Legislative Power, Executive Duty, and Legislative Lawsuits

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ABSTRACT

The Constitution does not entitle members of Congress, or the houses of Congress, as such, to judicial relief for executive failure to carry out the law properly. Nor does the Constitution empower Congress to authorize lawsuits for that purpose by legislators or legislative bodies. The argument that the Constitution itself authorizes that kind of litigation rests on an error concerning the concept of legislative power. Insofar as it creates an interest that could be injured so as to figure in a cause of action, legislative power creates an interest in the validity of legal enactments, not in compliance with them. The interest in validity is not threatened when a private person fails to comply with, or when the executive fails to carry out, a valid enactment. Because the legislative power's operation is complete when a valid enactment is created, to enable legislators or legislative bodies to sue executive officers for failure properly to carry out the law would be to enable them to exercise or control the executive power, and so would be inconsistent with the separate vesting of the two powers. Although the federal courts have generally assessed the constitutionality of lawsuits by legislators as such under the Supreme Court's Article III standing doctrine, the genuinely important question involves causes of action, not the authority of the federal judiciary. Legislative lawsuits to enforce the law raise questions concerning the relationship between the legislature and the executive, not the role of the federal courts in the constitutional system.

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INTRODUCTION

On July 30, 2014, the House of Representatives adopted a resolution authorizing the Speaker "to initiate or intervene in one or more civil actions on behalf of the House of Representatives in a Federal court of competent jurisdiction to seek any appropriate relief regarding the failure of the President, the head of any department or agency, or any other officer or employee of the executive branch, to act in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of" specified statutory provisions.¹

In United States v. Windsor,² Justice Alito argued that the houses of Congress are proper parties in some cases involving the constitutionality of federal statutes.³ He maintained that the House of Representatives had a judicially cognizable interest in the constitutionality of a statute, not the statute's proper execution. His argument raises the broader question of when, if ever, the legislative power is an interest that makes legislative chambers or legislators proper parties in litigation.

Whether federal legislators or houses of Congress may sue executive branch officials for failure to execute the law is a question of considerable practical importance. It is also of considerable importance in another sense, because its answer depends on questions that are not often asked, questions concerning the legal categories into which different constitutional provisions fall. This essay undertakes to analyze and develop those categories, in order both to resolve that issue of practical importance and to improve the conceptual tools that are used to understand the Constitution.

The Constitution does not authorize federal legislators or legislative chambers to sue executive officials to compel them properly to execute the law, with no claim other than executive failure to do so. Nor does it allow

³ Id. at 2711–14 (Alito, J., dissenting). Justice Alito dissented as to the merits. He agreed with the majority that the Court had jurisdiction, but did not accept the majority's grounds for that conclusion. In Windsor, the Solicitor General took the position that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional, but that the executive would apply it to Windsor unless directed otherwise by a court. Id. at 2685–87 (majority opinion). In the majority's view, the government's conduct with respect to Windsor created a case or controversy between adverse parties, without regard to the Solicitor General's position on the legal issue. Id. Justice Scalia maintained that because of that position there were no adverse parties. Id. at 2698–703 (Scalia, J., dissenting) (dissenting as to both the jurisdictional and merits questions). Justice Alito maintained that Windsor was a case or controversy with adverse parties only because the House of Representatives had intervened and taken the position that the provision was unconstitutional. In his view, the House suffered an injury when the Court of Appeals for the Second Circuit found that Section 3 of DOMA was unconstitutional, and that injury made the House a proper petitioner in the Supreme Court. Id. at 2712 (Alito, J., dissenting).
Congress to provide for lawsuits of that kind by statute. Those conclusions follow from fundamental conceptual and substantive features of the Constitution's allocation of the powers of government.

Section I argues that the legislative power in which legislators and legislative chambers participate is the capacity to create valid, legally effective norms. The legislative power, as a power, operates in the category of validity. Executive failure properly to carry out the law does not harm the legislative power as such, because legislative power is fully effective when it issues a valid law, and executive default does not impair validity. That conclusion results from the categorical distinction between the duties imposed on executive officials and the powers of Congress. Because harm to the legislative power as such is a necessary condition for an implied cause of action under the Constitution, legislators or legislative chambers are not entitled to judicial relief for executive default as a purely constitutional matter. Because that conclusion follows from fundamental features of the separation of powers, it is possible to go farther and conclude that the Constitution does not allow Congress to create causes of action of that kind.

Section II discusses three leading Supreme Court cases that relate to legislative lawsuits. None of them supports the conclusion that members of Congress may sue federal executive officials for failure to implement federal law. Section III discusses the rubric under which legislative lawsuits usually are addressed, the Supreme Court's standing doctrine under Article III. It argues that whether the Constitution creates or permits legislative causes of action has nothing to do with the jurisdiction granted by Article III or with the role of the courts in the constitutional system. Thinking about legislative lawsuits in terms of judicial power, cases and controversies, and judicial role, is a distraction from the real issues.

The Constitution does not explicitly entitle federal legislators or houses of Congress to a judicial remedy for executive failure to carry out the law.

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4 A quite different set of issues concerns officials, executive and legislative, who participate in the law-making process itself by producing authoritative records of that process. It is possible, though in my view unlikely, that the Constitution itself treats failure to perform those functions properly as grounds for judicial relief for holders of legislative power like the houses of Congress.

Whether the Constitution itself does so is thus left to inference. In standard terminology, the question is whether the Constitution implies such a cause of action.

Although the Supreme Court has recognized causes of action under the Constitution itself, the Court has not established a standard mode of analysis for determining whether one exists. The question of legislative lawsuits can be addressed without much guidance, however, because the issue on which it turns can be identified with just basic principles. The argument for such causes of action finds in the Constitution a configuration familiar from the private law: a duty, and an interest that can be harmed by a breach of the duty. In the tort of negligence, for example, judicial relief is available when the defendant's risky conduct results in injury to the plaintiff's person or property, the integrity of which is an interest protected by the law. In contract, a breach violates the promisor's duty to perform and harms the promisee's interest in receiving performance.

The argument that the Constitution authorizes legislative lawsuits against executive officials for failure to implement the law finds this combination of legal positions in the Constitution, and from those legal positions infers an entitlement to judicial relief parallel to the entitlements found in the private law. According to the argument, the duty found in the Constitution is the President's obligation to take care that the laws be faithfully executed.6 The interest subject to harm is the legislative power conferred on Congress by Article I, and the votes by which its members participate in the exercise of that power.7 This line of reasoning is reflected in the claim that executive failure to carry out the law impairs the votes of the legislators who made the law.8 Congress' legislative power plays an especially important role in this argument, because it identifies particular institutions and individuals to whom the President's duty might be said to run. By itself, the obligation to execute the laws might well be thought to run from the President in his political capacity to the people in their political capacity, with the remedy

6 U.S. CONST. art. II, § 3 ("He shall take care that the laws be faithfully executed.").
7 U.S. CONST. art. I, § 1 ("All legislative Powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). The Constitution provides that each Senator shall have one vote, id. § 3, and while it does not state that each Representative shall have one vote, it assumes that members of both houses will vote, for example when it provides for entering the yeas and nays on each house’s journal at the request of one-fifth of those present, id. § 5.
8 The idea that an official action can be wrongful because it holds a legislator's vote for naught is found in Coleman v. Miller, 307 U.S. at 438. Coleman is important in this connection because the Court decided on the merits a claim raised by state legislators who maintained that a state official's act had held their votes for naught. This Article discusses it in detail later.
for default being wholly political. Congress and its houses, however, might be thought to suffer a more specific harm to a legally protected interest, the legislative power itself.

At this point the distinctions among different kinds of legal rules produce a decisive objection to legislative causes of action. Legislative power, because of its characteristic mode of operation, is not subject to harm by failure to comply with or carry out the law. Legislative power is the capacity to make and change legal rules. The Constitution's text reflects this fundamental point. For example, Congress is given power "to make rules for the government of the land and naval forces," and to make all "laws" necessary and proper to certain ends.

The measure of successful exercise of legislative power is validity. When a legislature acts within its authority, it produces a legally binding or valid enactment. Conversely, the basic principle of American constitutional law is that congressional enactments that are inconsistent with the Constitution are invalid. They are legally ineffective, and not to be treated as binding.

Whether a constitutional rule operates exclusively through validity and invalidity has important consequences. The Supreme Court faced that question in one of the few cases explicitly to address constitutional causes of action, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. Bivens alleged that he had been unreasonably detained and searched by federal narcotics agents. He sought damages, and the Court held that he had properly stated a claim directly under the Fourth Amendment, which protects the right of the people to be secure in their homes and persons from unreasonable searches and seizures.

In order to decide whether the Fourth Amendment by itself could support a damages claim, the Court had to address the argument that the amendment operates in a different mode. The Solicitor General, on behalf of the agent defendants, maintained that the appropriate mode of relief was a suit for

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9 See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803) ("By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.").


11 See, e.g., Marbury, 5 U.S. (1 Cranch) at 180 (holding that a statute inconsistent with the Constitution is invalid and so not to be followed by the courts).


