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### Government Standing and the Fallacy of Institutional Injury

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## ARTICLE

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### GOVERNMENT STANDING AND THE FALLACY OF INSTITUTIONAL INJURY

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TARA LEIGH GROVE<sup>†</sup>

*A new brand of plaintiff has come to federal court. In cases involving the Affordable Care Act, the Defense of Marriage Act, and partisan gerrymandering, government institutions have brought suit to redress “institutional injuries”—that is, claims of harm to their constitutional powers or duties. Jurists and scholars are increasingly enthusiastic about these lawsuits, arguing (for example) that the Senate should have standing to protect its power to ratify treaties; that the House of Representatives may sue to preserve its role in the appropriations process; and that the President may go to court to vindicate his Article II prerogatives. This Article contends, however, that government standing to assert “institutional injuries” rests on a fundamental misunderstanding of our constitutional scheme. The provisions of our structural Constitution are not designed for the benefit of institutions. Instead, the Constitution divides power between the federal government and the States and among the branches of the federal government for the benefit of the entire public. Government institutions have no greater interest in their official powers than any other member of society. Moreover, as this Article demonstrates, denying government*

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*standing to assert “institutional injuries” is not only consistent with constitutional structure, history, and precedent, but also reminds us of a basic principle: Individuals, not institutions, are the rightsholders in our constitutional system.*

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## INTRODUCTION

There is a new plaintiff in town. Government institutions are heading to federal court, seeking to vindicate “institutional injuries,” that is, claims of harm to their constitutional powers or duties. For example, the House of Representatives sued the federal executive, alleging that the executive’s (improper) implementation of the Affordable Care Act injured its Article I legislative power.<sup>1</sup> Along the same lines, the House claimed a “concrete, particularized institutional injury” when a lower court struck down a federal

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<sup>1</sup> See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57-58 (D.D.C. 2015).

law (the Defense of Marriage Act) on equal protection grounds.<sup>2</sup> And the Arizona state legislature went to court to protect its alleged federal constitutional right to regulate federal elections.<sup>3</sup>

A growing number of scholars have endorsed these lawsuits.<sup>4</sup> They insist, to varying degrees, that government institutions should have standing to protect their official powers and duties.<sup>5</sup> Scholars argue, for example, that the

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<sup>2</sup> Brief on Jurisdiction for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 13, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12–307) [hereinafter *BLAG Brief*] (arguing that the lower court decision caused “institutional harm to the House’s core constitutional authority”).

<sup>3</sup> See Brief for Appellant at 11, *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2007) (No. 13–1314) [hereinafter *Ariz. Leg. Brief*] (urging that a state legislature should have standing “when deprived of rights or powers conferred or protected by the federal Constitution.”); see also U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

<sup>4</sup> See, e.g., Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 128 (2014) (suggesting courts should “grant institutional standing to public organs” to resolve disputes over constitutional rules); 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) (“argu[ing] in favor of institutional congressional standing by Congress, a house of Congress, or a duly authorized committee”); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 343–44 (2015) (arguing for congressional standing to sue the executive branch in various settings); see also Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1440 n.16, 1514–15 (2013) (arguing that only institutions, rather than private parties, should presumptively have standing to assert institutional interests); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 873–85, 893 (2018) (offering qualified support for some claims of institutional injury and urging that “[b]right line preclusive rules categorically denying standing for broad ranges of plaintiffs or claims are neither necessary nor desirable”); *infra* notes 5–9 and accompanying text.

<sup>5</sup> See sources cited *supra* note 4; *infra* notes 6–9 and accompanying text. Many earlier commentators also advocated “institutional standing,” particularly for the federal legislature. See R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 2, 26–27, 31 (1986) (arguing that although courts should not grant standing to individual legislators, “absent direct, personal injury,” courts should often permit Congress or a house of Congress to assert “an institutional injury”); Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 264 (1981) (urging courts to dismiss at least some claims by individual or groups of legislators, but to hear suits brought by (or on behalf of) a chamber or Congress as a whole); Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 70–71 (1992) (urging standing for both individual legislators and the institution as a whole “when the executive usurps or undermines power constitutionally allocated to Congress”); see also Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 234–35, 321–22, 340–41 (1991) (arguing that the judiciary should hear only “ripe” cases—that is, “when Congress as a whole,” or at least the minimum number of legislators necessary to effect legal change, “asked for the court’s assistance”). There are a few skeptics. Two commentators doubt that courts will accept most legislative standing claims. See Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 685, 691–93 (2016); Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 58 (2015) (concluding that “the Court has avoided recognizing legislative standing but has left the door very slightly ajar in the event that an unanticipated case arises.”). And one article argues that legislative standing to assert “institutional injuries” is not consistent with the separation of powers but fails to develop the analysis. See Anthony

Senate may sue to vindicate its power to ratify treaties;<sup>6</sup> that the House may protect its role in originating revenue bills;<sup>7</sup> and that the President may prevent invasion of his Article II prerogatives.<sup>8</sup> Many commentators further insist that each house of Congress suffers an “institutional injury” and may bring suit whenever the executive branch refuses to enforce a federal law.<sup>9</sup>

The federal courts have recently warmed up to these lawsuits as well. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld the state legislature’s standing to vindicate its institutional interest in regulating federal elections.<sup>10</sup> Likewise, in *U.S. House of Representatives v. Burwell*, a federal district court found that the executive

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, 277, 280 n.354 (2001) (failing to specify the “separation of powers” problem).

<sup>6</sup> Indeed, commentators have urged that only thirty-four senators need to bring suit, because that is the number—one third of the Senate plus one—that could prevent ratification. See Nash, *supra* note 4, at 378-79; see also U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]”).

<sup>7</sup> See Greene, *supra* note 4, at 148 (“[E]xamples of potential disputes over constitutional rules might include . . . a House minority’s claim that an enrolled revenue bill did not ‘originate’ in the House of Representatives . . . .”); see also U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives”).

<sup>8</sup> See Huq, *supra* note 4, at 1514 (“Congress or the executive, that is, can and do sue to protect Article I or Article II prerogatives.”); see also Greene, *supra* note 4, at 142, 149 (“Institutional standing could apply to Houses of Congress, the President, an administrative agency, or a state entity.”).

<sup>9</sup> Supporters of institutional standing are divided on this point. Compare, e.g., *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 61, 61 (2014) (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law) [hereinafter Foley Testimony, Hearing] (arguing that a house of Congress suffers a cognizable “institutional injury” when the President fails to enforce a law); Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 596-97, 603 (2017) (same); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 582, 598 (2012) (same); Michael Sant’Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253, 1258-60 (2017) (arguing that Congress has standing only when the executive “refuses to enforce a statutory provision based on constitutional objections.”), with, e.g., Greene, *supra* note 4, at 128, 149-50 (arguing that lawmakers may sue over violations of constitutional rules, but not standards like the President’s alleged failure to faithfully execute the law); Hall, *supra* note 4, at 39-40 (urging that a claim that the President “fail[ed] to enforce the law” does not assert a “cognizable institutional injury under any plausible understanding of legislative standing doctrine”); Mank, *supra* note 4, at 144 (arguing “against legislative suits merely challenging how the executive branch implements a particular federal statute.”). For a thoughtful analysis, see John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & POL. 103, 104-05 (2015) (“[F]ederal legislators or legislative chambers [may not] sue executive officials to compel them properly to execute the law, with no claim other than executive failure to do so.”).

<sup>10</sup> See 135 S. Ct. 2652, 2659, 2664 (2015) (“The Arizona Legislature . . . is an institutional plaintiff asserting an institutional injury”). Although the majority in *United States v. Windsor* did not address the House’s standing to defend the Defense of Marriage Act, see 133 S. Ct. 2675, 2688 (2013) (“[T]he Court need not decide whether BLAG would have standing . . . .”), Justice Alito insisted that the House suffered an institutional injury, because the lower court decision striking down the law “limited Congress’ power to legislate.” *Id.* at 2712-14 (Alito, J., dissenting).

branch's alleged misuse of federal funds caused an "institutional injury" to the House.<sup>11</sup> Significantly, jurists and scholars acknowledge that private parties could not bring these lawsuits, simply alleging a violation of the structural Constitution; such a private lawsuit would be dismissed as presenting only a "generalized grievance." But commentators assume that government institutions are different, because they have a special—"particularized"—interest in their constitutional powers.

This Article challenges that assumption. The concept of "institutional injury" rests on a fundamental misunderstanding of our constitutional scheme. The provisions of our structural Constitution are not designed for the benefit of institutions. Instead, the Constitution divides power between the federal government and the States and among the branches of the federal government for the benefit of the entire public. The goal is to create a workable, but limited, federal government that will not arbitrarily infringe on individual liberty. Institutions are the vessels through which these constitutional powers and duties flow; they are not the beneficiaries of this scheme. Instead, any breakdown in this structural scheme is an injury to everyone. Institutions have no greater interest in their constitutional powers and duties than any other member of society.

Government standing to assert institutional injuries is not only at odds with the constitutional structure but also undermined by history and precedent. Although governments are in some ways special litigants, who can bring suit even when private parties cannot, such special standing is limited to certain classes of cases. In this Article, I articulate a theory that unites these cases—and thereby provides a limiting principle for future government standing claims. Governments have traditionally had broad standing only to perform functions that they cannot perform without resort to the federal courts. As the judiciary has long recognized, a government *must* have standing when it seeks to impose sanctions on individuals; due process principles require judicial review in such cases. This principle explains why federal and state governments have standing to enforce and defend their respective laws,

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<sup>11</sup> See 130 F. Supp. 3d 53, 57-58, 71 n.21 (D.D.C. 2015) (concluding the House of Representatives had standing to pursue an institutional injury). As this Article went to print, there were a few developments. First, the Supreme Court held that the Virginia House of Delegates lacked standing to defend a state redistricting plan but reaffirmed the decision in *Arizona State Legislature*. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54, 1956 (2019). Second, a federal district court held that the U.S. House of Representatives lacked standing to challenge President Trump's use of funds to build a wall along the southern border. See *U.S. House of Representatives v. Mnuchin* at \*4-5, \*12, 2019 WL 2343015 (D.D.C. June 3, 2019) (rejecting the asserted "institutional injury"). The House plans to appeal that decision. See Jacqueline Thomsen, *House Democrats Appeal Order Against them in Trump Border Wall Lawsuit*, THE HILL (June 10, 2019), <https://thehill.com/regulation/court-battles/447794-house-dems-appeal-order-against-them-in-trump-border-wall-lawsuit>.

and why each house of Congress has traditionally been permitted to defend its contempt sanctions against nonmembers. By contrast, under our constitutional structure, government institutions can interact with one another—and in the process enforce the structural Constitution—without the involvement of an Article III court.<sup>12</sup>

Articulating a limiting principle on government standing furthers important constitutional values. A prohibition on “institutional injuries” serves as a reminder that individuals, not government institutions, are the rightsholders in our constitutional scheme. Moreover, this restriction on government standing also preserves important limits on the federal judicial power. Standing doctrine is designed in part to identify when litigants have an interest that merits judicial resolution, while leaving other matters to the political process. Governments must go through the Article III courts—and therefore must have standing—when they seek to act on individuals. But government institutions can and should battle one another on their own (political) turf.

This analysis has significant implications for both legal scholarship and constitutional litigation. First, the Article offers an important (and largely overlooked) objection to standing based on “institutional injuries.” Government institutions have no special interest in their constitutional powers or duties. Second, the Article articulates a principled constraint on government standing, a still undertheorized concept.<sup>13</sup> Governments have broad standing only to perform functions that they cannot perform, without resort to an Article III court. This principle not only explains the longstanding doctrine and history supporting government standing in

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<sup>12</sup> See Section II.A-B. This theory explains the boundaries of government standing in the bulk of cases brought by governments. Government entities have broad standing to enforce and defend the law against private parties, but government institutions lack standing to sue one another over alleged violations of the structural Constitution. As noted below, there are complex questions about the extent to which the state and federal governments can sue one another. I have dealt with state standing in past work, and plan to address the (difficult) questions about federal government standing to sue a State in future work. See *infra* note 132.

<sup>13</sup> Scholars and jurists have only begun to consider the topic—likely in large part because government-initiated lawsuits (outside the enforcement, defense, and contempt arenas) are a relatively recent phenomenon. My past work discussed some aspects of government standing but did not examine “institutional injury,” nor did it articulate a limiting principle for government standing. See Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 627-28 (2014) (asserting that the House and the Senate may not defend federal law on behalf of the United States); 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 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, 854-56 (2016) (discussing state standing). Notably, the analysis here—emphasizing the distinctive nature of government standing—aligns with Richard Fallon’s insightful observation that standing may be best understood not as a single unified doctrine, but as a series of guidelines for different contexts. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1068-70 (2015).

enforcement, defense, and contempt actions but also illuminates why there is no similar history of standing to assert institutional harm.

Two points of clarification are necessary at the outset. First, the analysis here focuses on what I refer to as *special* government standing—that is, cases where governments assert injuries that private parties cannot (like the generalized interest in enforcing the law). Governments may, like private parties, also suffer concrete injuries-in-fact if, for example, someone breaches a contract with the government or trespasses on government-owned land.<sup>14</sup> There appears to be no question that governments have standing in such cases.<sup>15</sup> This Article explores the more difficult question of when, and the extent to which, governments may invoke federal jurisdiction, even though a private party could not.

Second, I acknowledge that the standing limitations on private parties have themselves been subject to severe scholarly criticism.<sup>16</sup> Many commentators argue that Congress should have broad power to confer standing on private individuals, including to assert some generalized grievances.<sup>17</sup> This Article does not take on that debate. For present purposes,

<sup>14</sup> See, e.g., *United States v. Estate of Hage*, 810 F.3d 712, 716 (9th Cir. 2016) (finding the government may prosecute trespassers in the same manner as ordinary landowners); see also Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (arguing that, even absent statutory authority, “the Executive has standing to enforce the contract or property rights of the United States”).

<sup>15</sup> Such concrete injuries may allow governments to assert some structural constitutional claims—as is true of private parties. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205-06, 211-12 (1987) (upholding, against a Spending Clause challenge, a federal law that required States to raise the minimum drinking age to twenty-one, or risk losing federal highway funds); Grove, *When Can a State Sue the United States?*, *supra* note 13, at 867-69 (explaining that although the *Dole* Court did not mention standing, the State had a concrete pecuniary interest in the federal funds). For similar reasons, States and localities may challenge federal laws that regulate their workplaces, cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985) (rejecting a Tenth Amendment challenge to a federal minimum wage law, without discussing standing), and “sanctuary cities” should have standing to challenge a federal executive decision to withhold funds on the (asserted) ground that the cities declined to abide by federal immigration law. Cf. Vivian Yee, *California Sues Justice Dept. over Funding for Sanctuary Cities*, N.Y. TIMES, at A9 (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/california-sues-trump-administration-over-sanctuary-city-policy.html> [<https://perma.cc/HWJ3-RMFR>] (discussing lawsuits).

<sup>16</sup> See, e.g., ERWIN CHERMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 93-114 (2017); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 381 (1989) (“[M]odern standing doctrine lacks a coherent conceptual foundation.”); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460-64 (2008) (doubting that standing protects separation of powers concerns).

<sup>17</sup> See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, ‘Injuries,’ and Article III*, 91 MICH. L. REV. 163, 235 (1992) (“Congress can create standing as it chooses and, in general, can deny standing when it likes.”); see also Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 54 (1984) (suggesting that courts should generally not “hold[] unconstitutional an act of Congress” conferring standing on private plaintiffs); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223-24 (1988) (arguing that Congress should have “essentially unlimited power” to grant standing to enforce federal statutes but only limited power as to constitutional rights).



I assume that the Supreme Court will continue to demand that private parties demonstrate a concrete injury to sue in federal court. My goal is to show that, whatever the proper boundaries of private party standing, government institutions should have no special status to sue over violations of the structural Constitution.<sup>18</sup>

The analysis proceeds as follows. Part I argues that the concept of “institutional injury” is at odds with the constitutional structure. In our constitutional scheme, government institutions have no special interest in their official powers or duties. Part II asserts that structure, history, and precedent place important limits on government standing and further undermine the case for institutional standing. That Part also offers a novel interpretation of *Coleman v. Miller*, a case involving the standing of state legislators that has long puzzled commentators.<sup>19</sup> Finally, Part III underscores that denying institutional standing furthers important normative values. Such a restriction not only preserves limitations on the federal judicial power but also reminds us of the purposes of our constitutional scheme. The constitutional structure was not designed for the benefit of government institutions, but to serve “we the people.”<sup>20</sup>

## I. THE STRUCTURAL CASE AGAINST “INSTITUTIONAL INJURY”

The structural Constitution is, and was always designed to be, a means to an end. The constitutional scheme has two primary (and somewhat conflicting) purposes. One goal was to correct for the defects in the Articles of Confederation by creating a more powerful—and thus more effective—

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<sup>18</sup> Relatedly, this Article does not dispute that private and public institutions may suffer some judicially cognizable injuries. Corporations and non-profits often have standing to sue in federal court; in many cases, standing questions do not even arise. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017) (nonprofit church alleged that the denial of a state grant to purchase playground equipment violated the Free Exercise Clause); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 84-87 (1984) (allowing a corporation to challenge a state law on Dormant Commerce Clause grounds). Governments can also bring suit if they suffer concrete injuries (or if they assert certain sovereign interests, such as the interest in enforcing the law). *See infra* Section II.A; *supra* notes 14–15 and accompanying text. My goal is to show that government institutions should not have special standing to assert an “injury” to their constitutional powers and duties. Government entities have no greater interest in the structural Constitution than any other member of society—and thus suffer no “particularized” injury when their constitutional powers and duties are threatened.

<sup>19</sup> *See* 307 U.S. 433 (1939); *infra* Section II.C.

