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Standing, Politics, and Exhaustion: A Response to Legislative Exhaustion

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STANDING, POLITICS, AND EXHAUSTION: A RESPONSE TO *LEGISLATIVE EXHAUSTION*

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ABSTRACT

Professor Michael Sant'Ambrogio's article, Legislative Exhaustion, *usefully approaches the problem of "legislative standing" by abandoning the typical Article III standing analysis and making instead a separation-of-powers argument. His theory—that Congress may sue the President only when it has no legislative avenue for addressing its problems—provides both a workable account of and a limiting principle for suits by the legislative branch against the executive. His analysis, however, raises questions regarding the effect of legislative lawsuits on the constitutional balance of powers. This Essay suggests that these questions should be more fully explored before Professor Sant'Ambrogio's approach can be adopted. It concludes by noting that the exhaustion principle, while helpful in the fraught context of legislative standing, should not be expanded to standing more generally (as a few courts appear to have suggested).*

* Professor of Law, the University of Alabama School of Law. I should disclose, because I discuss the nomination of Chief Judge Merrick Garland of the D.C. Circuit to the U.S. Supreme Court, that I served as a law clerk to Chief Judge Garland in 2000-2001. Thanks to Michael Sant'Ambrogio for his helpful comments on this Essay.

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INTRODUCTION

Standing doctrine fails to provide convincing answers to the separation-of-powers question of when (if ever) Congress[1] may invoke the jurisdiction of the federal courts to sue the executive branch.[2] In *Legislative Exhaustion*, Professor Michael Sant'Ambrogio argues instead for a principle of legislative exhaustion to condition Congress's access to the federal courts.[3] If Congress has a legislative avenue for solving its problems, it may not sue, but when no legislative avenue exists, it may.[4] On this theory, Professor Sant'Ambrogio concludes that jurisdiction is available primarily when Congress brings constitutional challenges to presidential inaction based on constitutional objections.[5]

Professor Sant'Ambrogio's theory is a welcome addition to the literature. Even though the Court has stated that standing "is built on a single basic idea—the idea of separation of powers"[6]—standing doctrine is actually not terribly good at answering separation-of-powers questions.[7] As I argue below, the literature on legislative standing is more successful the further it gets from traditional concepts of standing doctrine and the more it focuses on actual separation-of-powers issues.[8] And because the legislative exhaustion theory takes this approach, it works.

The idea of legislative exhaustion also prompts further questions. For example, would an exhaustion principle, or something like it, work in reverse? One can imagine the executive branch suing Congress or a house thereof for dereliction of duty—for example, the

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1. For ease of reference, I will usually refer to Congress as the legislative entity that is seeking standing. But, of course, legislative standing can involve the effort to sue of not only Congress, but also the House, the Senate, a block of legislators, or individual legislators. *See, e.g.*, Michael Sant'Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1255, 1264-72 (2017). When appropriate, I will refer to the more specific legislative entity.

2. *See id.* at 1258-59 nn.1-3 (collecting citations to the vast literature on legislative standing and its failings).

3. *Id.* at 1316-20.

4. *Id.* at 1318-19.

5. *Id.* at 1319.

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

7. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 463-64 (2008).

8. *See infra* Part I.

Senate's refusal to hold hearings on Chief Judge Merrick Garland's nomination to the Supreme Court.[9] But, as I explain below, such a suit is likely prohibited under current law. Professor Sant'Ambrogio's theory would thus give asymmetric access: Congress, but not the President, could sue a coequal branch. If, then, we think Congress *should* have access to the federal courts, is there a principle that would give the President similar access? Add to this consideration of the courts' own power vis-à-vis Congress and the President: How does it affect the federal courts to be pulled into such interbranch disputes? These issues suggest that, although legislative exhaustion is an excellent theory upon which to base congressional power to sue the executive branch, invoking the theory requires caution.

A wholly separate line of questions arises from the concept of exhaustion itself as a threshold constitutional requirement for jurisdiction. Professor Sant'Ambrogio provides excellent reasons to apply such a concept in the fraught context of legislator litigation.[10] But a few lower courts have recently suggested that standing doctrine *in general* requires plaintiffs to show that they have exhausted other avenues of redress before they may turn to the courts.[11] This use of generalized exhaustion as a constitutional barrier to suit invades Congress's power to craft remedial schemes when it enacts statutes and should be abandoned.

