

## ARTICLES

### DOES *UNITED STATES V. WINDSOR* (THE DOMA CASE) OPEN THE DOOR TO CONGRESSIONAL STANDING RIGHTS?

Bradford C. Mank

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# ARTICLES

## DOES *UNITED STATES V. WINDSOR* (THE DOMA CASE) OPEN THE DOOR TO CONGRESSIONAL STANDING RIGHTS?

Bradford C. Mank\*

### ABSTRACT

In rare cases, a President refuses to defend a statute based upon a belief that the statute is unconstitutional. The law is unclear whether either House of Congress

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has Article III standing to defend a statute that the President refuses to defend. In *United States v. Windsor*, the Supreme Court in 2013 addressed the constitutionality of the Defense of Marriage Act (“DOMA”). The Obama Administration took the middle position of declining to defend DOMA, but still enforcing it, despite its view that the statute was unconstitutional to assist federal courts in reviewing the constitutionality of the statute. It was unclear whether an appeal was proper in the case once a district court held the statute was unconstitutional, and the Executive Branch essentially agreed with that decision. Applying both prudential standing principles and mandatory Article III standing rules, Justice Kennedy, writing for the majority, recognized that the Executive Branch was an appropriate party on appeal because it continued to enforce the statute. Additionally, the majority acknowledged that briefs filed by House of Representatives leadership supporting the constitutionality of DOMA supplied the necessary adverseness in the case given the Executive’s view that DOMA was unconstitutional. The majority did not fully resolve the thorny issue of congressional standing in cases where a President refuses to enforce a federal statute. Justice Scalia, in his dissent, emphasized the almost exclusive role of the Executive Branch in defending federal laws under Article II, squarely rejected congressional standing, and argued that no party had standing to appeal in *Windsor* because the Executive agreed with the district court’s judgment holding Section 3 unconstitutional. By contrast, Justice Alito, in his dissent, would have expressly recognized the authority and standing of the leaders of either House to defend any federal statute that the President does not defend. Yet by acknowledging that congressional participation could supply the necessary adverseness to litigate a case when the Executive Branch agrees with the challenger that a statute is unconstitutional, the Court’s opinion in *Windsor* likely will pave the way for increased congressional participation in unusual cases where the Executive Branch believes a statute is unconstitutional, but at least one House of Congress wishes to defend the statute’s constitutionality.

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## INTRODUCTION

Article II of the Constitution requires that the President “take Care that the Laws be faithfully executed.”<sup>1</sup> In accordance with this provision, the Executive Branch, through the Department of Justice (the “DOJ”), routinely defends federal laws whose constitutionality is challenged,<sup>2</sup> but occasionally refuses to do so.<sup>3</sup> During various presidential administrations, the DOJ has taken different positions on its duty to defend federal laws. In 1981, the DOJ took the position that “[t]he Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.”<sup>4</sup> The DOJ subsequently took a broader view of presidential discretion to decline to defend a federal statute in 1994, especially in cases where a statute arguably “encroach[es] upon the constitutional powers of the Presidency.”<sup>5</sup> Because the DOJ acknowledged the ultimate role of the United States Supreme Court in deciding constitutional issues, even if the President disagrees with its decision, the 1994 DOJ opinion suggested that the Executive Branch might, in some circumstances, enforce a law whose constitutionality it doubted to create a justiciable controversy so that the Court could make the final decision on its constitutionality.<sup>6</sup>

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<sup>1</sup> U.S. CONST. art. II, § 3.

<sup>2</sup> Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 938–39 (2012) (“The approximately 10,000 lawyers at the DOJ take the lead role in defending lawsuits against the federal government and suing to enforce the law at the trial level.”); Brianne J. Gorod, *Defending Executive Nondefense and the Principle-Agent Problem*, 106 NW. U. L. REV. 1201, 1210–12 (2012) (explaining central role of DOJ in defending federal laws); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1196–98 (2012) (explaining that Executive Branch lawyers routinely defend the constitutionality of federal laws). Sometimes Congress places responsibility for government litigation outside the DOJ, especially in the case of independent agencies; a full discussion of that issue is beyond the scope of this article. See Gorod, *supra*, at 1223–24.

<sup>3</sup> Meltzer, *supra* note 2, at 1198 (“Thus, one can say in general that refusals by the [E]xecutive [B]ranch to defend or enforce acts of Congress are extraordinarily rare. But they do occur. . .”).

<sup>4</sup> Att’y General’s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25, 25 (1981); 43 Op. Att’y Gen. 325, 325 (1981).

<sup>5</sup> Memorandum from Walter Dellinger, Assistant Att’y Gen., Dep’t of Justice, to Hon. Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199–203 (1994) [hereinafter Dellinger Memorandum], available at <http://www.justice.gov/olc/nonexecut.htm> (considering seven different factors regarding whether the President may decline to enforce a statute); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 518–19 (2012) (discussing the Dellinger Memorandum).

<sup>6</sup> Dellinger Memorandum, *supra* note 5, at 200–01; Devins & Prakash, *supra* note 5, at 518–19.

