those disputes will have on the judiciary—if the courts continue to be receptive to government standing claims. But we should not forget that one of the central purposes of standing doctrine is to safeguard the federal judiciary against such risks—by ensuring that the courts do not become substitute forums for matters that should be left to the political process.<sup>114</sup> That is, standing restrictions help secure “the judiciary’s credibility and reputation” by ensuring that it does not become embroiled “in every important political or constitutional controversy.”<sup>115</sup>

#### CONCLUSION

Justice Scalia had good reason to be skeptical of government standing. But contrary to the Justice’s assertions, that is not because grants of standing represent a “power grab” by the judiciary. Instead, the rise in government-initiated litigation seems to be a symptom of deeper issues in our constitutional separation of powers. Elected officials are all too eager to refer controversial issues to the courts; judges, in turn, may be willing to take these cases, because they (like the public generally) have lost confidence in the democratic process. Federal courts cannot reverse these trends simply by placing restrictions on government standing. But such restrictions would, at least, curb

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<sup>113</sup> See Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait* (NBC News, July 20, 2016), archived at <http://perma.cc/ZP9G-56SZ>.

<sup>114</sup> See *Valley Forge Christian College v Americans United for Separation of Church and State*, 454 US 464, 473 (1982) (“Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of ‘standing’ would be quite unnecessary.”); John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 NYU L Rev 962, 1003–07 (2002) (emphasizing how justiciability tests, including the prohibition on advisory opinions, help protect “the judiciary’s credibility and reputation” by limiting its role in political and constitutional controversies).

<sup>115</sup> Ferejohn and Kramer, 77 NYU L Rev at 1007 (cited in note 114).



one manifestation—and thereby help to prevent an “overjudicialization of the processes of self-governance.”<sup>116</sup>

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<sup>116</sup> Scalia, 17 *Suffolk U L Rev* at 881 (cited in note 14).