13 Id. at 389.

14 Id. ("The Fourth Amendment provides that: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....' In Bell v. Hood, 327 U.S. 678 (1948), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.").
damages under the ordinary private law, which is how Fourth Amendment issues had traditionally arisen in damages actions. When the officers responded that as federal agents they were privileged to take steps that would be tortious without the privilege, the plaintiff would reply that the Fourth Amendment limits the privileges that may be given to federal officers. They may be authorized to take individuals into custody and search them only reasonably. With no privilege for an unreasonable search, federal agents who engage in unreasonable searches and seizures are subject to damages as would be a private tortfeasor.\(^{15}\)

According to the Solicitor General's view, the Fourth Amendment is only a restriction on legislative power, and does not itself impose duties the way that tort law does. Just as the First Amendment keeps Congress from criminalizing political speech, so the Fourth Amendment keeps it from conferring on federal officers privileges to engage in unreasonable searches and seizures. Congress may authorize federal agents reasonably to search and seize, and when it does so the agents are not liable in tort. But Congress can no more authorize the kind of conduct Bivens alleged than it can make religious worship a crime.

Writing for the Court, Justice Brennan in *Bivens* addressed this question about the legal category into which the Fourth Amendment falls. He pointed to earlier cases holding that some official conduct was a search even though it was not otherwise unlawful.\(^{16}\) A then-recent example was *Katz v. United States*,\(^ {17} \) in which the Court had found that the use of a listening device on a phone booth was a search within the meaning of the Fourth Amendment, although it invaded no non-constitutional private rights of person or property.\(^ {18}\) Justice Brennan concluded that the only explanation was that the Fourth Amendment itself contains rules for official conduct, and is not only a limitation on Congress' ability to create official privileges.

\(^{15}\) Id. at 390–91 ("In respondents' view, however, the rights that petitioner asserts -- primarily rights of privacy -- are creations of state and not federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would merely limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals.").

\(^{16}\) Id. at 392 ("Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law." (citation omitted)).


\(^{18}\) *Bivens*, 403 U.S. at 393–94 ("And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws.") (citing *Katz*).
Bivens does not deny that the Fourth Amendment limits Congress’ ability to protect federal officers from liability. It holds that the Search and Seizure Clause also directly forbids certain conduct by those officials. That clause thus includes, but is not limited to, a rule about legislative power. The Constitution’s grants of power to Congress, by contrast, are just about power. When Congress exercises one of those powers, the result is law that private persons must comply with, that the federal executive must carry out if the law calls for executive enforcement, and that the courts must apply in cases within their jurisdiction. When Congress purports to legislate in excess of the Constitution’s grants, that putative legal action does not produce valid law. But neither does legislation in excess of enumerated power violate any duty the courts enforce, the way tortious conduct does. Members of Congress may well have duties not to seek to legislate beyond their power to do so, but those duties are not judicially enforceable. Senators and Representatives are not punished and are not subject to liability when they adopt a statute that is not supported by any grant of authority. As far as the courts are concerned, the result is simply that nothing has happened. And conversely, when Congress acts within its grants of power, the result is valid and binding law.

Constitutional rules granting legislative power are thus of the same kind as the rules that give private persons contractual capacity. With contract too, the result of a proper exercise of capacity is a valid act, one that changes the legal relations of the parties. And if someone who lacks contractual capacity attempts to make a contract, the result is no result, just as the result of an attempt by Congress to exceed its authority is no binding rule.

Breach of contract is possible only when a contract has been made, and so the concept of breach assumes both that there are obligations created by valid contracts and that those obligations persist when they are not complied with. If non-performance undermined a contract’s binding character, breach would be impossible. In similar fashion, a private person can be said to violate a statute, and an executive officer can be said not to have carried it out properly, only because validity is independent of compliance and implementation. Whether a norm exists and whether it has been violated are, and must be, different questions.

Because compliance and implementation are distinct from validity, failure of implementation by the executive does not impair the legislative power. That power has done its work when it has produced a legal norm against which private and official conduct can be measured. It cannot be harmed or diminished in that way.
By contrast, there is one distinctive category of official acts that might be said truly to harm or impair legislative power. Those are official acts that affect the validity of legislative enactments in the strict sense, the sense in which a bill that has not been presented to the President is not a valid act of Congress. It is important to understand the distinctive nature of that category, both in order to understand how ordinary executive actions cannot threaten legislative power, and because a case about it gave rise to the terminology of nullification of a legislator's vote, which has come to stand for an official act that injures the legislative power. The case was Coleman v. Miller, and it involved the production of authoritative records of the law-making process, not execution of the law in the usual sense. Official failure in that function also might be said to impair the legislative power, but only because it can actually operate on the legal effectiveness of an enactment.

Rolla Coleman was a Kansas state Senator who sued Clarence Miller, Secretary of the Senate of Kansas. In 1937, the Kansas Senate voted on ratification of the Child Labor Amendment to the federal Constitution, which Congress had proposed in 1924. The Senators were evenly divided, with Coleman voting against, and the Lieutenant Governor of Kansas purported to cast a tie-breaking vote in favor of ratification. After the vote in the Senate, the Kansas House of Representatives voted in favor of ratification. Coleman and other Kansas legislators then sued Miller and other Kansas officials in the Supreme Court of Kansas. They sought a mandamus directing Miller to change the endorsement on the resolution, so that his endorsement would state that the resolution was not passed, rather than that it was adopted. The plaintiffs also asked the Kansas Supreme Court "to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor."

The plaintiffs argued that the Lieutenant Governor was not part of the legislature of Kansas for purposes of ratifying constitutional amendments, and that the proposed amendment had failed in the Kansas Senate on an evenly divided vote. They also maintained that the Child Labor Amendment was not susceptible of ratification by Kansas in 1937 because

20 All the Kansas state senators who voted against ratification were plaintiffs. Id. at 436.
21 Id. at 435–36.
22 Id. at 436.
23 Id.
24 Id. at 446–47.
of a 1925 vote of the Kansas legislature purporting to reject it, and that it was not susceptible of ratification at all, because it had been rejected by twenty-six states in the 1920s, and the time for ratification had expired by 1937. The Supreme Court of Kansas rejected those arguments on the merits and denied relief. The Supreme Court of the United States affirmed, but without a majority opinion on the merits.

Section II discusses in considerable depth the precise holding of Coleman. The important point here is that Secretary Miller's official conduct concerned the legislative power in a distinctive way, a way that might well be thought to threaten to impair it. Official documents have legal consequences. Had the courts ordered Miller not to submit the resolution of ratification to the Governor, he in turn would not have informed the federal government that Kansas had ratified. A process that should produce a valid enactment can be stymied when record-keeping officials do not perform their function properly. The plaintiffs in Coleman sought "to compel a proper record of legislative action." That was the context in which Chief Justice Hughes said that the plaintiffs complained that their votes had been "held for naught."

Actions of record-keeping officials thus can affect legal effectiveness in ways in which operational decisions of the executive cannot. A failure by the Secretary of the Senate of Kansas, or of the United States, can impair the

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25 Id. at 435–36.
26 Id. at 437.
27 Id. at 456. Although the Supreme Court of the United States affirmed the Supreme Court of Kansas, the seven Justices who voted to affirm did so on the grounds that the validity of ratification was a political question to be decided by Congress. See id. (opinion of Chief Justice Hughes, joined by Justices Stone and Reed); id. at 456–57 (opinion of Justice Black, joined by Justices Roberts, Frankfurter, and Douglas). Those seven Justices thus did not address the validity of Kansas' ratification under Article V. Their votes to affirm indicate that they regarded the political question rationale as resolving the case on the merits.
28 As this Article will explain, the decision of the Supreme Court of the United States in Coleman does not stand for the proposition that legislators are entitled to sue for a judicial remedy when officials like Miller err in their part of the law-making process. Rather, the Court held that the interest vindicated by a state-law cause of action of that kind brings a plaintiff within the Supreme Court's appellate jurisdiction over the state courts.
29 307 U.S. at 437.
30 Coleman and the other Senators who voted against ratification claimed that those votes "have been overridden and virtually held for naught" by Miller's endorsement of the resolution as having passed when, according to their argument, it had failed. Id. at 438. Although the plaintiffs in Coleman raised a number of substantive arguments under Article V, in assessing the plaintiffs' standing the Chief Justice relied specifically on the claim by Senators like Coleman that their votes had in fact defeated ratification by creating a tie that the Lieutenant Governor had no power to break. "We find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." Id. at 446.
exercise of legislative power. But when a valid rule is assumed to exist, as when an executive officer is sued for failing to enforce it, no harm to the legislative power is at issue.

There is thus an important distinction between official acts that might interfere with a statute’s legal effectiveness and acts that make the statute practically less effective because it is not fully implemented. That distinction draws a line between situations like those in *Coleman* and those in which an executive official does not carry out a concededly binding statutory rule. The former may be said to threaten the legislative power itself in a way in which the latter does not. Criticism of the latter as lawless assumes that the legislated rule is intact.

This is not to say that the constitutional legislative power is the kind of interest that could figure in a cause of action, or that the Constitution implies judicial remedies to protect it. It is to say that the category of harm to legislative power, if that category exists for these purposes, must be limited to threats to validity. That conclusion follows from the meaning of lawmaking. Hence judicial remedies for improper execution are not implied even if remedies for impairment of legislative authority are.