<sup>20</sup> U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . .”).

central government to serve the public.<sup>21</sup> But second, the Constitution also had to control the very government that it created and empowered, so as to prevent arbitrary infringement on individual liberty.<sup>22</sup> The Madisonian scheme of separated powers and federalism was the mechanism chosen to achieve this difficult balance.<sup>23</sup>

Notably, many scholars have recently criticized the Madisonian design, arguing that the original structure has largely collapsed or failed.<sup>24</sup> Whatever one thinks of this commentary, for my purposes, the important point is that even the sharpest critics agree that the structural Constitution is a means to an end. The skeptics simply believe that the Madisonian design has failed to serve its primary ends.

I begin with an overview of these basic structural principles, because they underscore a point that is central to this Article: the Constitution confers power on and divides power among institutions, not for the benefit of those institutions, but to serve the public at large. Government institutions suffer no particularized injury when their powers or duties are threatened and, accordingly, should not have standing to assert “institutional injuries.”

### A. *The Constitutional Structure as a Means, Not as an End*

#### 1. The Madisonian Ideal

Many features of our structural Constitution reflect its dual purposes to create an effective, but limited, government. Indeed, the entire scheme of separated powers can be seen in this way. The Constitution divides responsibility over the enactment, execution, and adjudication of the law among three different institutions, so that each branch can specialize in one

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<sup>21</sup> Alexander Hamilton laid out this purpose in the very first paper of *The Federalist*. See THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (underscoring the “unequivocal experience of the inefficacy of the subsisting federal government” under the Articles of Confederation); SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 4-10 (2003) (concluding that the Constitution was designed not only to constrain power but also to devise a workable government).

<sup>22</sup> See *infra* notes 26–27 and accompanying text.

<sup>23</sup> Notably, one need not adopt an originalist approach to constitutional interpretation to accept that the structural Constitution has these dual purposes. Even strong critics of originalism agree that the Constitution was designed to create a workable, but limited, government. See *infra* Section I.A. My goal is to show that, once we are reminded about these overarching (and largely uncontested) principles, the case for institutional standing is greatly weakened.

<sup>24</sup> See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 18 (2010) (asserting that the Madisonian “theory has collapsed”); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 671 (2011) (“[A]ll indications are that political ‘ambition counteracting ambition’ has failed to serve as a self-enforcing safeguard for the constitutional structures of federalism and separation of powers in the way that Madison seems to have envisioned.”).

aspect of governance and thereby (in theory) operate more efficiently.<sup>25</sup> But this division can also (again, in theory) protect individual liberty by preventing the concentration of power in any one person or institution.<sup>26</sup> As James Madison emphasized in *The Federalist*, if the legislative, executive, and judicial powers were joined “in the same hands, . . . the life and liberty of the subject would be exposed to arbitrary control.”<sup>27</sup>

More specific provisions also reflect the dual purposes of the constitutional scheme. For example, Article I gives Congress far greater power than that exercised by the Continental Congress under the Articles of Confederation (among other things, to regulate interstate commerce and tax the populace).<sup>28</sup> But Congress can exercise these powers only through the cumbersome process of bicameralism and presentment.<sup>29</sup> Every law thus requires the assent of the House, the Senate, and the President (or two-thirds of each house to override a presidential veto).<sup>30</sup> Although this procedure may lead to better policymaking overall, because it ensures that the exercise of legislative power is carried out only after careful deliberation, it also creates multiple “veto gates” for legislation—allowing any proposal to be stopped by the House, the Senate, or the President.<sup>31</sup> Along the same lines, the Constitution facilitates international arrangements by empowering the President to negotiate

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<sup>25</sup> See *Loving v. United States*, 517 U.S. 748, 757 (1996) (“By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.”); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 64 (2005) (“Separation of powers . . . facilitated a certain degree of specialization of labor, enabling each branch to concentrate on a different function and thereby operate more efficiently.”).

<sup>26</sup> See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.”); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 263 (1980) (“[T]he separation of powers principle was perceived from the time of its origin as a keystone for guaranteeing the liberty of the people.”); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 103 (1995) (emphasizing that the separation of powers was “to prevent absolutism—the arbitrary use of power”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617, 682 (1996) (underscoring “the separation of powers objective of preserving liberty by dispersing government authority”); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 237-38 (rev. ed. 2014) (“[T]he most obvious way [the original Constitution would protect liberties] was by the political constraints of federalism and separation of powers.”).

<sup>27</sup> THE FEDERALIST NO. 47, *supra* note 21, at 301, 303 (James Madison) (internal quotations and citations omitted).

<sup>28</sup> See U.S. CONST. art. I, § 8.

<sup>29</sup> See U.S. CONST. art. I, § 7, cl. 2-3.

<sup>30</sup> *Id.*

<sup>31</sup> See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-36 (1962); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339 (2001) (noting that this process creates, in effect, a supermajority requirement); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 n.5 (1992) (emphasizing the “veto gates” of the federal legislative process).

treaties.<sup>32</sup> (Notably, under the Articles of Confederation, there was no central executive to engage in such diplomacy.)<sup>33</sup> But the document places an important check on this presidential power by permitting just over one-third of the Senate to block any such international accord.<sup>34</sup>

The States are another important layer in the scheme of checks and balances.<sup>35</sup> Although most commentary focuses on the role of the state government as a whole, the U.S. Constitution also—important to the analysis here—confers certain powers on specific state institutions. These provisions further reflect the Constitution’s dual purposes of creating a workable, but constrained, government to serve the public. Article V, for example, provides that constitutional amendments can be ratified by three-fourths of state legislatures.<sup>36</sup> Notably, this amendment procedure is much more flexible than the unanimity requirement of the Articles of Confederation.<sup>37</sup> But Article V still ensures that changes can be blocked by a little over one-fourth of the States.

Under the Madisonian design, this interlocking web of powers and duties would simultaneously ensure a workable government to meet the needs of “we the people,” while preventing arbitrary exercises of power that might threaten our liberties. The officials in each institution would have not only the proper incentives to serve the public interest but also “the necessary constitutional means and personal motives to resist encroachments” on constitutional principles.<sup>38</sup> As Madison famously stated, “[a]mbition” would “counteract ambition.”<sup>39</sup> Ideally, this regime would work so well that the U.S. Constitution would be “a machine that would go of itself.”<sup>40</sup>

<sup>32</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>33</sup> See ARTICLES OF CONFED. of 1781, art. IX (giving the Continental Congress authority over foreign affairs, including a limited power to “enter[] into treaties and alliances”); CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1789* 55–56 (1969) (noting how the Continental Congress had to exercise this power even before the Articles went into effect in 1781).

<sup>34</sup> See U.S. CONST. art. II, § 2, cl. 2 (“[T]wo thirds of the Senators present [must] concur”).

<sup>35</sup> Under the Madisonian design, the States and the national government would compete for the public’s affection and, in the process, notify the public of constitutional violations by the other level of government. See *THE FEDERALIST* NO. 51, *supra* note 21, at 323 (James Madison). Federalism, of course, is said to offer several benefits in addition to protecting liberty—providing, for example, regulatory diversity and additional opportunities for political participation. Those benefits also focus on individuals, so I do not separately emphasize them here. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[The] federalist structure of joint sovereigns preserves to the people numerous advantages.”).

<sup>36</sup> U.S. CONST. art. V.

<sup>37</sup> See ARTICLES OF CONFEDERATION OF 1781, art. XIII (establishing that “every State” must agree to “any alteration”).

<sup>38</sup> *THE FEDERALIST* NO. 51, *supra* note 21, at 321–22 (James Madison); see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1832 (2009) (“Madison hoped that [the Constitution] could be made politically self-enforcing by aligning the political interests of officials and constituents with constitutional rights and rules.”).

<sup>39</sup> *THE FEDERALIST* NO. 51, *supra* note 21, at 322 (James Madison).

<sup>40</sup> MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 18 (1986).

## 2. Recent Critiques Question the Means, Not the Ends

In recent years, the Madisonian “machine” has been subjected to a barrage of scholarly criticism. Notably, commentators do not doubt that the Madisonian scheme was designed to create an effective, but limited, government to serve the public. Even the sharpest skeptics acknowledge that “[m]utual checking and monitoring by the branches of government” was supposed to “prevent concentration of power, suppress the evils of factionalism, and conduce to better policymaking overall,”<sup>41</sup> while also protecting “individual liberty and minority interests.”<sup>42</sup> But scholars doubt that the scheme of separated powers and federalism can fulfill these lofty goals.

There are two major objections. First, scholars assert that the scheme of separated powers and federalism can no longer serve as a reliable check on concentrated power—or, at least, cannot check power in the way Madison envisioned. In an influential article, Daryl Levinson and Richard Pildes argue that Congress will check the President only when the House of Representatives or the Senate is controlled by a different political party.<sup>43</sup> By contrast, when the government is unified, the two branches are more likely to cooperate than to compete.<sup>44</sup> Along similar lines, Jessica Bulman-Pozen has urged that state officials will challenge federal action only when the federal government is controlled by an opposing political party.<sup>45</sup> That is, “[s]tates oppose federal policy” for partisan reasons, “not because they are states as such.”<sup>46</sup> In sum, according to this critique, any check on the concentration of power depends on the “separation of parties, not powers.”<sup>47</sup>

41 POSNER & VERMEULE, *supra* note 24, at 18; *see id.* (arguing that “[t]his theory has collapsed”); *see also* BINDER, *supra* note 21, at 4-10 (emphasizing that the Constitution was designed not only to constrain power but also to devise a workable government).

42 Levinson, *supra* note 24, at 668.

43 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316, 2329 (2006).

44 *Id.* at 2329 (“[W]hen government is unified . . . we should expect interbranch competition to dissipate.”); *accord* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1809-10 n.222 (2007) (agreeing that “the branches operate very differently depending on whether they are all controlled by the same party”); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 479 (2008) (“Lawmakers advance party interests, not Congress’s institutional interests, such that relations between Congress and the White House are defined by whether there is unified or divided government.”).

45 *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079-80 (2014) (arguing that States serve as “checks” on the federal government when the States are “governed by individuals who affiliate with a different political party”).

46 *Id.* at 1080.

47 Levinson & Pildes, *supra* note 43, at 2385. Notably, even if this “separation of parties” theory is correct, the presence of state governments helps ensure that there will be some checking. It would be exceedingly difficult for a single party to gain control at both the state and the federal levels. *See* Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 109-10 (2016) (“[F]ederalism all but ensures the vertical division of government along partisan lines.”).

Second, commentators also worry that our constitutional scheme contains far too many checks on federal government action, such that the Madisonian scheme has failed to create a workable government. Significantly, under the Madisonian design, the legislature should be the heart of policymaking; that way, all major policies can be carefully tested and deliberated through the complex process of bicameralism and presentment.<sup>48</sup> Yet complaints of congressional gridlock abound.<sup>49</sup> Even during periods of unified government, internal rules (like the veto power of committees and the Senate filibuster), as well as internal party divides, may make it difficult for Congress to enact legislation.<sup>50</sup>

Although these two criticisms may appear to be in tension (that is, how can the government be both gridlocked and insufficiently constrained?), there is an important connection. Bruce Ackerman and others argue that when government is gridlocked, such that Congress cannot act, the President fills the void through unilateral action.<sup>51</sup> This “solution” may temporarily provide the public with needed services. But it also creates the risk of concentrated power—in Ackerman’s terms, a “runaway presidency”—the very disease that the structural checks and balances aim to avoid.<sup>52</sup>

Given these concerns, scholars increasingly suggest fixes—alternative ways to achieve the aims of the Madisonian design. Much of the commentary focuses on how to constrain the growth in presidential power. Eric Posner and Adrian Vermeule argue that although the Madisonian scheme has collapsed, politics and public opinion have largely filled the void and today place important limits on what the President can do.<sup>53</sup> Neal Katyal has emphasized that the executive branch contains its own “internal separation of powers.”<sup>54</sup>

<sup>48</sup> See *supra* notes 28–31 and accompanying text. Cf. THE FEDERALIST NO. 51, *supra* note 21, at 322 (James Madison) (“In republican government, the legislative authority necessarily predominates.”).

<sup>49</sup> See BINDER, *supra* note 21, at 1–2 (observing that “innumerable critics of American politics” complain about gridlock and “call for more responsive and effective government”); see also Daryl J. Levinson, *Incapacitating the State*, 56 WM. & MARY L. REV. 181, 208–09 (2014) (“The inefficiency and gridlock of divided government . . . is now more than ever a source of frustration for those who seek governmental solutions to pressing social problems.”).

<sup>50</sup> House and Senate committees may block even popular legislation. See John R. Boyce & Diane P. Bischak, *The Role of Political Parties in the Organization of Congress*, 18 J.L. ECON. & ORG. 1, 1–3 (2002). The Senate’s Rule 22 allows one member to filibuster a bill, absent a cloture vote by three-fifths of the Senate (sixty members). See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?* 8 (1997).

<sup>51</sup> See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4–6 (2010) (arguing that frustration with “congressional obstructionism” creates “the danger of a runaway presidency”); see also Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1100–01 (“[C]ongressional gridlock pushes the other branches to take a more pronounced role”).

<sup>52</sup> ACKERMAN, *supra* note 51, at 6.

<sup>53</sup> See POSNER & VERMEULE, *supra* note 24, at 4–5, 18; *id.* at 12–13 (constraints include elections, public approval ratings, and presidential concerns about long-term legacy).

<sup>54</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317–18 (2006) (“outlin[ing] a set of mechanisms that create checks

Under this view, the complex bureaucracy—replete with government officials who serve from administration to administration—can push back on “presidential adventurism.”<sup>55</sup> And Jack Goldsmith and Gillian Metzger have argued that the President is constrained by a variety of forces, including the other branches, the bureaucracy, and external groups like the press, lawyers, and nonprofit organizations.<sup>56</sup> This mix of legal and political oversight, Goldsmith asserts, “translates in a rough way the framers’ original design of making presidential action accountable . . . to the wishes of the people.”<sup>57</sup>

Whatever one thinks of these critiques (or the suggested fixes),<sup>58</sup> they do provide important reminders about the nature of our structural scheme of separated powers and federalism. The scheme is simply a means to an end. As Jacob Gersen has observed, the Madisonian structure was “a design choice,” one way to achieve “the dominant aspiration[s] of constitutionalism . . . to constrain government, avoid tyranny, and produce desirable public policy.”<sup>59</sup>

This point sheds light on how we should conceptualize the various powers conferred on, and duties assigned to, the different branches and levels of government. Government institutions are simply the vessels through which constitutional powers and duties flow. Ideally, the interaction among these institutions will lead to good policymaking while preserving individual liberty. But regardless, institutions are not the beneficiaries of their respective powers. Government institutions have no greater interest in their constitutional powers and duties than any other member of society.

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and balances within the executive branch” and that rely on the bureaucracy to “constrain presidential adventurism”); see also Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 543, 543-47 (2015) (emphasizing that “the independent and much relied-upon civil service has institutional, cultural, and legal incentives to insist that agency leaders follow the law, embrace prevailing scientific understandings, and refrain from partisan excesses”).

<sup>55</sup> Katyal, *supra* note 54, at 2318.

<sup>56</sup> See JACK GOLDSMITH, *POWER AND CONSTRAINT* x-xvi, 209 (2012) (arguing that these forces not only constrain the President but have also legitimated the growth in presidential power); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 77-85 (2017) (arguing that “the internal complexity of the administrative state” checks executive power and is essential to maintain the separation of powers).

<sup>57</sup> See GOLDSMITH, *supra* note 56, at 209.

<sup>58</sup> Some scholarship has questioned the premises of the “separation of parties” critique. See JOSH CHAFETZ, *CONGRESS’S CONSTITUTION* 28-35 (2017) (urging that each house of Congress does at times protect its institutional interests and further arguing that cooperation during periods of unified government “is a feature of the American governing system, not a bug,” if it reflects the wishes of the public); David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 5 (2018) (arguing that “the behavior of federal officials cannot always be explained simply by partisan or ideological motives”).

<sup>59</sup> Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 302-03 (2010); see also *id.* at 332 (arguing that “systems can [also] control the excessive concentration of power . . . by limiting the domain in which a political institution may act”).

### B. *Anthropomorphizing Government Institutions*

Given the structural principles that I have articulated, it may seem surprising that jurists and scholars are so enthusiastic about government standing to assert institutional injuries. But the support for institutional standing appears to be an outgrowth of a trend in separation of powers and federalism case law. The Supreme Court's structural constitutional jurisprudence is riddled with "institution talk." That is, the Justices rarely revert to first principles, such as the protection of liberty or the promotion of a workable government. Instead, the Supreme Court typically examines separation of powers and federalism cases as "turf wars" between institutions or levels of government.

Several commentators have powerfully criticized the Court's emphasis on institutions rather than background principles. For my purposes, however, it is important to acknowledge that there is nothing inherently wrong with this "institution talk." As I explain below, such an approach may be a legitimate way to create workable doctrine. But such "talk" becomes problematic when commentators take the additional step of assuming that institutions have ownership over—and even rights to—their constitutional powers. That additional and troubling step has been taken by supporters of institutional standing.

#### 1. A Doctrinal Short Cut

The Supreme Court has often observed that the ultimate purpose of the scheme of separated powers and federalism is to protect individual liberty.<sup>60</sup> The Justices have also, albeit less commonly, stated that the Founding Fathers sought to create an effective national government.<sup>61</sup> However, these first-order principles rarely factor into the Court's analysis in structural constitutional cases.

Instead, in any given separation of powers case, the Supreme Court generally asks whether one branch has "encroached" on another branch or otherwise "aggrandized" its own powers.<sup>62</sup> For example, in *Zivotofsky v. Kerry*, the Court

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<sup>60</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (internal quotation marks omitted)); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of [the] separation of powers is to protect the liberty and security of the governed.").

<sup>61</sup> See *Loving v. United States*, 517 U.S. 748, 757 (1996) ("Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power . . . . By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.").

