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Cameron R. Hall

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CAMERON R. HALL*

I. INTRODUCTION

Imagine that the 114th Congress gains bipartisan support to pass comprehensive gun-control legislation in response to recent national tragedies. Bolstered by popular support, the proposal quickly passes both Houses and is signed into law by President Obama. Excited for the potential effect that the law could have on the public health and safety, President Obama directs the executive branch to implement enforcement. For the final year of Obama's presidency, the law is enforced as written.

Then, in November 2016, Donald Trump is elected as the 45th President of the United States. After taking office in 2017, President Trump decides that the newly passed gun-control legislation should no longer be enforced. He could reach this decision based on political beliefs, personal beliefs, or for no reason at all. President Trump orders the executive branch to discontinue enforcement of the gun-control law.

Outraged, members of Congress and the public decry President Trump's action. The decision to refuse enforcement of the gun-control law is rebuked as unconstitutional. Legal scholars debate whether the new President has the power to unilaterally refuse enforcement of the gun-

* Candidate for Juris Doctor, May 2017, Stetson University College of Law. The author would like to thank Professor Louis J. Virelli III for his comments and suggestions. The author also wishes to thank Editor-in-Chief Joshua Lanphear and the *Ohio Northern University Law Review* staff for their helpful editing and time commitment to this article.

control reform. The public demands that the Supreme Court make a final decision on the constitutionality of President Trump's action. Only one problem stands in the way—who can bring suit?

Traditional standing doctrine requires, in part, that an individual allege an "injury in fact" that is "concrete and particularized" and "actual or imminent."[1] Had the law been challenged as unconstitutional when it was being *enforced* under President Obama, it would be easy to find an individual to challenge the law—anyone who was prosecuted for its violation. But who can be harmed through non-enforcement? Arguably, everyone is harmed—or not harmed—in the same way. While the public generally could say that they are harmed as a society by the president's actions, no specific plaintiff would satisfy Article III standing jurisprudence.[2] Congress could decide to impeach the president, but given the rarity and unlikely success of the impeachment proceedings, Congress seems to be in a bind.[3] Moreover, the public could voice their displeasure through the political process, but any reprieve would be four full years away.[4]

The difficulty of finding a plaintiff with standing to challenge executive non-enforcement seemingly precludes any judicial redress for our scenario with a hypothetical President Trump. Furthermore, the Court will be unable to answer our most fundamental question about this issue: when is executive non-enforcement constitutional? While the hypothetical described is purely conjectural, the underlying issues of executive non-enforcement are authentic. Increasingly, concern over executive power has brought attention to instances of executive non-enforcement.[5] Before determining whether these actions are constitutional, the Court would have to determine that a certain plaintiff satisfies standing requirements.[6] Ultimately, I believe that Congress—either through one or both Houses—could allege a sufficient institutional injury to establish the standing requirements necessary to proceed with a legal challenge for certain instances of executive non-enforcement.

This article argues that certain compositions of congressional plaintiffs would be able to establish the standing requirements in a challenge against

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1. U.S. v. Windsor, 133 S. Ct. 2675, 2685 (2013).

2. *See Windsor*, 133 S. Ct. at 2685.

3. *See* Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 422-23 (2000) (noting that only two Presidents—Bill Clinton and Andrew Johnson—have been impeached in American history).

4. U.S. CONST. art. II, § 1.

5. *See generally* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

6. *See Windsor*, 133 S. Ct. at 2685.

specific instances of executive non-enforcement. Part II provides an introduction to standing jurisprudence and the application of standing doctrine to challenges by legislators in their official capacity.[7] Part III introduces real-life instances of alleged executive non-enforcement.[8] Part IV discusses the application of standing jurisprudence to the unique circumstances of executive non-enforcement.[9] Specifically, this section addresses the following questions: (1) what type of injury must be alleged to support congressional standing; (2) what composition of plaintiffs is required to allege that injury; and (3) what separation of powers concerns could preclude a finding of standing?[10] Part V concludes by summarizing the combination of requirements needed to establish standing against executive non-enforcement and by discussing some practical concerns.[11]

II. BACKGROUND OF STANDING DOCTRINE

"[T]HE LAW OF ART. III STANDING IS BUILT ON A SINGLE BASIC IDEA—THE IDEA OF SEPARATION OF POWERS."[12]

A. Standing Jurisprudence Generally

The doctrine of standing finds its foundation in the Constitution.[13] Article III provides that "[t]he judicial power shall extend to . . . cases . . . [and] to controversies."[14] Accordingly, a threshold question to every federal case is "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III."[15] This case-or-controversy requirement establishes the jurisdictional basis of standing.[16] Additionally, the courts also consider "judicially self-imposed limits on the exercise of federal jurisdiction."[17] These self-imposed limitations establish the category of "prudential standing."[18] Together, the jurisdictional requirements of Article III and the prudential limits on its exercise restrict the federal courts in deciding the merits of particular disputes or issues.[19]

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7. *See infra* Part II.
8. *See infra* Part III.
9. *See infra* Part IV.
10. *See infra* Part IV.
11. *See infra* Part V.
12. Allen v. Wright, 468 U.S. 737, 752 (1984).
13. *See Windsor*, 133 S. Ct. at 2685.
14. U.S. CONST. art. III, § 2.
15. Warth v. Seldin, 422 U.S. 490, 498 (1975).
16. *Windsor*, 133 S. Ct. at 2685.
17. *Allen*, 468 U.S. at 751.
18. *Windsor*, 133 S. Ct. at 2685.
19. *Allen*, 468 U.S. at 750-51.

The wisdom of restricting access to the federal courts is buttressed by a number of premises. For one, standing is said to promote the separation of powers.[20] Less stringent standing requirements would inherently expand judicial power.[21] Furthermore, the Supreme Court has noted that standing "serves to prevent the judicial process from being used to usurp the powers of the political branches."[22] Given this concern, the courts have been especially hesitant to find standing when a dispute challenges the actions of the executive or legislative branches.[23] In these instances, the courts hope to resolve disputes "only in the last resort."[24] Despite this inclination to avoid a finding of standing, the courts must also be cognizant that unwillingness to reach the merits of certain disputes can also *raise* separation of powers concerns.[25] The courts should not use standing to skirt difficult issues; the appropriate goal of the standing inquiry is not to heedlessly minimize judicial involvement, but rather to focus on "the proper place of the judiciary in the American system of government."[26]

In addition to separation of powers concerns, standing doctrine is premised upon practical considerations. Given the limited resources of the judiciary, standing doctrine is heralded as necessary to prevent an overflow of lawsuits based on purely ideological interests.[27] Limited standing also ensures that courts are able to decide issues within the confines of a specific factual dispute.[28] Furthermore, constraining standing to the parties of a specific factual dispute ensures that the advocates will have sufficient knowledge and interest to efficaciously argue their cases.[29] Finally, standing doctrine also ensures that third parties will not become involved in the rights of others who "either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not."[30]

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20. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (4th ed. 2011). *See also Warth*, 422 U.S. at 498 ("In both dimensions [standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society.").

21. U.S. v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

22. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013).

23. *Id.* at 1147.

24. Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982).

25. *See* CHEMERINSKY, *supra* note 20, at 60 (opining that "concern for separation of powers also must include preserving the federal judiciary's role in the system of government.").

26. *Id.*

27. *Richardson*, 418 U.S. at 192 (Powell, J., concurring). *See also Valley Forge Christian Coll.*, 454 U.S. at 486 (noting that "standing is not measured by the intensity of the litigant's interest . . . .").

28. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974) ("Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.").

29. *See id.* ("This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective . . . .").

30. Singleton v. Wulff, 428 U.S. 106, 114 (1976).

The separation of powers and practical considerations behind standing are reflected in the requirements articulated by the Supreme Court.[31] The Court has expressed three jurisdictional requirements of Article III:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[32]

The prudential concerns of standing, conversely, are flexible rules "designed to protect the courts from 'deciding abstract questions of wide public significance even when other governmental institutions may be more competent to address the questions.'"[33] Courts must consider all of these requirements; failure of any single requirement will preclude judicial involvement.[34]

B. Jurisprudence of Legislative and Congressional Standing

The Supreme Court has had few opportunities to apply the standing doctrine to suits brought by legislators in their official capacity.[35] The first case that implicated concerns over legislative standing was *Coleman v. Miller*.[36] In *Coleman*, twenty of Kansas's forty state senators voted against ratifying a proposed Constitutional amendment.[37] With the vote at a stalemate, the ratification resolution was set to fail.[38] Despite this seemingly-rejected vote, the lieutenant governor, who was the presiding officer of the Kansas Senate, cast a vote in favor of the resolution.[39] The

31. *See Windsor*, 133 S. Ct. at 2685.
32. *Id.* at 2685 (citations and internal quotations omitted).
33. *Id.* at 2686.
34. *See id.* at 2685.
35. These cases have ranged from individual legislators to the legislature as a whole. *See* Raines v. Byrd, 521 U.S. 811, 814 (1997) (where suit was brought by six members of Congress—four senators and two Congressmen); *see also* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2659 (2015) (where the Arizona state legislature itself brought suit).
36. 307 U.S. 433 (1939).
37. *Miller*, 307 U.S. at 435-36 (the amendment was known as the Child Labor Amendment).
38. *Id.* at 436.
39. *Id.*

extra vote allowed the ratification resolution to pass the Kansas Senate.[40] The twenty Kansas senators who voted against the resolution, one Kansas senator who voted for the resolution, and three members of the Kansas House of Representatives brought suit to compel the Secretary of the Kansas Senate to change the resolution's status from passed to not passed.[41]

The Court found that the *Coleman* legislators had standing to bring their suit.[42] The Court tailored its analysis to the question of whether the legislators alleged a sufficient injury—the first requirement of Article III standing.[43] Importantly, the plaintiffs' composition is inherently connected to the injury suffered.[44] In this instance, the Court noted that the twenty senators' votes "would have been decisive in defeating the ratifying resolution" if it were not for the lieutenant governor's actions.[45] However, given the lieutenant governor's vote, the plaintiffs' "votes against ratification have been *overridden* and *virtually held for naught*."[46] Ultimately, the Court held that "*at least* the twenty senators whose votes" were sufficient to defeat the resolution "have a plain, direct[,] and adequate interest in maintaining the effectiveness of their votes."[47] This vote-nullification was a sufficient injury to find standing for the portion of the Kansas Senate that brought suit.[48]

Later interpretation of *Coleman* provides insight into its implications.[49] First, *Coleman*'s holding was summarized by the *Raines* Court:

> [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.[50]

That Court then stated, but did not decide, that *Coleman*'s holding may not extrapolate to federal court cases because of separation of powers concerns

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40. *Id.* (the resolution was then adopted by a majority vote in the Kansas House of Representatives).

41. *Id.* The Court later characterized this composition of legislators as suing in a "bloc." *Raines*, 521 U.S. at 822.

42. *Coleman*, 307 U.S. at 446.

43. *See id.* at 437-46 (analyzing different arguments about whether the legislators' allegations were a sufficient basis to give the Court jurisdiction).

44. *See Raines*, 521 U.S. at 822-23.

45. *Coleman*, 307 U.S. at 441.

46. *Id.* at 438 (emphasis added).

47. *Id.* (emphasis added).

48. *Id.* at 446.

49. *See Raines*, 521 U.S. at 822-23.

50. *Id.* at 823.

that were absent from *Coleman*.[51] The Court's fear that *Coleman* could provide support for standing in disputes between the Federal Legislative and Executive Branches has also appeared in other cases where state legislatures were accorded standing.[52] Nevertheless, *Coleman* must *at least* stand for the proposition that actual vote-nullification is a sufficient injury to meet the first requirement of Article III standing.[53]

The next case the Supreme Court confronted regarding a legislator suing in his official capacity was *Powell v. McCormack*.[54] In *Powell*, the plaintiff was elected to serve in the United States House of Representatives.[55] However, a House resolution prevented Powell from taking his elected seat.[56] The Court determined that Powell's exclusion from his seat and, therefore, his loss of salary met the injury component of the Article III case-or-controversy requirement.[57] Viewed in isolation, *Powell*'s worth seems limited to the narrow factual circumstances of the case.[58] The Court's interpretation of *Powell* in the next case involving a legislator suing in his official capacity, however, helps establish the framework for all suits invoking legislative standing.[59] This next case was *Raines v. Byrd*.[60]

Raines was an attempt by four senators and two House representatives to challenge the constitutionality of the Line Item Veto Act.[61] Each of these six members of Congress originally voted against the Act.[62] Turning to the courts, the legislators made three arguments purporting to establish standing's injury-in-fact requirement.[63] First, the legislators alleged that the Act "alter[ed] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items."[64] Next, the legislators

51. *Id.* at 824 n.8.

