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REINVIGORATING THE JUDICIARY'S ROLE IN RESOLVING INTERBRANCH DISPUTES

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I. INTRODUCTION

The Framers established a federal government of three coequal, coordinate branches—each with its own constitutional responsibilities and each charged with checking the other two branches. Indeed, separated functions and balance of power are the two underlying elements of our bedrock constitutional principle of separation of powers.[1] The current style of governance in the Unites States poses a unique and serious threat to that basic principle. Congressional dysfunction prevents the legislative branch from legislating, pushes the executive branch toward assuming greater lawmaking authority, and undermines the ability of both the judiciary and executive branch to fulfill their own constitutional obligations.

Moreover, Congress represents the sole available check on many executive branch actions.[2] This fact then serves to amplify the concerns over executive aggrandizement of power. If the only check against the president is congressional action, congressional dysfunction weakens that check.[3]

Equally problematic is that all of this is pushing us toward a constitutional crisis.

It is perhaps true, as Jack Balkin and Sandy Levinson have pointed out, that the term "constitutional crisis" is overused.[4] But when congressional inaction forces the president to interpret constitutional text governing congressional process differently than Congress, a true crisis is in the making. When legislative brinkmanship and dysfunction force public officials, commentators, and even a former president to encourage President Obama to invoke an obscure provision in the Fourteenth Amendment to unilaterally revoke the debt-ceiling law, we're

∗ © 2014 Michael Teter. Associate Professor of Law, University of Utah, S.J. Quinney College of Law. Special thanks to all of the Symposium participants, as well as to the entire *Utah Law Review* staff. In particular, Symposium Editor Megan Baker did a tremendous job organizing the event and shepherding this piece through the editing process. As always, thank you to Anna Mariz, Atticus Talbot, Milana Prejean, and Theodus William for their inspiration and support.

[1] *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1167–68 (2000).

[2] This is largely because of self-imposed limitations by the judiciary. The goal of this piece is to suggest the judiciary should rethink those doctrines.

[3] It may be true, as Professor Ken Mayer suggests, that the Congress is a weak check, *see* Kenneth R. Mayer, *Executive Power in the Obama Administration and the Decision to Seek Congressional Authorization for a Military Attack Against Syria: Implications for Theories of Unilateral Action*, 2014 UTAH L. REV. 821, but it remains a check.

[4] Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 709–10 (2009).

headed toward a constitutional crisis. The way to avoid the demise of separation of powers and tamp down on the continuing institutional conflicts that are becoming increasingly common and more disconcerting is for the third branch to step into the ring and play a central role in resolving these institutional disputes. But is the federal judiciary prepared to, and capable of, serving this function? To do so may require the courts to overcome conventional notions of the proper role for an unelected judiciary, eschew its traditional stance against deciding political questions, and relax other self-imposed limits on justiciability, particularly, the doctrines of standing and mootness.

The current state of American governance, then, is what I see as the greatest challenge posed to the federal judiciary. The biggest question is whether the judiciary is willing to rethink some long-held views and reconsider some well-established doctrines to address the threat posed to our constitutional framework by congressional dysfunction and executive overreach.

II. THE JUDICIARY'S CHALLENGE: POLICING INTERBRANCH DISPUTES BETWEEN CONGRESS AND THE EXECUTIVE

A. Contextualizing the Problem

Our government is struggling to function. Other Symposium participants have addressed this concern,[5] so I will not spill too much ink on this. It is worth reiterating, however, that we have a legislature that barely can legislate,[6] a depleted judiciary and executive branch because of Senate inaction,[7] and a Congress that is failing to fulfill not only its lawmaking function but also its checking function.[8]

In part, because of all of this, we have seen greater institutional conflict—not in the constitutionally prescribed manner of checks and balances, but in destructive forms that are best exemplified by the fight over recent appointments, the government shutdown, and the standoffs over the debt ceiling. While opponents of an increased judicial role may look at each of these problems and declare a partial victory—Congress and President Obama, after all, did not allow these events to lead to a full-scale crisis—I believe that view is flawed. Few, if any, of the recent

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[5] *See, e.g.*, William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive Branch Action*, 2014 UTAH L. REV. 773 (noting that some argue congressional gridlock justifies President Obama's expansive use of presidential power); Terri Peretti, *Democracy-Assisting Judicial Review and the Challenge of Polarization*, 2014 UTAH L. REV. 843 (noting that American policy making is increasingly plagued by polarization and gridlock).

[6] *See* Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WISC. L. REV. 1097, 1103–06.

[7] *See* Sheldon Goldman et al., *Obama's Judicial Appointments in a Time of Extraordinary Obstruction*, SCHOLARS STRATEGY NETWORK (Aug. 2013), http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_goldman_slotnick_and_schiavoni_on_obamas_first_term_judiciary.pdf.