There has been a continuing debate about whether a President has a duty to enforce or, to the contrary, a duty to decline from defending or enforcing a statute the President believes is unconstitutional.<sup>7</sup> There is a middle position that a President should enforce a statute whose constitutionality the President doubts if there is a possibility that the federal courts will decide that the statute is constitutional, because a justiciable controversy may exist only if the DOJ at least nominally enforces the statute while openly expressing any doubts about its constitutionality.<sup>8</sup> As will be discussed, one reason for arguing that a President should enforce a potentially unconstitutional statute is because the law is unclear whether Congress has the authority to intervene and Article III standing to defend a statute that a President refuses to defend.<sup>9</sup>

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<sup>7</sup> Compare EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 72 (5th rev. ed. 1984) (arguing that the President has a duty to enforce a statute he or she believes is unconstitutional), and Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382–84 (1986) (arguing the same, but acknowledging that “the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted”), with Devins & Prakash, *supra* note 5, at 509–10, 512–13 (arguing that the President should not defend or enforce a statute he or she believes is unconstitutional).

<sup>8</sup> See Parker Rider-Longmaid, Comment, *Take Care That the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 306–07 (2012) (“Nondefense decisions better respect separation-of-powers principles than do nonenforcement decisions. . . . Nondefense thus splits the difference: the President defers to Congress by giving the statute effect through enforcement and by giving Congress an opportunity to defend the law, but he also gives voice, particularly in court, to his own concerns about the act’s constitutionality.”); Walter Dellinger, *The DOMA Decision*, THE NEW REPUBLIC, Mar. 1, 2011, <http://www.tnr.com/article/politics/84353/gay-marriage-obama-gingrich-doma> (defending the Obama Administration’s decision to enforce but not to defend DOMA because “[h]ere, the [P]resident has decided to comply with the law and leave the final decision of its constitutionality to the courts, a course of action that respects the institutional roles of both Congress, which passed the law, and the judicial branch”); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 581 (2012) (“My arguments against interpretive obligation are not arguments against judicial review, and inter-branch interpretive dialogue is enhanced when the President gives the courts an opportunity to weigh in on his (non)enforcement decisions based on his reading of the Constitution.”); Peter M. Shane, *Not Defending DOMA: A Conscientious and Responsible Decision*, HUFFINGTON POST (Feb. 25, 2011, 2:26 PM), [http://www.huffingtonpost.com/peter-m-shane/not-defending-defense-of-marriage\\_b\\_828348.html](http://www.huffingtonpost.com/peter-m-shane/not-defending-defense-of-marriage_b_828348.html) (“[T]he [E]xecutive stance [of enforcing but not defending a law] does not deprive the law of defenders. In the case of DOMA, for example, courts are likely to allow Congress to intervene and offer a defense.”).

<sup>9</sup> Compare Greene, *supra* note 8, at 582–98 (arguing that Congress or either House has standing to defend a statute that the President refuses to defend, but acknowledging counterarguments), with Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 572–73, 625–32 (2014) (arguing that the Take Care Clause gives the Executive exclusive authority to defend federal laws, thus excluding congressional standing to intervene even when the President refuses to enforce a law and also contending that bicameral principles in the Constitution bar one House of Congress from defending a challenged federal statute), and Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014) (manuscript at 3–4, 39–48) (arguing Congress

In *United States v. Windsor*,<sup>10</sup> the United States Supreme Court in 2013 addressed the constitutionality of Section 3 of the Defense of Marriage Act (DOMA).<sup>11</sup> The Obama Administration took the middle position of not defending DOMA yet still enforcing it, despite its view that the statute was unconstitutional, to assist federal courts in reviewing the constitutionality of the statute.<sup>12</sup> It was unclear whether an appeal was proper in the case once a district court held the statute was unconstitutional, and the Executive Branch essentially agreed with that decision.<sup>13</sup> The Obama Administration recognized that the leadership of the House of Representatives could file briefs in support of DOMA, but argued that the Executive Branch alone had exclusive authority to defend federal statutes even if Congress or either House in some circumstances could file amicus briefs on a particular issue.<sup>14</sup>

Applying both prudential standing principles and mandatory Article III standing rules, Justice Kennedy's majority opinion recognized that the Executive was an appropriate party on appeal because it continued to enforce the statute by

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lacks authority under Article I to defend or enforce a statute and therefore lacks Article III standing), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2362961](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362961). See also Meltzer, *supra* note 2, at 1211 (“[I]t is uncertain whether Congress or one of its houses may intervene as a party or simply file a brief as an amicus and whether, if it may intervene, it enjoys all of the rights of a party at the district court level to depose and summon witnesses, gather and introduce documents, and the like.”); *id.* at 1210 n.133 (discussing cases).

<sup>10</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>11</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)). *Windsor* challenged Section 3 of DOMA which amended the federal definition of “marriage” and “spouse” in Title 1, § 7 of the United States Code so that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7 (2012).

<sup>12</sup> *Windsor*, 133 S. Ct. at 2683–89. See Part III below.

<sup>13</sup> *Windsor*, 133 S. Ct. at 2683–89. See Part III below.