In Part I of what follows, I discuss what I think is particularly helpful about Professor Sant'Ambrogio's abandonment of standing doctrine in answering the question of federal jurisdiction over Congress-versus-President lawsuits. In Part II, I explore questions raised by the legislative exhaustion approach for other separation-of-powers contexts and suggest that, without compensating theories to be used *against* Congress, our constitutional powers may end up out of balance. I then demonstrate, in Part III, why a more general idea of exhaustion should not be a constitutional threshold for obtaining federal jurisdiction.

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9. *See infra* Part II.
10. *See* Sant'Ambrogio, *supra* note 1, at 1261-62.
11. *See infra* Part III.

I. LEGISLATIVE STANDING V. LEGISLATIVE EXHAUSTION

As Professor Sant'Ambrogio ably explains, standing doctrine has not been able to solve the puzzle of when, if at all, Congress may invoke the jurisdiction of the federal courts to challenge the executive branch.[12] This is because standing doctrine—injury-in-fact, causation, and redressability[13]—does not perform well in answering this kind of question. Even though the Court has stated that standing "is built on a single basic idea—the idea of separation of powers"[14]—standing doctrine is actually not terribly good at answering separation-of-powers questions.[15] As I have argued elsewhere, there is no single idea of separation of powers.[16] Instead, there are varied ideas about how the Constitution allocates, separates, and balances power among the three branches.

Whatever standing is built on, then, is not a "single basic idea."[17] And the single tool of standing doctrine turns out to be ill-suited for the varied uses to which it has been put.[18] Although standing doctrine does a moderately good job at one separation-of-powers function—ensuring that the plaintiff brings to the courts an Article III case *qua* case with adverse parties[19] and susceptible to judicial resolution[20]—it fails utterly at other separation-of-powers functions, such as keeping the courts out of disputes better resolved in the political branches[21] and limiting Congress's overuse of citizen suits to strong-arm the President.[22]

It is, accordingly, no surprise that standing doctrine has failed to provide helpful answers to the question of when Congress itself can

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12. *See* Sant'Ambrogio, *supra* note 1, at 1263-87.

13. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

14. Allen v. Wright, 468 U.S. 737, 752 (1984); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2695 (2015) (Scalia, J., dissenting); Raines v. Byrd, 521 U.S. 811, 820 (1997).

15. *See* Elliott, *supra* note 7, at 463-64.

16. *See id.* at 461-63.

17. *See id.* at 460-61 (quoting *Allen*, 468 U.S. at 752).

18. *See id* at 460-64.

19. *But see* United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (holding that the Article III "case" adversity is a prudential requirement rather than a constitutional one).

20. *See* Elliott, *supra* note 7, at 469-71.

21. *See id.* at 475-92.

22. *See id.* at 492-96.

sue the President in federal court. As Professor Sant'Ambrogio thoroughly demonstrates, the cases that directly address legislative standing are sparse and provide no clear rules for determining legislative access to the courts.[23] And the cases that bear on legislative standing indirectly, as well as the legislative standing literature, provide no determinate principles for when Congress may or may not bring suit against the executive branch.[24] Standing doctrine is simply not equipped to answer this kind of question.

Thus, the scholarship that has been most successful (in my view, at least) in addressing legislative "standing" actually strays far from the typical standing analysis of factual injury and instead focuses on the Constitution. Professor Tara Grove, for example, focuses on whether the Constitution empowers Congress to sue, analyzing Article I and concluding that, because Article I does not seem to empower Congress to sue, it probably cannot.[25] Similarly, Professor John Harrison argues that Article III questions are beside the point and that the "fundamental conceptual and substantive features of the Constitution's allocation of the powers of government" show that Congress may not bring suit against the executive branch for failure to enforce the law.[26] Professor Jonathan Nash investigates the constitutional powers allocated to Congress and justifies legislative standing when those powers have been compromised.[27]

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23. Sant'Ambrogio, *supra* note 1, at 1269-72.

24. *See id.* at 1272-80.

25. *See* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1353-55 (2014); *see also* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 627 (2014).

26. *See* John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & POL. 103, 104-05 (2015).

27. Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 343 (2015). Admittedly, Professor Nash couches his argument in terms of injury-in-fact and standing, *see id.* at 343, 388, but his conceptualization of congressional injury in terms of the Constitution takes him far from the typical *factual* inquiry involved in a standing assessment, as exemplified by the Court's tedious investigation into the travel situations of the plaintiffs in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563-67 (1992).

I do not mean to suggest that these are the only three scholars who have addressed the issue well. For other contributions to the legislative standing literature, see, for example, Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63 (1992) (arguing for congressional lawsuits as a counterbalance to expanded presidential power); David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205 (2001); Note, *Standing in the Way of Separation of Powers: The Consequences of* Raines v. Byrd, 112 HARV. L. REV. 1741 (1999).