<sup>62</sup> E.g., *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances . . . was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting *Buckley v.*



struck down a federal passport law as a violation of the President's power to recognize foreign governments.<sup>63</sup> The Court declared: "It was an improper act for Congress to 'aggrandiz[e] its power at the expense of another branch.'"<sup>64</sup>

Likewise, in federalism cases, the Court does not typically harken back to first-order principles of liberty but instead aims to prevent incursions by the national government on the States qua States.<sup>65</sup> For example, in its decisions holding that Congress may not "commandeer" state institutions, the Court has admonished that Congress may not "reduc[e] [the States] to puppets of a ventriloquist Congress."<sup>66</sup> Moreover, in its state sovereign immunity decisions, the Court has emphasized the importance of state dignity, declaring that "[w]hen Congress legislates in matters affecting the States," it must accord these "sovereign entities . . . the esteem due to them as joint participants in a federal system."<sup>67</sup>

A number of scholars have sharply criticized the Court's focus on government institutions, rather than background principles. As Rebecca Brown has emphasized, the Court's separation of powers opinions "place primary emphasis not on the prevention of tyranny or protection of individual liberties, but on the advancement of the institutional interests of the branches themselves, as if that goal were itself a good—a proposition with no historical support."<sup>68</sup> Likewise, in the federalism literature, many

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Valeo, 424 U.S. 1, 122 (1976)); *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) ("The dangers of congressional usurpation of Executive Branch functions have long been recognized.").

<sup>63</sup> The statutory provision at issue instructed the executive to allow individuals born in Jerusalem to designate "Israel" as the official birthplace on their passports. The Court reasoned that the law interfered with the President's decision not to recognize Jerusalem as part of any country. See 135 S. Ct. 2076, 2082, 2094-96 (2015).

<sup>64</sup> *Id.* at 2096 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

<sup>65</sup> Notably, the Court often focuses on the State as an aggregate. But some doctrines, such as commandeering, do emphasize infringement on specific state institutions. See *New York*, 505 U.S. at 161 ("Congress may not simply 'commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'"(internal citation omitted)); *infra* note 66 and accompanying text.

<sup>66</sup> *Printz v. United States*, 521 U.S. 898, 928 (1997) (internal quotation marks omitted); see *id.* at 933-35 (holding that a provision of the Brady Handgun Violence Prevention Act improperly commandeered state officials to enforce federal law).

<sup>67</sup> *Alden v. Maine*, 527 U.S. 706, 715, 758 (1999); see also *Fed. Maritime Comm'n v. S. C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

<sup>68</sup> Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1518-19 (1991) ("The Court's ultimate goal appears to be to protect the interests of each branch—its 'turf'—against encroachment by the others."); accord David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 309-10 (1990) (lamenting this "troubling tendency in separation of powers law"); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 115 (1994) (describing the Court's case law as "a kind of 'turf protection' model of the Constitution"); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U.

commentators have attacked “the Court’s apparent anthropomorphization of states.”<sup>69</sup> In both contexts, structural constitutional doctrine focuses on protecting the “turf” of the “victim” branch or level of government, rather than securing the broader purposes of the constitutional scheme.<sup>70</sup> Accordingly, some scholars urge the Court to return to first principles, arguing that the “protection of individual rights . . . should be an explicit factor” in structural constitutional cases.<sup>71</sup>

These scholars have raised important concerns. As Brown observes, there is “no historical support” for the idea that our Constitution advances “the institutional interests of [government entities] themselves.”<sup>72</sup> Indeed, that point is central to this Article’s case against institutional standing. Nevertheless, I want to acknowledge that the “anthropomorphization” that these commentators have identified is not necessarily objectionable. That is, there are legitimate reasons for the Court, in its separation of powers and federalism cases, to talk about institutions instead of background principles.

In articulating constitutional doctrine, the Supreme Court cannot always harken back to first principles. Instead, it must often craft second-order rules that implement the more generalized commands of the Constitution.<sup>73</sup> Indeed, this

PA. L. REV. 603, 629 (2001) (“Discussions of the need to prevent aggrandizement or to preserve balance among the departments assume that balance among the three branches is an end in itself.”).

<sup>69</sup> Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 84-86, 89-91 (2001) (exploring, and ultimately rejecting, both expressive and instrumental justifications for the focus on state “dignity”); accord Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245, 246, 250-51 (2000) (arguing that the Court’s “insistence on ‘dignity’ for the states sounds like . . . blind deference to States Rights,” rather than an emphasis on the background principles that federalism is designed to serve); Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1125-27 (2000) (criticizing the way the Court has “anthropomorphized” States); Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights”*, 46 WM. & MARY L. REV. 213, 224-26, 226-43, 343 (2004) (“[C]rucial aspects of federalism, including institutional flexibility, national community, and ultimately even individual liberty, will all be casualties of this new conception of ‘states’ rights.”); see also Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1924-28 (2003) (tracing the origins of the word “dignity” in international law and Supreme Court jurisprudence and concluding that the Court is not wrong to refer to States’ “dignity,” but is wrong to interpret that dignity to imply immunity from suit).

<sup>70</sup> See, e.g., Brown, *supra* note 68, at 1518-19 (noting this tendency in separation of powers cases); Levinson, *Foreword, supra* note 47, at 44 (“In federalism cases, similarly, the fighting issue is typically how much policymaking turf the national government will be permitted to control and how much will be left for state governments.”).

<sup>71</sup> Brown, *supra* note 68, at 1515-16; accord Strauss, *supra* note 68, at 309 (noting “the development of what might be called a turf-protecting instead of an individual rights orientation.”). Victoria Nourse has powerfully argued for more attention to how structural changes affect “political relationships”—that is, the way in which individuals and groups are empowered through the political system. See Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 751-52, 781-86 (1999).

<sup>72</sup> Brown, *supra* note 68, at 1518.

<sup>73</sup> Many scholars have recognized that the Supreme Court seeks in large part to craft doctrines that implement the more generalized commands of the Constitution. See RICHARD H. FALLON,

approach may be the only way that the Court can provide guidance to lower courts.<sup>74</sup> In our current judiciary, the Supreme Court reviews only a fraction of lower court decisions on federal law. But the Justices can still influence their judicial inferiors by articulating broad doctrinal tests for the lower courts to apply in the many cases the Supreme Court cannot review.<sup>75</sup> For example, the Court has instructed lower courts to subject content-based restrictions on speech to strict scrutiny,<sup>76</sup> while applying only rational basis scrutiny to most economic regulations.<sup>77</sup> These doctrinal rules provide substantial guidance to lower courts on how to approach a range of constitutional cases.

Similar principles may explain the Court's "institution talk" in its structural constitutional cases. Although scholars have been extremely skeptical of the Madisonian design in recent years, these critiques do not (yet) appear to have influenced the judiciary. Instead, the Justices seem committed to the idea that "[l]iberty is always at stake," when one branch encroaches on

JR., IMPLEMENTING THE CONSTITUTION 4-5 (2001) ("[T]he Justices . . . must craft doctrines and tests that reflect judgments of constitutional meaning but are not perfectly determined by it."); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9, 12 (2004) ("Much of existing constitutional doctrine is better understood not as judicial statements of constitutional meaning . . . but rather as judicial directions regarding how courts should decide whether such operative propositions have been satisfied . . ."); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) ("[C]onstitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate . . .").

<sup>74</sup> See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 5 (2009) (arguing that, given its capacity constraints, the modern Court should issue broad decisions to guide lower courts on federal law). Without endorsing the approach as a normative matter, some scholars have observed that the Court can and does use broad doctrinal rules to guide its judicial inferiors. See Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2046-48 (2008); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668-69 (2012); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095, 1135 (1987); see also Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, J.L. ECON. & ORG. 326, 326, 339 (2007) (asserting that legal doctrine can serve as an "instrument of political control by higher courts over lower courts").

<sup>75</sup> This approach will be effective, of course, only if lower courts comply with Supreme Court decisions. For purposes of this discussion, I assume that lower courts do endeavor to comply—an assumption that has some empirical support. See John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502, 517-19 (1980) (finding compliance with the Court's libel decisions); Donald R. Songer, *The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830, 838-39 (1987) (finding compliance with labor and antitrust decisions); see also David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2025-26 (2013) (concluding, based on an empirical study, that lower courts generally follow higher court dicta).

<sup>76</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

<sup>77</sup> See *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (showing the Court's view that social and economic regulations that neither interfere with fundamental constitutional rights nor proceed along suspect lines should generally be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

another or the federal government intrudes on state terrain.<sup>78</sup> If the Justices are indeed convinced that the divisions among the branches and between the federal and state governments are essential to protecting individuals, then all the Court need do (and instruct lower courts to do) is preserve those institutional boundaries. In this way, the Court's "turf-protection" doctrines (like aggrandizement and commandeering) can be understood as doctrinal short cuts—second-order rules that implement the first-order ideals of preserving a workable government, while also safeguarding individual liberty.

But it is crucial to recognize that the Court's emphasis on institutions is, properly understood, only a second-order rule to protect first-order principles. That is, "institution talk" is nothing more than a doctrinal short cut. Supporters of institutional standing seem to have overlooked this important point. These jurists and scholars have recently begun to treat the "victim" institution not only as the focus of analysis but as a special beneficiary of the constitutional scheme (even a rightsholder). With this conceptual move, the "victim branch" becomes an injured party with standing to sue in federal court.

## 2. The Troubling Move: Institutions as Constitutional Rightsholders

Every institutional standing case involves a claim that some provision of the structural Constitution has been violated. Under current doctrine, if a private plaintiff brought such a suit, the federal judiciary would toss it out of court as presenting only a "generalized grievance" that "does not state an Article III case or controversy."<sup>79</sup> To bring suit, a private party must demonstrate a separate concrete injury-in-fact.<sup>80</sup> Supporters of institutional standing do not dispute this point. Accordingly, their argument for "institutional injury" must rest on an assumption that government institutions have a *greater*—more "particularized"—stake in structural constitutional provisions than do private individuals.

Indeed, that is precisely what recent courts and commentators have asserted. In *U.S. House of Representatives v. Burwell*, the House challenged the executive's implementation of the Affordable Care Act.<sup>81</sup> The House alleged in part that the executive branch had spent money, without a specific congressional appropriation. The funds at issue were subsidies that the Obama

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<sup>78</sup> *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); see also *supra* note 60 and accompanying text.

<sup>79</sup> See *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) ("[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 . . . does not state an Article III case or controversy.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)).

<sup>80</sup> See *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (holding that a private party must demonstrate a concrete injury that can be traced to a challenged action and that can be redressed by the requested relief).

<sup>81</sup> See 130 F.Supp.3d 53, 60-70 (D.D.C. 2015).

administration provided to health insurance companies to offset the costs of insuring low-income individuals.<sup>82</sup> According to the House, the executive's conduct violated Article I, which states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>83</sup>

The district court recognized that no private party would have standing simply to assert that the federal executive misspent federal funds. But the court insisted that the House of Representatives was different: "[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>84</sup> The House had standing to redress that "concrete and particularized" injury in federal court.<sup>85</sup>

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the state legislature brought suit to protect its institutional interest in regulating federal elections.<sup>86</sup> In 2000, voters in the State had, through the initiative process, adopted a constitutional amendment that transferred control over redistricting to an independent commission. (The goal was to overcome partisan gerrymandering.)<sup>87</sup> To support standing, the Arizona legislature pointed to the Elections Clause, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," although "Congress may at any time . . . alter such Regulations."<sup>88</sup>

Notably, just eight years before, the Supreme Court in *Lance v. Coffman* unanimously rejected private party standing to bring a virtually identical

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<sup>82</sup> See *id.* at 60.

<sup>83</sup> U.S. CONST. art. I, § 9, cl. 7; see *Burwell*, 130 F.Supp.3d at 57, 81 ("Through this lawsuit, the House of Representatives complains that [the executive has] spent billions of unappropriated dollars to support the Patient Protection and Affordable Care Act.").

<sup>84</sup> *Burwell*, 130 F.Supp.3d at 72-73.

<sup>85</sup> *Id.* at 76-77 ("[T]he House of Representatives has alleged an injury in fact under its Non-Appropriation Theory—that is, an invasion of a legally protected interest that is concrete and particularized."). The House also claimed that the executive infringed on its Article I power by delaying enforcement of parts of the Affordable Care Act (and thereby "amending" the statute). *Id.* at 63. Despite the House's constitutional rhetoric, the district court construed this claim as an assertion that the executive had violated the statute, rather than the Constitution. *Id.* at 57-58. On this basis, the court denied standing. *Id.* at 76.

<sup>86</sup> See 135 S. Ct. 2652, 2658-59 (2015).

<sup>87</sup> See ARIZ. CONST. art. IV, pt. 2, §1(14); *Arizona State Legislature*, 135 S. Ct. at 2658-59 (noting that the amendment was "an endeavor by Arizona voters to address the problem of partisan gerrymandering").

<sup>88</sup> U.S. CONST. art. I, § 4, cl. 1; see also *Ariz. Leg. Brief*, *supra* note 3, at 11 ("The divestment of the Legislature's constitutionally-conferred redistricting authority clearly constitutes an actual, concrete, and particularized injury to the Legislature.").

constitutional claim.<sup>89</sup> The Court in *Lance* declared: “The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.”<sup>90</sup> But in *Arizona State Legislature*, the Court found standing, reasoning that the state initiative “strips the Legislature of its alleged prerogative to initiate redistricting.”<sup>91</sup> Accordingly, the state legislature could sue to redress its “concrete and particularized” “institutional injury.”<sup>92</sup>

Likewise, a growing number of commentators insist that institutions have particularized interests in their constitutional powers—interests not shared by private parties.<sup>93</sup> Jamal Greene, for example, applauds the grant of standing in *Arizona State Legislature*, but he urges the Court to go much further in accepting claims of institutional injury.<sup>94</sup> To illustrate this broader claim, Greene points to *NLRB v. Noel Canning*, which involved the Recess Appointments Clause.<sup>95</sup> The case before the Court was brought by a private company (Noel Canning), which challenged an adverse decision by the National Labor Relations Board on the ground that three Board members were improper recess appointees.<sup>96</sup>

Greene argues that “*Noel Canning* involved . . . a pure public law dispute, one in which the central interests on both sides of the case are those of public institutions rather than private citizens.”<sup>97</sup> The “central interests” in that case were, on the one hand, “the right of the President to appoint the Board’s members during a disputed recess of the Senate,”<sup>98</sup> and, on the other hand, “the

<sup>89</sup> See 549 U.S. 437, 441-42 (2007) (per curiam). In *Lance*, the plaintiffs claimed that the Colorado Supreme Court had usurped the legislature’s authority over redistricting by allowing a court-written plan to go into effect. See *id.* at 437-38.

<sup>90</sup> See *id.* at 442 (stating that the problem with private party standing was “obvious”).

<sup>91</sup> 135 S. Ct. 2652, 2663, 2665 (2015).

<sup>92</sup> *Id.* at 2663-64; see also *id.* (“[t]he Arizona Legislature . . . is an institutional plaintiff asserting an institutional injury”).

<sup>93</sup> See *supra* notes 4-9 (collecting sources endorsing institutional standing).

<sup>94</sup> See Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1645-46, 1696-97, 1699-1701 (2016) (construing the Court’s case law as prohibiting institutional standing and urging that “in cases about the meaning of constitutional rules, the Court should have no special aversion to the standing of political actors or institutions”).

<sup>95</sup> See U.S. CONST. art. II, § 2, cl. 3 (“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.”); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556-57, 2567 (2014); Greene, *supra* note 4, at 140-41.

<sup>96</sup> See *Noel Canning*, 134 S. Ct. at 2557.

<sup>97</sup> Greene, *supra* note 4, at 140.

<sup>98</sup> See *id.* (“The Court’s real interest was not in the right of Noel Canning to a properly constituted Board; it was in the right of the President to appoint the Board’s members during a disputed recess of the Senate.”).

Senate's interest in presidential appointments that skirt advice and consent."<sup>99</sup> In such a case, Greene argues, the Court should not wait for a private party with a concrete injury to bring suit. Instead, the Court should "[g]rant standing to the Senate itself, or to a minority of the Senate" to vindicate "[t]he claimed constitutional injury" to "its institutional prerogatives."<sup>100</sup>

Supporters of institutional standing clearly treat government institutions as the primary beneficiaries of their respective powers. Indeed, some jurists and scholars suggest that institutions are constitutional rightsholders. Greene, for example, emphasizes "the right of the President to [make appointments] during a disputed recess of the Senate."<sup>101</sup> Aziz Huq agrees that structural constitutional cases involve the "rights of institutions such as states and branches."<sup>102</sup> And in *Burwell*, the district court declared that the House "must be able to invoke the existing jurisdiction of the courts for the protection of [its] justiciable constitutional rights."<sup>103</sup>

But this view has taken us far afield from the constitutional scheme. Consider Greene's arguments about *Noel Canning*. One can certainly debate the scope of the Recess Appointments Clause. But its underlying purpose (on any interpretation) is to ensure that the President can keep the federal government staffed during a "recess" of the Senate, without giving the President untrammelled power over appointments.<sup>104</sup> The Clause thus reflects the dual purposes of the structural Constitution—providing an effective

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<sup>99</sup> See Greene, *supra* note 94, at 1699-1700 (arguing that the Court should grant standing "in the presence of a strong institutional interest, such as the Senate's interest in presidential appointments that skirt advice and consent").

<sup>100</sup> See Greene, *supra* note 4, at 127 ("The claimed constitutional injury in this case was to the Senate and its institutional prerogatives.").

<sup>101</sup> Greene, *supra* note 4, at 140.

<sup>102</sup> For this reason, Huq characterizes private suits to enforce the structural Constitution as a form of "third-party standing." See Huq, *supra* note 4, at 1436-37, 1440-41, 1457-58 (arguing on this basis that only institutions, rather than private parties, should presumptively have standing to enforce the structural Constitution). See generally Section III.A.