That conceptual distinction may seem to ignore practical realities. The argument from practical reality is that the purpose of legislative power is to enable the lawmakers to affect actual conduct, and not just to create legally valid norms that may or may not be obeyed and implemented. The legislative power therefore can be injured even though there is no doubt about the rules that have been properly adopted. Speaking practically, a law that is not followed may as well not have been made. If an enactment that is entitled to be treated as law is not so treated, one might think that the legislative power has been injured, and the votes of legislators “held for naught.”

Structural considerations provide a response to that argument, reinforcing the conceptual argument and counting heavily against treating executive failures as injury to the legislative power that would support a judicial remedy. If the legislative power is diminished when executive officials do not carry out the law, it is just as much diminished when private people violate it. Yet the Constitution does not allow federal legislators or houses

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31 In the United States Senate, all bills and joint resolutions passed by the Senate are to be examined under the supervision of the Secretary of the Senate before they go out of possession of the Senate, and all bills and joint resolutions that originate in the Senate and pass both houses are to be presented to the President by the Secretary of the Senate. STANDING RULES OF THE SENATE, Rule XIV.5, S. Doc. No. 113-18, at 9 (2013). The Constitution provides that all bills that have passed both houses are to be presented to the President for signature or veto. U.S. CONST. art. I, §7, cl. 2. Were the Secretary of the Senate not to present a bill that had passed both houses to the President, there would be no bill for the President to sign.
of Congress to participate in enforcing private obligations. Insofar as that enforcement is carried out by executive officials, neither house may participate, because neither house may exercise the executive power. Senators and Representatives personally may not make executive enforcement decisions, because those who hold office under the United States may not serve in Congress. If the harm from law violations is to the United States as a sovereign, and the executive acts for the United States as to enforcement just as the legislature acts for the United States as to law-making, that arrangement makes perfect sense. But if private violations impose distinctive harm on the legislature, the legislature’s inability to do anything about it directly is hard to understand.

Equally hard to understand, if private violations injure the legislature as an institution, is another basic constitutional feature. Not only are the houses of Congress and their members barred from directly enforcing the law, the most natural means of influencing executive enforcement is also unavailable. In parliamentary systems of government, the executive must command the confidence of the legislature, and if it does not, a new executive is chosen. As the debates over presidential removal of executive officials show, the power to remove is a central tool of influence. Yet the only means by which the houses of Congress may remove executive officials—impeachment—differs fundamentally from a vote of no confidence. Impeachment requires culpable conduct—a high crime or misdemeanor—and conviction requires a super-majority in the Senate. It has never been a serious instrument by which the houses of Congress influence executive policy.

Besides removal, another way to keep the executive from harming the legislative power would be by giving the legislature a role in selecting the executive. If the current Congress could select executive officials, it could choose individuals likely to enforce the law as Congress now sees it. The Constitution, however, allows Congress as a whole no role in appointments. Only the Senate is involved, and only in response to presidential

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32 That conclusion follows from the separate vesting of the legislative and executive powers in Articles I and II. The Supreme Court relied on the principle in *Bowsher v. Synar*, 478 U.S. 714 (1986), which is discussed in more detail below.

33 U.S. CONST. art I, § 6, cl. 2.

34 See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (deciding whether President has adequate control over Independent Counsel subject only to limited removal).

35 U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").
nominations. That system of carefully limited involvement of one legislative chamber falls far short of selection by the legislature. As for the President himself, the House of Representatives under certain circumstances chooses him from a short list produced by the electors. That last happened in 1825.

If executive default and error in law enforcement diminish the legislative power and hold the laws for naught, the legislature is nevertheless given little express ability to do much about it. Nor are executive default and error the only possible problems. Compliance with the law by private people, and to some extent the executive, is enforced by the judiciary. When courts err, the law as the legislature enacted it has not only been held for naught, but turned into something else. But the judiciary, state and federal, is strongly independent of the houses of Congress and their members. From the standpoint that identifies legislative chambers and legislators with the law, the courts are part of the problem. Regarding failure in private compliance or in executive implementation as judicially remediable harms to the legislative power would treat them as part of the solution.

Identifying the legislature with the law in this way leads to serious incongruities with the legislature's relation to private people and the other branches of the government. It even leads to incongruities with legislative chambers' relations to the law. The body of federal statutory law at any time has many provisions that would not be enacted at that time. United States v. Windsor concerned a statute like that. If proposed in 2013, the Defense of Marriage Act would not have become law. The same situation arose in NFIB v. Sibelius. When that case was decided in 2012, the House of Representatives certainly, and the Senate very likely, would not have passed the Patient Protection and Affordable Care Act as it was adopted in 2010. If every executive default is an injury to the legislative power, sometimes defaults are injuries to legislative power that was exercised in the past and that is not in accord with current views. Not only do current legislators have little interest in requiring the executive to carry out many laws adopted in

36 U.S. CONST. art. II, § 2, cl. 2 (providing that the President shall appoint officers of the United States with the advice and consent of the Senate, but that inferior officers may be appointed by the President alone, the heads of departments, or the courts, as provided by statute).

37 Under the Twelfth Amendment, if no candidate receives a majority of the electoral votes, the House of Representatives chooses the President, with each state having one vote. U.S. CONST. amend. XII.

38 When the electoral votes were counted in 1825, Andrew Jackson had ninety-nine, John Quincy Adams eighty-four, William Crawford forty-one, and Henry Clay thirty-seven. MARY M.W. HARGREAVES, THE PRESIDENCY OF JOHN QUINCY ADAMS 19 (1985).

the past, they have no express constitutional obligation to do so. The President, by contrast, has an obligation to the law. As the fact of change in view over time demonstrates, that is not the same as an obligation to the current legislative chambers.

None of these difficulties arises if private people, the executive, the courts, and the legislature each are seen as having their own characteristic relationship to the law, relationships in which the law is distinct from all of them. Over time, the legislature makes the law, private people are obliged to comply with it, the executive is obliged to implement it, and courts are required to apply it to cases within their jurisdiction. A system of separation of powers, in which the executive and the courts are not agents of the legislature in any straightforward sense, can also be characterized as one of legislative supremacy. That characterization is useful because the executive and the courts are bound by the laws the legislature produces, but there is an even better description: the rule of law.

Text and structure thus refute the claim that the Constitution entitles legislators or legislative chambers to a judicial remedy when the executive fails to implement the law correctly. Because that conclusion follows in part from the relation between the executive and the law, a stronger conclusion also follows. Congress may not by statute authorize its houses or its members to bring suits of that kind. To do so would be inconsistent with the vesting of the executive power in the President and not in Congress.40

The Constitution gives the President the executive power, but it also contemplates that he will not be alone.41 The natural inference, drawn since 1789 at the latest, is that the President has some authority and responsibility to oversee others who carry out the laws.42 The Take Care Clause reinforces this inference. If the President had no authority to see to faithful execution, an obligation to do so would be unreasonable. But while the Constitution

40 Professors Grove and Devins reach a similar conclusion, on similar grounds, with respect to litigation by Congress or its houses to defend the constitutionality of acts of Congress (as the standard terminology puts it). Tara Leigh Grove & Neal Devins, Congress’s (Limited) Power to Represent Itself in Court, 99 CORNELL L. REV. 547 (2014). Just what Congress or one of its houses is doing as a legal matter when it appears as a party in a suit involving the constitutionality of a federal statute, and argues in favor of constitutionality, is not at all clear.

41 For example, Article II authorizes the President to require the opinion in writing of “the principal officer in each of the executive departments.” U.S. CONST. art. II, § 2. As the President has the executive power, heads of executive departments are in some respect carrying out the President’s responsibilities.

42 Myers v. United States, 272 U.S. 52 (1926), which held unconstitutional a restriction on the President’s power to remove a Postmaster, reviewed the debates on presidential removal authority in Congress in 1789. Id. at 111–17. After that discussion of history, Chief Justice Taft said for the Court: “The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.” Id. at 117.
thus contemplates that the President will supervise others, it makes no provision for anyone to supervise him, other than the voters.

That understanding of the relationship between Congress and the President was decisive in *Bowsher v. Synar.* Congress had adopted deficit-reduction legislation that gave important authority to the Comptroller General, who could be removed by statute and performed many functions in aid of legislative operations. In the Court’s view, the deficit-reduction functions were executive, and could not lawfully be performed by an officer subject to congressional control. Contrasting American separation of powers with parliamentary systems, the Chief Justice said for the Court, “The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.” He then reviewed historical and judicial precedents, and concluded, “Congress cannot reserve for itself the power of removal of an officer charged with execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.”

Requiring that officers perform their legal duties is a form of supervision. Indeed, it is a form of supervision so basic and important that the Court affirmed the President’s power and duty to provide it even while also accepting a measure of independence in an executive officer. In *Morrison v. Olson,* the Court approved a statute granting prosecution responsibilities to an Independent Counsel who could be removed only for cause. The provision did not impermissibly burden the President’s power to control or supervise the Independent Counsel because the ability to remove for good cause meant that “the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.” *Morrison* suggests that the ability to ensure compliance with the law is at the center of the President’s executive power. To say that Congress has a similar role with respect to the President would be to say that it has the executive power.

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44 Id. at 727–32 (describing Comptroller General’s connection with Congress).
45 Id. at 722.
46 Id. at 726.
48 Id. at 692 (footnote omitted).
49 As *Morrison* demonstrates, one need not subscribe to a strong view of the unitary nature of the executive branch in order to believe that the President has a substantial supervisory role and that that role
Separation of executive and legislative power does not mean that Congress has no authority concerning the President’s performance of his duties. Congress has immense power in that respect, because it makes the laws that the President is required to execute. The legislature operates through the law, which remains distinct from legislators in their individual or collective capacities.