Professor Sant'Ambrogio's theory, like the others just mentioned, succeeds precisely because he recognizes that the separation-of-powers question of when Congress can sue the President needs a separation-of-powers answer. His answer is that Congress can redress most of the problems it faces with the President through a variety of legislative tools.[28] Only when those tools fail—in other words, only when there is legislative exhaustion—can Congress invoke the jurisdiction of the courts against the President.[29]

The legislative exhaustion principle has three notable benefits, in my view. The first, as I have already suggested, is that it replaces the unhelpful question of whether Congress has standing to sue, with the helpful and specific question of when separation-of-powers principles justify a congressional suit. Such specificity (which is not foreign to concerns of subject-matter jurisdiction[30]) is a welcome alternative to the confusion embodied in, and increasing complications of, standing doctrine.[31]

The second benefit is that his theory provides for congressional access to the courts in circumstances in which such access intuitively makes sense. The primary situation in which Professor Sant'Ambrogio concludes that Congress would be empowered to sue the President is when "the Executive refuses to enforce a statutory provision based on constitutional objections."[32] That is, if Congress has enacted a statute to which the Executive raises constitutional objections, the Executive should not have the last word. Instead, as the Supreme Court has instructed us (for better or worse), it is the

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28. *See* Sant'Ambrogio, *supra* note 1, at 1295-316. Congress can, for example, amend statutes to clarify meaning when the President adopts an interpretation with which Congress is unhappy, *id.* at 1295-99; adopt hammer provisions to force executive action, *id.*; control presidential action through appropriations, *id.* at 1299-303; coerce presidential cooperation with legislative priorities by collaterally attacking unrelated presidential priorities, *id.* at 1303-05; provide for judicial review of executive action at the insistence of private parties, *id.* at 1307-10; isolate agencies from political control, *id.* at 1310-12; and, ultimately, censure or even impeach the President, *id.* at 1305-07.

29. *See id.* at 1316-20.

30. For extensive coverage of the complications of federal subject-matter jurisdiction, see generally Volumes 13 to 14AA of CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, Westlaw (database updated Jan. 2017).

31. *See* Elliott, *supra* note 7, at 466-67; Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 126 (2014).

32. Sant'Ambrogio, *supra* note 1, at 1261, 1316-20.

judicial branch that has the final word on constitutional questions, at least when those questions are properly presented.[33] And the Congress-versus-President lawsuit meets pre-standing-doctrine[34] notions of concreteness and adversity; such a lawsuit raises no concerns about collusion[35] or advisory opinions.[36]

The third benefit of Professor Sant'Ambrogio's approach is that it would serve to *limit* Congress's access as a plaintiff as much as to grant it. It is no small thing, as I discuss further below, to allow one branch of the government to sue the second branch in the forum provided by the third—indeed, such access may be so problematic that it should be foreclosed.[37] But certainly it seems that such intervention should at least be rare.[38] Because Professor Sant'Ambrogio's

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33. *See* City of Boerne v. Flores, 521 U.S. 507, 516 (1997) ("The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803))); *e.g.*, Laurence H. Tribe, *Transcending the* Youngstown *Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J.F. 86, 89 (2016) (suggesting that, once the Supreme Court has been returned to its full complement of nine Justices after Justice Scalia's death, "[t]he reconstituted Court will likely continue to take an active role, rather than a role of pragmatic abstention and avoidance, in resolving disputes between the political branches—a role more consistent with the Court's general duty to interpret the Constitution and laws of the United States when the lives or liberties of individuals depend on their meaning").

34. Despite its status today as "an essential and unchanging part of the case-or-controversy requirement of Article III," Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992), standing doctrine did not achieve its modern tripartite form until 1981, in the case *Watt v. Energy Action Education Foundation*, 454 U.S. 151, 161 (1981). As recently as 1979, for example, the Court had stated a two-part test: "The crucial elements of standing are injury in fact and causation." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 120 (1979) (Rehnquist, J., dissenting).

35. *E.g.*, Muskrat v. United States, 219 U.S. 346, 359-60 (1911); *see also* Nash, *supra* note 27, at 372 ("[T]here is no more reason to think that Congress and the President would invent an interbranch conflict than to expect executive agencies to fabricate an intrabranch dispute, and yet the Court has been open to recognizing standing to adjudicate disputes between executive agencies.").

36. 13 WRIGHT ET AL., *supra* note 30, § 3529.1.

37. *See infra* Part II.