<sup>14</sup> See *Windsor*, 133 S. Ct. at 2684–89 (“The [DOJ] did not oppose limited intervention by BLAG. The District Court denied BLAG’s motion to enter the suit as of right, on the rationale that the United States already was represented by the [DOJ]. The District Court, however, did grant intervention by BLAG as an interested party.”); *Windsor v. United States*, 797 F. Supp. 2d 320, 323–25 (S.D.N.Y. 2011) (“[T]he DOJ asks that BLAG’s involvement be limited to making substantive arguments in defense of Section 3 of DOMA while the DOJ continues to file all procedural notices.”); Meltzer, *supra* note 2, at 1210–11 (“The [DOJ] has taken the view that only the [E]xecutive [B]ranch may represent the United States in litigation, or . . . that any intervention by Congress should be limited to presenting arguments in defense of a statute’s constitutionality.”).

refusing to pay a tax refund to the challenger.<sup>15</sup> Additionally, the majority acknowledged that briefs filed by House of Representatives leadership supporting the constitutionality of DOMA supplied the necessary adverseness in the case given the Executive's view that DOMA was unconstitutional.<sup>16</sup> The majority did not fully resolve the thorny issue of congressional standing in cases where a President refuses to enforce a federal statute.<sup>17</sup> Justice Scalia's dissenting opinion emphasized the almost exclusive role of the Executive Branch in defending federal laws pursuant to Article II's Take Care Clause, squarely rejected congressional standing, and argued that no party had standing to appeal in *Windsor* because the Executive agreed with the district court's judgment holding Section 3 unconstitutional.<sup>18</sup> Yet even Justice Scalia's dissenting opinion did not challenge the authority of Congress to represent itself in separation of powers cases involving its institutional authority.<sup>19</sup> By contrast, Justice Alito's dissenting opinion would have expressly recognized the authority and standing of the leaders of either House to defend any federal statute that the President does not defend.<sup>20</sup>

Justice Kennedy's majority opinion partially accepted the Obama Administration's nuanced approach to the role of Congress in defending statutes

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<sup>15</sup> *Windsor*, 133 S. Ct. at 2684–89. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined Justice Kennedy's majority opinion. *Id.* at 2681.

<sup>16</sup> *Id.* at 2684–89.

<sup>17</sup> *Id.*; see Grove & Devins, *supra* note 9, at 622 (observing that *Windsor* did not decide the Congressional standing issue).

<sup>18</sup> *Windsor*, 133 S. Ct. at 2698–2705 (Scalia, J., dissenting). Justice Thomas joined Justice Scalia's dissenting opinion in full. *Id.* at 2681. Chief Justice Roberts joined only the standing portion, Part I, of Scalia's dissenting opinion, but not his discussion of the merits, as the Chief Justice filed a separate dissenting opinion on the merits. *Id.* at 2681 (listing opinions); *id.* at 2696–97 (Roberts, J., dissenting); *id.* at 2697–2711 (Scalia, J., dissenting).

<sup>19</sup> *Id.* at 2700 & n.2 (Scalia, J., dissenting) (“[In *Chadha*] the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers.”); Grove & Devins, *supra* note 9, at 623 (“[N]o Justice in *Windsor* challenged the power of the House or the Senate to sometimes stand in for the [E]xecutive and defend federal statutes.”).

<sup>20</sup> *Windsor*, 133 S. Ct. at 2711–14 (Alito, J., dissenting). *But see* Grove & Devins, *supra* note 9, at 574, 625–32 (arguing that the Take Care Clause gives the Executive exclusive authority to defend federal laws, thus excluding congressional standing to intervene even when the President refuses to enforce a law and also contending that bicameral principles in the Constitution bar one House of Congress from defending a challenged federal statute). Justice Thomas joined only Parts II and III of Justice Alito's dissenting opinion on the merits, but not Part I on standing. *See Windsor*, 133 S. Ct. at 2681 (listing opinions); *id.* at 2711–20 (Alito, J., dissenting).



the Executive Branch believes are unconstitutional, which made fine distinctions between Article III and prudential standing in assessing the respective roles of the Executive Branch and Congress in the DOMA litigation.<sup>21</sup> Unlike Justice Alito's dissenting opinion,<sup>22</sup> Justice Kennedy's majority opinion in *Windsor* did not formally recognize the authority of Congress or either House to stand in lieu of the Executive Branch when it refuses to defend the constitutionality of a statute.<sup>23</sup> Yet, by acknowledging that congressional participation could supply the necessary adverseness to litigate a case when the Executive Branch agrees with the challenger that a statute is unconstitutional, Justice Kennedy's opinion likely will pave the way for increased congressional participation in unusual cases where the Executive Branch believes a statute is unconstitutional, but at least one House of Congress wishes to defend the statute's constitutionality.<sup>24</sup> Because of the strong dissenting argument by Justice Scalia that Article II's Take Care Clause gives the President almost exclusive authority to defend federal statutes, the Court arguably will not fully adopt Justice Alito's full congressional standing theory when it is easier to recognize congressional participation in a "middle" situation where the Executive nominally enforces a statute it refuses to defend.<sup>25</sup>

Part I discusses the basics of Article III and prudential standing. Part II examines whether the Executive Branch has a duty to defend statutes it believes are unconstitutional; whether Congress may intervene if the Executive refuses to defend a statute; and President Obama's middle approach of enforcing but not defending DOMA § 3. Part III discusses the background to the DOMA litigation and lower court decisions in *Windsor*. Part IV explores the reasoning behind the majority opinion in *Windsor*. Part V discusses Justice Scalia's strong defense of Executive prerogative and rejection of congressional standing. Finally, Part VI examines Justice Alito's proposed theory of congressional standing where the leadership of one House wishes to defend a statute that the Executive Branch refuses to defend.