52. *See Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665 n.12 (reasoning that the "case before us does not touch or concern the question whether Congress has standing to bring a suit against the President.").

53. *See Raines*, 521 U.S. at 822-23. By recognizing that vote-nullification is an actual injury under the first requirement of Article III standing, the Court's concerns for federal cases stem from separate separation of powers issues. *See id.*

54. 395 U.S. 486 (1969).

55. *Powell*, 395 U.S. at 489.

56. *Id.* The resolution preventing Powell from taking his seat was promulgated out of beliefs that Powell falsely reported travel expenses in his former role as a House subcommittee chairman. *Id.*at 489-90.

57. *Id.* at 512-16.

58. *See generally id.*

59. *See Raines*, 521 U.S. at 820-21.

60. 521 U.S. at 811.

61. *Id.* at 814. The Line Item Veto Act granted the president authority to "cancel" certain spending and tax benefit measures after the bill or resolution was signed into law. *Id.*

62. *Id.*

63. *Id.* at 816.

64. *Id.*

alleged that the Act divested them of their constitutionally mandated role in the repeal of legislation.[65] Finally, the legislators claimed that the Act "alter[ed] the constitutional balance of powers between the Legislative and Executive Branches."[66] The Court rejected each of these arguments and concluded that these members of Congress lacked "a sufficiently concrete injury" to establish Article III standing.[67]

The Court used *Coleman* and *Powell* as benchmarks against which *Raines* could be assessed.[68] The Court's analysis further emphasizes the role that a plaintiff's composition plays in determining the existence of an injury.[69] The Court began by distinguishing *Powell*.[70] While the injury in *Powell* was individualized to Powell himself, the injury alleged in *Raines* was a "type of institutional injury . . . which necessarily damages all Members of Congress and both Houses of Congress equally."[71] As such, *Powell* concerned the loss of a private right, whereas *Raines* invoked "a loss of political power."[72] This distinction was more than formalistic; the Court opined that such an institutional injury lacked concreteness for the *Raines* legislators.[73] Influenced by James Madison in *The Federalist No. 62*, the Court stated:

> If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.[74]

The Court's reasoning here seems to limit the prospects of individual members of Congress establishing standing in suits that allege institutional injuries.[75]

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65. *Raines*, 521 U.S. at 816.

66. *Id.*

67. *Id.* at 830. Interestingly, the Court found the Line Item Veto Act unconstitutional one year later. *See* Clinton v. City of New York, 524 U.S. 417 (1998). By refusing to resolve an issue that the Court held unconstitutional a year later, the Court demonstrated that standing must be established before reaching the merits of a case. *See Raines*, 521 U.S. at 830; *see also Clinton*, 524 U.S. at 417.

68. *See Raines*, 521 U.S. at 811-12.

69. *See id.* at 821.

70. *See id.*

71. *Id.*

72. *Id.*

73. *See Raines*, 521 U.S. at 821.

74. *Id.*

75. The Court's reasoning is susceptible to criticism. *See id.* at 837 (Stevens, J., dissenting) ("[T]he deprivation of this right . . . constitutes a sufficient injury to provide every Member of Congress with standing . . . If the dilution of an individual voter's power to elect representatives provides that

After distinguishing *Powell*, the *Raines* Court proceeded to distinguish *Coleman*.[76] Quoting heavily from *Coleman*, the Court compared the Kansas senators' votes, which "would have been decisive in defeating the ratifying resolution,"[77] with the *Raines* legislators' votes, which "*were* given full effect."[78] As to the passage of the Line Item Veto Act, the Court stated that the legislators "simply lost that vote."[79] As to fears about the effectiveness of the legislators' *future* votes, the Court reasoned that such a holding would "require a drastic expansion of *Coleman*."[80] Future implications of legislative standing were emphasized in the Court's statement that there "is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power" alleged in *Raines*.[81] Future suits based on legislative standing must be closer to the actual vote nullification in *Coleman* than the conjectural impact of future votes in *Raines*.[82]

In total, the *Raines* majority rejected the legislators' standing based mainly on Article III grounds, since the alleged injuries lacked concreteness and were too conjectural to establish an injury in fact.[83] To bolster its final judgment, the majority suggested that separation of powers concerns precluded standing.[84] Some of these separation of powers were determinative to the concurrence, which stated that it was "fairly debatable whether [the legislators'] injury [was] sufficiently personal and concrete to give them standing."[85] The Court's concerns fall into four categories: historical practice, congressional support, availability of others to bring suit, and potential damage to the judiciary.[86]

Historical practice, or more appropriately, lack thereof, was held to "cut against" the *Raines* legislators.[87] The Court stated that despite the existence of analogous disputes between the executive and legislative branches, no similar *suits* had been brought based upon an alleged injury to official

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voter with standing—as it surely does . . . the deprivation of the right possessed by each Senator and Representative to vote . . . must also be a sufficient injury to create Article III standing for them.").

76. *See id.* at 821-26 (majority opinion).

77. *Coleman*, 307 U.S. at 441.

78. *Raines*, 521 U.S. at 824 (emphasis added).

79. *Id.*

80. *Id.* at 826.

81. *Id.*

82. *See id.*

83. *Raines*, 521 U.S. at 830. Arguably, the flexibility with which the Court used these "separation of powers" concerns aligns with prudential standing; the Court asked whether it *should* take the case, not whether it *could*.

84. *See id.* at 826-29.

85. *Id.* at 832 (Souter, J., concurring).

86. *See generally id.*

87. *Id.* at 826 (majority opinion).

power.[88] The Court argued that disputes over the Tenure of Office Act were illustrative.[89] Even with the possibility that presidents had stronger injury claims than the *Raines* legislators based on diminution of official power, the Court noted that none of the affected presidents apparently believed that they could challenge the Act in federal court.[90] Notwithstanding the critiques that can be levied against such reasoning,[91] this historical backdrop was one separation of powers concern that weighed against standing.[92]

In discussing the Tenure of Office Act, the Court mentioned that "a plaintiff with traditional Article III standing" eventually brought suit.[93] In spite of the fact that the Court "has declined to *lower* standing requirements simply because no one would otherwise be able to litigate a claim," the Court has not restricted itself from imposing a barrier to standing because of the availability of other potential litigants.[94] In fact, both the majority and concurrence in *Raines* did precisely that.[95] The concurrence exalted "the virtue of waiting for a private suit" given "the certainty that another suit can come."[96] In the Court's eyes, the certainty that a private individual would be free to allege an actual, concrete injury when the president actually implemented the Line Item Veto Act served as another separation of powers consideration weighing against a finding of standing.[97]

A third concern directing a denial of standing was the mere fact that other members of Congress did not support the *Raines* legislators.[98] The Court "attach[ed] some importance" to the reality that the legislators were not authorized to represent their respective Houses—in fact, both Houses

88. *Raines*, 521 U.S. at 826.

89. *See id.* The Tenure of Office Act "provided that an official whose appointment to an Executive Branch office required confirmation by the Senate could not be removed without the consent of the Senate." *Id.*

90. *Id.*

91. *See id.* at 838 n.3 (Stevens, J., dissenting) ("The majority's reference to the absence of any similar suits in earlier disputes between Congress and the President . . . does not strike me as particularly relevant. First, the fact that others did not choose to bring suit does not necessarily mean the Constitution would have precluded them from doing so. Second, because Congress did not authorize declaratory judgment actions until . . . 1934, . . . the fact that President Johnson did not bring such an action in 1868 is not entirely surprising.").

92. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1238 (1987) ("[T]his type of negative 'proof' . . . is speculative at best . . . [T]he only way to resolve the dilemma *historically* is to offer *affirmative* historical evidence . . . .").

93. *Raines*, 521 U.S. at 827 (referring to Myers v. U.S., 272 U.S. 52 (1926)).

94. *Id.* at 835 (Souter, J., concurring) (emphasis added).

95. *Id.* at 829 (majority opinion) ("[N]or forecloses the Act from constitutional challenge *by someone who suffers judicially cognizable injury resulting from* [*the Act*].") (emphasis added); s*ee id.* at 834 (Souter, J., concurring).

96. *Id.*

97. *See id.* at 832-33. Ultimately, the Court's prediction came to fruition. *See generally Clinton*, 524 U.S. 417.

98. *See Raines*, 521 U.S. at 829-30 (majority opinion).

"actively oppose[d]" the litigation.[99] Brazenly emphasizing that the *Raines* legislators' votes were given full effect and that "they simply lost that vote," the Court seemingly clarified that it would not act as an outlet for legislators who lost a political dispute within their own branch.[100]

The final separation of powers concern that the Court raised was based on a fear that the courts' involvement would somehow damage public confidence in the judiciary.[101] The Court emphasized that the judiciary's role was "not some amorphous general supervision of the operations of government."[102] Furthermore, the concurrence stated that while the judiciary does not "shrink from a confrontation with the other two coequal branches," the courts should be the "last resort."[103] The concurrence felt that "embroiling the federal courts in a power contest nearly at the height of its political tension" could cause public doubt over the judiciary's legitimacy.[104] The added time between the political resolution and the judicial review, while waiting for a private plaintiff, reduces some political forces that would challenge the judiciary's legitimacy.[105] In all, this consideration, along with the three other separation of powers concerns and traditional Article III limitations, directed the Court to determine that the *Raines* legislators lacked standing.[106]

After laying dormant for over fifteen years, the Court again tackled the perplexity of legislative standing in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[107] Here, the Court was confronted with a suit brought by the Arizona Legislature.[108] The Legislature disputed a voter-adopted initiative that "remove[d] redistricting authority from the Arizona Legislature and vest[ed] that authority in an independent commission."[109] Significantly, the case presented the Court with an opportunity to apply and develop existing precedent.[110] While rejecting the case on the merits, the Court found that the Arizona Legislature had standing to assert its challenge.[111]

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99. *Id.* at 829.
100. *Id.* at 824.
101. *Id.* at 829 (majority opinion), 832-34 (Souter, J., concurring).
102. *Id.* at 829 (majority opinion).
103. *Raines*, 521 U.S. at 833 (Souter, J., concurring) (quoting *Valley Forge Christian Coll.*, 454 U.S. at 474).
104. *Id.*
105. *Id.* at 834.
106. *Id.* at 830 (majority opinion).
107. 135 S. Ct. at 2652.
108. *See id.* at 2658.
109. *Id.* This initiative was titled Proposition 106. *Id.*
110. *See id.* at 2655-57.
111. *Id.* at 2665-66.

The injury that formed the basis of standing was the Legislature's rescinded ability to initiate redistricting.[112] While the institutional injury alleged in *Raines* was not sufficient to accord standing to six members of Congress,[113] this purely institutional injury was sufficient in *Arizona State Legislature*.[114] The difference was that the Arizona Legislature was "an institutional plaintiff asserting an institutional injury," and had "commenced this action after authorizing votes in both of its chambers."[115] This holding further demonstrates the importance of the plaintiffs' composition.[116] Axiomatically, had this been a Federal Legislature suit, the authorizing votes also would have eliminated the concern about lack of support from within the branch that was present in *Raines*.[117]

The strongest challenge presented against the Arizona Legislature was that the alleged injury was too conjectural and hypothetical to establish standing.[118] The argument here was that the injury would not be concrete and actual unless and until the Legislature attempted to pass a competing plan for redistricting.[119] The Court disagreed with this argument.[120] First, the Court characterized a prerequisite of passing a competing plan as requiring the Legislature to violate the Arizona Constitution in order to establish standing.[121] Curtly, the Court reasoned that the Proposition "would 'completely nullify' any vote by the legislature, now or 'in the future,' purporting to adopt a redistricting plan."[122] For the Court, the injury was actual, given the Proposition's effect on the Legislature, not the effect on a future redistricting plan.[123] As such, the Court stated that the dispute was framed in a concrete, factual context that would permit judicial resolution.[124]

112. *See Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2663.
113. *Raines*, 521 U.S. at 811.
114. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2664.
115. *Id.*
116. *See id.*; *see also Raines*, 521 U.S at 821.
117. *See infra* Part IV.
118. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2663.
119. *Id.*
120. *Id.* at 2664-65.
121. *Id.* at 2664.
122. *Id.* at 2665 (quoting *Raines*, 521 U.S. at 823-24).
123. *See Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665.
124. *Id.* at 2665-66.