38. *Cf.* Raines v. Byrd, 521 U.S. 811, 819-20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."); *see also* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1146-47 (1973) ("Courts do violence to a democratic separation of powers when they legitimize executive assaults upon legislative prerogatives. If the courts define the privilege narrowly, so as to entertain on the merits

foregrounding of the separation-of-powers issues clarifies that Congress cannot resort to the courts when it has legislative avenues for action, he limits congressional lawsuits to a narrow class of cases. Indeed, on his analysis, Congress actually can get quite a lot done using its constitutionally conferred armory.[39] Thus the only cases in which Congress might be able to sue are cases challenging presidential inaction on constitutional grounds.[40] That Sant'Ambrogio's theory both authorizes and limits congressional suit is a virtue.

II. THE LARGER SEPARATION-OF-POWERS CONTEXT

Legislative exhaustion provides a principle upon which we could intelligibly authorize Congress to sue the President. But if we wish to add the power of suit to Congress's toolbox, we need to think about the consequences of that addition for the balance of powers established by the Constitution. Indeed, Professor Sant'Ambrogio himself acknowledges that "[t]here may be other reasons to deny Congress standing" even in cases where legislative exhaustion would permit it.[41]

A. A Reverse Example

For those wishing to empower Congress to sue the President, the presidential failure to enforce or defend a federal statute serves as the typical example.[42] A recent, prominent reverse example is the historically unusual refusal of the U.S. Senate to hold an up-or-down vote on President Obama's nomination to the Supreme Court of Chief Judge Merrick Garland of the U.S. Court of Appeals for the

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executive-motivated challenges to legislative activities, they will subject themselves to weighty pressures which threaten to politicize their processes.").

39. Sant'Ambrogio, *supra* note 1, at 1295-316.

40. *Id.* at 1316-20.

41. *Id.* at 1270; *see also id.* at 1344 ("There may be other reasons to bar Congress from court, but neither Legislative Exhaustion nor the deliberation-forcing goals of interbranch conflict provide one.").

42. *See, e.g.*, *id.* at 1272-80; Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1208 (2012); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 598 (2012).

D.C. Circuit.[43] Just as the President has a textual duty to "take Care that the Laws be faithfully executed,"[44] the Constitution assigns to the Senate the role of giving its "Advice and Consent" to the President's nominations of "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."[45] If Congress can sue the President for failing to "take Care," should the President not be able to sue the Senate for refusing to provide its "Advice and Consent"?[46]

One answer, of course, is that the text of the Constitution does not impose on the Senate a duty to vote in the way that it imposes on the President the duty to take care. After all, Article II states that the President "*shall* take Care that the Laws be faithfully executed."[47] The Constitution describes the "Advice and Consent" of the Senate with no such mandatory words.[48] And, indeed, party leaders in the Senate have disagreed over whether there is a mandatory duty to hold a vote on a nominee.[49]

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43. *See* Neil S. Siegel, *The Harm in the GOP's Pseudo-Principled Supreme Court Stance*, HILL (Apr. 15, 2016, 12:00 PM), http://thehill.com/blogs/pundits-blog/the-judiciary/276462-the-harms-in-being-pseudo-principled-about-the-supreme-court [https://perma.cc/4DNT-9JY8] ("One would have to go back to the late 1860s—during Reconstruction—to find a Senate that did anything comparable to what this Senate is doing.").

44. U.S. CONST. art. II, § 3.

45. *Id.* art. II, § 2.

46. *Id.* art. II, §§ 2-3. At least one commentator suggested a different avenue: that the President could appoint Chief Judge Garland to the Supreme Court without Senate confirmation if the Senate refused for a sufficiently long time to vote up or down on the nomination. *See* Gregory L. Diskant, *Obama Can Appoint Merrick Garland to the Supreme Court if the Senate Does Nothing*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/opinions/obama-can-appoint-merrick-garland-to-the-supreme-court-if-the-senate-does-nothing/2016/04/08/4a696700-fcf1-11e5-886f-a037dba38301_story.html [https://perma.cc/C5QX-9N6C]. The argument relies on the proposition that "[i]t is altogether proper to view a decision by the Senate not to act as a waiver of its right to provide advice and consent." *Id.* Diskant's general argument did not receive general approbation. *See, e.g.*, Ed Whelan, *Gobsmackingly Stupid Op-Ed*, NAT'L REV. (Apr. 10, 2016, 8:54 AM), http://www.nationalreview.com/bench-memos/433888/diskant-gobsmacking-stupidity [https://perma.cc/AEE7-WWH4].