II.

This section discusses the Supreme Court cases that bear on the question of legislative lawsuits: Coleman v. Miller, INS v. Chadha, and Raines v. Byrd. Coleman and Raines reflect the distinction between legislators’ interest in validity and compliance, and Chadha probably does so, although it is harder to read on that point. None of them supports legislative causes of action in response to executive failure to carry out the law properly.

A. Coleman v. Miller

Coleman originated in state court as a mandamus action concerning the record-keeping responsibilities of Kansas officials involved in the law-making process. The legislative plaintiffs relied on an interest regarding official records, an interest related to the validity of enactments and not executive duties under valid enactments. The Supreme Court of the United States found that interest could support a petition for certiorari. It did not hold that the Kansas state senators had a cause of action to vindicate that interest; their cause of action was a question of state law not subject to review on certiorari. Coleman had nothing at all to do with the implementation of substantive law by executive officials.

Plaintiffs in Coleman sought mandamus to the Secretary of the Senate of Kansas concerning the proper endorsement and disposition of an authoritative document that was part of the process of ratification of a proposed constitutional amendment, and similar orders to other officials concerning the official records of that process. When that relief was denied by the Supreme Court of Kansas, they petitioned for certiorari, which was granted. Before addressing the merits under Article V, Chief Justice Hughes discussed “The jurisdiction of this Court.”

includes enforcing statutory duties. The objection to the Independent Counsel system in Morrison was that the President could not direct exercises of discretion, not that he could not enforce duties.


Id. at 347 (italics in original). Although Chief Justice Hughes’ opinion is styled that of the Court, apparently only the section on jurisdiction had the support of five Justices. The voting pattern in Coleman is difficult to unravel, because different majorities formed for different conclusions at a time when the
section identified the jurisdictional question as one of standing to petition for certiorari. "Our authority to issue the writ of certiorari is challenged upon the ground that petitioners have no standing to seek to have the judgment of the state court reviewed, and hence it is urged that the writ of certiorari should be dismissed." The petitioners sought "mandamus to compel a proper record of legislative action." The proper record would show that the proposed amendment had been defeated in the Kansas Senate, not passed, because if petitioners were correct about Article V, their votes "would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment." The Kansas Senators thus relied on their power to keep the Kansas Senate from taking a legally effective act, ratification. The harm to that interest arose when Kansas officials, in preparing authoritative records, treated as valid a purported ratification that was actually invalid.

This understanding of the petitioners’ stake in the case appears throughout Chief Justice Hughes’ discussion of standing. The Kansas Senators’ votes, he explained, “have been overridden and virtually held for naught although if they are right in their contention their votes would have...
been sufficient to defeat ratification."\(^{55}\) The Chief Justice relied on earlier cases endorsing the standing of other participants in the law-making process. In *Hawke v. Smith*,\(^ {56}\) the Court had reviewed on the merits an Ohio decision upholding the submission of the Eighteenth Amendment to a referendum, when Congress had directed it to state legislatures for ratification. Plaintiffs in *Hawke* were Ohio voters who argued that under Article V the people could not validly act on the amendment, because they were not the legislature.\(^ {57}\) Like the plaintiffs in *Coleman*, the plaintiffs in *Hawke* sought to block a legislative process in which they were entitled to participate in order to keep it from producing a result they claimed would be invalid.\(^ {58}\) Also similar, Chief Justice Hughes said in *Coleman*, was *Leser v. Garnet*,\(^ {59}\) another state court decision that had been reviewed on certiorari. In *Leser*, qualified electors of Maryland sought removal from the voter lists of women enfranchised by the Nineteenth Amendment, which the plaintiffs said was not valid.\(^ {60}\) There too, participants in a law-making process sought to keep the officials responsible for that process from certifying official results contrary to the correct legal standard. As Chief Justice Hughes recognized, the voters in *Leser* were farther removed from actual exercises of legislative power than the Kansas Senators in *Coleman*: "The interest of the plaintiffs in *Leser v. Garnet* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case."\(^ {61}\) The *Coleman* plaintiffs "would have been decisive in defeating the ratifying resolution" if the Lieutenant Governor had been excluded from the process, as they said Article V required.\(^ {62}\)

Plaintiffs in *Coleman* claimed that their law-making power would be injured if an official record reported as valid an official act that they said was invalid because an exercise of that power had kept it from happening. The Court found that that interest entitled them to petition for certiorari. It did not find that the interest in legislative power entitled the petitioners to sue in the first place. Whether it did – whether they had a cause of action – was a question of Kansas law with which the Court was not concerned. In

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\(^{55}\) Id. at 438.


\(^{57}\) *Coleman*, 307 U.S. at 438–39 (describing *Hawke*).

\(^{58}\) Neither the Chief Justice in *Coleman* nor the Court in *Hawke* delved into the Ohio law that the Ohio courts had relied on in resolving the claim in the latter case on the merits. A voter’s claim that a vote should not be taken may seem anomalous, but the Supreme Court did not seek to unravel that difficulty.

\(^{59}\) *Leser v. Garnet*, 258 U.S. 130 (1922).

\(^{60}\) *Coleman*, 307 U.S. at 439–40 (describing *Leser*).

\(^{61}\) Id. at 441.

\(^{62}\) Id.
the concluding paragraph of the section on jurisdiction, the Chief Justice explained that the twenty state Senators who claimed that their votes had in fact defeated ratification by an even division of the Kansas Senate "have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." Rather than saying that the interest was grounds for reaching the merits, the Chief Justice said that it was so "treated by the state court." That formulation indicates the distinction between the federal questions, which the Court reviewed, and state-law questions, which it did not. Whether the plaintiffs' interest qualified for mandamus was one of the latter.

That way of thinking was on display earlier in the section on jurisdiction, where the Chief Justice also separated state and federal questions. By holding that "the right of the parties to maintain the action is beyond question," Chief Justice Hughes explained, the state court had "determined in substance that members of the legislature had standing to seek, and the court had jurisdiction to grant, mandamus to compel a proper record of legislative action." By itself, that decision about the availability of mandamus was a matter of state law, not within the certiorari jurisdiction, but the merits had turned on federal law. "Had the questions been solely state questions, the matter would have ended there. But the questions raised in the instant case arose under the Federal Constitution and these questions were entertained and decided by the state court."

Whether the petitioners' interest made them proper plaintiffs in a mandamus action thus was a question of Kansas law for the Kansas courts. Once the Kansas Supreme Court had ruled on the merits, the question for the Supreme Court of the United States was whether petitioners "lack[ed] an adequate interest to invoke our jurisdiction to review [the state court's judgment]." The Chief Justice's answer was that the state senators' claim that their votes had been "overridden and virtually held for naught" gave them "a plain, direct and adequate interest in maintaining the effectiveness of their votes." As the next sentence made clear, that interest mattered because it supported the Court's jurisdiction on certiorari: "Petitioners come

63 Id. at 446.
64 Id. at 437 (quoting the state court decision but not providing the citation, Coleman v. Miller, 146 Kan. 390, 392 (1937)).
65 Id. at 437.
66 Id. at 437–38.
67 Id. at 438.
68 Id.
directly within the provisions of the statute governing our appellate jurisdiction.\textsuperscript{[69]}

Another indication that the Court was concerned with the petitioners' interest but not their cause of action appears from a line of cases on which Chief Justice Hughes relied respecting the jurisdictional question. Justice Frankfurter, dissenting as to jurisdiction, argued that the legislator plaintiffs had suffered no "private damage," and that their complaint pertained "to legislators not as individuals but as political representatives executing the legislative process."\textsuperscript{[70]} Chief Justice Hughes responded by pointing to a number of cases in which the Court had granted certiorari at the instance of public officials when lower courts' decrees had interfered with their official conduct, for example by restraining them from enforcing allegedly unconstitutional statutes. He gave as an example \textit{Boynton v. Hutchinson Gas Co.},\textsuperscript{[71]} in which Boynton, the Attorney General of Kansas, sought certiorari to review a decision of the Kansas Supreme Court holding a Kansas statute unconstitutional and enjoining its enforcement. Respondents moved to dismiss the writ on the grounds that the Attorney General's interest was official and not personal, but the Court granted certiorari.\textsuperscript{[72]} Attorney General Boynton had been the defendant below, so the Court could not have been concerned with his cause of action. Rather, the question was whether Boynton had an interest that would support certiorari, given what the state court had done. That was also the question in \textit{Coleman}.

That case is thus two steps removed from suits by members or houses of Congress to compel the federal executive to implement the law. The injury the Court recognized involved official records of the law-making process, not execution, and that injury was relevant for federal jurisdictional purposes only, not with respect to plaintiffs' cause of action below. \textit{Coleman} holds that when state law gives state legislators a cause of action against state officials with respect to the state's law-making process, the interest protected

\textsuperscript{[69]} Id. The Chief Justice then used the words of the certiorari statute as it then stood. "[Petitioners] have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege." \textit{Id.} at 438. In 1939, the Court had certiorari jurisdiction when a party set up a federal right or privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. \textit{Id.} at 438. In 1939, the Court had certiorari jurisdiction when a party set up a federal right or privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. \textit{Id.} at 438. In 1939, the Court had certiorari jurisdiction when a party set up a federal right or privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. \textit{Id.} at 438. In 1939, the Court had certiorari jurisdiction when a party set up a federal right or privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. 