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<sup>21</sup> *Windsor*, 133 S. Ct. at 2684–89.

<sup>22</sup> *Id.* at 2712–14 (Alito, J., dissenting).

<sup>23</sup> *Id.* at 2684–89 (majority opinion).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2698–2705 (Scalia, J., dissenting); see also Grove & Devins, *supra* note 9, at 574, 625–32 (arguing that the Take Care Clause gives the Executive exclusive authority to defend federal laws, thus excluding congressional standing to intervene even when the President refuses to enforce a law).

## I. INTRODUCTION TO CONSTITUTIONAL AND PRUDENTIAL STANDING<sup>26</sup>

### A. Constitutional Article III Standing

Although the Constitution does not explicitly require that plaintiffs possess “standing” to file suit in the federal courts, the United States Supreme Court has inferred from Article III’s limitation of judicial decisions to “Cases” and “Controversies”<sup>27</sup> that federal courts must utilize standing requirements to ensure that plaintiffs have a genuine interest and stake in the case.<sup>28</sup> The federal courts have jurisdiction over a case only if at least one plaintiff can prove standing for each form of relief sought.<sup>29</sup> A federal court must dismiss a case without deciding the merits if the plaintiff fails to meet the constitutional standing test.<sup>30</sup>

Standing requirements are related to broader constitutional principles. The standing doctrine prohibits unconstitutional advisory opinions.<sup>31</sup> Standing

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<sup>26</sup> The discussion of standing in Part I relies upon my earlier standing articles cited above under the asterisk on page 1.

<sup>27</sup> See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

<sup>28</sup> *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 339–41 (2006) (explaining why the Court infers that Article III’s case and controversy requirement necessitates standing limitations); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (stating explicitly the Article III standing requirement in a Supreme Court case for the first time); Bradford C. Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1709–10 (2008). *But see* *Am. Bottom Conservancy v. United States Army Corps of Eng’rs*, 650 F.3d 652, 655–56 (7th Cir. 2011) (questioning whether standing is based on Article III requirements and citing academic literature). See generally Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1036–38 (2009) (discussing the debate over whether the Constitution implicitly requires standing to sue).

<sup>29</sup> *Daimler Chrysler*, 547 U.S. at 351–54; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”); Mank, *supra* note 28, at 1710.

<sup>30</sup> See *Daimler Chrysler*, 547 U.S. at 340–44; *Friends of the Earth*, 528 U.S. at 180 (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”); Mank, *supra* note 28, at 1710.

<sup>31</sup> *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (“Article III of the Constitution restricts the power of federal courts to ‘Cases’ and ‘Controversies.’ Accordingly, [t]o invoke the jurisdiction of a federal

requirements, moreover, support separation of powers principles, which define the division of powers between the judiciary and political branches of government so that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”<sup>32</sup> There is disagreement, however, regarding the extent to which separation of powers principles limit Congress’ authority to authorize standing to sue in federal court for private citizens challenging alleged Executive Branch under-enforcement or nonenforcement of congressional requirements mandated in a federal statute.<sup>33</sup>

With respect to standing, the Court requires a plaintiff to prove: (1) that she has “suffered an injury-in-fact” that is “concrete and particularized” and “actual or imminent,” as opposed to “conjectural or hypothetical”; (2) the existence of “a causal connection between the injury and the conduct complained of,” meaning the injury must be “fairly . . . trace[able] to the challenged action of the defendant,” as opposed to the result of the “independent action of some third party not before the court”; and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>34</sup> The plaintiff bears the burden of establishing all three prongs of the standing test.<sup>35</sup>

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court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.” (citations omitted) (internal quotation marks omitted)).

<sup>32</sup> *Daimler Chrysler*, 547 U.S. at 340–42 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984), *partially abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)); Mank, *supra* note 28, at 1710.

<sup>33</sup> Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (arguing that courts should not use standing doctrine as “a backdoor way to limit Congress’s legislative power”); *infra* Part IV (discussing Justice Kennedy’s views on to what extent Congress may define Article III standing injuries). Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–78 (1992) (concluding that Article III and Article II limit Congress’ authority to authorize citizen suits by any person lacking a concrete injury), *with id.* at 602 (1992) (Blackmun, J., dissenting) (arguing that the “principal effect” of Justice Scalia’s restrictive approach to standing was “to transfer power into the hands of the Executive at the expense—not the Courts—but of Congress, from which that power originates and emanates”).