[8] Teter, *supra* note 6, at 1145.

institutional conflicts have been resolved. Instead, they have been delayed, pushed back for a few months until the next deadline creates the opportunity for more brinksmanship and crises.

B. The Challenges to the Judiciary Policing Interbranch Disputes

The judiciary, therefore, needs to decide whether it is willing to play a greater role in resolving these institutional conflicts between Congress and the executive. To be certain, obstacles exist to increased judicial mediating of interbranch disputes. As briefly noted above, and discussed more thoroughly below, I see three significant challenges to the judiciary. The first is the firm grip that the so-called countermajoritarian difficulty has on our collective understanding of the proper role of the judiciary. Second, and relatedly, is the judicially created concept of the political question doctrine, which constrains federal courts from deciding matters better resolved by the "political" branches. Finally, the justiciability concerns over standing and mootness could serve to hinder the judiciary's ability to play a central role in deciding institutional conflicts between the legislature and executive. As I explain below, I believe the first two obstacles—the countermajoritarian difficulty and the political question concern—can, and should, be discounted. The problems posed by standing and mootness doctrines may impose enough of a challenge that they require a more relaxed approach in cases involving interbranch disputes.

1. The Countermajoritarian Difficulty

As the only unelected branch of government, the federal judiciary plays a unique role in promoting constitutionalism and policing the boundaries of the separation of powers. From the nation's founding, however, critics of a strong judiciary have sought to portray the exercise of judicial power as democratically illegitimate.[9] The Anti-Federalists who opposed the Constitution's ratification voiced deep concerns about a judiciary "subject to no control,"[10] that will "control the legislature,"[11] and that will serve independent of the desires of the populace.[12] Alexander Hamilton sought to respond to those critiques by noting the judiciary's lack of political authority.[13] Indeed, Hamilton famously resorted to labeling the judiciary as the "least dangerous" branch.[14] Hamilton's assertions placated few among the Anti-Federalists.

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[9] *See, e.g.*, THE ANTIFEDERALIST NO. 78, at 223–25 ("Brutus" (likely Robert Yates)) (Morton Borden ed., 1965) (arguing that judicial review places the judiciary above control by the legislature or any other power).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] THE FEDERALIST NO. 78, at 521–30 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[14] *Id.* at 522.

Moreover, after the election of 1800, when Thomas Jefferson defeated President John Adams, marking the first transition of power between two competing political parties, the Federalists exploited the antidemocratic nature of the judiciary.[15] When President Adams and his allies in the Senate expanded the federal judiciary three weeks before Jefferson assumed office, and managed to nominate and confirm dozens of appointees in just days, Jefferson stated, "[T]he [Federalists] have retired into the Judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased."[16]

All of this is to say that the worries over the antidemocratic nature of the federal judiciary have existed (and persisted) since even before the nation's founding. The modern version of the dilemma found voice in the 1960s, when Alexander Bickel wrote of the "counter-majoritarian difficulty."[17] As the very brief history provided above shows, Bickel could hardly claim to be the first to express concerns about unelected judges overseeing the politically accountable branches. Nevertheless, Bickel's work did give life to the legal world's modern obsession with the topic.[18] Bickel developed and nurtured the idea of the countermajoritarian difficulty, labeling judicial review a "deviant institution"[19] because "it thwarts the will of representatives—of the actual people of the here and now."[20] From law school constitutional law courses to legal scholarship to the Supreme Court itself, Bickel's views have found a willing and sympathetic audience.

It is time to loosen the grip that Bickel's countermajoritarian critique holds over us for a variety of reasons. First, plenty of evidence contemporary with our nation's founding suggests that the Framers did intend for the judiciary to play an important role in policing the relationship between the branches.[21] How deviant can judicial review be, then, if it was an accepted premise of American constitutionalism from the get-go?

Second, as many scholars have noted, Bickel overstates the importance of majoritarianism as a framework value of American government.[22] Instead, majoritarianism is just one in a list of underlying constitutional principles, joining others such as federalism, liberty, anti-arbitrariness, and separation of powers. If majoritarianism is not the lodestar that Bickel makes it out to be, then perhaps judicial review of interbranch disputes is not so "deviant" and instead serves other, equally important, foundational interests.

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[15] *See* MICHAEL W. MCCONNELL, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 13–17 (Michael C. Dorf ed., 2009).

[16] *Id*. at 15–16 (alterations in original) (citation omitted).

[17] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[18] *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464–65 (2003).

[19] BICKEL, *supra* note 17, at 18.

[20] *Id*. at 31.

[21] *See, e.g.*, FEDERALIST NO. 78, *supra* note 13, at 521–27.

[22] *See, e.g.*, Bressman, *supra* note 18, at 467; Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 533–34 (1998).