Diskant went on to say that, if the President appointed Chief Judge Garland to the Court without Senate confirmation, "[p]resumably the Senate would then bring suit challenging the appointment." Diskant, *supra*. This suggestion highlights the oddity of the imbalance in access to the courts. Why does it require the President to take an unprecedented and highly controversial step and *then* have the Senate sue in return? Would it not be more straightforward for the President to sue the Senate for its failure to act?

47. U.S. CONST. art. II, § 3 (emphasis added).

48. *Id.* art. II, § 2.

49. *See* Alexander Bolton & Jordain Carney, *Reid Plots Strategy to Force Vote on Obama*

Even if the Senate has a duty to hold an up-or-down vote, however, a second issue is whether Congress itself is an entity that can be sued—not simply because of the general sovereign immunity of the United States,[50] but because of the special immunity accorded to legislators in the Constitution.[51] The Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[52] Subsequent interpretations have read the Speech and Debate Clause broadly to "protect[ ] Members against prosecutions that directly impinge upon or threaten the legislative process."[53] Indeed, even the time and energy of responding to a lawsuit is too much of a burden on members of the legislative branch.[54] Members of the House and Senate are immune from suit.[55]

It is unclear, however, whether the Speech and Debate Clause protects the body of Congress as a whole or only its individual members. The text of the Constitution suggests the latter, extending protection to "Senators and Representatives."[56] Similarly, Supreme Court cases invoking the clause have been careful to refer

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Nominee, HILL (Apr. 5, 2016, 8:08 PM), http://thehill.com/homenews/senate/275235-reid-rare-procedural-tactic-an-option-to-move-garland [https://perma.cc/XL9Z-32L3] (comparing Senator Harry Reid's recent statement—"The obligation is for them to hold hearings and to have a vote. That's in the Constitution."—with Senator Reid's 2005 statement—"The duties of the Senate are set forth in the Constitution of the United States. Nowhere in that document does it say the Senate has a duty to give presidential nominees a vote.").

50. *E.g.*, United States v. Lee, 106 U.S. 196, 204-06 (1882).

51. *See* U.S. CONST. art. I, § 6.

52. *Id.*

53. Gravel v. United States, 408 U.S. 606, 616 (1972).

54. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975) ("[L]egislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves'.... [Litigation] creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks." (quoting Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)). *See generally* JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW (2007).

55. Even though Article II does not give the President the kind of immunity the Speech and Debate Clause gives members of Congress, courts have implied presidential immunity from suit based on "the Constitution, federal statutes, and history." *See* Nixon v. Fitzgerald, 457 U.S. 731, 747 (1982). But that immunity is not as invariable as the constitutionally conferred legislator's immunity. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 712-13 (1974) (subordinating claim of presidential privilege and immunity from subpoena to the federal interest in "the fair administration of criminal justice"). The Court has gestured toward the idea that Congress could waive the President's immunity even for damages actions. *See Fitzgerald*, 457 U.S. at 748 & n.27.

56. U.S. CONST. art. I, § 6.

to it as one that protects the members of Congress.[57] It is surprisingly difficult to get a clear answer on whether Congress itself can be required to defend a lawsuit.[58]

For purposes of discussion, however, let us assume that Congress, or a house thereof, would be immune from suit by the President for failure to undertake a constitutionally required action. Access to the federal courts on Professor Sant'Ambrigio's theory would therefore be asymmetric: Congress could sue the President, but not vice versa. What consequences would that asymmetry have on our willingness to allow Congress to sue the President?

B. Consequences of the Reverse Example

How does legislative exhaustion affect the balance of powers? Does it give Congress too much power if there is no countervailing executive access to the courts? Professor Nash suggests that this question is beside the point. He has argued that there may be "policy arguments against Congress (or members thereof) ... seeking help from the courts. They are not, however, reasons not to recognize congressional standing in the first place. Standing opens courthouse doors; it does not promise the relief that the plaintiff seeks on the merits."[59] This highlights the difficulty in thinking of the issue as one of *standing*. The interbranch disputes at issue here cannot be analyzed solely in terms of standing; one can conclude that Congress has standing under the injury-in-fact test and still be left with the separation-of-powers question of whether Congress should be able to sue the President. What, then, are the consequences of allowing Congress to sue the President, and not vice versa?

One concern might be that Congress would repeatedly embroil the executive branch in litigation, with the various costs in time and money that litigation involves.[60] Indeed, as discussed above, these costs are one of the reasons why the Supreme Court has expansively interpreted the Speech and Debate Clause.[61] At this point, we

57. *E.g.*, Doe v. McMillan, 412 U.S. 306, 311-12 (1973); *Gravel*, 408 U.S. at 616.