<sup>34</sup> *Lujan*, 504 U.S. at 560–61 (citations and quotation marks omitted); Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 876 (2012).

<sup>35</sup> *Daimler Chrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Lujan*, 504 U.S. at 561 (stating that parties asserting federal jurisdiction must carry the burden of establishing standing under Article III); LARRY W. YACKLE, *FEDERAL COURTS* 336 (3d ed. 2009); Mank, *supra* note 28, at 1710.

### B. *The Uncertainties of Prudential Standing*

In addition to Article III standing requirements, federal courts may impose prudential standing requirements to limit unreasonable demands on finite judicial resources or for other judicial policy reasons.<sup>36</sup> The Court has explained the prudential standing doctrine as follows:

Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”<sup>37</sup>

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<sup>36</sup> See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997) (describing the “zone of interests” standard as a “prudential limitation” rather than a mandatory constitutional requirement); *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (stating that prudential requirements are based “in policy, rather than purely constitutional, considerations”); YACKLE, *supra* note 35, at 318 (stating that prudential limitations are policy-based “and may be relaxed in some circumstances”).

<sup>37</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 469 U.S. 737, 751 (1984), *partially abrogated by* *Lexmark Int’l v. Static Control Components, Inc.*, 134 S. Ct. 1337 (2014)). Professor Meier summarized the Court’s pre-*Lexmark* prudential standing doctrine as follows:

The Court has been less precise in identifying prudential standing requirements, but the most commonly recognized are: (1) the requirement that a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit,” *Bennett v. Spear*, 520 U.S. 154, 162 (1997); (2) the requirement that a plaintiff “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,” *Warth v. Seldin*, 422 U.S. 490, 499 (1975); and (3) a prohibition against “generalized grievance[s]” shared in a substantially equal measure by all or a large class citizens[.]” *Id.* More recently, however, the Court has tended to articulate the prohibition against generalized grievances as deriving from Article III rather than prudential concerns. See, e.g., *Hein [v. Freedom From Religion Found., Inc.]*, 551 U.S. [587,] 597–98 [(2007)] (“We have consistently held that [the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution] is too generalized and attenuated to support Article III standing.”); *Lujan*, 504 U.S. at 573–74 (“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.”).

The Court's prudential standing doctrine is arguably less defined and more open to interpretation than its constitutional standing doctrine.<sup>38</sup> In *Elk Grove Unified School District v. Newdow*, the Supreme Court acknowledged that "we have not exhaustively defined the prudential dimensions of the standing doctrine."<sup>39</sup> In *Newdow*, the Court dismissed an Establishment Clause suit brought by the father of an elementary school student challenging the constitutionality of a school district's policy requiring teacher-lead recitation of the Pledge of Allegiance because of prudential standing concerns about the appropriateness of federal courts "entertain[ing] a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."<sup>40</sup> In his concurring opinion, Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, complained that the majority invented a novel prudential standing principle based on "ad hoc improvisations" to dismiss a troublesome case rather than developing "general principles" for the doctrine of prudential standing.<sup>41</sup> The *Newdow* decision demonstrates that there is considerable disagreement on the Court about how to apply prudential standing principles.<sup>42</sup>

Additionally, the line between constitutional Article III standing and prudential standing is often unclear.<sup>43</sup> Some commentators argue that the Court's

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Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 *FORDHAM L. REV.* 1241, 1243 n.4 (2011).

<sup>38</sup> See Gregory Bradford, Note, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 *B.C. L. REV.* 1065, 1079 (2011) (describing the prudential standing doctrine as "a malleable framework").

<sup>39</sup> *Newdow*, 542 U.S. at 12.

<sup>40</sup> *Id.* at 17–18. The child's mother, who was the custodial parent, intervened to dismiss the complaint and there were complex issues based in California family law about the father's right to influence his daughter's religious upbringing. *Id.* at 13–17. As a result of these family law issues, a majority concluded that the Court should prudentially avoid a case involving family law matters defined by California domestic relations law. *Id.* at 12–18.

<sup>41</sup> *Id.* at 18–25 (Rehnquist, J., concurring).

<sup>42</sup> See Bradford, *supra* note 38, at 1079–80.

<sup>43</sup> Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 *CONN. L. REV.* 677, 692–93 (1990) (arguing that the Court's distinction between prudential and constitutional standing is often arbitrary); Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 *LEWIS & CLARK L. REV.* 1169, 1173 (2008) (arguing that the Court sometimes shifts the line between prudential and constitutional standing, especially in generalized grievances cases).

distinction between Article III and prudential standing rests only on the Court's arbitrary decision to classify an issue as constitutional or prudential for its convenience without any genuine logical basis.<sup>44</sup> For example, the Court's first major case denying taxpayer standing, *Massachusetts v. Mellon*, held that an individual taxpayer generally cannot sue the government to challenge how tax dollars are appropriated because the taxpayer's generalized interest in government funds "is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating[,] and uncertain."<sup>45</sup> In its subsequent *Flast v. Cohen* decision, the Court acknowledged that the *Mellon* decision could be read to rely on either the Article III or prudential standing doctrine to deny standing, but the *Flast* decision preferred to read *Mellon* as using prudential or policy reasons to deny taxpayer standing.<sup>46</sup> Even today, the Court has not clearly explained whether the general prohibition against taxpayer suits is based on constitutional or prudential considerations,<sup>47</sup> although recent Court decisions have emphasized constitutional barriers to taxpayer standing.<sup>48</sup>