In addition, Bickel's approach assumes too much about our electoral system's ability to adequately express majoritarian preferences. This is neither the time nor the paper to discuss the failings of our electoral system, but it is fair to say that the United States' system of electing national office holders hardly guarantees that the outcomes represent majoritarian preferences, especially for each individual issue considered by Congress.[23]

Finally, even if one accepts Bickel's majoritarian impulse, congressional dysfunction and the interbranch disputes to which it gives rise actually disturb majoritarian principles. Often, congressional inaction occurs because of a willful minority's actions to block the wishes of a legislative majority.[24] Judicial review in this context would actually serve to restore majoritarianism rather than scuttle it.

2. The Political Question Doctrine

Related to the concerns over unelected judges overseeing the two elected branches, the political question doctrine prevents a court from hearing a matter that is otherwise justiciable if the claim presents a "political question." Much like the countermajoritarian difficulty, the political question doctrine enjoys roots in early American constitutionalism. In *Marbury v. Madison*,[25] Chief Justice Marshall wrote that "political act[s]" committed to the discretion of the executive are not "to be questioned."[26]

The political question doctrine played an important role in various cases throughout the nineteenth and early twentieth centuries. For example, the Court refused to become involved in a dispute between two factions claiming to be the legitimate government of Rhode Island, in part because the executive branch had already recognized one group as the bona fide government.[27] And in 1912, the Court similarly refused to decide the meaning of the Guarantee Clause of the Constitution when a party challenged the validity of a statute enacted through voter initiative as not consistent with a "republican form of Government."[28]

In 1962, the Court addressed this history of the political question doctrine in the seminal case of *Baker v. Carr*.[29] There, in considering whether the issue of malapportioned legislative districts presented a nonjusticiable political question, Justice Brennan's plurality opinion acknowledged that the "political question doctrine" is something of a misnomer, as "the mere fact that the suit seeks

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[23] For a more in-depth discussion of the topic, see generally Patrick Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519 (arguing that legal scholars should rethink the countermajoritarian difficulty because courts often advance the public interest more effectively than legislatures).

[24] *See* Teter, *supra* note 6, at 1107–08 (noting that the Senate cloture vote and filibuster have placed a "stranglehold" on Senate action).

[25] 5 U.S. (1 Cranch) 137 (1803).

[26] *Id.* at 164.

[27] Luther v. Borden, 48 U.S. (7 How.) 1, 7, 42 (1849).

[28] Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 139–41 (1912).

[29] 369 U.S. 186 (1962).

protection of a political right does not mean it presents a political question."[30] Instead, Justice Brennan focused on the "need for case-by-case inquiry" and canvased the field of political question cases to "infer from them the analytical threads that make up the political question doctrine."[31] From this review of the existing political question jurisprudence, Justice Brennan put forward the six "prominent" elements of a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[32]

With these factors in mind, how could one view the political question doctrine as an obstacle to judicial intervention in interbranch disputes? It would seem that several of the "prominent" elements are more clearly implicated than others. Indeed, I think it is possible to dismiss numbers three, five, and six out of hand. After all, resolving disputes between the branches does not require any "initial policy determination," nor does it pose a need for "unquestioning adherence" to a political decision already made (say, like having recognized one state's elected officers as the official government of the state). Additionally, the nature of interbranch disputes already presupposes "multifarious pronouncements by various departments."[33] Thus, the judiciary stepping in to resolve the matter can hardly be said to present the potential for embarrassment—at worst, the "potentiality" has already been realized by the congressional-executive conflict.

Nevertheless, that does leave three possible elements to consider. When resolving conflicts between the two other branches, is the judiciary likely to be faced with a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; the "lack of judicially discoverable and manageable standards"; or "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government"? A review of the cases in which the Court found such elements implicated demonstrates that these remaining concerns over the political question doctrine are not applicable in situations involving interbranch disputes arising from congressional dysfunction.

The Court has found a demonstrable constitutional commitment to a coordinate branch only when the constitutional text and its history strongly suggest that one of the other branches was intended to be the sole decision maker with

[30] *Id.* at 209.
[31] *Id.* at 210–11.
[32] *Id.* at 217.
[33] *Id.*

regard to the issues raised.[34] The Court has also concluded that a lack of judicially manageable standards arises often in cases presenting a demonstrable commitment to a coordinate branch, or in the context of partisan gerrymandering.[35] Otherwise, as the Court noted in *United States v. Munoz-Flores*,[36] the lack of current standards does not mean that "developing such standards will be more difficult in this context than any other."[37] Finally, the Court has rejected efforts suggesting that judicial review of other branches' decision making expresses a lack of respect.[38] There is nothing in particular about interbranch disputes that would suggest the Court should find such a problem in this context.