58. *See, e.g.*, Judicial Watch, Inc. v. U.S. Senate, 432 F.3d 359, 362 (D.C. Cir. 2005) (affirming dismissal based on plaintiff's lack of standing).

59. Nash, *supra* note 27, at 373 (footnote omitted).

60. *See generally* Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855 (2015).

61. *See supra* notes 56-57 and accompanying text.

should be more precise in asking who is actually bringing the lawsuit. If it is Congress as a whole, when both houses have to vote to authorize suit, it seems unlikely that suits will occur often: obtaining a majority in both houses is challenging.[62] In times of divided government, however, when both houses of Congress are controlled by one party and the President is a member of another party, cooperative votes to bring suit would be more likely.[63] Suits by the House or the Senate individually are more likely, and suits by a subset of legislators more likely still. Of course, the costs of litigation do not fall only on the defendant; whatever entity is suing will also face those costs.

Another concern would be that these lawsuits would give Congress a way to shove around the executive branch. But, once sued, the executive branch could litigate just as aggressively as Congress, and there is no reason to think that the courts would agree with Congress on the *merits* of lawsuits any more often than they agree with the President. Indeed, Professor Aziz Huq has argued persuasively that courts are biased toward the executive branch,[64] which may deter Congress from suing.[65]

It is also possible that adding the ability to sue the President to Congress's toolbox is exactly what is needed. The executive branch's power has expanded mightily over the years.[66] Indeed, one scholar contends that this is unavoidable: "[T]he presidency of the United States has the institutional disposition and capacity for constitutional arrogance—to take unilateral actions challenging its

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62. *See, e.g.*, John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202 (2007) ("[B]icameralism and presentment make lawmaking difficult *by design*."). Admittedly, bicameralism *without* presentment (as would be required of a decision by Congress to sue) is easier than legislating, but (I think) still difficult.

63. It is worth noting, however, that even in the bitter partisan years early in President Obama's second term, only the House intervened in the marriage equality litigation. *See* United States v. Windsor, 133 S. Ct. 2675, 2684 (2013).

64. Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1678-79 (2014).

65. *But see* 26A WRIGHT ET AL., *supra* note 30, § 5675 (suggesting that the judicial branch might simply "fulfill[ ] its usual role of mediator in spelling out the boundaries between the powers of the two popular branches").

66. *See* Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319-21 (2006) (describing a vicious cycle of legislation, veto power, and judicial deference that has dramatically increased the power of the executive branch).

constitutional boundaries and extending its powers at other authorities' expense."[67] Thus, even if there is asymmetrical access—even if Congress can bring suit while remaining immune itself—such asymmetry may offset an existing imbalance.

The final separation-of-powers concern, of course, is what happens to the *courts* if they have jurisdiction over these interbranch disputes. The Supreme Court's standing cases are alive to the concern:

> Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.[68]

A repeated theme in Justice Scalia's jurisprudence was the worry that the courts were gaining more and more power, as more types of disputes were assigned to them.[69] The same worry applies here. Indeed, the specter of the Court resolving a dispute between its two coequals may be the most worrisome situation of all. But such concern about judicial overreach "fails to recognize the possibility that judicial growth may have occurred precisely to balance the even greater growth of power in the other branches."[70]

One might say that, ultimately, this is all something that should be controlled by the People in elections.[71] However, the Court's continued refusal to find any example of political gerrymandering to be an Equal Protection Clause violation[72] has meant that an increasing

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67. Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1650 (2016).

68. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

69. *See* Meyer, *supra* note 27, at 104; *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2611-31 (2015) (Scalia, J., dissenting).

70. Meyer, *supra* note 27, at 105.

71. *Cf.* Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 82-112 (2016) (arguing that governmental power must be understood with reference not simply to federal and state governmental entities but also to voters, political parties, interest groups, and the like).

72. *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (dismissing a political gerrymandering claim as nonjusticiable); Davis v. Bandemer, 478 U.S. 109, 131 (1986) (plurality opinion) ("[T]he mere fact that a particular apportionment scheme makes it more difficult for a par-

number of House seats are Republican sinecures,[73] reducing the ability of the electorate to "throw the bastards out."[74]

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Professor Sant'Ambrogio's legislative exhaustion idea limits congressional power to sue the executive branch to suits challenging presidential inaction based on constitutional questions.[75] As I have suggested, however, even that limited scope may lead to structural imbalance.[76] Any implementation of the legislative exhaustion idea should take such considerations into account.