<sup>103</sup> See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 79 (D.D.C. 2015) (quoting *Davis v. Passman*, 442 U.S. 228, 242 (1979)) (making this comment in concluding that the House had an implied right of action under the Constitution).

<sup>104</sup> Although the majority and concurrence disagreed over the meaning of "recess," they both agreed on this basic purpose. Compare *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014) ("The Clause gives the President authority to make appointments during 'the recess of the Senate' so that the President can ensure the continued functioning of the Federal Government when the Senate is away."); and *id.* at 2556-57, 2567 (concluding that the Constitution allows the President to fill vacancies during both intersession and intrasession recesses, and to fill vacancies that occur at any time, but that a recess of "less than 10 days is presumptively too short to fall within the Clause"), with *id.* at 2592, 2598 (Scalia, J., concurring in the judgment) (construing the Clause to provide a much narrower presidential power to fill vacancies and asserting that this power was most useful in the country's early days, when senators were away from Washington, D.C., for extended periods and could not act on nominees, but that today the Clause is "an anachronism [because t]he need it was designed to fill no longer exists.").

federal government to serve the public, without concentrating power in a single person or institution. The President and the Senate are the vessels through which this power flows. But they have no special interest in, much less rights to, this appointment scheme.

The same can be said of the provisions at issue in *Burwell* and *Arizona State Legislature*. The Appropriations Clause does not give the House a special interest in the way the executive branch spends money; instead, it places an important constraint on executive discretion for the benefit of the broader public.<sup>105</sup> And one can certainly debate the meaning of the word “legislature” in the Elections Clause (that is, whether the Clause allows different state entities to establish congressional districts).<sup>106</sup> But there seems to be little doubt that the primary purpose of the Clause was to provide for the staffing—the “election”—of the federal legislature. The states have initial authority to establish districts and can perhaps use this power to influence the federal government.<sup>107</sup> But they do not have untrammelled control; in the event that a State balks, Congress may step in and provide for the selection of its members, so that “the existence of the Union” is not left “entirely at [the] mercy” of the States.<sup>108</sup> Accordingly, much like the Recess Appointments Clause, the Elections Clause reflects the Constitution’s balance between a constrained, but still workable, federal government. The provisions of the structural Constitution are designed to serve the broader public interest; they do not confer rights on specific government institutions.

Notably, as this discussion underscores, proponents of institutional standing do not contend that government institutions should have standing

<sup>105</sup> Even scholars who argue for fairly broad executive discretion over spending agree that the purpose of the Clause was to protect the public from arbitrary executive action. See J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1167 (“That there must be a showing of legal authority in order to draw funds from the Treasury ensures that the people will have notice of the spending decisions of government.”); see also Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988) (arguing for a narrower presidential power and asserting that “Congress has not only the power but also the duty to exercise legislative control over federal expenditures” so as to constrain executive discretion over important policies).

<sup>106</sup> See U.S. CONST. art. I, § 4, cl. 1. Compare *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2675 (2015) (interpreting the term to include all forms of state lawmaking, including a state initiative), with *id.* at 2678 (Robert, C.J., dissenting) (asserting that the term “legislature” applies only to the state representative body).

<sup>107</sup> See Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 862-63 (arguing that gerrymanders allow for state influence).

<sup>108</sup> See U.S. CONST. art. I, § 4, cl. 1 (“Congress may at any time by law make or alter such regulations . . . .”); THE FEDERALIST NO. 59, *supra* note 21, at 363 (Alexander Hamilton) (“[A]n exclusive power . . . in the hands of the State legislatures[] would leave the existence of the Union entirely at their mercy.”); see also Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1227-28, 1232 (2012) (underscoring that Congress is ultimately “sovereign” over federal elections).



to sue as representatives of the public.<sup>109</sup> Instead, courts and commentators insist that institutions should have standing to protect their *own* interests in their constitutional powers. Thus, in *Burwell*, the district court stated that the House had standing to protect its “unique role in the appropriations process prescribed by the Constitution, not held by the ordinary citizen,” and that “perversion of that process inflicts on the House a particular injury quite distinguishable from any suffered by the public generally.”<sup>110</sup> Along the same lines, Greene urges that the Senate should have had standing in *Noel Canning* to vindicate “[t]he claimed constitutional injury” to “*its* institutional prerogatives.”<sup>111</sup> Thus, proponents of institutional standing treat institutions as having an intrinsic interest in their constitutional powers. As this Part demonstrates, this assumption—that government institutions have ownership over, and even rights to, their constitutional powers—overlooks some basic principles of our constitutional scheme.

The Constitution confers powers on and divides power among institutions to serve the public at large. There are serious questions as to whether the Madisonian scheme in fact fulfills its dual purposes of creating an effective, but limited, government. But one point seems beyond dispute: government institutions are not the beneficiaries of this scheme. Instead, they are the vessels through which power flows. Government institutions have no particularized, much less concrete, interest in their respective powers.

## II. A LIMITING PRINCIPLE FOR GOVERNMENT STANDING

As *Burwell* and *Arizona State Legislature* illustrate, government entities have in recent years increasingly taken their disputes from the statehouse to the courthouse—often with the blessing of courts and commentators.

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<sup>109</sup> Supporters of institutional standing argue that institutions have a “particularized” interest in their constitutional powers. Otherwise, courts and commentators appear to assume, these claims would constitute “generalized grievances” that must be resolved in the political process, rather than in the courts. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226–27 (1974) (“[A] generalized interest [in the enforcement of the structural Constitution] is too abstract to constitute a ‘case or controversy’ appropriate for judicial resolution . . . . Our system of government leaves many crucial decisions to the political processes.” (footnote omitted)). In any event, for the reasons discussed in Part II, an argument for representational standing would also be undermined by constitutional text, structure, and history. There is no longstanding history of suits between government institutions to enforce structural constitutional provisions (on behalf of the public or otherwise). *See infra* notes 164–168 and accompanying text. Instead, our constitutional system gives government institutions a variety of structural tools (like the presidential veto and congressional investigations) to enforce the structural Constitution against alleged incursions by other institutions. *See* Section II.B. This structure indicates that institutions should carry out their intergovernmental disputes in the political arena, rather than taking their claims to court. Such a structural inference is, in turn, buttressed by the lack of history of intergovernmental disputes.

<sup>110</sup> 130 F. Supp. 3d 53, 72–73 (D.D.C. 2015).

<sup>111</sup> Greene, *supra* note 4, at 127 (emphasis added).

Accordingly, there is a pressing need today to articulate the boundaries of government standing. Drawing on constitutional structure, history, and precedent, this Article offers a theory of the scope and limits of government standing. This theory further underscores why government institutions should not be permitted to sue one another over alleged “institutional injuries”—that is, claims of harm to their constitutional powers or duties.

Although governments are in certain respects special litigants, who can invoke federal jurisdiction even when private parties cannot, such special standing is limited to certain classes of cases. I articulate here a principle that unites these cases: governments have broad standing to perform functions that they cannot perform without resort to the Article III courts. Governments *must* have standing when they seek to impose sanctions on individuals; due process principles require judicial review in such cases. This principle explains the judiciary’s long acceptance of federal and state government standing to enforce and defend their respective laws, and the equally established (but less well-known) rule that each house of Congress has standing to defend its power to hold nonmembers in contempt.

By contrast, under our constitutional system, government institutions have alternative mechanisms to enforce the public interest in the structural Constitution. Institutions can use structural tools (like the presidential veto, the appropriations power, or congressional investigations) to object to incursions by other government entities on their constitutional powers. We can thus make a structural inference that government institutions should rely on those structural tools, not lawsuits, to protect the public interest in our scheme of separated powers and federalism.<sup>112</sup> Such a structural inference has strong historical support: there is no history of lawsuits between government institutions over the structural Constitution. In sum, government institutions can and should battle one another without resort to an Article III court.<sup>113</sup>

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<sup>112</sup> Put another way, government institutions should not have standing to sue one another, even as representatives of the public. For a discussion of the widely accepted practice of making inferences from constitutional structure, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7-32 (1969).

<sup>113</sup> Notably, as discussed below, state institutions have mechanisms under state law to object to incursions by other state entities—the scenario in *Arizona State Legislature*. See *infra* subsection II.B.2. Some readers may doubt that government institutions will in fact use these structural tools, at least against a government entity controlled by the same political party. I discuss these concerns below but offer a brief preview here. First, there is evidence that government institutions *do* use these tools. See *infra* subsection II.B.1.b. Second, even if government entities are less likely to use these tools during periods of unified government (and, conversely, will do so primarily during periods of divided government), permitting institutional standing is no panacea. Those same government entities will also likely bring suit only during periods of divided government. Thus, allowing institutional standing would simply permit government entities to take their (largely partisan) disputes from the statehouse to the courthouse. See *infra* Section III.B.

### A. *The Lessons of Structure, History, and Precedent*

#### 1. Standing to Enforce and Defend the Law

Article III provides that the federal “judicial Power shall extend to [certain] Cases . . . [and] Controversies” involving both the United States and the States.<sup>114</sup> But the constitutional text is noticeably silent about what types of “cases” and “controversies” governments may bring—that is, about the scope of government standing. As scholars have begun to recognize, other constitutional principles and provisions help inform the meaning of Article III “cases” and “controversies” in this context.<sup>115</sup>

One of those background principles is the concept that a sovereign government must have standing to enforce and defend its laws in court. Indeed, this principle is so uncontroversial that the Supreme Court rarely considers the standing of the state or federal government to pursue those sovereign interests (at least when the government is represented by its executive branch).<sup>116</sup> Accordingly, in sharp contrast to private parties, governments may invoke federal jurisdiction to enforce or to protect the continued enforceability of their laws, absent any showing of concrete injury.<sup>117</sup>

*United States v. Lopez*<sup>118</sup> illustrates this principle. The federal government brought a criminal prosecution against Alfonso Lopez for violating the Gun—

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<sup>114</sup> See U.S. CONST. art. III, § 2, cl. 1–2.

<sup>115</sup> See, e.g., Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 589 (2015) (arguing that due process and separation of powers principles inform standing doctrine); Grove, *Standing Outside*, *supra* note 13, at 1314–16 (urging that Article II and Article I help define executive and legislative standing to represent the United States); Grove, *When Can a State*, *supra* note 13, at 854–56 (explaining how history and principles of federalism inform state standing); see also Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 296–306 (2011) (arguing that state enforcement of federal criminal law would raise Article II concerns as well as standing questions).

<sup>116</sup> There is an important debate over whether a legislature can represent its government in court. The Supreme Court has suggested that state legislatures may represent their governments, at least when authorized by state law. See *Arizonans for Official English v. Arizona*, 520 US 43, 65 (1997). By contrast, the Court has never decided whether Congress or its components may represent the United States in court. In past work, I have argued against such legislative standing. See Grove, *Standing Outside*, *supra* note 13, at 1353–65. Other scholars, by contrast, have insisted that Congress or one of its components may represent the United States, at least in defense of federal law. See Brienne Gorod, *Defending Executive Non-Defense & the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1248 (2012); Greene, *Interpretive Schizophrenia*, *supra* note 9, at 582, 595–97 (favoring both institutional standing and standing to “litigate . . . on behalf of the United States”). I do not seek to revisit that issue here.

<sup>117</sup> See *In re Debs*, 158 U.S. 564, 584 (1895) (stating that the federal government’s obligation to enforce the law “is often of itself sufficient to give it a standing in court”); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) (“No one doubts that a State has a cognizable interest ‘in the continued enforceability’ of its laws” (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986))); *United States v. Raines*, 362 U.S. 17, 26 (1960) (holding that Congress may “authorize the United States” to enforce civil rights laws).

<sup>118</sup> 514 U.S. 549 (1995).

Free School Zones Act of 1990.<sup>119</sup> No one asked how the federal government was harmed when Lopez brought a firearm to his high school in San Antonio, Texas. Nor did anyone question the government's standing to appeal and defend the constitutionality of the federal law, when the Fifth Circuit struck it down as a violation of the Commerce Clause.<sup>120</sup> The federal judiciary accepted that, in contrast to private parties, the federal executive has standing simply to enforce and defend federal law on behalf of the United States.

The Supreme Court has likewise recognized the broad standing of state governments to protect state law. Although state governments do not typically seek to enforce their laws in federal court,<sup>121</sup> they must often defend those laws against constitutional or other challenges. And when a lower court strikes down a state law, the federal judiciary accepts that the State may appeal.<sup>122</sup> *Roberts v. U.S. Jaycees*<sup>123</sup> provides an example. The case arose out of a determination by a Minnesota state agency that the Jaycees, a private social club, violated state antidiscrimination law by excluding women.<sup>124</sup> The Jaycees brought suit in federal district court, seeking a declaration that the State's effort to force them to accept female members violated their First Amendment right to freedom of association.<sup>125</sup> When the Jaycees prevailed in the lower court, no one doubted the State's standing to appeal and defend its law against that constitutional challenge.<sup>126</sup>

The judiciary's longstanding acceptance of government standing in these cases makes a great deal of sense. A government must often go through an Article III court to enforce its laws. After all, a government generally cannot,

<sup>119</sup> *See id.* at 551.

<sup>120</sup> *See* *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993).

<sup>121</sup> They do on occasion. Beginning in 1815, Congress allowed federal revenue officers to remove state court actions, including criminal prosecutions, to federal court. *See* *Tennessee v. Davis*, 100 U.S. 257, 267-69, 271 (1879) (allowing removal of a murder prosecution). In the post-Civil War era, Congress also authorized private individuals to remove state court actions, if they could show that the state courts would not protect their civil rights. *See* *Georgia v. Rachel*, 384 U.S. 780, 794-805 (1966); *see also* *Virginia v. Rives*, 100 U.S. 313, 323-24 (1879) (concluding that removal of a murder prosecution was improper under the statute); *Collins & Nash*, *supra* note 115, at 278-84 (discussing the removal statutes). Notably, the Supreme Court has not doubted state standing to appeal cases removed under these provisions—even when the State's only interest was the enforcement of state criminal law. *See, e.g.,* *Georgia*, 384 U.S. at 792-93, 805-06 (ruling on the merits of the State's appeal and concluding that removal was proper).

<sup>122</sup> *See, e.g.,* *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (seeking review of a decision striking down an application of the State's specialty license program on First Amendment grounds); *Florida v. Powell*, 559 U.S. 50, 55-56 (2010) (seeking review of a decision setting aside a robbery conviction).

<sup>123</sup> 468 U.S. 609 (1984).

<sup>124</sup> *See id.* at 612-16.

<sup>125</sup> *See id.* at 615-16.

<sup>126</sup> The Court ultimately upheld the application of the state antidiscrimination law to the Jaycees. *See id.* at 623, 631.

consistent with the requirements of due process, simply impose criminal or civil penalties on private parties; there must be judicial review (at least after the fact).<sup>127</sup> Accordingly, absent standing to enforce its laws in court, the government could not implement many laws at all.

Moreover, as I have argued in prior work, a government's defense of its laws is part and parcel of those enforcement efforts.<sup>128</sup> Alfonso Lopez, for example, did not deny that he carried a weapon onto his school's campus; instead, he sought to defeat the criminal prosecution solely by challenging the constitutionality of the Gun-Free School Zones Act.<sup>129</sup> Accordingly, in order to continue its enforcement action, the government had to defend its law against that constitutional challenge.<sup>130</sup> A government must also defend its laws to ensure their enforceability in future cases. In *Roberts*, once a lower court invalidated Minnesota's antidiscrimination law, the State risked losing its power to sanction not only the Jaycees but also any other entity that might improperly exclude women (or another group). The State thus had to appeal to protect its legitimate "interest 'in the continued enforceability' of its laws."<sup>131</sup> In sum, a government often could not implement its laws at all, absent standing to enforce and defend those laws in an Article III court.<sup>132</sup>

<sup>127</sup> See, e.g., U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

<sup>128</sup> See Grove, *Standing Outside*, *supra* note 13, at 1329–32, 1358–60.

<sup>129</sup> See Brief for Respondent at 8, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260) (noting that Lopez admitted to carrying the gun for use in a "gang war").

<sup>130</sup> My argument depends on the connection between enforcement and defense. That is, I contend that the federal and state governments have standing to defend laws in order to ensure their continued enforceability in future cases. See Grove, *Standing Outside*, *supra* note 13, at 1359–60 ("The [federal] executive branch does not have standing [to appeal and defend a law] merely to offer its views on a constitutional question or to seek a Supreme Court resolution of the question. The executive has standing because, absent an appeal, the law can no longer be enforced against (at least) the parties to that case."); see also Grove, *When Can a State*, *supra* note 13, at 859–62 (explaining that state governments likewise have standing to defend state laws in order to preserve the continued enforceability of those laws). Relatedly, I assert that governments have broad standing *only* to defend laws that regulate their citizens. Under this view, governments *lack* standing to defend laws that merely declare citizens to be exempt from legal requirements. One example of such a "declaratory" law may be Virginia's statute (enacted in the wake of the Affordable Care Act) announcing that private citizens should not be required to purchase health insurance. See Grove, *When Can a State*, *supra* note 13, at 859–62, 876–80 (discussing the Virginia law and asserting that states lack standing to protect "declaratory" state laws that will not be enforced against anyone).

<sup>131</sup> *Hollingsworth v. Perry*, 570 U.S. 693, 701 (2013) (denying private party standing to defend state law, absent a separate concrete injury, but stating that "[n]o one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional.") (citing *Maine v. Taylor*, 477 U.S. 131, 137 (1986)).