\textsuperscript{[70]} 307 U.S. at 470.

\textsuperscript{[71]} \textit{Boynton v. Hutchinson Gas Co.}, 291 U.S. 656 (1934) (granting certiorari).

\textsuperscript{[72]} 307 U.S. at 444. As Chief Justice Hughes explained, the Court later dismissed the writ for another reason. \textit{Id.}
by that cause of action is adequate for the Supreme Court’s appellate jurisdiction.73 It does not hold that federal law entitles legislators as such to sue anyone.

B. INS v. Chadha

INS v. Chadha74 is important here because the Court held that the houses of Congress are proper intervening parties when the executive branch takes the position that a federal statute is unconstitutional. Although that holding is clear, the reasoning is not. According to one reading, the legislative chambers were proper parties because the validity of a statute was at issue.

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73 As discussed below, the Court’s most important legislator standing case since Coleman, Raines v. Byrd, 521 U.S. 811 (1997), reinforces the conclusion that Coleman concerned the law-making process, not the execution of the laws more generally. Raines also explicitly leaves open the question whether Coleman’s conclusion about jurisdictional standing applies to similar suits brought by federal legislators. Id. at 824 n.8.

The Court in Coleman explicitly treated standing as a jurisdictional question. The fact that the case came from the state court makes it especially easy to see the distinction between jurisdiction and the plaintiff’s cause of action, because the latter was not a question of federal law at all and so was not before the Court. The Chief Justice’s opinion in Coleman suggests, but does not conclusively establish, that state and federal law concerning causes of action about matters of general public interest were different at that time. In order to show that the state senators had an interest adequate to support the Court’s appellate jurisdiction over the state courts, the Chief Justice pointed to two then-recent cases, discussed above, brought in state court in which the plaintiffs relied on their status as voters. In Hawke v. Smith, 253 U.S. 221 (1920), plaintiffs sued as Ohio voters and taxpayers challenging the Ohio constitutional provision stating that federal constitutional amendments submitted by Congress to state legislatures for ratification were to be put before the people in a referendum. They sought an injunction directing Ohio election officials not to conduct the referendum. The Ohio courts decided the case on the merits and upheld the referendum provision against the argument that the legislatures referred to in Article V are representative bodies, not the people at large. The Supreme Court reached the merits, accepted that argument, and reversed. In Leser v. Garnet, 258 U.S. 130 (1922), a Maryland voter sued Maryland election officials in Maryland court, seeking an injunction against the registration of women voters in light of the Nineteenth Amendment. The plaintiffs argued that the amendment had not been validly ratified. The Maryland Court of Appeals rejected the challenge on the merits, and the Supreme Court of the United States did likewise. In both cases, a state court had found that a private voter could sue because of an alleged injury to the voter’s interest as such. The Court in Coleman contrasted Hawke and Leser with Fairchild v. Hughes, 258 U.S. 126 (1922). Plaintiff Fairchild sued Secretary of State Charles Evans Hughes (the author of Coleman) in federal district court, seeking an injunction against promulgation of the Nineteenth Amendment. Fairchild sued as a citizen and taxpayer. The Court, through Justice Brandeis, found that “Plaintiff’s alleged interest in the question submitted is not such as to afford a basis for this proceeding,” id. at 129, and affirmed the lower court’s dismissal of the case. Chief Justice Hughes in Coleman pointed to Fairchild in order to show that the Court in Leser, which was decided the same day, was aware of possible defects in the plaintiff’s interest in the litigation. Coleman, 307 U.S. at 440. One possible explanation for the different outcomes in the state and federal cases is that the principles governing causes of action were more restrictive in federal than state court, and that the Supreme Court had nothing to do with the latter when reviewing state court decisions. It is also possible, however, that the Chief Justice thought that voters were proper plaintiffs whereas citizens and taxpayers were not, or that the statutory or constitutional jurisdictional rules for original proceedings in federal court were different from the jurisdictional rules for cases coming from state court. Then as now, the Court was not always rigorous in distinguishing between constitutional limits on jurisdiction, statutory limits on jurisdiction, and causes of action.

If that is what *Chadha* means on this issue, then it regards a threat to validity as a threat to legislative power. That reasoning has no implications for executive duties to carry out the law. According to another reading, the two houses were proper parties because in the unusual context of the legislative veto, a power had been conferred by statute on each house of Congress. That reasoning has no application to statutes in general, and so no implications for the execution of the laws in general.

*Chadha* presented a problem of adversariness. Under the Immigration and Nationality Act, the Attorney General could suspend deportation of aliens whose visas had expired, but either house of Congress could override that decision by resolution. Chadha, an alien who had over-stayed his visa and was subject to deportation, received a suspension from the Attorney General. The House of Representatives adopted a resolution overriding the Attorney General’s suspension as to several named individuals, one of whom was Chadha. If the legislative veto provision of the statute was valid, the INS was obliged to deport him. It undertook to do so before an Immigration Judge, who ruled for the INS. Chadha sought administrative review of that decision, arguing that the legislative veto was unconstitutional. The Board of Immigration Appeals, like the Immigration Judge, concluded that it had no authority to disregard an act of Congress, whether unconstitutional or not, and upheld the INS’ decision. When the Board’s decision was on direct review in the Ninth Circuit, the government took the position that the legislative veto was unconstitutional, but stated that Chadha would be deported unless a court ordered otherwise.\(^75\)

Chadha’s position and the government’s were thus adverse in one respect but not another. They were materially adverse because the INS proposed to deport Chadha despite his desire to remain in the country. They were substantively in accord because both parties agreed that the legislative veto was unconstitutional and the House’s resolution of disapproval ineffective. In light of that unusual configuration, the court of appeals invited the houses of Congress to file briefs as amici curiae in support of the legislative veto’s constitutionality.\(^76\) Later in the Ninth Circuit proceedings, both houses adopted resolutions authorizing their own intervention in *Chadha* as parties, and their motions to intervene were granted.\(^77\) The Ninth Circuit concluded that the legislative veto was unconstitutional.\(^78\) The INS then appealed to the Supreme Court, once again taking the position that it would deport

\(^{75}\) *Id.* at 923–28 (setting out the facts and procedural history).

\(^{76}\) *Id.* at 928.

\(^{77}\) *Id.* at 930 n.5.

\(^{78}\) *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980).
Chadha unless ordered not to do so, even though Chadha was correct on the dispositive issue in the case. The House and Senate did not join in the INS’ appeal, but joined one another in a petition for certiorari. The Court granted the writ while postponing a decision on its jurisdiction over the INS’ appeal. It ultimately concluded that it had jurisdiction on appeal as well as certiorari.

Chadha discusses the status of the House and Senate as parties in two contexts. The first was in response to their motion to dismiss the INS’ appeals, on the grounds that the agency was not a proper appellant because it had received all the relief it sought when the Ninth Circuit concluded that the legislative veto was invalid. In a footnote, the Court noted that the House and Senate were themselves parties, and could move to dismiss, because the Ninth Circuit had granted their motion to intervene. The Court stated that intervention was proper but did not resolve a dispute between the parties on that issue, and so quite possibly assumed and did not decide the point as a matter of precedent. The Court denied the chambers’ motion to dismiss the INS’ appeal, explaining that the Ninth Circuit’s order that the INS not deport Chadha made the agency an aggrieved party within the meaning of the appellate jurisdiction. Despite the agency’s argument in the court of appeals, the Court reasoned, the INS was aggrieved because it had decided to comply with “the House action ordering deportation of Chadha.”

The second and slightly more extensive discussion of the chambers’ status as parties came when the Court responded to the objection that Chadha was not a case or controversy, because Chadha and the Solicitor General agreed as to the constitutionality of the legislative veto. Writing for the Court, the Chief Justice addressed the contention “that this is not a genuine controversy but a ‘friendly, non-adversary proceeding,’ Ashwander v. TVA, 297 U.S., at 346 (Brandeis, J., concurring), upon which the Court should not pass.” That argument rested “on the fact that Chadha and the INS take the same position on the constitutionality of the one-House veto.”

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79 At the time, court of appeals decision holding federal statutes unconstitutional were subject to appeal as of right, not just certiorari. 28 U.S.C. § 1252 (1982).
80 Chadha, 462 U.S. at 928–29.
81 Id. at 931.
82 Id. at 929–30.
83 Id. at 930 n.5.
84 Id. at 930.
85 Chadha, 462 U.S. at 939. As this Article will explain presently, that characterization of the one-house veto provides important insight into the Court’s thinking about the congressional role in Chadha.
86 Id.
The Court gave two reasons for concluding that it faced a case or controversy within the meaning of Article III. First, once the House and Senate had intervened, "the concrete adverseness is beyond doubt. Congress is both a proper party to defend the constitutionality of [the legislative veto provision] and a proper petitioner under 28 U.S.C. sec. 1254(1)."87 And even before the chambers intervened, "there was adequate Art. III adverseness even though the only parties were the INS and Chadha."88 At that point and throughout the litigation, the agency's position was that it would deport Chadha unless ordered not to. For that reason, the Supreme Court agreed with the Ninth Circuit that Chadha had asserted "a concrete controversy and our decision will have real meaning."89 Those consequences were for Chadha, and they were quite real.