For these reasons, the political question doctrine does not impose a particularly difficult obstacle to judicial review of interbranch disputes. Perhaps more importantly, the Court has demonstrated a clear willingness to police the boundaries of the separation of powers, despite political question concerns. For example, the Court did not hesitate to resolve cases involving the use of the legislative veto,[39] the constitutionality of the independent counsel law,[40] or the line-item veto,[41] all of which presented interbranch disputes. The reason the Court felt it could, and should, address the merits of these cases was because it is the judiciary's responsibility to police the boundaries of the separation of powers, despite the fact that—quite often—doing so will require it to intervene in interbranch conflicts.

Therefore, I do not think that the political question doctrine truly erects a meaningful barrier to judicial review of disputes between Congress and the president. To be sure, the Court may hide behind the doctrine if it so chooses, but doing so leaves the Court hanging its hat on a linguistic, rather than doctrinal, hook.

3. Standing and Mootness

Assuming courts are willing to cast off the imagined Bickelean shackles of countermajoritarianism and also to reject an overly rigid view of the political question doctrine, one final obstacle remains. The courts have interpreted the

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[34] *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228, 230 (1993) (holding that the Senate has sole discretion to choose impeachment procedures under U.S. Const. art. I, § 3, cl. 6 and, thus, the issue of an impeachment trial procedure was nonjusticiable political question).

[35] *See* Vieth v. Jubelirer, 541 U.S. 267, 277–78, 281 (2004).

[36] 495 U.S. 385 (1990).

[37] *Id.* at 396 (holding that challenge to misdemeanor law under Origination Clause nonjusticiable).

[38] *Id.* at 390–91.

[39] *See* Bowsher v. Synar, 478 U.S. 714, 726 (1986).

[40] *See* Morrison v. Olson, 487 U.S. 654, 678–79 (1988).

[41] *See* Clinton v. City of New York, 524 U.S. 417, 448–49 (1998).

Article III command that it hear only "cases" and "controversies" to impose standing requirements on plaintiffs and to reject claims that have become moot.[42]

The constitutional standing doctrine is familiar. It requires that a plaintiff demonstrate a cognizable, concrete injury; a causal link between the injury and the defendant's alleged conduct; and, finally, that a favorable judicial decision would redress the injury.[43] In short, by imposing a standing requirement on parties, the Court has sought to "preserve[] the vitality of the adversarial process by assuring . . . that the parties before the court have an actual, as opposed to professed, stake in the outcome" and that the judiciary's role does not extend beyond its appropriate constitutional balance.[44]

In addition to requiring that a party have standing to bring a claim, the case or controversy must remain "live." Specifically, the mootness doctrine requires that "[t]he requisite personal interest that must exist at the commencement of the litigation . . . must continue throughout its existence . . . ."[45] Imposing a mootness doctrine on litigants helps ensure that the federal courts do not engage in advisory opinions and avoids unnecessary rulings on the merits of a case.

Each of these justiciability doctrines—but, in particular, that of standing—serves as an obstacle to orderly judicial review of interbranch disputes. Unlike in the case of the "countermajoritarian difficulty" or the political question doctrine, both presenting psychological rather than concrete hurdles to judicial review, there needs to be a rethinking of standing, mootness, and ripeness doctrines in the context of interbranch conflicts. The required changes to those doctrines are subtle—minor shifts, not wholesale abandonment—and could be limited to a particular set of cases involving separation-of-powers disputes.

(a) Standing

By limiting who can bring an action, the standing doctrine imposes an obstacle to judicial involvement in conflicts between Congress and the executive. Perhaps the best example of this is *Raines v. Byrd*,[46] in which the Supreme Court dismissed a challenge to the Line Item Veto Act brought by six members of Congress. There, the plaintiffs claimed that by granting the president authority to "cancel" individual spending items from larger appropriation bills, the Act had "unconstitutionally expand[ed] the President's power."[47] The Court refused to

[42] U.S. Const. art. III, § 2.

[43] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[44] *Id.* at 581; *see also* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

[45] U.S. Parole Comm'n. v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

[46] 521 U.S. 811 (1997).

[47] *Id.* at 816.

reach the merits on the constitutionality of the law because it held that the members lacked standing to bring the suit.[48] Insisting on "strict compliance" with standing requirements, the Court held that the plaintiffs could not demonstrate a sufficient personal, concrete injury.[49] Distinguishing *Raines* from *Powell v. McCormack*,[50] where the Court permitted a challenge by Adam Clayton Powell to proceed because Congress had refused to seat him, the Court noted that in the case of the Line Item Veto Act, the congressmen were alleging that the Act deprived them of political power, not a personal right.[51] "Their claim," the Court stressed, "is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally."[52]