<sup>132</sup> In past work, I have argued that similar principles support state standing to sue the federal government, challenging federal statutes or agency actions that preempt, or otherwise undermine the enforceability of, state laws regulating private individuals. See Grove, *When Can a State*, *supra* note 13, at 854–55, 863–76. I argued that such standing not only has historical support but also is a

## 2. The Contempt Power

Similar principles explain why each house of Congress has standing in contempt cases. The House of Representatives and the Senate could not protect their decisions to hold individuals in contempt, absent standing to defend those decisions in federal court.<sup>133</sup> For this reason, scholars are simply wrong to assert that the contempt power supports standing to raise a range of “institutional injuries.”<sup>134</sup>

To understand this point, some history is in order. Beginning in the late eighteenth century, each house of Congress exercised what is known as the “inherent contempt power.”<sup>135</sup> Notably, this power had been exercised by both houses of Parliament and colonial and state legislatures—and was so well accepted at the Founding that it has aptly been dubbed a “constitutional backdrop.”<sup>136</sup>

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reasonable extension of state standing to defend state law. A federal statute or regulation that preempts a state law has much the same impact as a judicial decision striking down the state law; in both scenarios, the State is hindered in its ability to enforce the law against future private parties. *See id.* at 876-80. Some readers may, however, assert that such standing is in tension with the limiting principle I have articulated. The argument might be that a State *need not* have standing to sue the United States in this context; a State could wait for a private party to challenge the (preemptive) federal law. But a private party may never bring such a challenge; private parties may simply adhere to federal requirements, particularly if they would face stiff penalties for violating federal law. *Cf. Wyoming v. United States*, 539 F.3d 1236, 1239-40 (10th Cir. 2008) (upholding state standing in a scenario where a private party would likely have had to violate federal criminal law to challenge the preemption). Moreover, a State could not as readily protect its legitimate interest in “the continued enforceability of its laws” through the political process. *Cf. Maine*, 477 U.S. at 137 (recognizing that States often have standing to protect this interest). As discussed below (in subsection II.B.2), threats to the power of specific state institutions have historically come from within the States themselves, where state institutions have maximum political influence. The preemption threat, by contrast, comes from the federal government. Thus, it is not clear that a State could protect its interest in enforcing state law, absent standing to challenge federal preemption. I recognize, however, that this vision of state standing is contestable. Nothing in this Article turns on one’s acceptance of my theory of state standing to sue the federal government. Along the same lines, this Article does not address the precise boundaries of federal government standing to sue a State (for example, to prevent state interference with the enforcement of federal law). *See, e.g., Arizona v. United States*, 567 U.S. 387, 393-94, 416 (2012) (ruling on the merits, and not discussing standing, in a lawsuit brought by the United States to enjoin the enforcement of an Arizona immigration law on the ground that it was preempted by federal law). I plan to explore that issue in future work.

<sup>133</sup> Notably, in prior work, Neal Devins and I asserted that each house has standing to litigate subpoena cases. *See Grove & Devins, supra* note 13, at 627-28. But we did not address whether such standing supports claims of “institutional injury.” I take on that task here. *See infra* notes 154-160 and accompanying text.

<sup>134</sup> *See Foley Testimony, Hearing, supra* note 9, at 73, 77-78 (pointing to “subpoena cases” as support for claims of “institutional injury”); McGowan, *supra* note 5, at 264 (same). *See also Nash, supra* note 4, at 363-65, 373-75 (similarly emphasizing Congress’s well-established “power to gather information”).

<sup>135</sup> *See, e.g., Allen B. Moreland, Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 190-94 (1967) (discussing contempt cases from 1795 to 1800).

<sup>136</sup> Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1854-57 (2012); *accord* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1085, 1093-1119, 1119-23, 1123-27 (2009) (recounting the history of the inherent contempt power). Notably, there is room for debate over whether each house’s investigative and contempt powers derive from the “legislative power” or each house’s

For present purposes, it is important to understand the procedure used in these inherent contempt cases. If the House of Representatives or the Senate concludes that someone has breached its privileges (by, for example, attempting to bribe a member of Congress or withholding information), the chamber can hold the individual in “contempt.”<sup>137</sup> The chamber can then direct its sergeant at arms to arrest the person and place him in a congressional cell.<sup>138</sup> Accordingly, under the inherent contempt procedure, each house of Congress has the authority to sanction—and even imprison—individuals.<sup>139</sup>

The case of John Anderson provides an early illustration. In 1818, the House of Representatives received a report that Anderson had attempted to bribe one of its members.<sup>140</sup> So the House directed its sergeant at arms to arrest Anderson and place him in a congressional prison.<sup>141</sup> After a hearing at the House of Representatives (a proceeding in which Anderson was represented by counsel and could present witnesses), the House found him guilty of “a contempt and a violation of the privileges of the House.”<sup>142</sup>

But a house of Congress cannot, consistent with due process principles, unilaterally punish contemnors. There must be an opportunity for judicial review (at least after the fact). In *Anderson*, the alleged contemnor filed suit against the

power to determine “the Rules of its Proceedings.” See U.S. CONST. art. I, § 1 (granting to Congress its legislative powers), 5, cl. 1-2 (granting each house the power to “determine the Rules of its Proceedings”). Compare, e.g., Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CALIF. L. REV. 3, 11 (1959) (emphasizing “the grant of legislative power”), with Grove & Devins, *supra* note 13, at 574-75, 597-98 (focusing on the Rules of Proceedings Clause). For present purposes, the important point is that if one accepts that each chamber has a contempt power (of whatever source), each chamber must also have standing to protect that power.

<sup>137</sup> In 1796, the House of Representatives held an individual in contempt for attempting to bribe House members. 5 ANNALS OF CONG. 221-29 (1796).

<sup>138</sup> Some scholars have asserted that the U.S. Capitol has its own jail. *Infra* note 139. The picture appears to be a bit more complicated. Alleged contemnors were typically held in a spare room at the Capitol or at a nearby hotel, not in a specified “jail.” See HISTORY, ART AND ARCHIVES, U.S. HOUSE OF REPRESENTATIVES: Room Service in the Clink: The Case of the Consumptive Witness (Aug. 1, 2013), <http://history.house.gov/Blog/2013/August/8-02-Capitol-Jail/> (“No evidence suggests that any room in the Capitol was ever designated for use as a jail . . . . [I]ndividuals the House has found to be in contempt, and, thus, detained, were . . . held temporarily in the offices of the Sergeant at Arms, locked in committee anterooms, or put under guard at local hotels.”). Today, the House or the Senate would likely ask that any contemnor be placed in a holding cell maintained by the Capitol police. See Tessa Berenson & Lily Rothman, *Can Congress Jail Witnesses Who Refuse to Cooperate?*, TIME (Nov. 15, 2017), <http://time.com/5023920/trump-russia-election-congress-capitol-jail/> (noting that “the Capitol Police do maintain a holding cell a few blocks away” from the Capitol); see also Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 88 (2011) (noting that the inherent contempt procedure has not been used since 1932).

<sup>139</sup> See Chafetz, *supra* note 136, at 1152 (“[E]ach house has a sergeant-at-arms, and the Capitol building has its own jail.”); see also Peterson, *supra* note 138, at 87-88 (explaining the process for confining a congressional witness).

<sup>140</sup> Moreland, *supra* note 135, at 194-95.

<sup>141</sup> *Id.* at 195.

<sup>142</sup> *Id.*

sergeant at arms for false imprisonment and assault and battery.<sup>143</sup> More often, each house's "detainees" have filed habeas corpus petitions in federal court.<sup>144</sup>

In order to protect their contempt findings, the House and Senate must defend their actions in these judicial proceedings. Although neither house must establish standing when the alleged contemnor initiates the litigation, each house must have standing to appeal.<sup>145</sup> And as with government enforcement actions more generally, federal courts have consistently recognized the standing of the House and the Senate to defend their power to punish alleged contemnors.

*McGrain v. Daugherty*<sup>146</sup> offers an example. In 1924, a Senate committee opened an investigation of former Attorney General Harry Daugherty for his alleged failure to prosecute violations of the Sherman Act and the Clayton Act.<sup>147</sup> When one witness (the Attorney General's brother Mally Daugherty) refused to comply with a subpoena for testimony, the Senate held him in contempt and directed its sergeant at arms to take him into custody.<sup>148</sup> Deputy Sergeant at Arms John McGrain then arrested Daugherty.<sup>149</sup> When a lower court granted Daugherty's habeas corpus petition, no one questioned the Senate's standing to appeal (through its deputy sergeant at arms) and defend its contempt finding.<sup>150</sup> Instead, the Supreme Court went straight to the merits, confirming that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."<sup>151</sup>

<sup>143</sup> *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 204 (1821); *see also id.* at 229-31 (affirming the contempt power but stating "imprisonment must terminate with [Congress's] . . . adjournment").

<sup>144</sup> *See, e.g., Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880) (granting a habeas petition sought by an individual held in contempt and imprisoned by the House). Such habeas actions are brought against the sergeant at arms in his official capacity, both because he is the custodian, and because an action against a member of Congress would violate the Speech or Debate Clause. *See* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [members of Congress] shall not be questioned."); *Kilbourn*, 103 U.S. at 200-05 (holding that a habeas action could proceed against the sergeant at arms, but not against members of Congress).

<sup>145</sup> *See* *Jurney v. MacCracken*, 294 U.S. 125, 152 (1935) (upholding, on appeal brought by the Senate's sergeant at arms, a contempt citation against a person who allegedly destroyed papers subpoenaed by a Senate committee); *McGrain v. Daugherty*, 273 U.S. 135, 180 (1927) (upholding, on appeal brought by the Senate's deputy sergeant at arms, a contempt citation where a witness refused to testify in front of a committee).

<sup>146</sup> *McGrain*, 273 U.S. at 135.

<sup>147</sup> *See id.* at 151-52; 65 CONG. REC. 3299 (1924) (documenting the proceedings of the relevant congressional hearing).

<sup>148</sup> *McGrain*, 273 U.S. at 152-54; Moreland, *supra* note 135, at 219 (discussing *McGrain*).

<sup>149</sup> *See McGrain*, 273 U.S. at 153-54 (noting the Senate "command[ed] the sergeant at arms or his deputy to take into custody the body of the said M.S. Daugherty wherever found").

<sup>150</sup> *See id.* at 150 ("This is an appeal from the final order in a proceeding in habeas corpus discharging a recusant witness held in custody under process of attachment issued from the United States Senate . . .").

<sup>151</sup> *Id.* at 174; *see id.* at 180 (holding that "the Senate [was] entitled to have [Mally Daugherty] give testimony").



Despite this lengthy history and judicial blessing, neither house of Congress has relied on its inherent contempt power since 1932.<sup>152</sup> That is, neither chamber has imprisoned an individual for contempt or, relatedly, sought to defend that action in federal court. Instead, since the mid-twentieth century, the House and Senate have often used a different approach: each chamber has filed an affirmative suit in federal court to enforce a subpoena against a recalcitrant witness.<sup>153</sup>

For example, in 2007, a Democratic-controlled House of Representatives investigated the firing of nine U.S. Attorneys during the George W. Bush administration.<sup>154</sup> When White House Counsel Harriet Miers and Chief of Staff Josh Bolton refused to comply with a subpoena for testimony and documents, the House held them in contempt.<sup>155</sup> But the House did not send its sergeant at arms to arrest either Miers or Bolton. Instead, it filed suit, seeking a judicial order compelling compliance with the subpoena.<sup>156</sup> Four years later, a Republican-controlled House sought documents from President Obama's Attorney General Eric Holder in connection with its investigation of the so-called Fast and Furious gun-running scandal.<sup>157</sup> When the Attorney General failed to produce all of the documents, the House held him in contempt—and then filed suit to enforce its subpoena.<sup>158</sup>

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<sup>152</sup> Peterson, *supra* note 138, at 88; see Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1616 (2000) (“The main problem with this [inherent contempt] procedure is that it requires a house to hold a time-consuming trial.”).

<sup>153</sup> See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 181 (6th ed. 2014) (noting the rise of this method in the late 1970s). Each house can also rely on the criminal “contempt of Congress” statute, which permits the executive branch to criminally prosecute an individual found by a chamber to be in “contempt.” See 2 U.S.C. §§ 192–194 (2018) (creating a misdemeanor punishable by fine or imprisonment for the refusal “to answer any question pertinent to the question under inquiry”).

<sup>154</sup> Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55 (D.D.C. 2008).

<sup>155</sup> See *id.* at 64.

<sup>156</sup> Notably, the House first asked the U.S. Attorney for the District of Columbia to prosecute the executive officials under the criminal contempt statute. The House filed suit only when the executive branch declined. See *id.*; *supra* note 153 (discussing the criminal contempt statute). Ultimately, the parties settled the matter. See Peterson, *supra* note 138, at 117–18 (stating that the executive offered to provide some documents and Rove and Miers agreed to testify in a closed hearing).

<sup>157</sup> Fast and Furious was a law enforcement operation to stem the flow of firearms from the United States to drug cartels in Mexico. The operation went awry when one weapon (which U.S. officials were supposed to be tracking) was used to kill a U.S. law enforcement officer. See Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013).

<sup>158</sup> Once again, the House brought suit only after the executive branch declined to pursue a criminal prosecution. See *id.* at 7–8; *supra* note 153 (discussing the criminal contempt statute).

Each chamber's standing to enforce compliance with subpoenas can be justified as an extension of its inherent contempt power.<sup>159</sup> As we have seen, each house has traditionally had the power to apprehend and imprison individuals who fail to comply with its investigations. But there must be judicial review at least after the fact (most likely through a habeas corpus action). In such after-the-fact review proceedings, each house clearly has standing to defend its contempt finding. Accordingly, it seems reasonable that each house also has standing to seek judicial review before the fact.<sup>160</sup>

There are some lingering questions surrounding these subpoena actions—and the scope of the House and Senate's inherent contempt power more generally.<sup>161</sup> This Article does not seek to enter those debates. The important point, for my purposes, is that each chamber's contempt power is *sui generis*. In this context alone, the House and the Senate act as “mini governments”—with the power to punish and even imprison individuals. Like governments more generally, each house must have standing to defend its power to impose such sanctions (before or after the fact).<sup>162</sup> But contrary to the suggestion of some scholars,<sup>163</sup> this unique context does not support standing to sue over a range

<sup>159</sup> For purposes of this analysis, I assume that each house could use its inherent contempt power against any executive branch official. Notably, the Office of Legal Counsel has asserted that this power may not be used in at least one context: when a high-level executive official refuses to provide information on the ground that it is protected by executive privilege (as was the scenario in *Miers* and *Holder*). See Theodore B. Olson, Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. Off. Legal Counsel 101, 140 n.42 (1984). There are reasons to doubt the executive branch's position. See Chafetz, *supra* note 136, at 1132-43, 1145 (drawing on historical evidence to argue that the inherent contempt power extends to all executive officials). This debate is beyond the scope of this Article but could (in my view) ultimately be hammered out in court. That is, if the House or Senate did imprison a high-level executive official (a seemingly unlikely scenario today), that official could file a habeas corpus petition and the House or Senate would have standing to defend and appeal any adverse lower court decision.

<sup>160</sup> Notably, Michael Rappaport at one point hinted at this conceptualization of subpoena actions. See Rappaport, *supra* note 152, at 1619 (“[I]t is essential to view this power [to enforce a subpoena] in conjunction with the traditional power of a legislative house to punish contempts.”). By contrast, Josh Chafetz has argued that the houses of Congress should not bring subpoena actions, at least against the executive. Each chamber should either rely on its inherent contempt power or use other political tools to enforce compliance. See Chafetz, *supra* note 136, at 1152-53.

<sup>161</sup> See *supra* note 159 (discussing one debate over the scope of the inherent contempt power). There are, for example, questions about whether each house has a statutory cause of action. See *Miers*, 558 F. Supp. 2d at 81-88 (noting the issue but finding a cause of action under the Declaratory Judgment Act); see also E. Garrett West, *Revisiting Contempt of Congress*, 2019 WIS. L. REV. (forthcoming 2019) (draft on file with author) (raising various questions about the inherent contempt power).

<sup>162</sup> Accordingly, the federal district courts were correct to find standing in *Miers* and *Holder*—although they did not do so on the grounds offered here. In fact, the federal courts' analyses could be construed (like other recent case law) as sympathetic to broader claims of “institutional injury.” See *Miers*, 558 F. Supp. 2d at 68-71, 78 (stating in part that the House was “an institutional plaintiff asserting an institutional injury”); see also *Holder*, 979 F. Supp. 2d at 14 (urging that *Raines v. Byrd*, 521 U.S. 811 (1997), does not foreclose congressional standing to “assert its institutional interests in court”).

<sup>163</sup> See sources cited *supra* note 134.

of “institutional injuries.” As I argue below, government institutions can object to incursions on their official powers, without resort to an Article III court.

### B. *Structural Tools to Assert Constitutional Powers and Duties*

There is no history of government standing to sue another government entity over an alleged “institutional injury.” The Supreme Court emphasized this point, albeit only in dicta, in *Raines v. Byrd*, when it held that six legislators lacked standing to challenge the Line Item Veto Act based on an alleged “institutional injury.”<sup>164</sup> (The plaintiffs in that case claimed that their “Article I voting power” would be “diluted” if the President could veto specific parts of legislation.)<sup>165</sup> The *Raines* Court emphasized 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.”<sup>166</sup> Instead, the issues were brought to the judiciary by “plaintiff[s] with traditional Article III standing.”<sup>167</sup> As the Court observed, this “historical practice” tends to cut against any claim of “institutional injury.”<sup>168</sup>

I argue that there is a principled reason for this historical rejection of institutional standing. The federal and state governments have broad standing only to perform functions that they cannot perform without resort to the federal courts. As discussed, a government *must* have standing when it seeks to impose sanctions on individuals; due process principles require judicial review in such cases. By contrast, government institutions can interact with one another—and in the process enforce the public interest in the structural Constitution—without the involvement of an Article III court.<sup>169</sup>

#### 1. Structural Mechanisms for the Federal Branches

##### a. *An Overview*

The federal Constitution gives the branches of the federal government many mechanisms to assert their constitutional powers. The President can, for example, veto<sup>170</sup> or (if enacted) refuse to enforce measures that interfere

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<sup>164</sup> See 521 U.S. 811, 814, 817, 821, 829-830 (1997).