In a law review article written when he was a judge on the United States Court of Appeals for the District of Columbia Circuit, Justice Antonin Scalia questioned the very existence of "the so-called 'prudential limitations of standing' allegedly imposed by the Court itself, subject to elimination by the Court or by

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<sup>44</sup> Chemerinsky, *supra* note 43, at 692 ("But what makes some requirements constitutional and the others prudential? For example, why are injury, causation, and redressability deemed constitutionally mandated, but the rules against third party standing and generalized grievance merely prudential? None are mentioned in the Constitution. All are created by the Court because they are viewed as prudent limits on federal judicial power. Each is of quite recent origin. So what makes some constitutional and the others prudential? The only apparent answer sounds terribly cynical: a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that. Nothing in the content of the doctrines explains their constitutional or prudential status."). *But see* Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (explaining the reasoning for prudential rules against third party standing and generalized grievances).

<sup>45</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 486–89 (1923).

<sup>46</sup> *Flast v. Cohen*, 392 U.S. 83, 92–94 (1968); Solimine, *supra* note 28, at 1042 (suggesting that *Flast* interpreted the *Mellon* decision as a prudential rather than constitutional standing case).

<sup>47</sup> Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn from California's Taxpayer Standing*, 98 CALIF. L. REV. 1595, 1605–07 (2010).

<sup>48</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441–49 (2011) (discussing Article III barriers to taxpayer standing).

Congress.”<sup>49</sup> He commented, “[p]ersonally, I find this bifurcation [between prudential and constitutional standing] unsatisfying—not least because it leaves unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.”<sup>50</sup> Instead, Scalia suggested that federal courts should eliminate the prudential standing doctrine and hear all cases for which there is constitutional standing: “[A]s I would prefer to view the matter, the Court must always hear the case of a litigant who asserts the violation of a legal right.”<sup>51</sup> As a member of the Court, Justice Scalia has not directly called for the abolition of prudential standing,<sup>52</sup> but in cases where the line between constitutional and prudential standing is debatable, he appears to prefer to classify issues as constitutional rather than prudential. In *Hein v. Freedom From Religion Foundation, Incorporated*, Justice Scalia argued, in a concurrence joined by Justice Thomas, that the Court should overrule *Flast* and squarely hold that the bar against taxpayer standing is constitutional and not just prudential.<sup>53</sup> In a 2014 decision, *Lexmark International, Incorporated v. Static Control Components, Incorporated*,<sup>54</sup> Justice Scalia, writing for a unanimous Court, significantly changed the prudential standing doctrine by holding that limitations on “generalized grievances” suits, including presumably taxpayer suits, are based on Article III standing requirements and not the prudential standing principles relied upon in some of the Court’s previous cases.<sup>55</sup>

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<sup>49</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983); see also Bradford C. Mank, *Judge Posner’s “Practical” Theory of Standing: Closer to Justice Breyer’s Approach to Standing Than Justice Scalia’s*, 50 HOUS. L. REV. 71, 106 (2012) (discussing Justice Scalia’s 1983 standing article’s criticism of prudential standing doctrine).

<sup>50</sup> Scalia, *supra* note 49, at 885; see also Mank, *supra* note 49, at 106.

<sup>51</sup> *Id.*

<sup>52</sup> Mank, *supra* note 49, at 106.

<sup>53</sup> *Hein*, 551 U.S. at 618–37, 634 n.5; accord *Winn*, 131 S. Ct. at 1449–50 (Scalia, J., concurring) (reiterating his view in *Hein* that the Court should overrule *Flast* and reject taxpayer standing on constitutional grounds); see also Solimine, *supra* note 28, at 1045.

<sup>54</sup> 134 S. Ct. 1377 (2014).

<sup>55</sup> *Id.* at 1387 & n.3.

C. *Article III Standing Requirements May Not Be Waived, But Prudential Standing May Be Waived*

At the time of *Windsor* and before the 2014 decision in *Lexmark*, the Court distinguished between mandatory Article III standing requirements<sup>56</sup> and discretionary, court-imposed prudential standing requirements.<sup>57</sup> The distinction between Article III standing and prudential standing matters because the Court has treated Article III requirements as fundamental and unwaivable, but has allowed the waiver of its prudential policies. In 1984, the Court declared in *Allen v. Wright* that Article III standing is “perhaps the most important” of the case-or-controversy doctrines, which include “mootness, ripeness, political question, and the like.”<sup>58</sup> The Court in *Allen* suggested that Article III standing is, as a “core component” of standing “derived directly from the Constitution,” more important than prudential standing doctrines, stating:

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked. . . . The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.<sup>59</sup>

In *Alliance for Environmental Renewal, Incorporated v. Pyramid Crossgates Company*, the United States Court of Appeals for the Second Circuit interpreted *Allen* as treating Article III standing as “[m]ore fundamental than judicially

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<sup>56</sup> See Part I.A above.