III. EXHAUSTION SHOULD NOT BE A GENERAL STANDING REQUIREMENT

As I have noted, Professor Sant'Ambrogio's argument is carefully cabined to the legislative lawsuit context, and he indicates that standing should be more difficult for Congress than for private parties.[77] But a few courts have suggested that some larger form of

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ticular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm."). In *Vieth*, four Justices believed that such claims were *never* justiciable. *See* 541 U.S. at 306. Justice Kennedy, however, who provided the fifth vote for dismissal, "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* (Kennedy, J., concurring).

73. *See* REDISTRICTING MAJORITY PROJECT, http://www.redistrictingmajorityproject.com/ [https://perma.cc/66KG-6P2N]. A recent decision by a panel of three district judges in Wisconsin did find unconstitutional a Republican-focused gerrymander. *See* Whitford v. Gill, No. 15-cv-421-bbc, 2016 WL 6837229, at *56 (W.D. Wis. Nov. 21, 2016) (three-judge panel) (finding redistricting plan an unconstitutional partisan gerrymander), *appeal docketed*, No. 16-1161 (U.S. Mar. 24, 2017); *see also* Whitford v. Gill, No. 15-cv-421-bbc, 2017 WL 383360, at *3 (W.D. Wis. Jan. 27, 2017) (three-judge panel) (enjoining use of unconstitutional redistricting plan). It remains to be seen whether that opinion will be affirmed on appeal.

74. Marcia Pally, *'Throw the Bastards Out': An American Tradition from Settlers to Trump*, GUARDIAN (Sept. 8, 2016), https://www.theguardian.com/us-news/2016/sep/08/donald-trump-us-history-religion-change [https://perma.cc/U57D-QPKB].

75. *See* Sant'Ambrogio, *supra* note 1, at 1316-17.

76. *See supra* Part I.B.

77. Based on the constitutional tools available to Congress but not private parties, he suggests there is "generally less, not more, reason to allow the legislature to avail itself of the federal courts to resolve what are essentially political disputes between the branches over the merits of government policy." Sant'Ambrogio, *supra* note 1, at 1269.

exhaustion should apply as a threshold requirement for litigation more generally. This suggestion is wrong and should be abandoned.

A. Some Courts Suggest that Exhaustion Is a General Standing Requirement

We are familiar with the idea of administrative exhaustion: a plaintiff who wishes to challenge the action of an administrative agency must show that she gave the agency a fair chance to resolve her dispute—she must have exhausted her administrative remedies.[78] Generally, only then may a court review the agency action.[79]

And, of course, exhaustion is closely related to the requirement that a plaintiff obtain a final decision on the merits from the administrative agency before she may sue.[80] It is common in land-use planning cases, for example, to require the landowner to go through several rounds of planning approval before she may be heard to say that her permission has been finally and improperly denied by the agency.[81]

But it has not been part of the justiciability canon to require a federal plaintiff, if she has a choice between nonjudicial and judicial means to solve the problem that faces her, to pursue the nonjudicial options and fail before a federal court may hear her case. A few courts have, however, suggested exactly this.

In *American Chemistry Council v. Department of Transportation*, trade groups representing hazardous waste manufacturers and shippers contended that the Department's regulations had not gone far enough in regulating their industry.[82] The D.C. Circuit rejected the case for lack of standing, pointing out that the trade groups' members had other options: "[T]he Court is left to wonder ... why petitioners cannot protect their 'products or the tank cars in which

78. 33 WRIGHT ET AL., *supra* note 30, § 8398.

79. *See id.*

80. *See id.*

81. *See, e.g.*, Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-90 (1985). The logic is that the landowner has not actually been improperly denied anything if her first application involves plans too grandiose or unlawful to be approved. *See id.* Only after it can be said that the landowner made a *meaningful* application and was rejected, does she have a cause of action. *Id.* at 190.

82. *See* Am. Chemistry Council v. Dep't of Transp., 468 F.3d 810, 811, 814 (D.C. Cir. 2006).

those products move' through voluntary self-regulation or private contracts."[83]

But surely it cannot be right that a plaintiff lacks standing to challenge the scope of a regulatory action if she can achieve the same results through voluntary self-regulation or private contracts. If so, almost no challenge to agency underregulation could survive the standing analysis; almost anything we wish an agency to do could conceivably be achieved by private action, albeit with extreme difficulty.[84]