<sup>165</sup> See *id.* at 817.

<sup>166</sup> *Id.* at 826-29.

<sup>167</sup> *Id.* at 827.

<sup>168</sup> *Id.* at 826, 826-28.

<sup>169</sup> Some readers may question whether government institutions will do “enough” to enforce the structural Constitution. That depends on one’s assumptions about both institutional incentives and the underlying merits of a given constitutional issue. I discuss those concerns below. See *infra* subsection II.B.1.b, Section III.B; see also *supra* note 113.

<sup>170</sup> See U.S. CONST. art. I, § 7, cl. 2.

with presidential prerogatives.<sup>171</sup> Notably, the executive branch must go through the courts in order to *enforce* federal law against private parties; the executive does not need the courts when it declines to enforce the law. The President's position in the constitutional structure also enables him to use other tools to assert his institutional authority. Most notably, the President can use "soft law"—signing statements or other nonbinding declarations—to raise concerns about interference with his constitutional duties.<sup>172</sup> And the President can always rely on the "bully pulpit" to alert the public about (what he perceives as) violations of his Article II powers.<sup>173</sup>

Likewise, Congress or each house separately can assert its institutional authority in a variety of ways. The House of Representatives or the Senate can object to executive interference by refusing an annual appropriations request.<sup>174</sup> As Josh Chafetz has emphasized, although both houses must act in concert (and with the President) to enact spending legislation, either chamber is free to *reject* a funding request.<sup>175</sup> The Senate can also delay hearings on presidential nominees.<sup>176</sup> And each chamber can, much like the executive, use "soft law" like congressional resolutions to communicate its discontent to other institutions and to the broader public. Notably, such "soft law" matters, because of each chamber's formal role in the constitutional structure. As Jacob Gersen and Eric Posner have forcefully argued, although such resolutions are not formally binding, they do influence actors in other institutions, in part because they signal formal actions that lawmakers may take in the future.<sup>177</sup>

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<sup>171</sup> Although scholars debate the scope of the President's power, most commentators today seem to agree that the President has at least some discretion *not* to enforce laws that he deems unconstitutional. See, e.g., David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS. 63, 89-90 (2000).

<sup>172</sup> See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 575 (2008) (noting that signing statements could be considered a form of "soft law," declarations that are not formally binding but still exert influence).

<sup>173</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("No other personality in public life can begin to compete with [the President] in access to the public mind through modern methods of communications.").

<sup>174</sup> Although the Constitution does not require annual appropriations, that has been the longstanding practice. See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 725-27 (2012); see also U.S. CONST. art. I, § 8, cl. 12 (placing a two-year limit on appropriations for the army, but not otherwise limiting the duration of appropriations).

<sup>175</sup> See Chafetz, *supra* note 174, at 725 ("The annual budget process guarantees that, every year, each house of Congress has the opportunity to give meaningful voice to its priorities and its discontents.").

<sup>176</sup> See U.S. CONST. art. II, § 2, cl. 2 ("[The President] 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 . . .").

<sup>177</sup> See Gersen & Posner, *supra* note 172, at 575, 577-79 ("Agencies, courts, and the President regularly incorporate legislative views . . .").

Moreover, the House and Senate can investigate alleged executive interference with congressional power. Although scholars debate the constitutional source of this investigative power (whether it stems from the general grant of “legislative power” or the more specific authority of each chamber to establish its internal rules), no one seems to doubt each chamber’s authority to conduct investigations.<sup>178</sup> Thus, the House of Representatives did not need to bring suit in *Burwell* to raise objections about the Obama administration’s handling of the Affordable Care Act. The House could have opened an investigation into the spending practices of the Department of Health and Human Services. Notably, although the House must rely on the courts to enforce any contempt finding, the House can conduct other aspects of an investigation, without resort to an Article III court. Many congressional investigations have occurred without any judicial involvement. Such an investigation would not only provide the House with potentially valuable information but would also serve as a congressional “bully pulpit,” raising public awareness about any executive wrongdoing.<sup>179</sup> And, if all else fails, the House and Senate can threaten (and the House can even commence) impeachment proceedings against recalcitrant executive officials.<sup>180</sup>

This variety of mechanisms helps overcome an objection that scholars have raised about reliance on the political process. Supporters of institutional standing have argued in particular that the impeachment and appropriation powers are overly blunt instruments. Although members of Congress may be angry about one presidential “error,” they may not believe he should lose his job.<sup>181</sup> Nor may a house of Congress want to cut off funding for an important program, simply because of one (possibly unrelated) presidential mistake.<sup>182</sup> Litigation, these

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<sup>178</sup> See *supra* note 136 and accompanying text. There may, however, be debates over the scope of each house’s investigative authority.

<sup>179</sup> Indeed, every exercise of power can be seen as a public relations campaign. Under the Madisonian design, the ultimate judge of “who wins” in this battle among government institutions is the electorate. See Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 618 (2010) (“[S]eparation of powers enhances the efficacy of the electoral constraint on politicians . . .”).

<sup>180</sup> See U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6 (stating that the House of Representatives “shall have the sole Power of Impeachment” and that “[t]he Senate shall have the sole Power to try all Impeachments.”). For important and illuminating accounts of presidential impeachment, see CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* (2017); LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* (2018).

<sup>181</sup> See *Foley Testimony*, Hearing, *supra* note 9, at 93-94 (“[I]mpeachment is a drastic political remedy that should be a very last resort, not encouraged by courts as a preferable alternative to a peaceful judicial determination of constitutional parameters.”) (emphasis in original); see also Nash, *supra* note 4, at 383-84 (“While judicial intervention might not be the preferred means by which to resolve an interbranch dispute, still it seems infinitely preferable to the prospect of impeachment.”).

<sup>182</sup> Supporters of institutional standing have argued that budget cuts are particularly inappropriate when the complaint is presidential nonenforcement of a law. How, commentators wonder, can the executive enforce the law without any money? See *Foley Testimony*, Hearing, *supra* note 9, at 93 (“asking

scholars argue, is a much better way for legislators to raise their concerns, because lawsuits can focus on a single area of presidential wrongdoing.<sup>183</sup>

But this argument overlooks the range of options that lawmakers have to challenge executive action. Each house can, for example, use its investigative power to zero in on one area of executive misconduct—as illustrated by the inquiry into the U.S. Attorney firings and the Fast-and-Furious scandal.<sup>184</sup> Likewise, the House or Senate can adopt resolutions criticizing a specific form of alleged presidential misconduct, such as the expenditures at issue in *Burwell*. Moreover, commentators have failed to appreciate that many of these structural tools are best understood as bargaining chips; a house of Congress may be able to extract concessions from the President by threatening to cut off funds, without actually doing so.<sup>185</sup> The constitutional structure offers many mechanisms, short of actual budget cuts or impeachment, for each house to register its disapproval of the executive branch—and to assert the institutional power of Congress.

b. *Structural Mechanisms in Practice.*

Government entities have in fact used these structural tools to assert their institutional authority. Significantly, that is true with respect to “institutional injuries” that have been the subject of recent commentary. Supporters of institutional standing have argued, for example, that the Senate should have standing to protect its power to ratify treaties; that the House may sue to preserve its role in originating revenue legislation; and that the President

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Congress to defund a law it simply wants to have faithfully executed is like asking Congress to cut off its nose to spite its face—a self-defeating overreaction that would make faithful execution of the law *harder*, not easier.” (emphasis in original). It is doubtful that the appropriations power is so blunt an instrument. After all, lawmakers do not have to cut off funding for the program they want enforced; they could take away funds for some other presidential priority. Nevertheless, this commentary suggests a more basic objection: that cutting off funding for important programs could harm the beneficiaries of those programs, without necessarily modifying presidential conduct.

<sup>183</sup> See Nash, *supra* note 4, at 383–84 (arguing that Congress should not be required to “resort to impeachment before commencing a lawsuit,” because that would mean “a fundamental constitutional showdown with the President, and one . . . not at all likely to be focused on the underlying policy dispute.”); Bethany R. Pickett, Note, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 465 (2016) (“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.”).

<sup>184</sup> See *supra* notes 154–158 and accompanying text.

<sup>185</sup> See Chafetz, *supra* note 174, at 732–35 (recounting how the Republican-controlled House gained concessions from the Obama administration by credibly threatening a government shutdown).

should have had standing to challenge the legislative veto as an infringement on his executive power.<sup>186</sup>

In each context, government institutions have relied on structural tools to object to incursions on their constitutional powers and duties. The Senate has used “soft law” to protect its treaty power, issuing declarations demanding that certain types of international agreements, such as those pertaining to arms control or human rights, be submitted for Senate approval.<sup>187</sup> Scholars report that such declarations have had the intended impact; presidents have been reluctant to bypass the Senate on such matters.<sup>188</sup> The House, for its part, has used another form of “soft law”—House resolutions—to object to Senate bills that (in the view of the House majority) circumvent the Origination Clause.<sup>189</sup>

For many years, presidents also condemned the legislative veto as congressional overreach. Both Presidents Jimmy Carter and Ronald Reagan complained (through signing statements and other messages to Congress) that the veto was unconstitutional; each President also threatened to disregard some legislative vetoes of administrative action.<sup>190</sup> The House and the Senate, in turn, fought back by warning that they might not appropriate money for certain agency actions, unless the executive branch abided by these statutory provisions.<sup>191</sup>

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<sup>186</sup> See *supra* notes 6–8 and accompanying text; Greene, *supra* note 94, at 1699–1700 (urging that the Attorney General had “a strong institutional interest . . . in the threat of a one-house veto of his decision to suspend deportation”).

<sup>187</sup> See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 473–76 (2012) (asserting that many “high-profile international agreements are typically processed as Article II treaties rather than congressional-executive agreements,” in large part because of constitutionally based insistence by the Senate); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 800–11 (2001) (recounting that many major international agreements in the areas of arms control, human rights, extradition, and the environment have been concluded through the treaty process, and asserting that “[i]n part, this consistent treaty practice seems to have resulted from Senate efforts to defend its prerogatives”).

<sup>188</sup> See Bradley & Morrison, *supra* note 187, at 473–76; Yoo, *supra* note 187, at 806, 800–11 (noting the impact of “Senate efforts to defend its prerogatives”).

<sup>189</sup> See CHAFETZ, *supra* note 58, at 32–33 (“The House protects this prerogative through ‘blue slips,’ resolutions [on blue paper] that assert that a bill that has originated in the Senate . . . ‘in the opinion of this House, contravenes [the Origination Clause] . . . and . . . shall be respectfully returned to the Senate with . . . this resolution.’”).

<sup>190</sup> See President Jimmy Carter, *Legislative Vetoes: Message to Congress* (June 21, 1978), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1978, at 1146–49 (announcing that legislative veto provisions are unconstitutional, and that his administration would not view them as “legally binding”); President Ronald Reagan, *Statement on Signing International Security and Foreign Assistance Legislation* (Dec. 29, 1981), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1981, at 1203 (objecting to legislative vetoes on constitutional and policy grounds).

<sup>191</sup> See BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 109, 129, 158 (1988) (recounting how the Carter administration’s “commitment to oppos[ing] legislative vetoes had become difficult to sustain” when “programs and funding were being held up while the pro- and anti-veto forces on the Hill fought over whether vetoes would be attached to authorizing legislation.”).

We can certainly debate whether each institution did enough to protect its constitutional powers or, relatedly, whether any given political resolution was the “right” one. The answers to these questions, of course, depend on one’s assessment of the underlying constitutional issue.<sup>192</sup> But there is no question that each institution had the power to defend its institutional authority and thereby protect the public interest in the structural Constitution, without resort to an Article III court.

These institutional disputes (over the treaty process, revenue bills, and the legislative veto) are thus categorically different from a government’s enforcement and defense of its laws, or a house of Congress’s enforcement of contempt sanctions. Due process principles require judicial review when governments seek to impose sanctions on individuals. By contrast, government institutions can battle one another, without the involvement of an Article III court.

## 2. State Institutions

State institutions also have mechanisms for defending their official powers and duties under the U.S. Constitution. As discussed, although we generally think of the role of the State as a whole in the federal scheme, the Constitution does confer some powers directly on state institutions. For example, Article V provides that amendments may be ratified by three-fourths of state legislatures.<sup>193</sup> And as *Arizona State Legislature* illustrates, the Elections Clause of Article I provides that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”<sup>194</sup>

Notably, threats to these constitutional powers have not historically come from the federal government. Instead, any challenges to state institutional authority come from within the states themselves.<sup>195</sup> *Hawke v. Smith*, for example, involved a 1918 Ohio constitutional provision, which prevented the state legislature from ratifying a federal constitutional amendment on its own; any such ratification had to be approved by state voters in a subsequent referendum.<sup>196</sup> The goal was apparently to block ratification of the Eighteenth

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<sup>192</sup> Cf. *INS v. Chadha*, 462 U.S. 919, 953–54, 959 (1983) (holding the legislative veto invalid in all applications).

<sup>193</sup> See U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States . . .”).

<sup>194</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>195</sup> I therefore bracket the difficult question whether the analysis would be different if state institutional authority were threatened by the federal government. For a discussion of how disputes between states and the federal government pose unique challenges for the standing analysis, see *supra* note 132.

<sup>196</sup> 253 U.S. 221, 224–26 (1920).



Amendment on prohibition.<sup>197</sup> The Supreme Court held in *Hawke* (which, notably, was brought by a private party) that this rule violated Article V.<sup>198</sup> Likewise, in *Arizona State Legislature*, the independent commission gained its authority over redistricting from the state constitution.<sup>199</sup>

This point is important because state institutions have maximum power and influence within their own state constitutional systems.<sup>200</sup> The state executive or legislature can propose (and, together, often enact) state laws, endeavor to amend the state constitution, and engage in media campaigns to influence the public.<sup>201</sup> The position of the Arizona state legislature provides an illustration. The legislature could not take back control over redistricting simply by enacting a statute (as one might expect, given that the legislature's power was removed by a state constitutional amendment).<sup>202</sup> But under the state constitution, the Arizona legislature still has the power to propose new

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<sup>197</sup> *Id.* at 224-25 (noting that the Ohio measure was adopted after the House and Senate submitted the Eighteenth Amendment to the States).

<sup>198</sup> *Id.* at 231. Notably, the Supreme Court at that time did not treat disputes over constitutional amendments as "political questions." See Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1912, 1929-32, 1944-46 (2015) (discussing how the Supreme Court for much of our history adjudicated challenges to constitutional amendments on the merits). The Court at that time also had a more relaxed approach to appellate standing—at least when reviewing state court decisions on federal law. See *infra* Section II.C.1 (discussing this approach to appellate review in connection with an analysis of *Coleman v. Miller*, 307 U.S. 433 (1939)); see also *Coleman*, 307 U.S. at 438-39 (citing *Hawke* as an example of the Court's willingness to review state court decisions, whenever the state court held that it had jurisdiction over the federal claim).

<sup>199</sup> See 135 S. Ct. 2652, 2658-59, 2668 (2015) (holding that the Elections Clause of the U.S. Constitution permitted Arizona to adopt the constitutional amendment by popular initiative to address the problem of gerrymandering since "[r]edistricting is a legislative function to be performed in accordance with the State's prescriptions for lawmaking").

<sup>200</sup> There are, of course, differences among the States. But it seems that all state constitutions give a prominent role to the state legislature and executive. See, e.g., Separation of Powers—An Overview, NAT'L CONF. OF ST. LEGISLATURES, at <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> (last visited Jan. 18, 2019) (providing an overview of state government structure).

<sup>201</sup> See *id.*; Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 486 (2016) ("Forty-nine states currently permit amendments by legislative approval, followed by a public referendum for ratification [while Delaware] permits amendment by the legislature without a ratifying referendum."); see also THAD KOUSSER & JUSTIN H. PHILLIPS, *THE POWER OF AMERICAN GOVERNORS* 37 n.40 (2012) (noting that "all governors in the United States possess the veto," although observing that some have a line-item veto and others do not); Richard Platkin, *Government Reform from an Executive Perspective*, 69 ALB. L. REV. 851, 854 (2006) (noting that "[t]he legislative process is definitely the Governor's main mechanism of reform" but that she can also influence "the constitutional reform process" in part because "the Governor enjoys the privilege of the bully pulpit").

<sup>202</sup> See ARIZ. CONST. art. IV, pt. 1, § 1, cl. 14 ("[T]he legislature shall not have the power to adopt any measure that supersedes, in whole or in part, any initiative measure . . . unless the superseding measure furthers the purposes of the initiative."); Ariz. Leg. Brief, *supra* note 3, at 18, 20 n.4 ("[A]bsent a constitutional amendment . . . the Legislature is forever barred from 'prescrib[ing]' Arizona's congressional districts.").

amendments.<sup>203</sup> So with the support of state voters, the legislature could override a particular redistricting plan—or perhaps undo the independent commission’s authority entirely.<sup>204</sup>

Accordingly, state institutions have ways to respond—through their own state government systems—when their official powers and duties are threatened by other state entities. This helps explain why there is no history of suits by state institutions alleging an “institutional injury.” Like their federal counterparts, state institutions have mechanisms to assert their constitutional powers, without resort to an Article III court.

### C. *Understanding Coleman v. Miller*

Constitutional structure, history, and precedent together undermine government standing to assert institutional injuries. Scholars and jurists who favor institutional standing, however, most frequently rely on the Supreme Court’s 1939 decision in *Coleman v. Miller*.<sup>205</sup> That case involved a group of state legislators, not a government institution, but commentators assert that the reasoning in the case supports claims of institutional injury. Although some language in *Coleman* might be read that way, that is not a necessary or even the best interpretation of the decision. This Article articulates an alternative—and novel—interpretation: *Coleman* should be understood as a case in which the Supreme Court applied a now-outdated rule of appellate standing to hear a federal constitutional challenge from a state court.