<sup>57</sup> *Newdow*, 542 U.S. at 12. See Part I.A below.

<sup>58</sup> *Allen*, 468 U.S. at 750 (citation omitted); see also *Alliance for Env’tl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 85 (2d Cir. 2006) (discussing *Allen*’s emphasis that Article III standing is the most important of the case-or-controversy doctrines).

<sup>59</sup> *Allen*, 468 U.S. at 751 (citations omitted); accord *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“[The Article III] requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called ‘prudential’ considerations.”); see also *Alliance*, 436 F.3d at 85 (discussing *Allen*’s suggestion that Article III standing is more important than prudential standing).



imposed, prudential limits on the exercise of federal jurisdiction.”<sup>60</sup> Accordingly, the Court in *Lujan v. Defenders of Wildlife* declared that neither Congress nor federal courts may waive the Article III requirement of a concrete injury:

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches. “The province of the court,” as Chief Justice Marshall said in [*Marbury v. Madison*], . . . “is, solely, to decide on the rights of individuals.” Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies’ observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.” It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and co-equal department,” . . . and to become “virtually continuing monitors of the wisdom and soundness of Executive action.” We have always rejected that vision of our role[.]<sup>61</sup>

On the other hand, because prudential standing is less fundamental than Article III standing, the Court has held that Congress may enact legislation to override prudential limitations, although a statute must “expressly negate[.]” such limitations.<sup>62</sup> The requirement of express statutory language to override the Court’s

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<sup>60</sup> *Alliance*, 436 F.3d at 85.

<sup>61</sup> *Lujan*, 504 U.S. at 576–77 (citations omitted).

<sup>62</sup> *Bennett*, 520 U.S. at 162–66 (1997) (explaining that “unlike their constitutional counterparts, [prudential limits on standing] can be modified or abrogated by Congress,” prudential limitations must be “expressly negated,” and concluding that a citizen suit provision abrogated the zone of interest

prudential standing rules probably does not require the extraordinary specificity demanded by a clear rule of statutory construction.<sup>63</sup> Additionally, the Court has stated that federal courts may waive prudential policies in some circumstances, and Justice Kennedy's majority opinion in *Windsor* strongly relied on the ability of courts to waive the usual prudential policy requiring the presence of adverse parties to find standing despite the Obama Administration's avowed approval of the district court's decision holding Section 3 of DOMA unconstitutional.<sup>64</sup> In *Lexmark*, the Court held that the usual prohibition against generalized grievances derives from Article III standing concerns rather than the prudential concerns cited in earlier cases; held that the zone of interests test is a separate doctrine about who Congress intends to allow to sue pursuant to each federal statute and not a part of prudential standing considerations; and left open whether limitations on third-party suits are based upon prudential or other considerations.<sup>65</sup> While *Lexmark* significantly changed the prudential standing doctrine, it seems unlikely that the Court will repudiate its discussion of prudential considerations in *Windsor* because that case was decided only one year before *Lexmark* and the Court's membership was the same in both cases.

## II. WHY THE OBAMA ADMINISTRATION CONTINUED TO ENFORCE DOMA AFTER IT REFUSED TO DEFEND IT

### A. *The Debate Over Whether the Executive Branch May Refuse to Defend the Constitutionality of Federal Statutes*

Some scholars argue that the President has a duty under Article II's Take Care Clause to enforce a statute the President believes is unconstitutional, but others contend that the President has a duty not to defend such a statute.<sup>66</sup> Some commentators suggest that the Executive Branch has a near mandatory duty to enforce all duly-enacted federal statutes pursuant to the President's obligation

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limitation); Bradford C. Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 *ECOLOGICAL L.Q.* 665, 676 & n.53 (2009).

<sup>63</sup> YACKLE, *supra* note 35, at 386 n.493.

<sup>64</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2687–89 (2013).

<sup>65</sup> *Lexmark Int'l*, 134 S. Ct. at 1386–88 & n.3.

<sup>66</sup> Compare CORWIN, *supra* note 7, at 72 (arguing that the President has a duty to enforce a statute he or she believes is unconstitutional), and Gressman, *supra* note 7, at 382–84 (same but acknowledging “the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted”), with Devins & Prakash, *supra* note 8, at 509–10, 512–13 (arguing that the President should not defend or enforce a statute he or she believes is unconstitutional).

under the Take Care Clause, and that any refusal to do so can be interpreted as a presidential attempt to assert nonexistent authority to repeal by fiat a validly enacted statute.<sup>67</sup> Some commentators imply that the Constitution only allows a President to object to a statute's constitutionality through the veto authority, but requires the President to enforce any enacted law.<sup>68</sup> Other commentators acknowledge that a President may refuse to defend statutes contrary to "clear" Supreme Court precedent, although they may disagree about what constitutes "clear" precedent.<sup>69</sup> Additionally, different considerations arguably apply regarding whether the Executive defends a statute in a trial court where it may be essential to create a record explaining the justification for the law's enactment, and whether the Executive must appeal a district court's determination that a statute is unconstitutional.<sup>70</sup>

A serious objection to the absolutist position that a president must enforce every law without regard to personal views concerning the law's legality or constitutionality is the "departmentalist" theory that each branch of government has independent constitutional interpretive authority to determine which governmental actions are lawful.<sup>71</sup> In particular, the president must exercise discretion in deciding

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<sup>67</sup> CORWIN, *supra* note 7, at 72; Gressman, *supra* note 7, at 382–84 (acknowledging that "the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted"); *see also* Meltzer, *supra* note 2, at 1193 (explaining the absolutist approach to presidential enforcement of statutes).