The Court did not describe the interest that entitled the House and Senate to intervene in the Ninth Circuit. Chief Justice Burger may have meant that the houses have an interest in the validity of statutes, and hence an interest in judicial decisions upholding validity. He said, "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."90 Defense of validity is a position taken in litigation, and as such is distinct from enforcement, in which Congress plays no role. To say that the houses of Congress are proper parties to argue that a statute is valid suggests that

87 Id.
88 Id.
89 Id. The Court noted that there might be "prudential, as opposed to Art. III, concerns about sanctioning the adjudication of these cases in the absence of any participant supporting the validity of [the legislative veto provision]." Id. at 940. "The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress." Id. The Ninth Circuit had invited those briefs before the chambers intervened as parties. Id. at 928. Although the Court then said that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is unconstitutional," id. at 940 (citations omitted), the decision to invite briefs indicates that the prudential concern about adverseness has to do with the presentation of positions, not the presence of parties. That reading is reinforced by the Court's citation of United States v. Lovett, 328 U.S. 303 (1946). In that case the Solicitor General took the position that a statute cutting off Lovett's pay was unconstitutional, and counsel for the House and Senate presented argument in support of the statute, but neither chamber was a party.
90 Chadha, 462 U.S. at 940. In support of that proposition, the Court cited Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), and United States v. Lovett, 328 U.S. 303 (1946). In neither of those cases was either chamber of Congress, or any member of Congress, a party. Rather, in both the Court received amicus briefs in support of a position that the executive did not support. In Lovett, the Solicitor General agreed with the private parties that a statute adversely affecting them was unconstitutional, and congressional counsel argued as amici in favor of constitutionality. In Cheng Fan Kwok, the Court appointed an amicus to defend the lower court's interpretation of a statutory provision, an interpretation the Solicitor General did not completely adopt. The Chief Justice did not say in Chadha that Congress is a proper party to require that the executive enforce a statute the executive refuses to enforce because it is unconstitutional.
their interest is in the court’s holding concerning validity. Because a holding of invalidity has effects similar to invalidation, especially if that holding comes from the Supreme Court, in arguing in favor of constitutionality the legislative chambers can be seen as defending their power to make valid statutes.

That seems to have been Justice Alito’s reading of Chadha in Windsor. Arguing that the House (and only the House) created a case or controversy with Windsor, he said that in Chadha the Ninth Circuit, “by holding the one-house veto to be unconstitutional, had limited Congress’ power to legislate.” 91 The Court in Chadha suggested, according to Justice Alito, “that Congress suffered a similar injury whenever federal legislation it had passed was struck down.” 92 The lower court’s decision holding DOMA unconstitutional, he said, “impairs Congress’ legislative power by striking down an Act of Congress.” 93 And when he invoked Coleman, Justice Alito did not say that legislators’ votes in favor of DOMA were “held for naught” when the Solicitor General argued against its unconstitutionality. He said that they were held for naught when the Second Circuit accepted that argument. 94 Far from arguing that Congress has an interest in the execution of the laws, he distinguished between the enforcement of statutes and their defense from constitutional attack. 95

As this Article has stressed, the argument that the legislative power entails an interest in validity is quite distinct from the argument that it entails an interest in compliance and implementation. The former is more defensible than the latter, though in my view the Constitution by itself does not entitle federal legislators or legislative chambers to judicial remedies with respect to the legislative process. Chadha may hold that the interest in validity supports intervention. That holding would not imply that Congress or its members have a legally cognizable interest in the executive’s implementation of the law. Nothing in the opinion suggests or implies that conclusion, and it would be astonishing if it did: as discussed above, three

91 United States v. Windsor, 133 S.Ct. 2675, 2712 (Alito, J., dissenting).
92 Id.
93 Id. at 2713.
94 Id. Justice Alito did not face the question whether an executive agency holds a statute for naught when it does not carry out the statute, because the government had implemented DOMA as against Windsor and intended to do so until finally ordered not to.
95 To his statement that Congress is a proper party to defend the constitutionality of a statute, Justice Alito attached a footnote explaining that Buckley v. Valeo, 424 U.S. 1 (1976), “is not to the contrary. The Court’s statements there concerned enforcement, not defense.” Windsor, 133 S.Ct. at 2714 n.3. Buckley held unconstitutional a statute conferring enforcement and regulatory authority on the Federal Election Commission, which at the time, included members appointed by the House and Senate, and not by the President pursuant to the Appointments Clause.
years after Chadha was decided, its author said for the Court, “the Constitution does not contemplate an active role for Congress in the supervision of officers charged with execution of the laws it enacts.”

Although the Court sometimes says that courts invalidate statutes when they hold them unconstitutional, in more careful moments it explains that courts are limited to deciding cases, and do not literally change the law the way a repeal does. For that reason, the interest in validity was not at stake in Chadha in the same sense in which it was at stake in Coleman. Another account of Chadha avoids the conclusion that the two houses were proper parties simply because of the effect of a judicial decision on validity, and relies instead on the specific circumstances of the legislative veto. Justice Scalia adopted this reading of Chadha in Windsor. The Immigration and Nationality Act authorized either house of Congress to veto executive decisions to suspend deportation. In discussing the INS’ status as an aggrieved party, the Court said that the House of Representatives “ordered” the agency to deport Chadha. In discussing concrete adverseness, the Court said that the agency intended “to comply with the House action ordering the deportation of Chadha.”

Sometimes public officers or institutions enforce the duties of other public officers or institutions through litigation. The writ of mandamus is a classic example of that kind of enforcement, and can produce seemingly odd modes of litigation like United States v. United States District Court, in which the federal executive used the extraordinary writ of mandamus to bring up an otherwise unreviewable district court decision. The President

97 See Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (“We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.”).
98 “Because Chadha concerned the validity of a mode of congressional action – the one-house legislative veto – the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers.” Windsor, 133 S.Ct. at 2700 (2013) (Scalia, J., dissenting).
100 Id.
102 The district court in that case had ordered the Attorney General to disclose records concerning government surveillance activities that the executive said were highly sensitive. Id. at 300–01. Interlocutory review of such rulings is not available, 28 U.S.C. § 1292 (setting out grounds for interlocutory review), so the government took the case to the Sixth Circuit on mandamus, which is in form a proceeding against the district court to enforce its duty, see, e.g., Kerr v. United States District Court, 426 U.S. 394, 402 (1976) (writing that mandamus is an extraordinary remedy used to confine lower courts to their jurisdiction or require them to exercise jurisdiction when it is their duty to do so).
usually can enforce the duties of subordinate executive officials without litigation, but federal district courts are less susceptible to presidential control. In similar fashion, if one house of Congress has a legal right that an executive agency carry out a binding directive that house has given the agency, the legislative chamber’s right might well be judicially enforceable. Thus had the legislative veto been constitutionally permissible, a congressional suit to require that the INS deport Chadha might also have been proper. The House’s position on the constitutionality of the legislative veto therefore also suggested that it had a legally cognizable interest in compliance with its resolution. On the merits, the Court found that congressional direction of the executive in that fashion was unconstitutional. That did not mean that the House and Senate were not proper parties, only that their argument was rejected.

Understood along these lines, Chadha held that the House was entitled to demand that the executive discharge an obligation created in part by the resolution of disapproval, on the assumption that the legislative veto was constitutional. Compliance was not directed, because the statute was invalid. That reasoning does not imply that in general the houses of Congress may sue to require that the executive carry out the law, and indeed cuts against it.

C. Raines v. Byrd

Chief Justice Rehnquist’s opinion for the Court in Raines v. Byrd, takes a narrow view of legislators’ interest in their official power and the validity of enactments. Insofar as it bears on legislative suits to require proper implementation of the law, it counts against them.

In the Line Item Veto Act, Congress granted the President authority to “cancel” items in appropriations acts, and provided a mechanism for congressional response to cancellations that resembled the veto override process of Article I, Section 7. Senator Robert Byrd, who had voted against the act, sued Franklin Raines, Director of the Office of Management and Budget, and the Secretary of the Treasury, seeking a declaration that the act was invalid. Senator Byrd maintained that the act impermissibly empowered the President to override a vote he might cast in the future for

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103 On the assumption that the legislative veto was constitutional, the Senate also had a real, if less imminently threatened, interest in INS compliance with vetoes it might issue.


105 Id. at 814–15.
an appropriation. The Court found that he lacked standing within the meaning of Article III and dismissed for want of jurisdiction.

Senator Byrd argued that the Line Item Veto Act altered the “meaning” and “integrity” of his votes for appropriations, making them less “effective.” He relied on Coleman for the principle that the plaintiffs in the earlier case had a “plain, direct, and adequate interest in maintaining the effectiveness of their votes.” The Court in Raines found that Coleman stood, 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 grounds that their votes have been completely nullified.”

The plaintiffs in Coleman, the Court explained, complained that their votes had been “deprived of all validity.” Senator Byrd and the other plaintiffs in Raines, by contrast, “[had] not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nevertheless deemed defeated.” The “abstract dilution of institutional legislative power” the plaintiffs alleged, the Court found, “pulls Coleman too far from its moorings,” and their claim that the Line Item Veto Act reduced the “effectiveness” of their votes “stretches the word far beyond the sense in which the Coleman opinion used it.”