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<sup>203</sup> See ARIZ. CONST. art. IV, pt. 1, § 1, cl. 15; ARIZ. CONST. art. XXI, § 1 (providing that “[a]ny amendment or amendments to this constitution may be proposed in either house of the legislature, or by initiative petition” and may then be submitted to the voters).

<sup>204</sup> *Id.* Notably, the Arizona state legislature’s power to propose state constitutional amendments is typical. See *supra* note 201 (noting that all state constitutions give the state legislature some power to propose amendments).

<sup>205</sup> 307 U.S. 433 (1939). Jurists and scholars rely on what has become known as the “vote nullification” theory. See *infra* subsection II.C.2. A few scholars have pointed to *INS v. Chadha*, where the Supreme Court permitted the House and the Senate to intervene and defend the statutorily created legislative veto. See 462 U.S. 919, 939 (1983) (declaring Congress a “proper party” capable of intervening in the case); Hall, *supra* note 4, at 19-20, 22, 26-28, 30-31 (examining the implications of *Chadha* for the assertion of institutional injuries); see also Jackson, *supra* note 4 at 869-72 (recognizing that *Chadha* is a complex decision but suggesting that the decision can be understood “narrowly to involve standing to assert a specific legislative prerogative to vote under a federal statute”). My own view, however, is that *Chadha* is, at best, doubtful support for “vote nullification” or any other theory of congressional standing. As I have explained in earlier work, the *Chadha* Court did not hold that either house had standing to appeal (to assert an “institutional injury” or otherwise). See Grove, *Standing Outside*, *supra* note 13, at 1360-61. Moreover, as Neal Devins and I have shown, the Court’s further assertion—that Congress may defend a federal statute, when the executive declines to do so—rested on a misreading of history. See Grove & Devins, *supra* note 13, at 580-93.

### 1. *Coleman* and Appellate Review

*Coleman v. Miller* involved a constitutional challenge to the Child Labor Amendment, which was proposed in 1924 but never ratified.<sup>206</sup> The specific facts arose out of Kansas. Although the state legislature had refused to ratify the amendment in 1925, it revisited the issue in 1937.<sup>207</sup> That year, the state house of representatives voted in favor of ratification.<sup>208</sup> The state senate split evenly (twenty to twenty), but the lieutenant governor broke the tie by voting in favor of the amendment.<sup>209</sup>

A group of Kansas legislators (including the twenty “no” voters in the state senate) subsequently filed suit in state court.<sup>210</sup> They objected in part to the participation of the lieutenant governor, pointing out that Article V provides for ratification by the state legislature, not the executive.<sup>211</sup> They also argued that Kansas could not undo its prior decision (rejecting ratification), and that the amendment was invalid because it had not been ratified by three-fourths of the States within a “reasonable time” since 1924.<sup>212</sup> The state court rejected these claims, so the plaintiff legislators sought further review in the Supreme Court.<sup>213</sup>

Writing (apparently) on behalf of a majority,<sup>214</sup> Chief Justice Hughes concluded that the legislators had standing to appeal the state court’s

<sup>206</sup> See 307 U.S. 433, 435-37 (1939). The amendment was designed to overrule Court decisions holding that Congress lacked power to prohibit child labor in the States. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION*, 1776-1995, at 257, 307-09, 469 (1996) (discussing the amendment’s purpose in the context of labor problems of the 1920s and 1930s). The amendment was rendered unnecessary in 1941 when the Court upheld Congress’s authority to regulate labor conditions. See *United States v. Darby*, 312 U.S. 100, 115-17 (1941) (“[W]e conclude that the prohibition of the shipment interstate of goods produced under the forbidden . . . labor conditions is within the constitutional authority of Congress.”); KYVIG, *supra*, at 313 (observing that, after *Darby*, “any remaining feeling of need for the still-unratified [child labor] amendment evaporated”).

<sup>207</sup> *Coleman*, 307 U.S. at 435-36.

<sup>208</sup> See *id.* at 436.

<sup>209</sup> *Id.* at 435-36.

<sup>210</sup> See *id.* at 436-37 (describing how the plaintiffs sought a writ of mandamus from the state court prohibiting state officials from certifying that the amendment passed).

<sup>211</sup> U.S. CONST. art. V (stating that amendments “shall be valid . . . when ratified by the Legislatures of three-fourths of the several States.”); *Coleman*, 307 U.S. at 446-47 (noting that the plaintiffs contended that the lieutenant governor “was not a part of the ‘legislature’ so that under Article V” he should not be “permitted to have a deciding vote on . . . ratification”).

<sup>212</sup> *Coleman*, 307 U.S. at 436.

<sup>213</sup> *Id.* at 437.

<sup>214</sup> Although Chief Justice Hughes’ opinion is styled as an “Opinion of the Court,” it was joined by only two other Justices (Reed and Stone). *Id.* at 435. Justices Butler and McReynolds urged the Court to reach the merits (and strike down the amendment), so they presumably found standing. See *id.* at 470-74 (Butler, J., dissenting) (urging that the amendment was invalid because it was not ratified within a reasonable time). But we do not know on what basis they found standing. In any event, even if one assumes that Hughes wrote for a majority, his opinion focused primarily on appellate jurisdiction over state courts.

decision.<sup>215</sup> Notably, the Chief Justice did not assert that the plaintiffs could have originally brought the same suit in federal court. On the contrary, he acknowledged (as Justice Frankfurter's concurrence insisted) that the state legislators may have lacked standing in federal district court.<sup>216</sup> But, the Chief Justice insisted, that should not preclude Supreme Court review of a state court decision on federal law.<sup>217</sup>

To underscore this point, Hughes contrasted the Court's treatment of two prior cases involving the Nineteenth Amendment, which granted women the right to vote.<sup>218</sup> *Leser v. Garnett* arose in state court.<sup>219</sup> A group of Maryland voters filed the suit, demanding that the State remove two female voters from the registration list, on the ground that the Nineteenth Amendment was substantively and procedurally defective.<sup>220</sup> When the state court rejected the challenge, the Supreme Court agreed to review the case, noting that "[t]he laws of Maryland authorize such a suit by a qualified voter against the Board of Registry."<sup>221</sup> On the merits, the Court upheld the Nineteenth Amendment.<sup>222</sup> *Fairchild v. Hughes*, by contrast, was originally brought in federal district court.<sup>223</sup> The Supreme Court there held that a New York voter lacked standing, concluding that his challenge to the Nineteenth Amendment involved only a generalized interest in "requir[ing] that the Government be administered according to law."<sup>224</sup>

In *Coleman*, Chief Justice Hughes asserted that these cases (and others) indicated that the Supreme Court could review state court decisions on federal law, even if the plaintiffs would have lacked standing to bring the same suit in lower federal court.<sup>225</sup> As long as the state court found that it had jurisdiction

<sup>215</sup> See *Coleman*, 307 U.S. at 437-46.

<sup>216</sup> This point is made clear by Chief Justice Hughes' discussion of *Fairchild v. Hughes*, 258 U.S. 126 (1922). See also *infra* notes 218-224 and accompanying text.

<sup>217</sup> Throughout his opinion, Chief Justice Hughes emphasized the importance of Supreme Court review of state court decisions on federal law. See *Coleman*, 307 U.S. at 437-38 (emphasizing that the state court found that "members of the legislature had standing" and suggesting that a case involving federal questions should not end in state court); *id.* at 442-43 (underscoring that Congress had repeatedly expanded the Court's appellate jurisdiction over state courts); *infra* notes 218-227 and accompanying text.

<sup>218</sup> U.S. CONST. amend. XIX; *Coleman*, 307 U.S. at 439-41.

<sup>219</sup> 258 U.S. 130, 130-31 (1922).

<sup>220</sup> See *id.* at 135-36.

<sup>221</sup> *Id.* at 136.

<sup>222</sup> See *id.* at 135-37 (holding that the amendment did not result in "so great an addition to the electorate" that it was outside the scope of Article V).

<sup>223</sup> 258 U.S. 126, 127 (1922).

<sup>224</sup> *Id.* at 127, 129-30 ("Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law . . . Obviously this general right does not entitle a private citizen to institute [a suit] in the federal courts").

<sup>225</sup> Interestingly, as Chief Justice Hughes observed, both opinions were penned by Justice Brandeis. See *Coleman v. Miller*, 307 U.S. 433, 439-41, 440 n.4 (1939) (asserting that the Court must have considered the jurisdictional issues in *Leser*, given that "on the same day, in an opinion . . . by

over the federal claims (as the Kansas Supreme Court had in this case), the Supreme Court could hear the appeal.<sup>226</sup> The Chief Justice declared:

In the light of this course of decisions [permitting appeals from state courts on federal questions], we find no departure from principle in recognizing . . . that at least the twenty senators whose votes . . . would have been sufficient to defeat [the] proposed constitutional amendment, have an interest in the controversy which, *treated by the state court as a basis for entertaining and deciding the federal questions*, is sufficient to give the Court jurisdiction to review that decision.<sup>227</sup>

Somewhat ironically, however, after this ode to appellate review, Chief Justice Hughes' opinion largely dismissed the constitutional challenges as nonjusticiable political questions.<sup>228</sup>

In a concurrence on behalf of four members of the Court, Justice Frankfurter insisted that the legislators lacked standing to appeal.<sup>229</sup> Notably, Justice Frankfurter took it as common ground that the legislators could not have filed suit in federal district court. Given that a Kansas legislator “[c]learly . . . would have no standing had he brought suit in a federal court,” the only question was whether the decision of the state court could “transmute the general interest in these constitutional claims into the individualized legal interest indispensable here.”<sup>230</sup> Justice Frankfurter insisted that the answer was no: Although the Kansas Supreme Court was free to hear whatever “causes of action” it chose, the State could not “define the contours of the authority of the federal courts, and more particularly of this Court.”<sup>231</sup>

*Coleman* was in large part a debate about the scope of Supreme Court review of state court decisions on federal law. Indeed, that is how at least some contemporary commentators construed the Justices' standing

the same Justice [Mr. Justice Brandeis], jurisdiction had been denied to a federal court” in *Fairchild*); *see also id.* at 438-46 (listing a string of cases in which the Supreme Court reviewed state court decisions on federal law).

<sup>226</sup> *See id.* at 437-38 (underscoring that the state court found that “members of the legislature had standing . . . . Had the questions been solely state questions, the matter would have ended there”).

<sup>227</sup> *Id.* at 446 (emphasis added).

<sup>228</sup> *See id.* at 450-51 (concluding that Congress had “ultimate authority” to determine “the efficacy of ratifications” and “whether . . . [an] amendment had lost its vitality through lapse of time . . . .”). Interestingly, the Court failed to reach a decision on the justiciability of what was arguably the legislators' primary objection: the tie-breaking vote of the lieutenant governor. *See id.* at 436, 446-47 (noting that the Court was “equally divided” on this issue). For an explanation as to how the Court could be equally divided on one issue in a case that involved nine Justices, see MARK TUSHNET, *THE HUGHES COURT* (draft on file with author) (explaining that Justice McReynolds failed to cast a vote on this issue before leaving on vacation).

<sup>229</sup> *See Coleman*, 307 U.S. at 460, 460-70 (Frankfurter, J., concurring).

<sup>230</sup> *Id.* at 465.

<sup>231</sup> *Id.* at 462; *see also id.* at 466 n.6 (urging that the federal statutes governing appellate jurisdiction over the state courts did not suggest that “Congress enlarged the jurisdiction of the Court by removing the established requirement of legal interest”).

analysis.<sup>232</sup> Chief Justice Hughes assumed that a plaintiff could have standing to appeal a state court ruling to the Supreme Court, even if the plaintiff could not have brought the same suit in federal district court. Today, by contrast, it is clear that the same standing requirements apply both at trial and on appeal to any Article III court.<sup>233</sup> It is also clear that this appellate standing rule may bar Supreme Court review of some state court decisions on federal law.<sup>234</sup> At the time, those rules had not been established. As William Fletcher has observed, “Justice Frankfurter’s concurring opinion in *Coleman v. Miller* . . . provided the first full elaboration” of the rule today: the Supreme Court will not review state court decisions on questions of federal law, unless the person seeking review can demonstrate an Article III injury.<sup>235</sup>

## 2. The Nullification Theory

Supporters of institutional standing appear to have largely overlooked *Coleman*’s emphasis on Supreme Court supervision of state courts. Instead, these commentators argue that the Court upheld standing on a different ground: the lieutenant governor’s tie-breaking vote “nullified” the votes of the twenty senators who declined to ratify the Child Labor Amendment.<sup>236</sup>

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<sup>232</sup> See James Wm. Moore & Shirley Adelson, *The Supreme Court: 1938 Term II. Rule-Making, Jurisdiction and Administrative Review*, 26 VA. L. REV. 697, 706-07 (1940) (stating *Coleman* was “probably consistent with earlier cases,” to the extent it held that the senators could “invoke the appellate jurisdiction of the Supreme Court, although they would not have had standing to sue initially in the federal courts.”). Contemporary observers were more troubled by the Court’s decision to treat constitutional issues surrounding amendments as nonjusticiable political questions. See *id.* (stating that the political question ruling was far “[l]ess anticipated”). Notably, *Coleman* was the first case to declare such issues to be nonjusticiable. See Grove, *Lost History*, *supra* note 198, at 1912, 1929-32, 1944-46 (“Throughout the nineteenth and much of the twentieth century, federal courts adjudicated constitutional questions on the merits, including . . . the validity of constitutional amendments . . . . Then, in . . . *Coleman v. Miller*, the Justices for the first time declined to rule on the validity of an amendment . . .”).

<sup>233</sup> See *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) (“We need not decide today whether a party seeking to intervene before a district court must satisfy . . . the requirements of Art. III. To continue this suit [on appeal] in the absence of [the original defendant], the [intervenor] must satisfy the requirements of Art. III.”).

<sup>234</sup> See Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund, 500 U.S. 72, 78 n.4 (1991) (“[T]he requirements of Article III plainly [do] not apply [in state court].”).

<sup>235</sup> William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 275 (1990) (footnote omitted); see *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989) (stating that the party seeking review from state court must demonstrate Article III standing); see also Fletcher, *supra*, at 265 (arguing that “[s]tate courts should be required to adhere to article III ‘case or controversy’ requirements” when they decide federal questions, so that their decisions are subject to Supreme Court review).

<sup>236</sup> See sources cited *infra* note 243. Some language in *Coleman* could be read this way, although (as I emphasize through italics) many of the same quotes can also be read to support my argument that the case was about appellate jurisdiction. See *Coleman*, 307 U.S. at 446 (“In the light of this course of decisions [upholding jurisdiction from state courts], . . . at least the twenty senators whose votes . . . would have been sufficient to defeat the resolution . . . , have an interest in the controversy which, *created by the state court as a*

The idea is that (absent the tie-breaker) those twenty votes would have killed the Kansas ratification; accordingly, those votes were “held for naught” by the lieutenant governor’s action.<sup>237</sup> There is language in *Coleman* to support this theory (although much of that same language is also consistent with this Article’s appellate review theory).<sup>238</sup>

This “nullification” construction also finds some support in *Raines v. Byrd*. Although the bulk of *Raines* opposed claims of institutional injury, the Court did not entirely foreclose such claims.<sup>239</sup> And in discussing Chief Justice Hughes’ opinion, the *Raines* Court stated:

[O]ur holding in *Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.<sup>240</sup>

The *Raines* Court seems to have been primarily concerned with distinguishing *Coleman* from the case before it, which was brought by only six legislators.<sup>241</sup> Moreover, *Raines* was clearly no ringing endorsement of “vote nullification” or any other claim of institutional injury—as demonstrated by the qualifier “at most” and the reasoning in the remainder of the opinion, which emphasized the lack of historical support for such claims.<sup>242</sup>

Nevertheless, scholars and jurists insist that *Coleman* and *Raines* can be read to support a range of institutional standing claims, at least for a legislature.<sup>243</sup> Under this view, the main problem in *Raines* was the small

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basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.”); see also *id.* at 438 (“Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. *Petitioners come directly within the provisions of the statute governing our appellate jurisdiction.*” (emphasis added)).

<sup>237</sup> *Coleman*, 307 U.S. at 438.

<sup>238</sup> See *supra* note 236.

<sup>239</sup> The Court, for example, “attach[ed] some importance” to the fact that the six plaintiff legislators in that case were not “authorized to represent their respective Houses,” although it quickly added that it “need not now decide” whether such authorization would have altered its standing determination. *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997).

<sup>240</sup> *Id.* at 823 (citation omitted).

<sup>241</sup> Indeed, the Court emphasized that it need not decide whether *Coleman* might “be distinguished in other ways.” *Id.* at 824 n.8 (noting that *Coleman* might not apply to “a similar suit” brought by federal legislators or “brought in federal court, since that decision depended on the fact that the Kansas Supreme Court ‘treated’ the senators’ interest in their votes ‘as a basis for entertaining and deciding the federal questions’”).

<sup>242</sup> *Id.* at 823; see also *supra* notes 164–168 and accompanying text (noting that *Raines* underscored the lack of historical support for institutional injuries).

<sup>243</sup> See Mank, *supra* note 4, at 188; Nash, *supra* note 4, at 349-58, 369, 376-78 (criticizing *Raines* as offering an “unnecessarily stingy” view of congressional standing, but arguing that the case and *Coleman* support claims

number of legislative plaintiffs; six legislators could not possibly speak for an institution. By contrast, the institution itself is much more analogous to the twenty “no” voters in *Coleman*. Just as those twenty “no” votes were “nullified” by the lieutenant governor’s tie-breaker, an institution’s power may be “nullified” by outside interference.