III. BACKGROUND OF EXECUTIVE NON-ENFORCEMENT

"EVERY INDIVIDUAL IS BOUND TO OBEY THE LAW, HOWEVER OBJECTIONABLE IT MAY APPEAR TO HIM: THE EXECUTIVE POWER IS BOUND NOT ONLY TO OBEY THE LAW, BUT TO EXECUTE IT."[125]

A. Current Developments of Executive Non-Enforcement

During his presidency, Barack Obama has been criticized for policy pronouncements that leave opponents questioning: "Is Obama enforcing the law?"[126] House Representative Trey Gowdy went as far as arguing that President Obama has gone beyond the traditional notions of prosecutorial discretion to the point of "anarchy."[127] While these critics agree that the executive is allowed some degree of prosecutorial discretion, they assert that the president's "categorical exclusions" result in "an outright negation of federal law."[128] President Obama's treatment of marijuana enforcement, the Obamacare employer mandate requirement, and immigration have been some of the most widely-criticized areas of his presidency's alleged non-enforcement.[129] A brief rendition of these areas follows.

Currently, marijuana is a Schedule I controlled substance.[130] By federal law, therefore, marijuana is considered a drug with a high potential for abuse, a drug with "no currently accepted medical use in treatment in the United States," and a drug with a lack of accepted safety for use.[131] Notwithstanding these federal concerns, twenty-three states and the District of Columbia have legalized medicinal marijuana in some form.[132] Furthermore, four states—Oregon, Colorado, Alaska, and Washington—have legalized the recreational use of marijuana.[133] Manifestly, a conflict exists, given that certain state laws permit a drug that federal law has prohibited.[134]

On October 19, 2009, Deputy Attorney General David Ogden addressed this conflict in a memorandum directed to selected United States

125. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 147 (2d ed. 1829).

126. *See* Benjamin Goad, *Is Obama Enforcing the Law?*, THE HILL (Apr. 13, 2014, 10:00 PM), http://thehill.com/regulation/court-battles/203388-is-obama-enforcing-the-law.

127. *Id.*

128. *Id.*

129. *Id.*

130. 21 U.S.C. § 812 (2012).

131. *Id.*

132. Sarah Whitten, *DEA Chief: Medicinal Marijuana is a "Joke"*, CNBC (Nov. 6, 2015, 3:55 PM), http://www.cnbc.com/2015/11/06/dea-chief-medicinal-marijuana-is-a-joke.html.

133. *Id.*

134. *See id.*

attorneys.[135] Describing the memo's purpose as providing uniform guidance for federal investigations and prosecutions, Ogden declared that attorneys "should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[136] Tactfully, Ogden framed the memorandum as a guide of prosecutorial discretion and reserved the possibility of investigation or prosecution when other important federal interests would be served.[137] A subsequent memorandum addressed state laws permitting recreational marijuana use.[138] This memorandum expanded the Ogden memorandum to further refrain from prosecuting individuals in states that have legalized recreational marijuana usage, so long as local and state regulation is sufficient.[139]

Politically, marijuana legalization has been a subject of continuing debate.[140] Some commentators have predicted that as many as sixteen states will have some form of legalization initiatives on ballots in 2016.[141] Federally, Senator Bernie Sanders introduced the Ending Federal Marijuana Prohibition Act.[142] Regardless of state law changes and the speculative support of future federal legislation, however, marijuana is still listed as a Schedule I drug at the federal level—meaning that it has no accepted use and is subject to criminal prosecution.[143]

President Obama has also been criticized for non-enforcement of a provision of the health care regime that colloquially bears his name—Obamacare.[144] Specifically, critics challenge the year delay of the Affordable Care Act's employer mandate.[145] Under Obamacare, companies

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135. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009) (on file with author).

136. *Id.* at 1-2.

137. *Id.* at 2-3.

138. Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (on file with author) [hereinafter Memorandum from James M. Cole].

139. *Id.* at 3.

140. The debate is further divided between legalization for medicinal purposes and legalization for recreational uses. Rebecca Kaplan, *Bernie Sanders Introduces Bill to End Federal Ban on Pot*, CBS NEWS (Nov. 5, 2015, 4:27 PM), http://www.cbsnews.com/news/bernie-sanders-introduces-bill-to-end-federal-ban-marijuana/ ("[Hillary] Clinton, on the other hand, said she supports the use of medical marijuana but has not yet taken a position on legalizing the drug for recreational use.").

141. Paul Waldman, *Why Marijuana Legalization Will Still Be a Potent Issue in 2016*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/blogs/plum-line/wp/2015/11/04/why-marijuana-legalization-will-still-be-a-potent-issue-in-2016/.

142. Kaplan, *supra* note 140. The bill would remove marijuana from the federal list of Schedule I drugs. *Id.*

143. *Id.*

144. *See* Price, *supra* note 5, at 673.

145. *See id.*

with at least fifty full-time employees must provide minimum essential health coverage or pay "shared responsibility" payments.[146] This penalty will cost qualifying companies that fail to provide the minimum coverage up to $3,000 per employee annually.[147] The employer mandate was set to take effect on January 1, 2014.[148]

Closely related to the employer mandate is a mandatory employer and insurer reporting requirement.[149] Without this reporting requirement, it would be "impractical to determine which employers owe shared responsibility payments."[150] In July 2013, the Obama Administration responded to employer concerns "about the complexity of the [reporting] requirements and the need for more time to implement them" by declaring that it would provide an additional year before the requirements began.[151] Given the delay for the reporting requirements, the Administration also delayed the shared responsibility payments to 2015.[152]

Critics of Obamacare generally purported that the delay was "a clear acknowledgment that the law is unworkable."[153] Turning their attention from the law itself, these critics also challenged the unilateral action of the president in permitting the delay, notwithstanding unambiguous statutory language requiring earlier implementation.[154] The dispute over the year delay of the employer mandate peaked with the filing of a lawsuit that was authorized by the House of Representatives.[155] While the District Court dismissed portions of the complaint that challenged the employer mandate delay for a lack of standing,[156] the suit is continuing and will likely result in appeals.[157]

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146. 26 U.S.C. § 4980H (2012).

147. *Id.*

148. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF THE TREASURY (July 2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Jeffrey Young, *Obamacare Employer Mandate Delayed for One Year*, HUFFINGTON POST (July 3, 2013, 5:50 PM), http://www.huffingtonpost.com/2013/07/02/obamacare-employer-mandate_n_3536695.html.

154. Michael A. Memoli, *House Lawsuit Over Obamacare to Focus on Employer Mandate Delay*, L.A. TIMES (July 10, 2014, 4:14 PM), http://www.latimes.com/nation/politics/politicsnow/la-pn-house-lawsuit-obamacare-20140710-story.html.

155. Jennifer Haberkorn, *House Obamacare Lawsuit Can Move Ahead in Part*, POLITICO (Aug. 9, 2015, 5:23 PM), http://www.politico.com/story/2015/09/house-obamacare-lawsuit-cost-sharing-subsidies-213465.

156. *See generally* U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D. D.C. Sept. 9, 2015).

157. Haberkorn, *supra* note 155.

Arguably, the most controversial and wide-sweeping example of President Obama's alleged non-enforcement exists in the immigration forum.[158] The Immigration and Nationality Act ("INA") was originally created in 1952.[159] Despite a number of amendments, the INA is "still the basic body of immigration law."[160] This Act demands the removal of aliens who fall into specific classes.[161] The Immigration and Customs Enforcement Agency ("ICE") is charged with removing unlawful immigrants within the United States as specified in the INA.[162]

Much like marijuana enforcement and Obamacare, immigration has been a politically popular topic for reform.[163] Also much like marijuana enforcement, immigration reform is subject to various levels of debate.[164] President Obama has been a staunch supporter of immigration reform.[165] In his 2011 State of the Union Address, he requested bipartisan support to "address the millions of undocumented workers . . . living in the shadows."[166] President Obama has also been a vocal supporter of the DREAM Act.[167] The DREAM Act, which was never passed in Congress despite being taken up in some form in 2006, 2007, 2009, 2010, and 2011, would permit unlawful children immigrants to earn legal status as long as they maintain specified criteria.[168] Given the Act's repeated failure and the Republican's control of the House in 2011, the prospects of the DREAM Act being passed in the near future are slim.[169]

Despite these barriers to the implementation of the DREAM Act and immigration reform, some critics allege that President Obama has used enforcement as a way of implementing his desired policies.[170] In 2011, noting that ICE has limited resources to remove unlawful individuals in the

158. *See* Price, *supra* note 5, at 678.

159. *Immigration and Nationality Act*, DEP'T OF HOMELAND SEC., www.uscis.gov/laws/immigration-and-nationality-act (last visited Sept. 10, 2016).

160. *Id.*

161. 8 U.S.C. § 1227 (2012). Some of the deportable classes are for aliens who were "[i]nadmissible at time of entry . . . .," committed certain criminal offenses, failed to register or falsified documents, or unlawfully voted in state or federal elections. *Id.*

162. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 788 (2013).

163. *See generally id.*

164. For example, debates exist about the proper approach to streamlining legal immigration, on what extent we should strengthen our borders, and how we should treat unlawful immigrants already within the United States. *See generally id.*

165. *See id.* at 783-84.

166. Barack Obama, President of the U.S., State of the Union Address (Jan. 25, 2011), *available at* https://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

167. *See* Delahunty & Yoo, *supra* note 162, at 783-84.

168. *Id.* at 788-89.

169. *See id.* at 789.

170. *Id.* at 789.

United States, ICE Director John Morton directed the agency to use "prosecutorial discretion" with actions against certain aliens.[171] In addition to providing a list of factors relevant to whether prosecutorial discretion should be granted to a specific alien, Morton described "positive factors [which] should prompt particular care and consideration."[172] Included in this list of factors is whether the individual was present in the United States since childhood.[173]

The Morton memorandum was expanded by Janet Napolitano in a 2012 memorandum devoted exclusively to "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."[174] Providing criteria for determining which individuals qualify as coming to the country as children, the memorandum then states that agencies should *prevent* qualifying individuals from being removed from the United States.[175] In 2014, "prosecutorial discretion" was augmented further.[176] A memorandum from Jeh Charles Johnson explained that deferred action for childhood arrivals would be expanded in a number of ways.[177] First, deferred action would be granted for three-year time periods, rather than just two-year increments.[178] Second, prosecutorial discretion would be allowed for immigrants who entered the country before turning sixteen, regardless of their current age.[179] Third, discretion would be granted to unlawful immigrant parents whose children are U.S. citizens or lawful permanent residents.[180]

Despite the insistence that determinations will be made on a case by case basis,[181] critics see these categorical exclusions of immigration enforcement as the Obama Administration's attempt to implement, through

171. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, & All Chief Counsel (June 17, 2011) (on file with author) [hereinafter Memorandum from John Morton].

172. *Id.* at 4-5.

173. *Id.* at 5. This program is called Deferred Action for Childhood Arrivals (DACA). Charles C. Foster, *The Historic Importance of President Barack Obama's Executive Actions on Immigration*, 52-APR HOUS. LAW. 28, 29 (2015).

174. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizen & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012) (on file with author).

175. *Id.*

176. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, & R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014) (on file with author) [hereinafter Memorandum from Jeh Charles Johnson].

177. *Id.* at 3.

178. *Id.*

179. *Id.*

180. *Id.* at 4. This expanded program is titled Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Foster, *supra* note 173, at 29.

181. Memorandum from Jeh Charles Johnson, *supra* note 176, at 3.

the guise of prosecutorial discretion, the proposed policy measures that have not passed through legislative channels.[182] House Speaker Paul Ryan stated that President Obama "has tried to go around Congress by ordering his administration to create a new legal status for undocumented immigrants."[183] While twenty-six states already brought a suit to challenge the constitutionality of the Administration's actions,[184] the House of Representatives considered, yet ultimately rejected, expanding their suit challenging the president's actions regarding Obamacare's employer mandate to also dispute immigration actions.[185]

B. Constitutionality of Executive Non-Enforcement

Extensive debate currently exists about whether the president's non-enforcement actions are constitutional.[186] The specific circumstances of each area of alleged non-enforcement raise different constitutional claims.[187] For President Obama's immigration enforcement, three bases for constitutional claims are frequently alleged: the Take Care Clause, the Youngstown/Curtiss-Wright dichotomy, and the Non-Delegation Doctrine.[188] Before the courts could ever consider the validity of these claims, a suitable plaintiff would have to establish standing.[189] I believe that a congressional plaintiff would be able to bring a challenge to the executive's non-enforcement. To reach the merits of the underlying claim, however, standing must first be established.[190]

182. *See* Delahunty & Yoo, *supra* note 162, at 791 ("The criteria for inclusion . . . mapped closely onto those specified in the DREAM Act . . . .").

183. Paul Ryan, *"Get Serious about Enforcing Our Laws"*, USA TODAY (Nov. 3, 2015, 4:27 PM), http://www.usatoday.com/story/opinion/2015/11/03/immigration-reform-house-speaker-paul-ryan-editorials-debates/75107720/.

184. *See* Raul A. Reyes, *Court's Delay on Immigration a Travesty*, CNN (Nov. 3, 2015, 8:05 AM), http://www.cnn.com/2015/11/03/opinions/reyes-executive-action-immigration/.