Raines implies that a particular vote is ineffective, completely nullified, and deprived of all validity, when a bill that had enough votes to pass and “would have become law” is “deemed defeated” and “does not go into effect,” or when a bill with enough votes to be defeated “goes into effect.” The Court did not elaborate on how a bill is deemed defeated, or does or does not go into effect. The problem alleged in Coleman was that the responsible official prepared an inaccurate record. Anyone could in some sense deem a bill to have been defeated, including the opponents, but not everyone’s views matter in the same way. The conduct of officials who provide authoritative statements of the legislative process, especially those

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106 Id. at 821–22.
107 Id. at 813–14. The statute itself authorized members of Congress and private parties adversely affected to sue to challenge its constitutionality. Id. at 815–16. It was thus clear that Senator Byrd had a case of action, and that the Court’s conclusion about jurisdiction rested on the Constitution. In a later case involving a party that had lost funding due to an exercise of the cancellation power, the Court found that the statute was unconstitutional. Clinton v. New York, 524 U.S. 417 (1998).
108 521 U.S. at 825.
109 Id.
110 Id. at 823 (footnote omitted).
111 Id. at 822.
112 Id. at 824.
113 Id. at 825–26.
like Secretary Miller who provide a statement other officials can act on at the next stage, deem that proposals have been defeated or adopted in a fashion that has legal consequences because the records they create are relied on. In similar fashion, an enactment does or does not go into effect depending on whether authoritative records do or do not reflect its adoption. *Raines* thus underlines that *Coleman* was about official legislative records, like the kind kept by Secretary of the Kansas Senate Miller.

The Court in *Raines* was careful to leave open the question whether *Coleman* would support a suit brought by federal legislators in federal court even with respect to the legislative process. Having distinguished *Coleman* on the grounds that Senator Byrd had not alleged vote nullification, *Raines* did not have to decide whether the earlier case could be otherwise distinguished.

For instance, appellants have argued that *Coleman* has no applicability to a similar suit brought in federal court, since that decision depended on the fact that the Kansas Supreme Court “treated” the senators’ interest in their votes “as a basis for entertaining and deciding the federal questions.” 307 U.S., at 446, 59 S. Ct., at 979. They have also argued that *Coleman* has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman*, and since any federalism concerns were eliminated by the Kansas Supreme Court’s decision to take jurisdiction over the case.114

By identifying but not passing on those issues, and by describing the propositions for which *Coleman* “at most” stands, the Court in *Raines* made clear that it was not endorsing any purported application of the earlier case to the federal government. That passage also underlines the point that the Court in *Coleman* had no occasion to decide whether the plaintiffs below had a cause of action. The Kansas Supreme Court had decided that Kansas legislators could seek mandamus against a Kansas official, and the Court in *Coleman* treated that decision as resting on Kansas law and not subject to review on certiorari.115

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114 *Raines*, 521 U.S. at 824 n.8.
115 *Raines v. Byrd* also bears on the Court’s understanding of *Chadha* and of harms to legislators as such. The Court in *Raines* distinguished *Coleman*, pointing out the difference between a failure to recognize the validity of a particular legislative act and the more “abstract” harm that Senator Byrd
Senator Byrd alleged an injury related to his share of the legislative power. In the Court’s view, his interest in the validity of potential statutes that might be enacted and cancelled in the future did not qualify under Article III. Coleman involved the effectiveness of a legislative decision that had already happened. The Court’s decision thus may well have turned on the difference between actual and potential exercises of power, and thus quite possibly reflected the ripeness aspect of standing doctrine. Whatever the exact rationale and holding were, they arose within the context of power and validity.

While the Court had no occasion to address executive duties unrelated to validity, Raines’ reasoning is difficult to reconcile with the suggestion that the Constitution confers on legislators or legislative chambers a judicially enforceable right that the executive carry out the law. Chief Justice Rehnquist discussed some lawsuits that never happened, but would have been proper if Senator Byrd was correct. A number of Presidents would have been able to sue to challenge the Tenure of Office Act, which limited their removal authority in ways they regarded as unconstitutional. Or the Attorney General could have sued to challenge the one-house veto provision of the Immigration and Nationality Act (that was the Court’s only reference to Chadha). Similar reasoning applies to congressional suits about improper execution. Throughout American history, members of Congress have complained that the executive is carrying out the law improperly, including through inaction. If absence of litigation is evidence that it was thought fruitless, and that in turn is evidence that it was properly thought fruitless, then more than 200 years with no legislative lawsuits to challenge non-enforcement is strong evidence.

III.

This essay has been about duties, interests, and the causes of action that connect them. It has been about standing only insofar as a party’s standing claimed. Raines did not even discuss Chadha as a case in which legislative power gave rise to a litigable interest. That may have been due to the way in which the parties approached the problem, but if so that too is noteworthy. The unusual situation in which the executive plans to carry out a law the executive says is unconstitutional, and the unusual status of an intervenor that presents arguments but makes no affirmative claim on any party, may have seemed to mean little for the more general question of legislative causes of action and Article II standing.

Raines, 521 U.S. at 826–29.

Chief Justice Rehnquist’s opinion says that the Court attaches “some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.” Id. at 829 (footnote omitted). He did not explain what that importance was.
consists of the party's cause of action. It has not been about the Supreme Court's Article III doctrine by that name, except in discussing Coleman and Raines.

That omission may seem strange. The principal argument against legislative lawsuits is that legislators lack standing under Article III as the Supreme Court interprets it. Both the lower courts and the Supreme Court address the issue in those terms. Kennedy v. Sampson,118 in which the D.C. Circuit began to develop its doctrine under which members of Congress may sue to vindicate some of their interests as such, was decided under Article III standing doctrine as it then stood.119 Indeed, the court of appeals in that case did not ask whether Senator Kennedy had a cause of action.120 Judge Robert Bork's well-known attack on his court's doctrine approving legislator lawsuits, in Vander Jagt v. O'Neill,121 and Barnes v. Kline,122 claimed that the doctrine was inconsistent with Article III and the Supreme

118 Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). The case does not represent the D.C. Circuit's current doctrine, because that court has subsequently held that Kennedy was at least limited by Raines. Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999).
119 The case was brought by Senator Edward Kennedy against Arthur Sampson, Acting Administrator of General Services. It involved a dispute about the operation of the so-called pocket veto. Article I, Section 7 of the Constitution provides that when a bill is presented to the President, he has ten days (Sundays excepted) in which to sign it or return it with his objections to the house in which it originated. If he does neither by the end of that period, the bill becomes law without his signature, unless Congress by its adjournment prevents a return. On December 14, 1970, the Family Practice of Medicine Act was presented to President Nixon. On December 22, the House and Senate adjourned for the Christmas holiday, the Senate to reconvene on December 28, the House on December 29. On December 24, the President issued a memorandum stating that he was not signing the bill and that it would not become a law because Congress, by adjournment, had prevented the bill's return to the Senate, in which it had originated. Kennedy, 511 F.2d at 432. Senator Kennedy, a supporter of the bill, took the position that the Senate's recess had not prevented return, because the Secretary of the Senate had been authorized to accept returned bills from the President, and that as a result the bill had become law without the President's signature. Responsibility for promulgating enacted laws in the Statutes at Large rested with the Archivist of the United States (as it does now), who at that time reported to the Administrator of General Services (which is no longer the case, as the National Archives and Records Administration is now a free-standing executive agency, not part of the General Services Administration). Senator Kennedy sued Acting Administrator Sampson, seeking a declaration that Sampson was obliged to promulgate the Family Practice of Medicine Act as a duly enacted statute. Id. at 430. The D.C. Circuit held that Senator Kennedy had standing to sue and agreed with his position on the merits of the Pocket Veto Clause, and so granted the declaration.
120 The court of appeals in Kennedy inquired only into Senator Kennedy's standing under Article III, and did not separately inquire into his entitlement to a judicial remedy. Id. at 433. The D.C. Circuit's approach was in keeping with that of the Supreme Court, which at the time frequently decided the standing question without asking whether some source of law authorized the plaintiff to bring suit. David P. Currie, Misunderstanding Standing, 1981 Sup. Ct. Rev. 41, 42 (criticizing that tendency). The Court in later years has made clear that standing under Article III and the plaintiff's cause of action are distinct questions. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (distinguishing standing in the jurisdictional sense from the question of whether some source of law entitles parties like the plaintiff to enforce the duty on which the plaintiff relies and so creates a cause of action).
Court decisions interpreting it. When the Supreme Court did resolve a legislator standing question in Raines, it concluded that Senator Byrd lacked standing under Article III. The Court’s most recent case involving a legislative plaintiff resolves the question of Article III standing without mentioning the plaintiffs’ cause of action.123

The Court’s Article III standing doctrine, however, is ill suited to the questions that must be resolved in order to decide whether federal legislators or legislative houses may sue to enforce the duty to execute the law. First, as an Article III doctrine it applies only to the federal judicial power and the federal courts. As the Court has noted, state constitutions need not impose similar limits on state courts, and some of them do not.124 If the Constitution itself confers a cause of action on federal legislators or federal legislative chambers, and that cause of action satisfies state but not federal standing requirements, then a state court in which the case is properly brought may, and indeed must, entertain it.125 Were such a case to be brought in state court, and were the state court to give relief, the Supreme Court would have appellate jurisdiction to decide the merits.126 If the state court were to deny relief, its resolution of the substantive question of federal law would be final under the Supreme Court’s current doctrine.