The Court then provided a look at other historical disputes between Congress and the president—generally involving congressional efforts to limit the president's ability to fire executive branch officials.[53] For example, the Court discussed the infamous Tenure of Office Act, which the Fortieth Congress enacted over President Andrew Johnson's veto as a means to limit the president's authority over his cabinet (and to spark an institutional conflict).[54] According to the Court, were the plaintiffs in *Raines* to have standing, then "it would appear that President Johnson would have had standing to challenge the Tenure of Office Act before he ever thought about firing a cabinet member, simply on the grounds that it altered the calculus by which he would nominate someone to his cabinet."[55] Rather than supporting its holding, the Court, I think, demonstrates the frustrating madness of its standing doctrine with regard to interbranch disputes. The Tenure of Office Act dispute ended with President Johnson's impeachment and his near removal from office (he was acquitted at his impeachment trial by one vote, which nearly went the other way).[56]

Why is this the preferred way to resolve interbranch disputes? The Court in *Raines* stated that "if the federal courts had entertained an action to adjudicate the constitutionality of the Tenure of Office Act immediately after its passage in 1867, they would have been improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress."[57] This, of course, ignores the fact that the Chief Justice of the Supreme Court presides over a

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[48] *Id.* at 829–30.
[49] *Id.* at 819, 829–30.
[50] 395 U.S. 486 (1969).
[51] Raines, 521 U.S. at 821.
[52] *Id*.
[53] *Id*. at 826–28.
[54] *Id*. at 826–27.
[55] *Id*. at 827.
[56] *See* WILLIAM REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 233–35 (1992).
[57] Raines, 521 U.S. at 827.

president's impeachment.[58] Indeed, it ignores the historical record from the President Johnson impeachment that shows that Chief Justice Chase could not escape playing a critical and substantive role in the "political battle" between Republican senators and President Johnson.[59] But more importantly, in 1926, the Court stated that the original Tenure of Office Act of 1867 was unconstitutional.[60] So, President Johnson was impeached and nearly removed from office as part of an interbranch dispute on the basis of an unconstitutional law.

The Court has rendered it nearly impossible for a political officeholder to represent her office's institutional interests. Just as the six members of the Senate and House did not enjoy standing to challenge the Line Item Veto Act because the harm they were asserting was to the institution, rather than to their personal interests, a president cannot challenge congressional procedures that prevent a vote on the president's executive branch nominees; and, similarly, members of Congress cannot challenge the president's recess appointment of a nominee that occurs when Congress does not consider itself in recess. All this, despite the fact that the congressional inaction on nominees and the presidential recess appointment harms the institutional powers of the other branch.

By applying an "especially rigorous"[61] standing requirement in cases of institutional disputes between Congress and the president, the Court has imposed an unnecessary and problematic obstacle to judicial resolution of these conflicts. It may be, as the *Raines* Court implies, that imposing a heightened standing burden on congressional members and on the president in such circumstances preserves the integrity and legitimacy of the judiciary.[62] But it is unclear to me how, exactly. Unlike the political question doctrine, the standing requirements are not intended to be used to carve out from judicial review a set of substantive matters. Moreover, precisely because of this, many of the institutional conflicts that the standing doctrine initially serves to shield from judicial review ultimately make their way before the courts. The *Raines* decision was followed by *Clinton v. City of New York*,[63] in which the Court struck down the Line Item Veto Act.[64] The imaginary challenges scoffed at by the Court in *Raines*—to the Tenure of Office Act brought by President Johnson, to the one-house veto brought by the Attorney General, to the Federal Election Campaign Act brought by President Ford, and to President Coolidge's pocket veto brought by a member of Congress—all presented real-world subsequent cases in which the Court was forced to intervene in the dispute.[65]

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[58] Chief Justice Rehnquist, the author of the *Raines* opinion, would preside at President Clinton's impeachment trial just two years later. Clinton v. Jones, 520 U.S. 681, 683 (1997).

[59] *See* REHNQUIST, *supra* note 56, at 219–35.

[60] Myers v. United States, 272 U.S. 52, 176 (1926).

[61] Raines, 521 U.S. at 819.

[62] *Id*. at 828–29 (citing United States v. Richardson, 418 U.S. 166 (1974)).

[63] 524 U.S. 417 (1998).

[64] *Id.* at 448–49.

[65] *See* I.N.S. v. Chadha, 462 U.S. 919 (1983); Buckley v. Valeo, 424 U.S. 1 (1976); The Pocket Veto Case, 279 U.S. 655 (1929); Myers, 272 U.S. 52 (1926).

The cases turned on the same substantive constitutional questions that would have been presented to the Court had standing not prevented the earlier resolution.

Thus, the only benefit the courts gain by refusing to decide disputes involving the two branches is time. I do not want to minimize the value of that additional time. I recognize, for example, that a court is more favorably positioned to avoid undue hostility and threats to its political well-being by resolving the constitutionality of the Tenure of Office Act in 1926 than at the heart of the battle in 1867. But that benefit must be weighed against two other considerations: the distortion of the standing doctrine to accomplish something it is not intended to accomplish and the costs of waiting.