185. *See* Christine Mai-Duc, *House Republicans Sue President Obama Over the Healthcare Law*, L.A. TIMES (Nov. 21, 2014, 8:56 AM), http://www.latimes.com/nation/politics/politicsnow/la-pn-obamacare-lawsuit-20141121-story.html.

186. *See generally* Delahunty & Yoo, *supra* note 162.

187. *See generally id.*

188. *See* Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 256 (2013) (describing and then rebutting each of these four arguments). *Compare id.*, *with* Delahunty & Yoo, *supra* note 162 (arguing that President Obama's immigration enforcement is unconstitutional).

189. Many *defenses* to allegations of non-enforcement would not be applicable under the standing analysis. For example, federalism concerns may affect President Obama's enforcement of marijuana laws in states that have legalized the drug. Nonetheless, if the underlying injury will still exist, it may be justified. *See Raines*, 521 U.S. at 829-30.

190. *See id.* at 811.

IV. APPLICATION OF CONGRESSIONAL STANDING TO EXECUTIVE NON-ENFORCEMENT

"THERE IS HARDLY A POLITICAL QUESTION IN THE UNITED STATES THAT DOES NOT SOONER OR LATER TURN INTO A JUDICIAL ONE."[191]

A. Jurisdictional Requirements of Article III

1. Injury Requirement—Vote Nullification

Presuming that Congress intends to sue the executive over concerns that a law is not being enforced, Congress would first have to determine what injury could be alleged to support standing.[192] Congress could allege a modification to the constitutional balance of powers between the legislative and executive branches.[193] However, this injury was rejected by the *Raines* Court.[194] Likewise, an injury charging the executive's non-enforcement with affecting *future* votes has been rejected as too conjectural.[195] Congress could potentially allege an injury based on misappropriations,[196] but

191. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J. Mayer ed., Harper Perennial Modern Classics 1961) (1835).

192. Scholar Tara Grove argues that Congress does not have the power to bring suit or appeal in federal court because of the constitutional principle that federal institutions must have affirmative authority for their actions. *See generally* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014). She contends that the Take Care Clause does not confer standing to Congress when the executive no longer has a law enforcement interest. *Id.* at 1312. Her argument, however, is tailored to situations where Congress steps into the place of the executive. *Id.* A distinction should be drawn between suits where Congress steps into the place of the executive and suits where Congress brings a legal challenge to preserve their own interest against the executive. In the latter situation, Congress's ability to protect their own affirmative grants of power should be implied within those grants in Article I. U.S. CONST. art. I, §§ 1-10.

193. *See Raines*, 521 U.S. at 816.

194. *See id.* In *Raines*, the Court paid very little attention to the plaintiffs' allegations of a shift in the balance of powers. *See id.* Conceivably, such an injury would not provide the Court with a specific factual dispute within which it could decide the issues. *See Schlesinger*, 418 U.S. at 221 ("Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions."). Furthermore, while *Raines* did not involve an institutional plaintiff, an institutional plaintiff would have similar difficulties in framing a dispute based upon an amorphous argument about a shift in the balance of powers. *Raines*, 521 U.S. at 829. At the very least, such a dispute would face an insurmountable barrier in the political question doctrine. *See* Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) ("We have explained that a controversy involves a political question . . . where there is a . . . *lack of judicially discoverable and manageable standards for resolving it*." (emphasis added) (internal quotations and citations omitted)).

195. *Raines*, 521 U.S. at 824.

196. Only Congress has the power to appropriate funds. U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). If the executive refused to enforce a law and then used funds appropriated for that law's enforcement for another purpose, such an action would presumably violate the Appropriations Clause. *Id.* For example, if Congress appropriated funds to the Immigration and Customs Enforcement Agency for immigration enforcement, and the executive refused to enforce immigration statutes and instead used the funds for defense purposes, Congress may be able to allege an injury in fact. *See Burwell*, 130 F. Supp. 3d at 53 (deciding that the House of Representatives had standing to challenge the executive's alleged spending

wrongful misappropriation would be a separate argument from pure non-enforcement.[197] Ultimately, Congress's best argument for an injury in fact from executive non-enforcement is the same injury that accorded standing to Kansas senators in *Coleman*—vote nullification.[198]

Congress should argue that executive non-enforcement constructively "overrid[es]" and "virtually h[o]ld[s] for naught" Congress's votes on a previously enacted law.[199] *Coleman* held that legislators have standing to sue when their votes, which would have been sufficient to enact a law that does not go into effect, are completely nullified.[200] Much like the lieutenant governor's actions that overrode the Kansas senators' votes on the Child Labor Amendment, the executive virtually repeals a validly-enacted law through a refusal to enforce; such action overrides and nullifies Congress's vote.[201] Naturally, Congress will face a number of challenges before being able to translate *Coleman* to executive non-enforcement.[202] Additionally, the executive's actions may seldom rise to the level of vote nullification.[203] Nevertheless, by alleging vote nullification, Congress may find firm ground for standing to sue the executive for specific instances of non-enforcement.[204]

Coleman provided a straightforward and undemanding case of vote nullification.[205] It is hard to imagine a more rudimentary example of vote nullification than a situation where a decisive vote takes place, only to have an outside influence immediately alter that vote to reach the opposite

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of monies under the Affordable Care Act that were not appropriated by Congress). In addition to situations where funds are used for a completely unrelated function, an interesting argument could be raised where funds are used by an appropriate agency, but for a purpose contrary to the appropriation's plain intent. President Obama's immigration policies have been questioned for their diversion of funds from enforcement purposes. Delahunty & Yoo, *supra* note 162, at 849 ("Moreover, by creating what amounts to a substantial new program, it has subtracted from the resources available for enforcement."). Conceivably, one could argue that using funds appropriated for immigration enforcement to grant unlawful immigrants temporary status is directly contrary to the appropriated function and is, therefore, a misappropriation.

197. *See Burwell*, 130 F. Supp. 3d at 53. While misappropriations are possible in the context of non-enforcement (because the funds are no longer needed for their original purpose), non-enforcement does not *necessarily* involve misappropriation. Allegations of misappropriations in addition to executive non-enforcement would be two separate acts of wrongdoing. As such, I will tailor my analysis to injuries based solely on non-enforcement.

198. *See* Chenoweth v. Clinton, 181 F.3d 112, 117 (D.C. Cir. 1999) (arguing that vote nullification under *Coleman* is still a valid injury after *Raines*).

199. *Coleman*, 307 U.S. at 438.

200. *Raines*, 521 U.S. at 823. The *Raines* Court also mentioned that separation of powers concerns were not present in *Coleman*; I address these concerns in Part IV.

201. *Coleman*, 307 U.S. at 435-36.

202. *See Raines*, 521 U.S. at 821-26.

203. *See id.*

204. *See id.*

205. *See generally Coleman*, 307 U.S. at 433.

result.[206] While this example provides a strong foundation from which to consider vote nullification, vote nullification can undoubtedly exist in other dimensions and conformations.[207] Two discrepancies between the vote nullification in *Coleman* and that which takes place from executive non-enforcement must be confronted before Congress will be able to rely on the Court's precedent to establish standing.[208] Ultimately, if the Court focuses on *effect* more than *form*,[209] none of these issues would "require a drastic expansion of *Coleman*."[210]

The first discrepancy between *Coleman* and executive non-enforcement is based on a temporal difference.[211] While *Coleman* involved an immediate action that nullified votes,[212] executive non-enforcement presumes that a bill became law before nullification takes place.[213] In some cases, like immigration enforcement, a law may have not only passed, but also was enforced for some length of time before the alleged refusal to enforce arose.[214] The most analogous example of the form of vote nullification in *Coleman* that could take place by executive non-enforcement is where the president refuses to recognize and enforce a law that was passed by two-thirds of both Houses in order to override a Presidential veto.[215] Not only would the effect of Executive action be

206. *Id.* at 435-36.

207. *See id.*

208. *See Raines*, 521 U.S. at 821-26.

209. I emphasize the distinction between the "form" (i.e., the manner in which the vote nullification takes place) and the "effect" that such action produces. The forms of vote nullification are fluid and multiple. Conversely, the actual effect of such action (vote nullification) is the single pivotal question. *See id.*

210. *Id.* at 826 (holding that injuries based on effects on *future* votes "would require a drastic expansion of *Coleman*.").

211. *See id.* at 823.

212. *See Coleman*, 307 U.S. at 435-36.

213. Not only does this difference assume a greater lapse of time, it also can be distinguished by formal distinctions about the stage of the legislative enactment. The *Raines* Court's interpretation of *Coleman* presumed that nullification would happen before a bill was formally made a law. *Raines*, 521 U.S. at 823 ("[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."). If the Court were to draw a line between votes that are nullified before being becoming a law and votes on a bill that becomes a law and is then nullified, the Court would create an unnecessary formalistic distinction. Furthermore, the distinction would be unreasonable and create perverse results. Specifically, the executive would have virtual immunity from suit from the legislative branch based on vote nullification; the executive would simply sign an opposed bill into a law before taking any non-enforcement action. Assuming no private plaintiff would exist, not only would the executive be immune from suit, the Court would be providing the executive with an *unlimited* veto power. With such a distinction, it would be hard to imagine why a president would ever veto a bill (and present Congress with the opportunity for an override) when he or she could simply sign the bill into law and proceed to disregard its existence.

214. *See* Delahunty & Yoo, *supra* note 162, at 787-92.

215. The president has the option to refuse to sign a bill that has passed the House and the Senate. U.S. CONST. art. I, § 7. Notwithstanding the president's veto, a bill may still become law after receiving

similar to *Coleman*, but the form of the action would be identical—votes would be nullified immediately following their inception.[216]

Scenarios where non-enforcement takes place immediately may make up the minority of actual instances of executive non-enforcement.[217] Rather, executive non-enforcement can take place after a lengthy period of time when the law is enforced.[218] While a number of factors may precipitate this change, the ultimate *effect* of the action nonetheless remains the same—the vote is nullified.[219] In *Coleman*, the lieutenant governor's unilateral act disregarded and erased any effect of the Kansas senators' votes.[220] When the executive decides to discontinue enforcement of a valid law, he or she is also unilaterally abolishing the legislature's previous actions.[221] This treacherous behavior unilaterally wipes the slate of legislative action.[222] Even though this type of vote nullification is not as immediate as in *Coleman*, the final effect remains the same—congressional votes are "overridden" and "virtually held for naught."[223]

The second discrepancy that Congress would have to confront in most instances of executive non-enforcement is whether *Coleman*'s concept of vote nullification can translate from complete nullification of an entire resolution to nullification of specific provisions or even applications of a statute's provisions.[224] One way to think about vote nullification is based on percentages. In *Coleman*, the vote was restricted to a singular issue

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a two-thirds vote from each House. *Id.* ("If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."). This scenario would be the shortest period of time between legislative and executive action. Likewise, it is possible to imagine a scenario where the executive signs a bill with no intentions of enforcement. Both of these events would be comparable to the immediate action that nullified votes in *Coleman*. *See Raines*, 521 U.S. at 823.

216. *See id.* at 821-26.

217. The Obamacare employer mandate delay is representative of an immediate refusal to enforce. *See* Goad, *supra* note 126.

218. *See* Delahunty & Yoo, *supra* note 162, at 787-92 (using immigration law as an illustration).

219. Immigration and marijuana enforcement represent scenarios where a law is enforced for some time before a change in policy. *See supra* Part III.

220. *See Raines*, 521 U.S. at 821-26.

221. *See id.*

222. The proper procedure for removing a valid law is through a repeal, which incorporates both the legislative and executive branches. *See* U.S. CONST. art. I, § 7. Inability of the branches to coordinate a repeal demonstrates a difference of opinion about the validity of a law. Allowing disagreements to actually empower one branch to act unilaterally places that branch, and their opinion on the law, above the other.

223. *Coleman*, 307 U.S. at 438. Furthermore, concerns about *Raines*'s rejection of effects on future votes is distinguishable, because even though laws are nullified over a greater period of time, the nullification relates to a specific law and provides a concrete factual dispute to frame the issue. *See Raines*, 521 U.S. at 821-26.

224. *See id.*

(whether to support a constitutional amendment).[225] Therefore, when the vote was changed from not passed to passed, the affected senators' votes lost 100% of their effect. Imagine that Congress passes and the president signs a bill into law that contains 100 distinct provisions. One form of nullification would take place if the executive refused to enforce any of the 100 provisions.[226] By refusing to enforce all 100 provisions of the law, the executive's non-enforcement would be identical to the 100% effect of vote nullification that occurred in *Coleman*.[227] Comparatively, imagine if the executive refused to enforce only one of the 100 provisions of our law. In this situation, it could be argued that only 1% of the vote was nullified, and that the overwhelming majority of the vote was given effect. Likewise, imagine that our 100 provision bill was enforced in its entirety, except for its application in specific areas—for example, perhaps in certain states.[228] It could be argued that Congress's vote was given over 99% effect, approaching full effect. Should *Coleman*'s concept of vote nullification translate to these instances where it could be argued that Congress's votes were given *almost* full effect? To be consistent with the powers delegated in the Constitution, the answer is yes.