For the Constitution to provide for a class of lawsuits that would resolve disputes between officers of the national government, but to forbid the national courts from entertaining those cases in the first instance, and sometimes from deciding them altogether, would be irrational. That arrangement would leave to the vagaries of state constitutions the implementation of an important principle of federal separation of powers. For that reason, the conclusion that Article III excludes some legislator lawsuits implies that the Constitution does not create and does not allow actions of that kind. But if that is true, it is true because of aspects of the

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124 “We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.” ASARCO v. Kadish, 490 U.S. 605, 617 (1989) (citations omitted). ASARCO itself was a case in which the state courts “chose a different path, as was their right, and took no account of federal standing rules in letting the case go to final judgment in the Arizona courts.” Id.
126 The Court in ASARCO found that once a state court had entered judgment against the defendant in a taxpayer suit, the defendant had standing to petition for certiorari and the Court had jurisdiction to review the state court decision, without regard to the plaintiff’s initial standing in state court. 490 U.S. at 617–19.
Constitution other than Article III, most likely the relations between legislative and executive power. The constitutional principles governing those relations, which apply in state and federal court alike, are the main question. Starting with Article III only postpones the important issue. Starting with the relations between the powers, by contrast, should resolve the question. If the Constitution creates or permits the creation of legislative suits, then Article III almost certainly accommodates them. If it neither creates nor permits them, Article III is irrelevant, and there is no reason to import into that trans-substantive provision considerations that have everything to do with the substance of federal legislative and executive power.

Second, the Article III standing doctrine as the Court has developed it draws a line between private people and the government. It therefore has no bearing on suits by government actors, like legislative chambers and legislators, who claim that their official position entitles them to judicial relief. Although the courts do not always emphasize the point, the injury-in-fact requirement that is central to standing doctrine applies only to private persons. Non-compliance with the law, whether by another private person or the government, is not by itself injury-in-fact. If the Constitution creates or permits legislative suits, then Article III almost certainly accommodates them. If it neither creates nor permits them, Article III is irrelevant, and there is no reason to import into that trans-substantive provision considerations that have everything to do with the substance of federal legislative and executive power.

Standing doctrine thus distinguishes private individuals from officials, and its injury-in-fact requirement applies only to the former. Limiting the

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127 "We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992). The same point is made in FEC v. Atkins, 524 U.S. 11 (1998), where the Court considered a challenge to the Article III standing of a plaintiff who sought to enforce a requirement that the Federal Election Commission disclose certain information. In response to the argument that such plaintiffs stated only a generalized grievance, because the information was to be available to the public, the Court explained that the central issue of standing is not whether an interest is widely shared and so generalized, but whether it is "of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.' L. Singer & Sons v. Union Pacific R.R. Co., 311 U.S. 295, 303 (1940)."

128 As Professor Edward Hartnett has pointed out, the natural explanation is that standing doctrine is as much about the executive power as the judicial. Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places, 97 MICH. L. REV. 2239 (1999). While standing doctrine ostensibly requires that plaintiffs have an injury to some interest other than the interest in compliance with the law, id. at 2240, "no federal judge, if pressed," would say the same thing in a case with the United States as plaintiff, id. at 2245. The real question in standing cases, says Hartnett, concerns proper parties to represent the public interest. Id. at 2256. That question (at the federal level, at least) properly arises under Article II, not Article III. Id. As Hartnett's explanation shows, standing doctrine does reinforce the conclusion that legislators and legislative chambers may not control the execution of the law. It does so, however, insofar as it is really about the executive power, not the judicial power.
ability of private people to vindicate public rights is indeed one leading explanation of current Article III standing requirements, an explanation urged by then-Judge Scalia in extra-judicial scholarship.129 Legislative plaintiffs are not private people and do not assert the government’s right that the law be complied with, a right generally vindicated in suits brought at the instance of the executive. They sue on the basis of official authority, and when they claim that the executive has defaulted in carrying out the law, they rely on the legislative power as the interest harmed. As Chief Justice Hughes pointed out in Coleman, the Court’s cases allow public officials as such to litigate on the basis of their official powers and responsibilities.130 A doctrine that disables private people from exercising the prerogatives of the government has no bearing on parties whose public office gives them some claim to official authority; the question is whether legislators’ official positions entitle them to bring such lawsuits, not whether they have official positions.

Third, one of the main rationales the courts give for Article III standing limitations is largely irrelevant to the problem of legislative lawsuits. In the leading case of Allen v. Wright, the Supreme Court quoted Judge Bork:

All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.131

That passage comes from a legislator standing case in which Representative Guy Vander Jagt, a member of the House Republican leadership group, sued the Speaker of the House, alleging that House committees had been weighted in favor of Democrats out of proportion to their numbers in the chamber.132 Judge Bork sharply criticized his court’s decision in Kennedy

129 Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881 (1983). Then-Judge Scalia argued that that harms to the public at large should be resolved through the political process, while the special role of the courts was to protect the rights of minorities (including minorities of one) upon whom distinctive and particularized harm was inflicted. Id. at 894–95.
132 Vander Jagt, 699 F.2d at 1177.
v. Sampson. A few years later, he further developed his criticism in Barnes v. Kline, in which another legislator sued the executive, relying on the legislator's stake in the legislative process as the grounds for relief.\textsuperscript{133}

Judge Bork's argument was largely about the proper role of the judiciary.\textsuperscript{134} It is certainly natural to think that the courts have no business deciding political disputes within Congress, for example the dispute in Vander Jagt, or political disputes between Congress or its members and the President concerning proper enforcement of the law. That way of thinking is natural, however, because the argument assumes its conclusion; political disputes should not be decided in court because they are political, not legal. But if some rule of law governs committee assignments, or requires that statutes be executed, and authorizes legislative lawsuits to enforce it, then the dispute is not just political but also legal. The role of the courts is precisely to decide legal disputes by entertaining causes of action the law establishes. Causes of action are the real question.

Once the real question is identified, one issue is whether the role of the courts has any bearing on it. Judicially enforceable duties of course entail judicial involvement in their enforcement. By itself, that fact is unlikely to affect the arguments for and against causes of action for legislators and legislative bodies. Judge Bork's argument seems to have been that legislative lawsuits would require the courts to exercise considerable policy discretion, that the exercise of that discretion would be inconsistent with the courts' constitutional role, and that therefore the involvement of the judiciary in deciding legislative lawsuits undermines the argument that the Constitution provides for or permits such suits.\textsuperscript{135}

Whether that is true with

\textsuperscript{133} Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting). Like Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), Barnes involved a dispute about the operation of the Pocket Veto Clause. Like Senator Kennedy, Representative Barnes sought a declaration that an act had become law where the President took the position that it had failed of enactment due to a pocket veto. Barnes, 511 F.2d at 23–26.

\textsuperscript{134} In Barnes, Bork argued that "the jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution." Id. at 42. In Vander Jagt, he relied on "compelling reasons rooted in the concept of separation of powers, and in particular in the proper role of courts in relation to the political branches." 699 F.2d at 1181.

\textsuperscript{135} "If an allegation of a diminution of influence on the legislative process were sufficient to confer standing, federal courts doubtless would be invited to rule upon the ways in which committee and subcommittee members are chosen, since, party lines aside, it is clear that those chosen for committees on the budget or foreign affairs or rules generally have more influence than those not so chosen. Perhaps we could be called upon to rule on filibusters, since those who filibuster may have disproportionate influence over legislative outcomes. Courts might be asked to control the order in which legislation is brought to the floor, debated, and voted on. Surely we would be requested to remedy disproportionate assignments of staff as between committee majorities and minorities, for those assignments affect influence on the legislative process. Examples of this sort could be multiplied, but perhaps enough has been said to indicate why federal courts should firmly refuse to enter upon the wholly inappropriate task
respect to any rule allegedly enforceable in a legislative suit depends on the content of the rule. Judge Bork was less disturbed by the "nullification of a vote" principle that his court had derived from *Coleman* in *Kennedy v. Sampson*, on the grounds that a legislator's vote is "a structural feature of our government, clearly assumed in Article I of the Constitution, as equal legislative influence or committee membership is not."

Judge Bork himself thus implicitly recognized that the central question concerns causes of action, not jurisdiction; by his reasoning, the answer as to jurisdiction depended on the cause of action at issue.

He was correct. The Constitution does not authorize legislators or legislative chambers to sue federal executive officials to require that they properly execute the law. Nor does it empower Congress to authorize such lawsuits. That principle has consequences for the role of the courts in the government, but it does not derive from that role.

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of ensuring absolute equity in Congress' legislative procedures. It is absurd to think that courts should purge the political branches of politics." *Vander Jagt*, at 699 F.2d at 1181. After arguing that judicial decisions on questions like those would entail confrontations between the courts and Congress, *id.* at 1181-82, Bork maintained that courts cannot answer them well. "Courts do not understand—indeed, probably not all legislators understand—how the various rules, customs, and practices of the legislature interact and how changing one aspect could produce the most unexpected distortions of the legislative process elsewhere. Nor can I imagine that extensive trials would educate courts to become experts on legislative processes so that they could improve those processes. The task, if there is a task that needs doing, is one for political reform by those intimately familiar with the complex arrangements and interactions involved." *id.* at 1182.

136 *id.*