First, the only role that the standing doctrine is supposed to serve is ensuring that the proper parties are before the courts and that a true "case" or "controversy" exists for the judiciary to resolve. To impose a stricter standing requirement on congressional members seeking to validate institutional power because otherwise the courts would become involved in a political battle is to ignore the underlying function of the doctrine. Second, the costs of imposing a more stringent standing doctrine can be quite real—an impeachment, legislative bargains undone, and entire executive branch agencies operating under the cloud of constitutional suspicion and uncertainty.

For these reasons, the Court must rethink its standing doctrine with regard to interbranch disputes. But what should it do? At the very least, the Court should not impose more exacting requirements on members of the other two branches to demonstrate standing. Perhaps more importantly, the Court should consider expanding the list of cognizable injuries to cover those that involve loss of political power or an aggrandizement of power by another branch. There are clear constitutional principles involved, and it makes little sense to recognize them as such while refusing to regard them as sufficiently concrete to give rise to a cognizable injury for standing. Put simply, if the Court is going to police—as it should—the constitutional parameters of the separation of powers, it should similarly recognize that a possible violation of that bedrock principle is a concrete, particularized injury.[66]

[66] The ripeness doctrine, which seeks to avoid ruling on matters that involve speculative injuries, also poses a possible obstacle to judicial review of interbranch disputes. For example, the President's recess appointment of members of the NLRB was not ripe for review under traditional application of the doctrine until the NLRB took an action. *See* Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom.* NLRB v. Noel Canning, 133 S. Ct. 2861 (2013). At that point, a person or entity "injured" by the NLRB action could challenge the action. My hope, however, is that by broadening the scope of cognizable injuries to include the loss of political power, the degree to which ripeness presents a hurdle to judicial review is dramatically reduced. The moment the President made the recess appointment, a senator's political power was reduced.

(b) Mootness

When combined with standing requirements, the mootness doctrine can serve to prevent many interbranch disputes from being subject to judicial review. Let me offer a far-fetched hypothetical to illustrate the point. A group of ideological extremists within one of the two major political parties pushes the U.S. government to the brink of fiscal disaster by refusing to allow a vote on a debt-ceiling increase. After taking all of the extraordinary measures it can to avoid a default, the Department of the Treasury is out of cash. In response, the president asserts what he believes is his constitutional authority under the Fourteenth Amendment to unilaterally raise the debt ceiling.[67] A week later, facing intense political pressure, the various sides reach agreement on a deal to raise the debt ceiling.

What can be done about the president's unilateral assumption of authority to ignore a bona fide debt-ceiling law in contradiction to Congress's express will? Assuming that a person or entity exists who could demonstrate a cognizable injury for standing, and that a challenge is properly filed in federal court, the mootness doctrine could stand in the way of its resolution since the unconstitutional behavior has ended. Moreover, even if the Court were to expand the concept of cognizable injuries to include the loss of political power, as discussed above, this imagined scenario would still be moot under current doctrine because political power between the branches has returned to its settled equilibrium once the deal to raise the debt ceiling was struck.

But, of course, it would not really. The president was able to assert an unconstitutional authority—concretely injuring Congress, as an institution. As long as the president and Congress know that the president can act in such a way without the courts intervening in the conflict, the balance of power has shifted.

The answer to this problem comes in two forms. The first relates back to standing. If courts recognize the loss of political institutional power as a cognizable injury, then the injury continues even after the two sides have negotiated a resolution to the specific matter at hand. There is, in mootness doctrine parlance, a collateral injury that remains, which leaves the case or controversy alive.

The second approach requires a liberalization of the mootness doctrine's exception for wrongs capable of repetition yet evading review.[68] To qualify for this exception, the Court demands that the challenged action be in "duration too short to be fully litigated prior to cessation or expiration" and that there exist "a reasonable expectation that the same complaining party will be subject to the same

[67] The validity of the public debt of the United States, authorized by law, including debts incurred for payments of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

[68] *See* S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 514–15 (1911) (holding that a challenge to an Interstate Commerce Commission's expired order could proceed because it was "capable of repetition, yet evading review").

action again."[69] The problem with the jurisprudence surrounding this exception is that the cases show quite clearly that the injury must be one of "inherently limited duration so that it is likely to always become moot before federal court litigation is completed."[70] Though possibly too short in duration, there is nothing inherent in the president's aggrandizement of power or the Senate's continued use of pro forma sessions to prevent recess appointments that would allow this exception to be invoked.