The president's use of the Line Item Veto Act provides an example of action that nullified only specific provisions of certain laws.[229] The Act gave the president the authority to "cancel in whole" certain types of appropriations provisions that were already signed into law.[230] Despite the fact that the legislative branch *affirmatively* granted this power to the president, the Court found that such action violated the Constitution.[231] The Court opined that although the Constitution was "silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes . . . [t]here are powerful reasons for construing constitutional silence . . . as equivalent to an express prohibition."[232] The Court further stated that "[t]he cancellation of one section of a statute may be the functional equivalent of a partial repeal *even if a portion of the*

225. *Coleman*, 307 U.S. at 435.

226. *See Raines*, 521 U.S. at 821-26.

227. *See id.*

228. For this example, consider the President's decision to not prosecute marijuana use in states where use and possession is legal. *See supra* notes 130-43 and accompanying text.

229. The Line Item Veto Act was the focus of the underlying dispute in *Raines v. Byrd*. *See generally Raines*, 521 U.S. at 791. Given that the plaintiffs were found to lack standing, the Court did not reach the constitutionality of the act in that case. *See generally id.* The constitutionality of the Line Item Veto Act was addressed in *Clinton v. City of New York*. *See generally Clinton*, 524 U.S. at 417.

230. *Clinton*, 524 U.S. at 436. The president had the power to cancel "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." *Id.*

231. *Id.* at 449.

232. *Id.* at 439.

section is not canceled."[233] Ultimately, the Court refused to accept that the Line Item Veto Act was consistent with Article I, Section 7 of the Constitution.[234] By realizing this inconsistency and the unconstitutionality of a President's unilateral repeal, the Court implicitly recognized that Congress's votes are nullified by Presidential action under the Line Item Veto Act.[235]

If the Court was willing to reject the president's unilateral changes to certain laws when that power was granted by the legislative branch, the Court should be even more suspect when the president engages in the same action in the absence of legislative support.[236] Therefore, while the Line Item Veto Act formalized a procedure for the president to effectively repeal individual provisions of laws, the Court should recognize that non-enforcement results in the same effect despite coming through a different form.[237] Irrespective of whether the president formally repeals a singular provision of a law or does so through non-enforcement, the ultimate effect of repealing the provision is inconsistent with the Constitution and nullifies previous congressional action.[238]

Returning to our 100 provision law example, presume that the Line Item Veto Act supports the president's decision to cancel certain provisions. Under such circumstances, a decision to cancel one provision of our law would be consistent with the terms of the statute, but the Supreme Court held that it would be inconsistent with the terms of the Constitution.[239] Likewise, if the president refuses to *enforce* one provision of our 100 provision law, such action should likewise be inconsistent with the Constitution. This "functional equivalent of a partial repeal" through non-enforcement should be viewed in the same light as vote nullification was in the Line Item Veto Act.[240] By repealing or amending even minor provisions

233. *Id.* at 441 (emphasis added).

234. *Id.* at 449.

235. It may seem inconsistent to say that the Line Item Veto Act results in vote nullification even though the *Raines* Court rejected the argument that those plaintiffs' injury was based on vote nullification. However, the alleged injury in *Raines* was predicated on the *potential* for nullification of future votes. *Raines*, 521 U.S. at 826. The Court stated that this potential for nullification did not establish a concrete injury. *Id.* In that case, the only vote that the plaintiffs could allege was nullified was their vote on the Line Item Veto Act itself, which the Court noted was given full effect. *Id.* at 824. Therefore, had the legislators been able to point to a specific appropriations bill that was altered through the procedure established in the Line Item Veto Act, they would have been able to point to a specific instance of vote nullification consistent with *Coleman*'s holding. *See id* at 821-26. Furthermore, it is significant to note that vote nullification is an institutional injury that depends on the plaintiffs' composition, which was held against the *Raines* legislators. *See id* at 829.

236. *See generally Raines*, 521 U.S. at 811. *Compare id.*, *with Clinton*, 524 U.S. at 417.

237. *See generally Clinton*, 524 U.S. at 417. *Compare id.*, *with Raines*, 521 U.S. at 811.

238. *See Clinton*, 524 U.S. at 448-49.

239. *See id.* at 449.

240. *See id.* at 441.

of a law, the president overrides Congress's specific vote.[241] Moreover, the *Clinton* Court reasoned that this functional repeal occurred even when the president only cancels portions of a law.[242] Therefore, *Coleman*'s concept of vote nullification should translate to instances of executive non-enforcement that results in the nullification of only individual provisions of a larger law or even applications of a law's provisions.[243]

Ultimately, notwithstanding the temporal differences or the differences in the breadth of a specific vote's nullification, executive non-enforcement can result in the same *effect* of vote nullification found in *Coleman*.[244] Given that these two discrepancies should not stand as a barrier to the idea of vote nullification by executive non-enforcement constituting an injury in fact for standing analysis, potential plaintiffs next have to consider when executive non-enforcement rises to the level of "vote nullification."[245]

Coleman was representative of a prototypical form of "vote nullification."[246] No simpler form of nullification could exist other than the dichotomy of changing a vote from "no" to "yes."[247] Likewise, the *Raines* Court opined that this principle would also result if a vote was changed from "yes" to "no."[248] To equate executive non-enforcement with this type of behavior, congressional plaintiffs would have to demonstrate that the executive's action *functionally* shifted a vote from yes to no. Arguably, if a bill became a law and was not enforced, the effect of that non-enforcement would be identical to formally shifting a vote from "yes" to "no."

Executive non-enforcement, however, is rarely as simple as an outright refusal to enforce.[249] Instead, presidents prefer to cloak their non-enforcement in terms of "prosecutorial discretion."[250] In reality, executive non-enforcement falls along a spectrum, with prosecutorial discretion at one end and outright vote nullification at the other.[251] To premise vote nullification as the underlying injury for congressional standing, plaintiffs have to demonstrate that the specific non-enforcement falls at the very end of this spectrum.[252] To determine where specific conduct rests between

241. *See id.*
242. *Id.*
243. *See Raines*, 521 U.S. at 821-26.
244. *See id.*
245. *See id.*
246. *See generally Coleman*, 307 U.S. at 433.
247. *Id.* at 436.
248. *Raines*, 521 U.S. at 823.
249. *See* Delahunty & Yoo, *supra* note 162, at 783.
250. *See supra* Part III.
251. *See* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 219 (2015) ("In most cases, nonenforcement falls along a spectrum from a categorical refusal to enforce the law to a perfect enforcement . . . .").
252. *See Raines*, 521 U.S. at 816.

prosecutorial discretion and vote nullification, the courts should consider a number of factors that take the accepted features of prosecutorial discretion and the commonsense notions of vote nullification into account. Naturally, this analysis will involve a great deal of subjectivity. But, in order to prevent judges from having to decide what conduct is nullification on an "I know it when I see it" basis,[253] factors can help guide decisions and promote consistency.

The courts should adopt a two-step analysis. First, the courts should consider four factors that distinguish executive non-enforcement from prosecutorial discretion. Assuming the alleged act of non-enforcement is differentiated from prosecutorial discretion, the courts should then consider whether the action aligns with notions of vote nullification. No single factor should be determinative to a court's decision. Furthermore, some factors may be inapplicable to certain alleged acts of non-enforcement. Ultimately, the factors should merely provide some structure to the fluidity and unpredictability of the countless potential methods of non-enforcement.

Courts should first consider four factors that distinguish the executive's action from traditional conceptions of prosecutorial discretion. These factors are: (1) whether the non-enforcement is decided generally as opposed to on a case-specific basis; (2) whether a substantial likelihood exists that the law will not be enforced in the foreseeable future; (3) whether the non-enforcement incorporates some affirmative act contrary to the statute's purpose; and (4) whether the non-enforcement does not arise in realms that historically accept prosecutorial discretion. Significantly, I have omitted certain policies underlying prosecutorial discretion from this list of factors. For example, "[o]ne of the major reasons behind prosecutorial discretion is the practical reality of a finite availability of resources."[254] While one *defense* to allegations of executive non-enforcement may be that insufficient funds exist to enforce a law on any scale, such considerations would not defeat the fact that categorical non-enforcement would functionally nullify a valid law—this consideration would, however, support a defense for the executive to justify non-enforcement and to shift blame back to Congress.[255]

As a starting place, an illustration of prosecutorial discretion is an individual prosecutor's decision not to bring charges against a certain

253. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

254. Heather Fathali, Comment, *The American Dream: DACA, DREAMers, and Comprehensive Immigration Reform*, 37 SEATTLE U. L. REV. 221, 225-26 (2013).

255. *See* Delahunty & Yoo, *supra* note 162, at 783 (using President Obama's current enforcement of immigration law as an illustration).

person based upon a number of considerations.[256] This notion of individualized decision-making is so well-founded that courts are willing to *presume* that an executive agency's decision not to prosecute a certain individual is "immune from judicial review."[257] Courts recognize that these decisions are predicated upon a number of factors, including assessments about whether a violation has occurred, whether bringing charges will ultimately result in successful outcome, and whether the particular enforcement fits overall policies.[258] Far apart from this perception of prosecutorial discretion is the situation where non-enforcement is decided on a general or categorical basis.[259] When categorical rejection of enforcing a law's specific provisions is effected, prosecution is not rejected because of uncertainty about whether one individual has violated the specific provision.[260] Nor is concern given to whether the charges will ultimately be successful.[261] Rather, in categorical decisions of non-enforcement, there is no conception of "discretion." A categorical decision instead removes discretion from a prosecutor and replaces it with outside judgment.[262]

When non-enforcement is decided on a general or categorical basis, courts should view such action as separate from the traditional notions of prosecutorial discretion. To determine that non-enforcement has been decided on a categorical basis, courts can look for directives disseminated from high-ranking individuals.[263] Instinctively, these individuals will not be making decisions based on facts of specific cases, but rather on policy decisions.[264] In this analysis, courts should not accept disclaimer language that alleges to preserve decision-making on a case-specific basis when such language is only secondary to categorical decisions about non-enforcement.[265] Instead, courts should use common sense in deciding whether these disclaimers are pretextual. If possible, courts should also

256. U.S. v. Armstrong, 517 U.S. 456, 464 (1996) ("In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (internal quotations and citation omitted)).

257. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

258. *Id.* at 831.

259. *See* Delahunty & Yoo, *supra* note 162, at 845-51 (using President Obama's current enforcement of immigration law as an illustration).

260. *See id.*

261. *See id.*

262. *See id.*

263. *See id.* at 787-92.

264. Final policy decisions should be made through proper channels, namely, the legislative branch. *See* U.S. CONST. art. I, §§ 1-10. Of course, high-ranking individuals in agencies will have to make certain policy decisions about the methods and procedures of enforcing laws. Courts should only be suspect when these decisions attempt to override or reject the plain meaning of statutes. *See* Delahunty & Yoo, *supra* note 162, at 787-92.

265. *See* Memorandum from John Morton, *supra* note 171, at 4 ("ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis.").

consider enforcement statistics before and after such directives.[266] In total, however, if a court decides that non-enforcement decisions were made on a categorical basis, it should distinguish the non-enforcement from the prosecutorial discretion side of our spectrum and move it towards the vote nullification end.

Another traditional conception of prosecutorial discretion is that future enforcement of the statutory provision is still likely.[267] Such prosecutorial discretion recognizes that the decision not to enforce was based on the individual circumstances of the case or alleged wrongdoer, not on the underlying law itself.[268] Comparatively, executive action aligns with *policy-making* when non-enforcement is decided on a more permanent basis.[269] Therefore, when courts believe that non-enforcement decisions are part of a larger non-enforcement scheme, executive action should be distinguished from prosecutorial discretion.[270]

The third factor courts should consider is whether the executive's actions incorporate some affirmative action that is contrary to the statute's purpose.[271] Prosecutorial discretion implies a passive action—the decision not to enforce a specific law in a certain instance.[272] When the executive incorporates non-enforcement with some affirmative grant beyond the mere refusal to apply the law, the action is distinguished from traditional notions of prosecutorial discretion.[273] President Obama's decision not to pursue enforcement of certain drug laws in states that have legalized marijuana usage would be representative of passive action.[274] The decisions to grant work authorization to unlawful immigrants and to not initiate deportation proceedings is representative of affirmative action beyond traditional

266. Assuming that decisions are still made on a case-specific basis, enforcement should not change drastically. Categorical decisions of non-enforcement, however, are more likely to result in significant decreases in enforcement. *See* Delahunty & Yoo, *supra* note 162, at 787-92.