Similarly, in *Grider v. City and County of Denver*, one of the plaintiffs challenged, under the Americans with Disabilities Act (ADA), a requirement that he fence his service dog, a pit bull, or have the dog seized.[85] The court held that Mr. Grider lacked standing to sue because he had an alternative avenue to solve his problem: he could obtain a license for his service dog by complying with the requirement to fence his dog.[86]

But it cannot be that a plaintiff lacks standing to challenge a regulation just because the court thinks it would not be hard for her to comply with the regulation. Again, under that rule, almost any challenge to regulatory action would fail at the standing stage. The whole point of Mr. Grider's lawsuit was that the ADA protected him against the requirement that he fence his dog,[87] just as the challenge to any regulation is that the Constitution, the Administrative Procedure Act, or the organic statute protects the plaintiff against that regulation. If the plaintiff alleges harm from having to comply with the challenged regulation, that is sufficient for Article III standing—indeed, that is paradigmatic Article III standing.[88]

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83. *Id.* at 820 (citation omitted). Admittedly, this was only one of a number of problems with the organization's standing. *See id.* at 816-21.

84. *See* DENNIS MUELLER, PUBLIC CHOICE II 34-35 (1989) (noting that, without government to aggregate preferences and act on them, the costs to individuals of obtaining the benefits of regulation have "transaction costs ... [that] are mind-boggling").

85. 958 F. Supp. 2d 1262, 1265 (D. Colo. 2013).

86. *See id.* at 1268-69.

87. *Id.*

88. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561-62 (1992) (noting that when "the plaintiff is himself an object of the action (or forgone action) at issue ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it"). It may be that the Court meant that Mr. Grider could not make out a failure-to-accommodate claim under the ADA given the possibility of obtaining a license, but that is a merits question, not a standing question.

B. Exhaustion in General Cannot Be an Article III Requirement

There are both practical and constitutional reasons to reject the idea that Article III generally requires some sort of exhaustion of nonjudicial remedies before a plaintiff may bring suit.

Practically speaking, it seems impossible for plaintiffs to meet an exhaustion requirement or even to know what such a requirement would entail. Imagine, for example, that a plaintiff alleges that she has been harmed in a car accident and is bringing suit for damages. Would an exhaustion requirement require her to demonstrate that she attempted to settle with the driver of the other car? That she had tried to get her own insurance company to pay for her injuries? Or that she had sought some kind of disability payments from the government? And given the uncertainty in the content of such a requirement—presumably judges could always think of other, creative ways one could address a problem short of a lawsuit—a plaintiff could never know until she brings suit whether she has accurately predicted what the court will require. Yet we typically prefer jurisdictional rules that are predictable.[89]

The constitutional problem is also apparent. Legislatures, of course, can impose exhaustion requirements; they do so every time they require that a party pursue administrative remedies and fail before being able to sue. And Congress can decline to authorize judicial review at all[90] (although some types of jurisdiction are constitutionally required[91]). But it is a far different thing for courts to say that such exhaustion requirements are *constitutionally* mandated.[92] Indeed, because the Supreme Court has long recognized that Congress has wide discretion in fashioning remedial mechanisms,[93] building a general exhaustion requirement into Article III

89. *See, e.g.*, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152-53 (1908) (establishing that, for purposes of federal subject-matter jurisdiction, a federal question must arise in the plaintiff's cause of action, rather than in defenses the defendant might raise).

90. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988).

91. *See* Boumediene v. Bush, 553 U.S. 723, 792 (2008).

92. *Cf., e.g.*, Gillian E. Metzger, Essay, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484-85 (2010) (discussing the overlapping nature of many administrative law and constitutional law questions and noting that "addressing these concerns through ordinary administrative law preserves a degree of flexibility that better accommodates changing regulatory needs and Congress's primacy in structuring government than do more immutable constitutional law prescriptions").

93. *See* Tigner v. Texas, 310 U.S. 141, 148 (1940) ("How to effectuate policy—the

interferes with Article I powers by inhibiting Congress's ability to make a lawsuit the preferred remedial action in a statutory scheme. Rather than permitting *Congress* to decide whether plaintiffs may take a dispute directly to court or must instead take a detour through alternative procedures first, constitutionalizing exhaustion would take that choice away from Congress.

CONCLUSION

Professor Sant'Ambrogio helpfully abandons standing doctrine in answering the question of federal jurisdiction over Congress-versus-President lawsuits; his legislative-exhaustion theory provides a clear and specific way of determining when such lawsuits might proceed. Whether that theory should be implemented without compensating theories to be used *against* Congress is a question that deserves further consideration. What is clear, however, is that Article III does not require exhaustion of nonjudicial remedies for the ordinary plaintiff to have standing.

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adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice.").