Moreover, because the Court currently does not recognize the loss of political power as a cognizable injury, any case would need to be brought by a third party "harmed" by the president's or Congress's actions. That party would not be able to meet the second prong of the exception, which requires a reasonable expectation that the *complaining* party will be subject to the same action, especially because it would be difficult to prove that there is a "sufficient likelihood" that the president or Congress will engage in the same behavior, which will harm the same plaintiff.

Therefore, the Court needs to dispense with the requirement that the "complaining party" be subject to the same action. Instead, the Court should focus on the nature of the action and determine whether the president or Congress *could* act similarly in the future.[71] If nothing prevents the president or Congress from taking the same challenged action, the Court should allow the case to proceed.

III. UNDERSTANDING THE CHALLENGE AND PROPOSED SOLUTIONS THROUGH THE RECESS APPOINTMENTS LITIGATION

In critiquing the Court's applications of standing and mootness, I do not mean to suggest that these justiciability doctrines are unimportant. Just the opposite—they help enforce important constitutional and political values. In my judgment, however, those principles are not served in cases involving interbranch disputes. Instead, they erect unnecessary and costly barriers to judicial intervention in conflicts between the two other branches.

As this Article goes to print, the Court is set to decide *National Labor Relations Board v. Noel Canning*.[72] The case arises out of President Obama's recess appointment of three members of the five-member National Labor Relations

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[69] Davis v. Fed. Election Comm'n, 554 U.S. 724, 725 (2008).

[70] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 120 (4th ed. 2011).

[71] To an extent, this matches another mootness exception that holds that a case is not moot if the defendant voluntarily ceases the complained-of behavior if the defendant is free to return to it at any time. *See* United States v. Concentrated Phosphate Exp. Ass'n., 393 U.S. 199, 203 (1968). The problem with this exception, however, is that the political deals ending these confrontations often include statutory ratifications of the conduct. Statutory changes are enough to render a case moot. *See, e.g.*, Kremens v. Bartley, 431 U.S. 119, 132 (1977) (holding that "intervening legislation . . . rendered moot . . . the claims of the . . . plaintiffs").

[72] No. 12-1281.

Board (NLRB).[73] This case is worth considering here for several reasons. First, it illustrates the very type of constitutional, interbranch dispute that is becoming increasingly common in the age of congressional dysfunction. Second, and more importantly, it serves to illustrate how several of the very issues I identified previously, namely, the political question doctrine, standing, and mootness, could all be used to prevent judicial resolution of the substantive issue presented by this dispute.[74] Finally, it shows, perhaps, an increasing willingness on the part of the Court to disregard those traditional barriers to judicial resolution, making more plausible the proposals I offered earlier regarding standing and mootness.

President Obama originally nominated three members to serve five-year terms on the Board.[75] Senate Republicans blocked a vote on all three nominees, at which point President Obama recess appointed each of them to the Board.[76] While the recess appointment power is clearly delineated in the Constitution's text, Congress had sought to curb President Obama's (and past presidents') ability to make such appointments by holding pro forma sessions every three days.[77] During such sessions, often a single senator would convene the chamber and then, immediately, adjourn.[78] By holding such sessions every three days, Congress believed it had never "recessed," and, therefore, the President could not make a recess appointment.[79]

Nevertheless, the Obama Administration labeled such efforts a "gimmick" and interpreted the recess appointments clause in a way that allows the president to make such appointments.[80] Thus, we have a clear interbranch dispute: Congress believes that it never was in recess, while President Obama thinks otherwise. If Congress is correct, the appointment of these three members to the Board—as well

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[73] For a richer discussion of this case, see John C. Roberts, *The Struggle Over Executive Appointments*, 2014 UTAH L. REV. 725.

[74] As discussed earlier, I do not believe that the countermajoritarian difficulty can truly be implicated in disputes between the two "political" branches precisely because both Congress and the President can lay claim to representing the democratic will.

[75] Roberts, *supra* note 73, at 725.

[76] *See* Mark Walsh, *SCOTUS Ponders Whether the President Can Make Appointment While Congress Is Out*, ABAJOURNAL.COM (Jan. 1, 2014, 3:50 AM), http://www.abajournal.com/mobile/mag_article/scotus_ponders_whether_the_president_can_make_appointments_while_congress.

[77] Pete Williams & Tom Curry, *High Court Agrees to Hear Obama Recess Appointment Case*, NBCNEWS.com (Jun. 24, 2013, 6:51 AM), http://nbcpolitics.nbcnews.com/_news/2013/06/24/19116038-high-court-agrees-to-hear-obama-recess-appointments-case?lite ("During the George H.W. Bush administration, Democrats came up with the idea of pro forma sessions, in which the body was gaveled to order then immediately adjourned for another few days. They claimed that because the Senate remained in session, recess appointments could not be made.").