267. *See Heckler*, 470 U.S. at 831.

268. *See id.*

269. *See* Delahunty & Yoo, *supra* note 162, at 787-92.

270. Courts should be suspicious when the non-enforcement is delayed for time periods that would exceed the president's term. For example, when the Obamacare employer mandate was delayed for one year, it was implied that the law would be enforced the next year. *See* Mazur, *supra* note 148. In this instance, courts would not weigh this factor against the executive's action. If the president had repeated the delay the next year or given no timetable for implementation, however, courts would be proper in distinguishing such action from prosecutorial discretion.

271. *See id.* C*ompare id.*, *with* 26 U.S.C. § 4980H (using the Affordable Care Act's employer mandate as an illustration).

272. For the purposes of distinguishing passive and affirmative actions in this context, I consider the decision not to pursue enforcement as passive (including any pronouncements that enforcement will not be engaged). Affirmative action entails any further action beyond this decision and pronouncement that enforcement will not be engaged.

273. *See Heckler*, 470 U.S. at 831.

274. Memorandum from James M. Cole, *supra* note 138.

prosecutorial discretion.[275] Accordingly, a court would be correct in weighing this third factor against allegations of non-enforcement with President Obama's immigration policies, but not with respect to his marijuana enforcement policy.

The final factor[276] courts should consider in the first step of analysis is whether the non-enforcement arises in a realm that is not traditionally associated with prosecutorial discretion. Prosecutorial discretion "is a principle deeply entrenched in American criminal law."[277] Naturally, therefore, courts should be more lenient to find that non-enforcement aligns with prosecutorial discretion in the criminal law realm.[278]

Courts will have to be flexible when considering how each specific factor should be weighted. Furthermore, while some forms of executive non-enforcement may resemble prosecutorial discretion for two of the four factors, the court would not be wrong to still believe that the executive's action is distinguished from the prosecutorial discretion end of our spectrum, given considerations of the other two factors. Such a situation would exist when the executive engaged in passive non-enforcement of a criminal law,[279] yet categorically refused that enforcement for an indefinite period of time.[280] In such a circumstance, the court would not err in deciding that the first two factors alone distinguished the executive's action from the prosecutorial discretion end of our spectrum.

Presuming that executive action stands apart from prosecutorial discretion, courts can make determinative judgments about whether a law is being nullified.[281] Some considerations from the first analysis would still be required in determining whether a vote is truly nullified. Categorical non-enforcement is a prerequisite to a vote being nullified.[282] Moreover, whether the law has any prospect of future enforcement may influence a

275. Memorandum from Jeh Charles Johnson, *supra* note 176.

276. This factor should be given the least weight in determining whether non-enforcement is distinct from prosecutorial discretion. This factor is based solely on general practice and not on the specific facts of a case.

277. Fathali, *supra* note 254, at 225.

278. Marijuana enforcement would fall into this category. *See* Kaplan, *supra* note 140. Immigration, however, is enforced civilly. U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149, 154 (1923).

279. Here, factors three and four are implicated. Passive action found in a criminal context aligns with prosecutorial discretion for these factors. *See Heckler*, 470 U.S. at 831.

280. The categorical refusal implicates the first factor and the lack of likelihood of future enforcement implicates the second factor.

281. *See* Delahunty & Yoo, *supra* note 162, at 787-92 (using immigration law as an illustration).

282. Decisions about whether to not enforce may be made on a case-by-case basis and still result in categorical non-enforcement. For example, if the case-by-case determination always results in the decision to refuse enforcement, the law would be categorically non-enforced. *See* Blackman, *supra* note 251, at 234-37. Therefore, the question for factor one of the first step of analysis asks how the decision was made. Here, the courts should consider what result was reached. While these two closely align, the possibility of different results exists.

court's approach to a final decision on vote nullification.[283] The courts, however, should also consider three other factors: (1) the mere fact that Congress opposes the executive action; (2) whether the executive's proffered reason for non-enforcement is inconsistent with the purpose of the statute; and (3) whether the executive is unilaterally implementing failed legislative reform.

While considering Congress's opposition to the executive's action as a factor pushing the non-enforcement towards vote nullification sounds like a self-serving argument, the reality is that Congress would not raise a good-faith challenge unless it believes that executive action is inconsistent with a valid law and nullifies it.[284] While this factor should not be given great weight, courts cannot overlook it either. At the same time, if Congress's suit was brought for political reasons other than a belief about vote nullification, the other considerations would implicate and undermine such action.[285]

Courts should consider the executive's proffered reason for the alleged non-enforcement. If non-enforcement was based on a desire to fulfill the statute's purpose, courts should avoid a finding of vote nullification.[286] For example, the Obama Administration would have been unable to determine which employers were required to pay shared responsibility payments for Obamacare's employer mandate without implementing reporting requirements.[287] At the same time, employers expressed great concern over both the complexity of those reporting requirements and their ability to comply with them.[288] Therefore, a court could find that refusing to enforce Obamacare's employer mandate for one year to ease transitions was consistent with the statute's greater purposes and would be less likely to demonstrate vote nullification.[289] However, by deciding not to initiate deportation proceedings against certain groups of unlawful immigrants, and by also granting them work authorizations, a court could find that President Obama's immigration non-enforcement is inconsistent with the Immigration and Nationality Act's purpose and would weigh towards vote nullification.[290]

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283. *See Raines*, 521 U.S. at 821-26.

284. *See* Delahunty & Yoo, *supra* note 162, at 787-92 (using immigration law as an illustration).

285. The mere fact that Congress has a political reason for bringing suit against the executive for non-enforcement should not defeat an otherwise valid allegation of vote nullification through executive non-enforcement. *See generally id.*; *see also Raines*, 521 U.S. at 821-26.

286. *See Raines*, 521 U.S. at 821-26.

287. Mazur, *supra* note 148.

288. *Id.*

289. *See Raines*, 521 U.S. at 821-26; *see also* Mazur, *supra* note 148.

290. *See Raines*, 521 U.S. at 821-26; *see also Immigration and Nationality Act*, *supra* note 159.

The third factor is whether the executive's non-enforcement resembles rejected legislative proposals. If the executive refuses to enforce a specific law and effectively acts according to legislative reforms that Congress rejected, courts would be naïve to believe that such a result was fortuitous. Presumably, such action would be the strongest indication of vote nullification. Opponents of President Obama's treatment of immigration enforcement allege that his administration is unilaterally implementing the DREAM Act, which has been rejected by Congress five times.[291] When considering whether this non-enforcement constitutes vote nullification, a court should treat any apparent congruity between the DREAM Act and the challenged immigration policies as indicative of vote nullification of existing immigration law.[292]

Ultimately, congressional plaintiffs will find that executive non-enforcement will seldom rise above the level of prosecutorial discretion and towards the "vote nullification" end of our spectrum. Nevertheless, the most egregious forms of executive non-enforcement can be distinguished from prosecutorial discretion and be held to constitute vote nullification analogous to the vote nullification in *Coleman*.[293] When executive non-enforcement reaches such a level under the two-step analysis I have provided, congressional plaintiffs could allege a specific instance of vote nullification and may establish the injury in fact basis required for standing.[294]

2. Who Has to Sue?

Given that a specific instance of vote nullification is the most persuasive injury[295] that members of Congress could allege to form the basis

291. *See Raines*, 521 U.S. at 821-26; *see also Immigration and Nationality Act*, *supra* note 159.

292. *See* Delahunty & Yoo, *supra* note 162, at 787-92.

293. *See Raines*, 521 U.S. at 821-26.

294. *See id.* If the Supreme Court articulated factors to assess when executive non-enforcement crosses from prosecutorial discretion to vote nullification, all future executive administrations would tailor their behavior towards those factors. While such a response would attempt to maintain as much executive discretion as possible within the limits, aligning behavior with the factors would have positive impacts. For example, if the Court articulated that decisions made on a case-by-case basis would be less likely to constitute vote nullification, the executive would have a greater incentive to document individualized decisions for non-enforcement. Likewise, if the Court stated that executive non-enforcement would resemble prosecutorial discretion when the non-enforcement only took place for short periods of time, the executive may tailor their non-enforcement to narrow, specified time frames. If the Court was willing to acknowledge that non-enforcement that resembles failed legislative proposals is more likely to constitute vote nullification, the executive would also be cautious about how to encourage reform.

295. An allegation based on improper appropriations would also raise questions of what portion of Congress would be needed to assert such an institutional injury. However, given that misappropriations issues will not always be present in suits alleging non-enforcement, I will focus my analysis on vote nullification. *See id.*

of jurisdictional standing in a suit against executive non-enforcement, the next necessary question is: what portion of Congress is needed to assert this institutional injury?[296] As is evident with Supreme Court precedent, plaintiffs' compositions can prove fatal to standing analysis where institutional injuries are alleged.[297] In the most general terms, four distinct categories of Congressional members could theoretically choose to bring suit: (1) Congress as a whole; (2) one House of Congress; (3) substantial groups of representatives who are unable to form a majority; and (4) individual representatives.[298] The plausibility of each of these categories being able to assert an institutional injury depends on the particular test that the Court employs.[299]

a. The "Trustee" Theory

In *Raines*, the Court held that individual members of Congress could not assert an institutional injury because they were mere "trustee[s]" of their official seat.[300] Under this "trustee" argument, the Court reasoned that individual members of Congress do not possess institutional injuries, but rather, these injuries are associated "with the Member's seat."[301] Therefore, because the individual member would lose the claim if he or she "retire[d] tomorrow," the injury lacks concreteness.[302] To assert an institutional injury under this "trustee" theory, the Court demands an institutional plaintiff.[303] The Court affirmed this notion when it found that the Arizona Legislature had standing when it alleged an institutional injury.[304]

To allege vote nullification by executive non-enforcement under the trustee theory, either one or both Houses of Congress would have to bring suit.[305] Under either of these scenarios, the injury would remain concrete even though individual members may leave.[306] It could be argued that one

296. The *Raines* Court distinguished the loss of a private right from a "loss of political power." *Id.* at 821. For example, an individual legislator being prevented from taking his elected seat was a private or individual injury. *Id*. at 820-21. Injuries that "necessarily damage[] all Members of Congress and both Houses of Congress equally" are "institutional injuries." *Id.* at 821. Vote nullification through executive non-enforcement affects Congress's previous passage of a resolution. As such, vote nullification should be treated as an institutional injury. An argument for an exception from this principle may exist when individual legislators actually voted for the law that is now being nullified.

297. *See supra* Part II (examining Supreme Court precedent on legislative standing).

298. *See generally Raines*, 521 U.S. at 791.

299. *See generally id.*

300. *Id.* at 821.

301. *Id.*

302. *Id.*

303. *See Raines*, 521 U.S. at 821-26.

304. *See Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658.

305. *See Raines*, 521 U.S. at 821-26.