This nullification idea has proven central to many recent assertions of institutional injury.<sup>244</sup> In *Burwell*, the House alleged that the executive’s payments to insurers “injured the House by nullifying” its decision not to appropriate funds.<sup>245</sup> In *Arizona State Legislature*, the Supreme Court found that the state legislature’s power over redistricting was “completely nullif[ied]” by the state constitutional amendment transferring that power to an independent commission.<sup>246</sup> And in *United States v. Windsor*, the House of Representatives argued that its “core lawmaking function [was] ‘completely nullified’” by a lower court decision invalidating the Defense of Marriage Act on equal protection grounds.<sup>247</sup> Indeed, the House in *Windsor* went further, stating that the “institutional harm to the House’s core constitutional

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of institutional injury); see also Greene, *supra* note 9, at 584-88, 593-94, 598 (asserting that the cases support standing to challenge a presidential nonenforcement decision).

<sup>244</sup> In June 2017, around 200 legislators relied on a “vote nullification” theory to support standing in a suit alleging that President Trump violated the Emoluments Clause. See Complaint at 50-51, *Blumenthal v. Trump*, No. 1:17-cv-01154 (D.D.C. June 14, 2017), 2017 WL 2561946 (stating that the President “nullified” their votes by failing to seek congressional authorization before accepting payments from foreign dignitaries); see also U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office [under the United States] shall, without the Consent of the Congress, accept [any Emolument] from any . . . foreign State.”). In September 2018, a federal district court held that each individual member of Congress has standing to allege this institutional injury. That is, the district court did not rely on the fact that the suit was brought by a large number of legislators. See *Blumenthal v. Trump*, 335 F.Supp.3d 45, 58, 61-63 (D.D.C. 2018) (concluding that *Raines* and *Coleman* establish that a legislator may have standing to assert an “institutional injury . . . when a legislator’s vote has been completely nullified” and that the “[p]laintiffs adequately allege that the President has completely nullified their votes in the past because he has accepted prohibited foreign emoluments as though Congress had provided its consent” and “will completely nullify their votes in the future” to the extent that he “continue[s] this practice”); see also *id.* at 63 (asserting that the Supreme Court has not held that “an institutional claim may be brought *only* by the institution”). Notably, the district court in this case went further than many current scholars. Although some early commentators supported individual legislator standing to assert institutional injuries, most recent commentators have suggested that such claims should be brought *only* by institutions—or at least by a large enough number of legislators to effect legal change on an issue (and, thus, represent the institution as a whole). See *supra* notes 4–9 and accompanying text (citing scholarship that supports the standing of institutions and that argues, for example, that thirty-four senators could bring suit to assert the Senate’s role in ratifying treaties, because that is the number—one third of the Senate plus one—that could prevent ratification).

<sup>245</sup> Opposition of the U.S. House of Representatives to Defendants’ Motion to Dismiss the Complaint at 26, U.S. House of Representatives v. *Burwell*, 130 F. Supp. 3d 53, 26 (D.D.C. Feb. 27, 2015).

<sup>246</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 (2015).

<sup>247</sup> The House claimed that the injury arose in part from the fact that the executive branch refused to defend the law in court. BLAG Brief, *supra* note 2, at 12-14. Although the majority in *Windsor* did not address the House’s standing, see 133 S. Ct. 2675, 2688 (2013), Justice Alito found that the House suffered an institutional injury, because the lower court decision striking down the law “limited Congress’ power to legislate.” See *id.* at 2712-14 (Alito, J., dissenting) (asserting that *Coleman* supported standing).



authority” stemmed in part from the fact that the lower court had applied intermediate scrutiny.<sup>248</sup> According to the House: “The decision below, if not reversed, will permanently diminish the House’s legislative power by imposing a heightened standard of review for legislation that classifies on the basis of sexual orientation.”<sup>249</sup>

As these examples suggest, the “nullification” theory attributed to *Coleman v. Miller* has become the basis of many modern claims of institutional injury. *Coleman*, however, is a thin reed on which to base such a revolution in standing doctrine. The bulk of Chief Justice Hughes’ opinion emphasized standing to seek Supreme Court review of state court decisions. And Hughes at no point suggested that plaintiffs could raise “institutional injuries” in lower federal court. Given that *Coleman* does not clearly endorse the concept of “institutional injury,” and given that such a concept is problematic as a matter of constitutional theory and at odds with the bulk of our history, it seems more reasonable to read *Coleman* as a case about appellate standing under a now-outdated rule.

### III. FURTHER REASONS TO LIMIT GOVERNMENT STANDING

This Article’s argument against institutional standing rests primarily on constitutional text, structure, history, and precedent. But adherence to the historical limits on government standing also furthers other constitutional values. First, denying standing to assert institutional injuries serves as a valuable reminder that individuals, rather than institutions, are the rightsholders in our constitutional system. Second, this rule preserves important limitations on the federal judicial power by requiring government institutions to battle one another on their own turf. Notably, in an era of increasing party polarization, this restriction serves not only to constrain but also to protect the judiciary from becoming embroiled in partisan controversies.

#### A. *Individuals as Rightsholders*

As discussed, the Supreme Court’s structural constitutional jurisprudence often focuses on government institutions, rather than the principles underlying our constitutional scheme. This approach is defensible, to the extent the Court aims to create workable doctrine for lower courts to apply. But as Rebecca Brown and others have powerfully argued, there is “no

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<sup>248</sup> BLAG Brief, *supra* note 2, at 13-14; see *Windsor v. United States*, 699 F.3d 169, 185, 188 (2d Cir. 2012) (applying intermediate scrutiny). The Supreme Court has not settled on a standard of scrutiny for claims of discrimination based on sexual orientation.

<sup>249</sup> BLAG Brief, *supra* note 2, at 13.

historical support” for the idea that the Constitution protects “the institutional interests of [government entities] themselves.”<sup>250</sup>

Supporters of institutional standing appear to have overlooked this fundamental point. These scholars and jurists treat institutions, rather than individuals, as the primary beneficiaries of the structural constitutional scheme. Under this view, government institutions may even have a right to their constitutional powers and duties.<sup>251</sup> Aziz Huq has carried these arguments about institutions as rightsholders to their logical conclusion. Huq not only supports institutional standing but also contends that private parties—even those who have suffered a concrete injury—should *not* have standing to raise separation of powers or federalism claims.<sup>252</sup>

Consistent with the premises of institutional standing, Huq argues that when private plaintiffs claim violations of the structural Constitution, they assert the “rights of institutions such as states and branches.”<sup>253</sup> Accordingly, Huq reasons, private suits to enforce the structural Constitution are a form of “third-party standing.”<sup>254</sup> In our legal system, third-party standing claims are generally disfavored; that is, courts are reluctant to let a plaintiff raise the constitutional rights of someone else.<sup>255</sup> Building on this doctrine, Huq concludes that private individuals should not have standing to “vindicate the constitutional interests of third-party institutions.”<sup>256</sup> Instead, “structural constitutional values are best entrusted in the courts to the institutions they directly benefit.”<sup>257</sup>

<sup>250</sup> Brown, *supra* note 68, at 1518; *see supra* subsection I.B.1.

<sup>251</sup> *See supra* subsection I.B.2-3.

<sup>252</sup> *See* Huq, *supra* note 4, at 1440. Huq argues that even a criminal defendant (like Alfonso Lopez) should not have standing to challenge his conviction on the ground that the relevant statute violated the structural Constitution. *See* United States v. Lopez, 514 U.S. 549 (1995); Huq, *supra* note 4, at 1514-15 (“Even when a litigant is hauled into court as a criminal or a civil defendant . . . no standing ought to be allowed.”). Huq identifies only one exception: private individuals should have standing to raise violations of Article III. *See id.* at 1520-21 (arguing that “the protections of Article III” are “part and parcel of the asserted individual interest in fair adjudication”).

<sup>253</sup> Huq, *supra* note 4, at 1458; *supra* subsections I.B.2-3.

<sup>254</sup> *Id.* at 1436-37 (characterizing “[i]ndividual standing for the structural constitution” as “a species of otherwise impermissible third-party standing”).

<sup>255</sup> Under third-party standing doctrine, the Court grants the plaintiff “standing to assert the rights of another.” *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (noting that such standing is generally disfavored); *Warth v. Seldin*, 422 U.S. 490, 499, 510 (1975) (recognizing limits on the ability of third parties to invoke the court’s remedial powers).

<sup>256</sup> Huq, *supra* note 4, at 1457-58 (“Canonical accounts of standing suggest that the federal courthouse door is open only to individuals seeking redress for violations of their own rights. How then is it that some individual litigants have standing under the structural constitution for the rights of institutions such as states and branches?”).

<sup>257</sup> *Id.* at 1439-40 (arguing, on policy grounds, that institutions can best determine when to raise structural claims). Notably, Huq does not seek to articulate the boundaries of institutional standing. He assumes that government entities and officials have broad standing to vindicate structural claims. *See id.* at 1440 n.16, 1514 (“In the mine run of cases, it is the case that the branch, the state, or an official of one of these governmental entities will have standing to raise a claim.”).

Huq's thesis is a logical implication of the argument for institutional standing. As discussed, that argument rests on the assumption that institutions have a particularized interest in their respective powers—an interest greater than any private citizen. If institutions are the primary beneficiaries (indeed, the rightsholders) of their constitutional powers, why not give them the exclusive authority to determine when to assert their “rights”?

But as I have demonstrated, this view inverts our constitutional order. The constitutional structure was designed to provide a workable, but limited, government that would better serve the public than had the Articles of Confederation. Government institutions are the vessels through which constitutional powers and duties flow; they are not the beneficiaries of the scheme. Denying institutional standing reminds us of this basic principle: Individuals, not institutions, are the rightsholders in our constitutional system.<sup>258</sup>

This point also underscores why the institutional disputes discussed in this Article should not be dismissed on political question grounds. Some readers may be inclined to say that courts could use the political question doctrine to avoid, for example, a Senate lawsuit over the Recess Appointments Clause or a House of Representatives claim under the Origination Clause. But under current doctrine, if the Supreme Court designates an issue as a “political question,” the federal judiciary cannot decide that constitutional issue at all.<sup>259</sup> Accordingly, such an approach would prevent a private plaintiff, even one with a concrete injury, from bringing suit.<sup>260</sup>

### B. *Protecting the Judicial Power in an Era of Polarization*

Denying institutional standing not only reminds us that individuals are the beneficiaries in our constitutional scheme but also promotes Article III values. Standing doctrine seeks in part to discern, perhaps imperfectly,<sup>261</sup> when litigants have an interest that merits judicial resolution, while leaving many other matters to the political process.<sup>262</sup> As I have argued, governments

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<sup>258</sup> Notably, Ann Woolhandler and Michael Collins have emphasized a similar point in arguing for limits on state standing. See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 517, 520 (1995) (“[A] narrower view of state standing [can] enhance the status of individuals as the primary beneficiaries of constitutional guaranties.”); see also Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 210, 212, 229-30, 233, 236 (2014) (reiterating this theme in arguing that the federal and state governments should be permitted to sue one another only with congressional authorization).

<sup>259</sup> See *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

<sup>260</sup> Private plaintiffs have raised claims under these constitutional provisions. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (Recess Appointments Clause); *United States v. Munoz-Flores*, 495 U.S. 385, 389-96, 397-400 (1990) (Origination Clause).

<sup>261</sup> See *supra* notes 16-17 and accompanying text.

<sup>262</sup> See *Allen v. Wright*, 468 U.S. 737, 750 (1984) (“The several doctrines that have grown up to elaborate [the “case” or “controversy”] requirement are ‘founded in concern about the proper—

*must* have standing when they seek to impose sanctions on individuals; due process principles require judicial review in such cases. For that reason, courts properly recognize government standing in enforcement, defense, and congressional contempt cases. But under our constitutional structure, government institutions have various tools to object to incursions by other government entities—and thereby to enforce the public interest in the structural Constitution. That is, government institutions can battle one another, without the intervention of an Article III court.

There are pressing reasons today to adhere to the structural and historical limits on government standing. Notably, such restrictions on the federal judicial power serve not only to constrain but also to protect the federal judiciary. These rules help safeguard “the judiciary’s credibility and reputation” by ensuring that it does not become embroiled “in every important political or constitutional controversy.”<sup>263</sup> Denying institutional standing furthers this important purpose. This restriction helps protect the judiciary from becoming a battleground for partisan conflicts.

In an era of growing party polarization,<sup>264</sup> government officials are likely to bring suit, not to redress alleged “institutional injuries,” but rather to fulfill partisan goals.<sup>265</sup> Indeed, partisanship seems to be at the heart of recent institutional standing cases. In *Burwell*, the Republican-controlled House of Representatives complained about the Obama administration’s implementation of the Affordable Care Act. But once the Trump administration took over, those same lawmakers asked the federal district

and properly limited—role of the courts in a democratic society.” (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [one’s] views in the political forum or at the polls.”).

<sup>263</sup> See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1003-07 (2002) (stating that justiciability tests help protect “the judiciary’s credibility and reputation” by limiting its role in political and constitutional controversies). This idea is connected to the notion that the federal courts’ authority may depend on their “diffuse support” among the public. See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658 (1992) (asserting, based on an empirical study, that the Supreme Court at that time enjoyed “diffuse support” among the public).

<sup>264</sup> See Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 219-220 (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 POL. SCI. Q. 5, 6 (2001) (arguing that, in the 1990s, “the stark partisan polarization among the parties’ politicians . . . accelerated”).

<sup>265</sup> As Neal Devins and I have demonstrated, in the past two decades, when lawmakers have participated in litigation (even as amici), they have done so largely for partisan reasons. See Grove & Devins, *supra* note 13, at 617-21; Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress’s Place*, 21 CHAP. L. REV. 55, 72-76 (2018) (“[P]olarization has transformed the role of institutional counsel in ways that reflect profound differences between the House and Senate.”).

court to put the litigation on hold.<sup>266</sup> The House did not press the issue, even when the Trump administration continued the very same spending practices that the House deemed “unconstitutional” under President Obama.<sup>267</sup> A similar story underlies *Arizona State Legislature*. When the independent commission was first established in 2000—and even after it created its first set of districts in 2001—the Republican-controlled state legislature did not object.<sup>268</sup> The legislature filed suit a decade later (in 2012), after the independent commission adopted a second districting scheme—one that was far less favorable to the Republican Party.<sup>269</sup>

Some readers might argue that the increase in partisanship also weakens the structural tools that institutions can use to enforce the structural Constitution. That is, in our currently polarized political environment, the House and Senate will not use their appropriations or investigative authority to challenge a same-party President; likewise, state officials will not take on other state institutions controlled by their ideological allies. Notably, some examples cut against that assumption. The Senate has asserted its role in the treaty process; the House has defended its power over revenue bills; and presidents objected to the legislative veto, without regard to party.<sup>270</sup>

Nevertheless, there is no question that government officials may often be motivated by partisan concerns, when they decide whether to use structural tools to defend institutional prerogatives. That may well be cause for concern, but it is no reason to give those same government officials broader access to the courts. Instead, as *Burwell* and *Arizona State Legislature* illustrate, to the extent that government officials are motivated by partisanship, those same motivations will apply to litigation. Permitting institutional standing simply allows government institutions to take their disputes—partisan and otherwise—to court.

As discussed, this Article aims primarily to show that government standing to assert “institutional injuries” is undermined by constitutional

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<sup>266</sup> See *U.S. House of Representatives v. Burwell*, 676 Fed. Appx. 1, 2016 WL 8292200 (D.C. Cir. Dec. 5, 2016) (granting the motion to hold the appeal in abeyance).

<sup>267</sup> In *Burwell*, the House complained about subsidies that the Obama administration provided to health insurance companies to offset the costs of insuring low-income individuals. See *supra* notes 81–85 and accompanying text. The Trump administration paid those same subsidies until October 2017, when the President announced that the executive would cease payment. See Robert Pear, Maggie Haberman, & Reed Abelson, *President Ending Health Subsidies for Poor People*, N.Y. TIMES, Oct. 13, 2017, at A1, [https://tucson.com/news/state-and-regional/republicans-file-new-challenge-to-congressional-district-lines/article\\_b4e17c62-6d33-5aa4-9221-82f498c12588.html](https://tucson.com/news/state-and-regional/republicans-file-new-challenge-to-congressional-district-lines/article_b4e17c62-6d33-5aa4-9221-82f498c12588.html) (reporting on the Trump administration’s decision to discontinue subsidizing insurance companies that pay out-of-pocket costs to low-income policy-holders).

<sup>268</sup> See Howard Fischer, *Republicans File New Challenge to Congressional District Lines*, ARIZ. DAILY STAR (Sept. 24, 2013) (reporting that, in 2001, “there was little interest by Republicans in challenging [the redistricting process] because the lines . . . were probably more favorable to the GOP.”).

<sup>269</sup> See *id.* (noting that Democrats took five of nine seats after the 2012 redistricting).

<sup>270</sup> See CHAFETZ, *supra* note 58, at 31–33. President Carter fought with a Democratic-controlled Congress over the legislative veto. See CRAIG, *supra* note 191, at 108–09.

theory, history and precedent. But adhering to the historical limits on government standing will also serve broader Article III values—by helping to ensure that the judiciary does not become embroiled in repeated partisan conflicts. Courts are thus well-advised to enforce those limits and deny claims of “institutional injury.” Government institutions should carry out their intergovernmental battles in the statehouse, not the courthouse.

#### CONCLUSION

Government standing to assert institutional injuries is in tension with our constitutional scheme. The provisions of our structural Constitution are not designed for the benefit of institutions, but for the benefit of the entire public. The goal is to create a workable, but limited, federal government that will not arbitrarily infringe on individual liberty. Although there may be reason to doubt whether our system of separated powers and federalism in fact serves these purposes, there is no question that individuals, not institutions, are the beneficiaries of this scheme. Institutions have no greater interest in their constitutional powers and duties than any other member of society.

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