[78] *Id.*

[79] *Id.*

[80] George Zornick, *Obama Bucks GOP, Nominates CFPB Chief*, NATION OF CHANGE (Jan. 5, 2012), http:/ /www.nationofchange.org/obama-bucks-gop-nominates-cfpb-chief-1325782277.

as Richard Cordray, to head the Consumer Financial Protection Board—was unconstitutional. In many ways, this is the Recess Appointment Clause's version of the Fourteenth Amendment debt-ceiling "hypothetical" discussed above. Who knows what controversy or crisis is next? We need not just a resolution to each particular dispute, but a mechanism for settling questions of interbranch disagreements. Unless the Court is willing to play that role, it is much more likely that the Chief Justice will be playing the unwanted role of presider at another politically precipitated and motivated impeachment.

The political question doctrine, as well as the standing and mootness doctrines, unnecessarily complicate judicial resolution of the *Noel Canning* case. It is possible, though fortunately at this stage unlikely, that the Court could conclude that the political question doctrine prevents judicial resolution of the meaning of the Recess Appointment Clause.[81] Does the Constitution textually commit the matter of making recess appointments to the president? Or, perhaps, the Constitution gives Congress the authority to decide when it is or is not in recess? Are there judicially discoverable standards for determining what constitutes a recess? Will a decision in the case show a lack of respect for one of the other branches?[82] As is made obvious from my earlier discussion, I do not believe that any of these questions—even if answered in the affirmative—ought to prevent the Court from deciding this matter. Yes, the issue is surely political, but the doctrine's true concerns are rightfully focused on matters of intrabranch governance and foreign policy decisions already made. When a case involves neither of these issues, and instead focuses on an interbranch dispute about constitutional meaning, the judiciary is the appropriate place for resolving the competing interpretations.

But is the heart of the dispute really between the NLRB and Noel Canning, a soft-drink bottling company found to have committed an unfair labor practice? Or, in deciding this case, will the Court be resolving a conflict between Congress and the president? To me, the answer is obvious: the question presented focuses exclusively on matters of presidential and congressional power. The NLRB and Noel Canning are mere puppets, forced to mouth the arguments that the real parties in interest are prevented from making themselves because of the Court's standing jurisprudence. If, instead, the Court were to recognize a loss of political power as a cognizable concrete injury, the issue would be more squarely, accurately, and timely presented.[83]

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[81] I say unlikely because the Court did not order the parties to address the political question doctrine in their briefs.

[82] Professor Victor Williams filed an amicus brief asking the Court to grant certiorari in the matter and find that the issue presented a nonjusticiable political question. Amicus Curiae Brief of Professor Victor Williams in Support of Petitioner, Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom.* NLRB v. Noel Canning, 133 S. Ct. 2861 (2013) (12-1281).

[83] Again, ripeness would not pose a problem either, as at the moment the President made the recess appointment in contradiction to Congress's intent, the political injury would have been particularized and concrete.

Speaking of timing, the case may soon be moot. In July 2013, Senate Republicans reached a deal with Senate Democrats to permit a vote on new nominees to the NLRB.[84] As of July, the NLRB is fully constituted and can act accordingly.[85] The Board, as newly constructed, could possibly ratify the orders that gave rise to the dispute between Noel Canning and the NLRB.[86] If that occurs, there would no longer be a live controversy between the two parties. Moreover, Noel Canning may not be able to demonstrate it has standing to proceed with the action. After all, judicial resolution will not redress the company's injury since the NLRB will have readopted its previous finding that the company engaged in unfair labor practices.

Of course, this is only a problem because of the Court's standing doctrine. If Senate Republicans could litigate their own claim, then the deal that allowed the confirmation of three members to the NLRB would not moot the issue of the recess appointment. But the Court could also permit the case to proceed through a more relaxed version of the mootness exception, as discussed above.

This case, then, demonstrates both the reasons for relaxing standing and mootness, as well as, perhaps, an increased willingness on the Court's part to subject interbranch disputes to greater judicial review.

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The purpose of this Symposium was to highlight the current challenges facing the federal branches in governing the United States. As has often been the case, the judiciary's most difficult task stems from the political dynamics driving the other branches. The judiciary cannot solve the current dysfunction in Congress, but it can act as a mitigating force, helping to stave off a constitutional crisis. Only time will tell whether the courts will embrace that role.

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[84] Emily Heil, *Senate's No-Nukes Deal Yields Approval of NLRB Nominees*, WASH. POST (July 30, 2013, 6:26 PM), http://www.washingtonpost.com/blogs/in-the-loop/post/senates-no-nukes-deal-yields-approval-of-nlrb-nominees/2013/07/30/90ccbf40-f95b-11e2-b018-5b8251f0c56e_blog.html.

[85] *Id*.

[86] This would require the Court to remand the case back to the NLRB so that the agency had jurisdiction over the matter. A court concerned about mootness would take that step.