306. *See id.*

House of Congress alone would be insufficient to raise the institutional injury because the institution (Congress as a whole) was harmed.[307] The *Raines* Court's concern, however, was not with a requirement about every harmed individual suing in unison.[308] Instead, the trustee theory is predicated upon beliefs about with whom the injury should connect.[309] Because individual legislators would lose their right to sue if they were removed from office, the Court reasoned that institutional injuries are better connected to the member's seat.[310] Presumably, if one House of Congress passed a resolution to bring suit against the executive, an individual member of Congress losing their seat would not detract from the injury's association with the House of Congress itself.[311] Without concerns about the continuation of the injury associated to a single House of Congress, and since both Houses of Congress play a role in passing legislation, an individual House of Congress would establish an institutional injury consistent with the trustee theory.[312]

Under the trustee theory, both individual members of Congress and groups of Congressional members would always fail in asserting an institutional injury.[313] Applied strictly, even if an overwhelming majority of members from both Houses of Congress (who had enough votes to make the institution proceed on its own, but chose not to) asserted an institutional injury, the suit would fail.[314] Under the *Raines* Court's reasoning, if all of the members were to retire tomorrow, they would lose their claim.[315] This reasoning overlooks the fact that the entirety of Congress will not retire tomorrow.[316] While the Court's concern may fit better for suits with one or two members of Congress, it does not align with realistic perceptions of the continued membership for suits where small minority groups of legislators allege an institutional injury.[317] Surely, without concerns about whether the suit will continue to exist, official members of an institution are harmed when that institution is harmed.[318]

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307. *See id.*
308. *See id.*
309. *See id.*
310. *See Raines*, 521 U.S. at 821-26.
311. *See id.*
312. *See id.*; *see also* U.S. CONST. art. I, § 7.
313. *See Raines*, 521 U.S. at 821-26.
314. *See id.*
315. *Id.* at 821.
316. *See* Amy Roberts, *By the Numbers: Longest-Serving Members of Congress*, CNNPOLITICS (June 7, 2013, 3:04 PM), http://www.cnn.com/2013/06/07/politics/btn-congressional-tenure/ (citing that the average length of service in Congress was 9.1 years in the United States House of Representatives and 10.2 years in the U.S. Senate).
317. *See Raines*, 521 U.S. at 821-26.
318. *See id.*

b. Functional Theory

The Court should create a minor expansion of the trustee theory for the unique circumstances of vote nullification.[319] Given that vote nullification through executive non-enforcement is the equivalent to a unilateral executive repeal of a law (or its specific provisions), the Court could shift the burden to a functional test—whether the plaintiffs would be able to prevent a legislative repeal.[320] Under this functional theory, the Court would incorporate the concreteness concerns from the trustee theory.[321] Specifically, if members of Congress could not prevent a legislative repeal, then the injury lacks concreteness, because the remainder of Congress could repeal the disputed provision.[322]

In effect, this theory would essentially align with the trustee theory; to prevent a repeal, the members of Congress would need a majority in either House.[323] The divergence of the theories, however, exists in the Senate.[324] Under Senate Rule XXII, three-fifths of the Senate is required to adopt a motion for cloture.[325] With this rule and the Senate's filibuster rule, a minority of forty-one senators effectively have "an absolute veto power over the business of the Senate."[326] Therefore, under this functional theory, only forty-one senators would be needed to assert an injury based on vote nullification.[327] If forty-one or more senators or a majority in the House of Representatives brought suit alleging vote nullification, the injury would be "concrete" in the sense that the law could not be repealed by the remainder of the legislature.[328]

c. Individual Theory

Even under the functional theory, the ability of individual members or small groups of Congressional members to bring suit alleging an institutional injury is nonexistent.[329] In dissenting from *Raines*, Justice Stevens expressed concern about limiting an individual legislator's standing

319. *See id.*
320. *See* Blackman, *supra* note 251, at 280-84; *see also Raines*, 521 U.S. at 821-26.
321. *See Raines*, 521 U.S. at 821-26.
322. *See id.*; *see also* Blackman, *supra* note 251, at 280-84
323. As under the trustee theory, only one House would be needed to assert the institutional injury. *See Raines*, 521 U.S. at 821-26. A repeal would require support from both Houses of Congress; refusal of one House would keep the law on the books. *See* U.S. CONST. art. I, § 7.
324. *See* U.S. CONST. art. I, § 3.
325. Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 468 (2011).
326. *Id.* at 469.
327. *See id.*; *Raines*, 521 U.S. at 821-26.
328. *See Raines*, 521 U.S. at 821-26; *see also* Bondurant, *supra* note 325, at 469.
329. *See Raines*, 521 U.S. at 821-26.

when confronted with the Line Item Veto Act.[330] Given the potential effect on a member's future vote because of the Act, Justice Stevens believed that the injury "provide[d] *every* Member of Congress with standing to challenge the constitutionality of the statute."[331] Arguably, this future effect on the plaintiffs' actual votes is distinguishable from nullification of a past vote that did not involve current plaintiffs.[332] His reasoning, however, would translate to instances where individual legislators actually voted on the law that is being nullified.[333] Consistent with his reasoning, and with the holding in *Coleman*, the Court should be willing to accept allegations of vote nullification by individual legislators who actually voted to support a law that has been effectively repealed.[334]

The tenure theory from *Raines* can either be read as separate from *Coleman* or as rejecting *Coleman*.[335] If *Raines*'s tenure theory is accepted as the sole test to determine who can assert an institutional injury, the *Coleman* plaintiffs would fail (should the same suit arise today).[336] The *Coleman* plaintiffs did not bring suit as an institution, but rather sued as individual members in their official capacities.[337] Under the tenure theory, the *Coleman* plaintiffs' injury was connected with their seats.[338]

To preserve the underlying theory of *Coleman*, the tenure theory must be read as creating an exception for situations where individuals have actually voted for a law that is being nullified.[339] The Court in *Coleman* stated that "at least the twenty senators" whose votes were nullified had an interest in maintaining the effectiveness of their votes.[340] The *Raines* majority and concurrence may not have considered this issue because they distinguished the Line Item Veto Act's *potential* effect on *future* votes from the specific nullification in *Coleman*.[341] When the executive nullifies a law through non-enforcement, the effect is not on future votes (as in *Raines*),

330. *Id.* at 837 (Stevens, J., dissenting).

331. *Id.* (emphasis added).

332. For example, if a bill was passed in 1900 and nullified through non-enforcement in 2016, the injury would connect with the institution better than with an individual legislator, since no current legislator was actually involved in that vote. In *Raines*, Justice Stevens contemplated that each individual legislator would vote on appropriations bills that would be at the whim of the president and the Line Item Veto Act. *Id.* Each of these individuals would have their actual vote affected. *Id.*

333. *Id.*

334. *See Raines*, 521 U.S. at 821-26.

335. *See id.*

336. *See id.*

337. *Coleman*, 307 U.S. at 436. Ultimately, twenty-one out of forty Kansas state senators brought suit. *Id. Coleman* would be consistent with the functional theory articulated above. *See Raines*, 521 U.S. at 821-26. By having a majority of the Senate bring suit, the functional theory would disregard the difference, even though the Senate itself did not join as a party. *See id.*

338. *See Raines*, 521 U.S. at 821-26.

339. *See id.*

340. *Coleman*, 307 U.S. at 438.

341. *Raines*, 521 U.S. at 826.

but rather is analogous to *Coleman*.[342] Therefore, if specific legislators have voted *affirmatively* for a law that is nullified through executive non-enforcement, the Court should be willing to find standing.[343]

B. Separation of Powers Considerations

Up to this point, I have demonstrated that establishing standing for members of Congress in a suit against executive non-enforcement would require plaintiffs to distinguish the executive's action from prosecutorial discretion and further correlate it to vote nullification. Additionally, I have demonstrated that allegations of vote nullification would have to be raised by either: (1) Congress as an institution; or (2) specific groups of Congressional members—depending on the test the Court employs. The final barrier to establishing the standing requirements come in the Court's catchall description of "separation of powers" concerns.[344]

The *Raines* Court stated that *Coleman*'s holding may not extrapolate to federal court cases because of separation of powers concerns that were absent from *Coleman*.[345] Likewise, the *Arizona State Legislature* Court opined that the Arizona case did not implicate separation of powers concerns that would exist in a suit between Congress and the president.[346] The sole opinion that provides any insight into what separation of powers concerns are implicated in cases between Congress and the executive branch is *Raines v. Byrd*.[347] Between the majority and concurring opinions, *Raines*'s separation of powers considerations can be distributed into four categories: (1) the potentiality of alternative remedies; (2) historical practice; (3) availability of others to bring the suit; and (4) potential damage to the judiciary.[348]

1. Alternative Remedies

In *Raines*, the Court "attach[ed] some importance" to the fact that the plaintiffs were not authorized to represent their respective Houses.[349] The

342. *See id.* at 821-26.

343. The legislator must have voted in favor of a law that was passed and subsequently nullified. *See id.* If the legislator voted against the law that was passed, his or her vote would not be nullified. *See id.*

344. The importance of these considerations cannot be understated. In *Raines*, Justice Souter's concurrence stated that "[b]ecause it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing, it behooves us to resolve the question under more general separation of powers principles underlying our standing requirements." *Id.* at 832-33 (Souter, J., concurring).

345. *Id.* at 824 n.8 (majority opinion).

346. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665 n.12.

347. *See Raines*, 521 U.S. at 832-33 (Souter, J., concurring).

348. *See generally id.*

349. *Id.* at 829 (majority opinion).

Court noted that the legislators merely lost the vote on the Line Item Veto Act.[350] In doing so, the Court implied that it would not act as an outlet for legislators in *intra*-branch disputes.[351] This reasoning is consistent with the D.C. Circuit's doctrine of "equitable discretion."[352] Under this doctrine, the Circuit has recognized that "courts should refrain from interfering in disputes arising out of the legislative process when a political remedy is available from within the process."[353] When a congressman "could obtain substantial relief from his fellow legislators," the doctrine prevents hearing a complaint even if other standing requirements were met.[354] Despite not explicitly endorsing equitable discretion, the *Raines* Court's reasoning matched the doctrine's substance.[355]

The *Raines* legislators' dispute arose out of disapproval over Congress's passage of the Line Item Veto Act.[356] Under the equitable discretion doctrine, the proper forum to voice this displeasure was within Congress itself.[357] In fact, had Congress not granted the president the affirmative power to unilaterally repeal provisions of laws, the executive branch would not be involved in the dispute.[358] This scenario from *Raines* stands in stark contrast to vote nullification through executive non-enforcement.[359] Non-enforcement does not arise from an affirmative legislative grant—to the contrary, executive non-enforcement is at odds with legislative action.[360] While the *Raines* legislators could have pleaded with their fellow Congress members to repeal the law they created, legislators have no similar recourse with executive non-enforcement.[361] At most, the legislators confronting executive non-enforcement could attempt to pass a new law that mimics the executively-nullified one and hope that it will be enforced.[362]

Justice Scalia argued in *United States v. Windsor*[363] that Congress has "innumerable ways to compel executive action without a lawsuit."[364] To illustrate, Justice Scalia suggested that Congress can refuse to confirm

350. *Id.* at 824.
351. *See id.*
352. *Chenoweth*, 181 F.3d at 114. The D.C. Circuit noted that the Supreme Court had the opportunity to consider the validity of the equitable discretion doctrine in *Raines v. Byrd*, but did not reach the issue. *Id.* at 115.
353. *Id.* at 114.
354. *Id.*
355. *See generally Raines*, 521 U.S. at 791; *see also Chenoweth*, 181 F.3d at 114.
356. *Raines*, 521 U.S. at 814.
357. *See Chenoweth*, 181 F.3d at 114-15.
358. *See Raines*, 521 U.S. at 814.
359. *See* Blackman, *supra* note 251, at 280-84; *see also Raines*, 521 U.S. at 821-26.
360. *See* Blackman, *supra* note 251, at 280-84.
361. *See Raines*, 521 U.S. at 824.
362. *See id.*
363. 133 S. Ct. at 2675.
364. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

presidential appointees.[365] Arguably, the proper approach to rebut inaction should not be more inaction. For example, suppose the executive refuses to enforce Law A. In response, Congress refuses to make certain appointments. To protest the vacant appointments, the executive then refuses to enforce Law B. After going back and forth with coercion, neither side will end with a net gain. Justice Scalia also argues that "[n]othing says 'enforce the Act' quite like '. . . or you will have money for little else.'"[366] Much like the dilemma described above, the executive and legislative branches should not enter into coercive disputes where negative treatment only spawns future governmental inefficiency.[367] Furthermore, suggestions of attempting to remedy executive non-enforcement by defunding other programs would ironically germinate additional non-enforcement.[368]

In total, executive non-enforcement does not leave Congress with many options.[369] For purposes of the equitable discretion doctrine, legislative options are either restricted to Justice Scalia's notions of engendering further inaction in an attempt to coerce the executive into certain behavior, or are restricted to paradoxically attempting to pass further legislation matching existing laws with a hope that the executive will somehow be more receptive to that law.[370] If the Court has separation of powers concerns about a dispute between the executive and legislative branches over executive non-enforcement, the Court must also be receptive to the inauspicious alternatives.[371]

2. Historical Practice

The *Raines* Court reasoned that the historical lack of lawsuits between the executive and legislative branches should discourage the proposition of such suits.[372] To illustrate this lack of evidence, the Court argued that the executive branch never challenged the Tenure of Office Act, even though presidents arguably had a stronger claim of injury than the *Raines* legislators.[373] Justice Stevens's dissent immediately responded to these contentions.[374] First, Justice Stevens noted that just because "others did not

365. *Id.*
366. *Id.*
367. *See generally* Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991 (2014) (using recent government shutdowns as an illustration of coercive tactics).
368. *See generally id.*
369. *See Chenoweth*, 181 F.3d at 114-15; *see also Windsor*, 133 S. Ct. at 2705.
370. *See Chenoweth*, 181 F.3d at 114-15; *see also Windsor*, 133 S. Ct. at 2705.
371. *See Raines*, 521 U.S. at 832-33 (Souter, J., concurring).
372. *Id.* at 826.
373. *Id.* at 826-27.
374. *Id.* at 835-38 (Stevens, J., dissenting).

choose to bring suit does not necessarily mean the Constitution would have precluded them from doing so."[375] Next, Justice Stevens opined that President Johnson did not challenge the Tenure of Office Act in 1868 probably, in part, because Congress did not authorize declaratory judgments until 1934.[376] The Court's argument can be further criticized on the ground that a lack of lawsuits by the executive against Congress is not determinative in the inverse: where Congress brings suit against the executive.[377]

The Court's reasoning about a lack of previous suits can also be used for an antithetical argument; Congress's increased willingness to request judicial intervention for executive action is reflective of the executive branch's aggrandizement and Congress's lack of options to confront this growth unilaterally.[378] Furthermore, Congress's continued pleading to the courts, in the face of difficult precedent, shows how far the scales of unequal bargaining have tilted.[379] Irrespective of the Court's view on the historical practice of lawsuits between Congress and the executive, the Court must recognize that the probative value of such evidence is not great, and should not be determinative in light of the Court's other potential considerations.[380]

3. Availability of Others to Bring Suit

Another separation of powers concern that discouraged the *Raines* Court from finding standing was "the virtue of waiting for a private suit" from "a plaintiff with traditional Article III standing."[381] In *Raines*, this traditional plaintiff was found a mere year later.[382] Given that the Line Item Veto Act permitted the executive to engage in an *affirmative* act—canceling appropriations provisions—a traditional plaintiff would be directly harmed when the president acted.[383] This is not the case with executive non-enforcement.[384] Non-enforcement implies a generally *passive* action—the decision *not* to prosecute.[385] Therefore, while a traditional plaintiff may exist for a law's enforcement by virtue of facing sanctions, non-enforcement

375. *Id.* at 838 n.3.
376. *See Raines*, 521 U.S. at 838 n.3.
377. *See id.* at 835-38.
378. *See* Free Enter. Fund v. Pub. Accounting Oversight Bd., 561 U.S. 477, 499 (2010) ("The . . . Executive Branch . . . now wields vast power and touches almost every aspect of daily life . . . .").
379. *See generally id.*
380. *See Raines*, 521 U.S. at 826.
381. *Id.* at 827, 834.
382. *See generally Clinton*, 524 U.S. at 417.
383. *See id.* at 436.
384. *See generally id.*; *see also* Delahunty & Yoo, *supra* note 162, at 787-92 (using immigration law as an illustration).
385. *See* Delahunty & Yoo, *supra* note 162, at 787-92 (using immigration law as an illustration).

will not result in an individual facing sanctions, and will not place the individual in a position to appeal the law's constitutionality.[386]

When the executive unilaterally refuses to enforce a law, precisely who is harmed? To illustrate, consider if President Obama's administration expanded marijuana non-enforcement[387] to the entire United States. Immediately, distinguish this scenario from affirmative enforcement; if the law was being enforced, any individual who faced criminal sanctions would be in a position to challenge the constitutionality of that process. If the law was *not* being enforced, no individual would face criminal sanctions or have a challenge against the constitutionality of his or her charge. Arguably, society as a whole suffers (or benefits) from non-enforcement. The general harm to society would be: (1) that the law was intrinsically not enforced (a potential injury stemming from the executive's dereliction of duty); and (2) the injury from not benefitting from the law's original purpose. However, this injury would not associate with any individual specifically. No individual would be able to demonstrate a concrete and particularized injury from general non-enforcement.[388]

While the *Raines* Court had the benefit of waiting for a suit by an individual with traditional standing requirements, a Court confronted with a challenge of executive non-enforcement would not be in a similar position.[389] Turning away a suit on this ground would provide the executive with virtual freedom from judicial intervention.[390] In such a case, the Court would place reliance solely on the political process or impeachment proceedings.[391] Ultimately, while the availability of a traditional plaintiff

386. *See Raines*, 521 U.S. at 821-26.

387. *See supra* Part III (discussing the Obama Administration's treatment of marijuana enforcement in states that have legalized the drug).

388. States may have the potential to sue in certain situations. For example, twenty-six states challenged President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents program. Tex. v. U.S., 809 F.3d 134, 146 (5th Cir. 2015). This challenge alleged a violation of the Administrative Procedure Act's notice-and-comment requirements. *See generally id.* However, the challenge could not allege wrongdoing from the executive's unilateral repeal of a law; such a challenge would have to come from Congress. *See Raines*, 521 U.S. at 821-26.

389. *See generally Raines*, 521 U.S. at 811.

390. *See generally id.*

391. The political process and impeachment proceedings are not viable alternative courses of action. Reliance on the political process could potentially allow the executive to act with unbridled discretion for four years. U.S. CONST. art. II, § 1. The chance for a great magnitude of permanent damage from executive non-enforcement is too great. Likewise, impeachment proceedings are inappropriate for two reasons. First, the rarity of impeachment proceedings indicates their difficulty. *See generally* Whittington, *supra* note 3. Second, impeachment would require a two-thirds vote in the Senate. U.S. CONST. art. I, § 3. Functionally, this would require two-thirds of the Senate's *support* for the enforcement of a valid law. Given that the law has already passed Congress, the functional test should not be based on a two-thirds standard, but rather on the ability to prevent a repeal.

discouraged standing in *Raines*, a challenge based on executive non-enforcement should not be ignored on this ground.[392]

4. Damage to the Judiciary

The final separation of powers concern reflected by the *Raines* Court was fear that the courts' involvement would damage public confidence in the judiciary.[393] The Court emphasized that courts did not have a role in "the general supervision of the operations of government."[394] Instead, the courts should be a "last resort" for "confrontation with the other two coequal branches."[395] Immediately, the courts should distinguish situations where the judiciary is asked to review one branch by a private citizen with situations where the judiciary is asked by the third branch to review another branch.[396] In the former situation, the courts are correct in cautiously approaching judicial review. In the latter, however, courts must not forget that the Constitution does not envision separate and distinct branches of government.[397] Instead, the Constitution envisions a systems of checks and balances.[398] Consistent with these checks and balances, the judiciary must recognize that it *does* have a role in supervising the other two branches.[399]

The *Raines* Court also feared that "embroiling the federal courts in a power contest nearly at the height of its political tension" could cause public distrust in the role of the judiciary.[400] This proclamation seems inconsistent with the Court's role in today's society.[401] If the Supreme Court was to reject certain claims to avoid political disputes, while at the same time accepting other issues of political controversy, the public could equally distrust the judiciary's role in society.[402]

In order to both preserve the nature of checks and balances within our system of government, and to protect against public perceptions of judicial selectivity, the courts should be more willing to review disputes between the

392. *See generally Raines*, 521 U.S. at 811.
393. *Id.* at 833 (Souter, J., concurring).
394. *Id.* at 829 (majority opinion).
395. *Id.* at 833 (Souter, J., concurring).
396. *See id.*
397. Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) ("[T]he three branches are not hermetically sealed from one another . . . .").
398. *See id.*
399. *See id.*
400. *Raines*, 521 U.S. at 833 (Souter, J., concurring).
401. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the right to marry is a fundamental right and that same-sex couples may not be deprived of that right); King v. Burwell, 135 S. Ct. 2480 (2015) (holding that the Patient Protection and Affordable Care Act's tax credits applied to qualifying persons in all states); D.C. v. Heller, 554 U.S. 570 (2008) (determining the constitutionality of weapons control statutes under the Second Amendment); Roe v. Wade, 410 U.S. 113 (1973) (establishing the parameters of state regulation of abortion procedures).
402. *See Raines*, 521 U.S. at 833 (Souter, J., concurring).

executive and legislative branches than it would when the dispute is between one branch and a private plaintiff.[403] In the case of executive non-enforcement, a single ruling would provide guidance on the constitutionality of the executive's behavior and eliminate any concerns about the balance of power between the executive and legislative branches.[404] The benefits of certainty in the future would prevent a situation where tension grows between the executive and Congress to the point where the Court's eventual involvement could be questioned as being based on insincere reasons.[405]

All four of the *Raines* Court's separation of powers concerns that precluded the *Raines* legislators' standing should not impede a finding of standing in a suit between Congress and the executive for non-enforcement.[406] If congressional plaintiffs were able to demonstrate that the executive's conduct resulted in vote nullification and were able to form a composition of plaintiffs that would satisfy the test the Court employs, the four concerns explained by the *Raines* Court should not hinder a determination of standing or the Court's ability to reach the merits of the case.[407]

V. CONCLUSION

Returning to our hypothetical with President Trump and his alleged non-enforcement of the gun-control legislation, presume that Senator Joe Smith wishes to challenge the executive's inaction. Senator Smith wants to sue on the basis of his membership in Congress. First, the Senator would have to demonstrate that President Trump's action resulted in a virtual nullification of Congress's previous vote.[408] To do so, he would have to distinguish Trump's non-enforcement from prosecutorial discretion.[409] If Senator Smith could show that: (1) President Trump's non-enforcement was decided on a categorical basis; (2) the non-enforcement is likely to continue throughout Trump's presidency; and (3) the non-enforcement incorporates some element of affirmative action contrary to the statute's purpose,[410] a

403. *See id.* at 833-35.
404. *See generally id.*
405. *See generally id.*
406. *See generally id.*
407. *See generally Raines*, 521 U.S. at 811.
408. *See supra* Part IV.A.1.
409. *See supra* Part IV.A.1.
410. For example, this situation would arise if the non-enforcement was coupled with the decision to allow shipments of otherwise illegal weapons to the United States.

court[411] would be able to distinguish the non-enforcement from prosecutorial discretion.[412]

After distinguishing President Trump's actions from prosecutorial discretion, the court would decide whether the conduct reached the level of vote nullification.[413] In this consideration, the court would decide whether the statute was, in reality, not being enforced.[414] If such a determination was made, the court would weigh the fact that Congress opposes the statute with whether President Trump's proffered reason for non-enforcement is inconsistent with the legislation's purpose[415] and whether Trump is unilaterally implementing failed legislative reform.[416]

If the court determined that Trump's action constituted vote nullification, the court would then decide whether Senator Smith was able to form an appropriate group of plaintiffs to allege the institutional injury.[417] A challenge by one or both Houses of Congress would surely satisfy any test the court employs.[418] If the court employed a functional test, Senator Smith would only have to assemble another forty senators to bring suit.[419] Assuming the court would allow an individual theory for vote nullification, and presuming that Senator Smith voted in favor of the now non-enforced law, he could potentially file suit individually.[420]

With each of these obstacles avoided, the court would still have to consider the separation of powers concerns that were voiced by the Supreme Court in *Raines*.[421] Given the unique circumstances of executive non-enforcement, the court should not preclude standing given these issues. Instead, if the other requirements are established, the court should determine that Senator Smith, and his appropriate plaintiff composition, have

411. The reference to "court" throughout this section incorporates all levels of the federal court system. Although a Congressional suit against the executive may eventually reach the United States Supreme Court, it must progress through the trial and circuit courts, where standing will be analyzed.

412. *See supra* Part IV.A.1. The fourth factor of the distinction from prosecutorial discretion is omitted, because gun-control laws would probably fit into the criminal realm, where prosecutorial discretion is well-founded. *See* Fathali, *supra* note 254, at 225-26. Courts should not look at an individual factor as fatal in light of other considerations.

413. *See supra* Part IV.A.1.

414. *See supra* Part IV.A.1.

415. For example, if President Trump argued that the gun-control legislation did not make the public safer, this reasoning would be contrary to Congress's belief and the statute's purpose.

416. *See supra* Part IV.A.1. If President Trump attempted to repeal or introduce a different set of gun-control legislation, and the non-enforcement's effect resembled that failed reform, the court should be more willing to find that the non-enforcement resulted in vote nullification.

417. *See supra* Part IV.A.2.

418. *See supra* Part IV.A.2.

419. *See supra* Part IV.A.2.b.

420. *See supra* Part IV.A.2.c.

421. *See generally Raines*, 521 U.S. at 811.

established standing necessary to determine the merits of President Trump's actions.[422]

In practice, executive non-enforcement may seldom rise above notions of prosecutorial discretion to the level of vote nullification. This difficult burden on plaintiffs will naturally serve as a barrier to frivolous suits. Overcoming the burden will also ensure that courts recognize the severity of the executive's action and the necessity for judicial intervention.[423] Nonetheless, the significant proposition is that congressional standing is not completely barred in a dispute against executive non-enforcement. Assuming that the congressional plaintiff can establish the requirements previously described, the courts have to accept that the standing requirements are met, and must proceed to the merits of the case.

422. *See supra* Part IV.A.2.

423. One conundrum of appealing to the judiciary for relief from executive non-enforcement is that the executive may also disregard an order from the courts. It is much more likely that the executive would follow a court order, instead of acting according to Congress's concerns, in the absence of judicial direction. Additionally, if the executive disregards laws and court orders, the concern may finally need to shift to impeachment proceedings.