<sup>68</sup> CORWIN, *supra* note 7, at 72; Gressman, *supra* note 7, at 382–84 (acknowledging that "the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted"); *see also* Meltzer, *supra* note 2, at 1193 (explaining the absolutist approach to presidential enforcement of statutes); Curt Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL'Y 377, 379–83, 406–24 (2014) (arguing Article II's Take Care Clause imposes a strong duty on a President to defend federal statutes except if the statute encroaches on Executive authority or if the statute is "transparently unconstitutional").

<sup>69</sup> Grove & Devins, *supra* note 9, at 580 n.36; Levey & Klukowski, *supra* note 68, at 409–12 (arguing Article II's Take Care Clause imposes a strong duty on a President to defend federal statutes, unless the statute is "transparently unconstitutional").

<sup>70</sup> Gorod, *supra* note 2, at 1212–15.

<sup>71</sup> Devins & Prakash, *supra* note 5, at 509–10, 512–13, 522, 526–32 (arguing that the President has significant interpretive authority as the head of Executive Department); Greene, *supra* note 8, at 579–81 (same); Meltzer, *supra* note 2, at 1187–98 (discussing departmentalism, but observing that the theory has more impact on academics than Executive officials, who generally defend and enforce federal laws despite doubts about their constitutionality). Some proponents of "departmentalism" would argue that the President may ignore even a constitutional interpretation of the Supreme Court; some argue that the Executive need only obey an actual court judgment or order, but others believe that the Executive is

how to perform the constitutional duty to take care that the laws of the United States are faithfully executed.<sup>72</sup> Furthermore, there is long historical practice within the Executive Branch of not defending or enforcing laws it believes are unconstitutional, especially those which infringe upon presidential authority.<sup>73</sup> Additionally, some commentators have argued that the President has a normative duty not to defend or to enforce a statute he or she believes is unconstitutional because the President's constitutional oath forbids the President from executing constitutional laws, because it is better for courts trying to decide constitutional questions to hear the President's real opinion about a law's constitutionality, and because supporters of the law are more likely to provide a good defense.<sup>74</sup>

Some commentators argue that the *defense* of a law is different from the Executive Branch's exclusive role in *enforcing* a law.<sup>75</sup> Brianne Gorod argues that

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bound by the Court's interpretive authority. See Devins & Prakash, *supra* note 5, at 526–32 (arguing that the President's interpretive authority is equal to the other two branches and that the Executive must only obey an actual court judgment); Gorod, *supra* note 2, at 1207, 1236–37 (discussing stronger and weaker approaches to presidential interpretive authority); Greene, *supra* note 8, at 581 (same and arguing that the Executive must only obey an actual court judgment). Even if a President must ultimately follow the constitutional interpretations of the Supreme Court, however, the Executive has some discretion in deciding whether to defend a statute whose constitutionality has not yet been decided by the Court. Gorod, *supra* note 2, at 1207, 1236–37; Greene, *supra* note 8, at 580–81.

<sup>72</sup> Greene, *supra* note 8, at 579–81.

<sup>73</sup> Dellinger Memorandum, *supra* note 5 (citing various cases, Executive opinions, and historical materials supporting the Executive's refusal in at least some cases to enforce federal laws and specifically observing that the President "has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the presidency. Where the [P]resident believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment"); see also Meltzer, *supra* note 2, at 1196–1208 (discussing the historical practice of the Executive Branch to not enforce some statutes, especially those unconstitutionally infringing upon presidential authority); Levey & Klukowski, *supra* note 68, at 407–09 (arguing Article II's Take Care Clause imposes a strong duty on a President to defend federal statutes but that an exception to the duty to defend is justified if a statute encroaches on the President's Executive authority).

<sup>74</sup> Devins & Prakash, *supra* note 5, at 509–10, 512–13, 521–32, 571–74; see also Gorod, *supra* note 2, at 1206 ("[T]he Executive Branch should not defend challenged statutes when it believes that the statute is unconstitutional, or even has questions about the statute's constitutionality."); *id.* at 1260 (same).

<sup>75</sup> Gorod, *supra* note 2, at 1219–21; Shane, *supra* note 8 ("In analyzing this question, it's important to distinguish two very different things: the [E]xecutive duty to carry out the law and the president's duty to defend statutes challenged in court. On the first matter, attorneys general have long set a very high bar before opining that the [E]xecutive [B]ranch can decline to carry out the law. . . . Defending laws in court is a different matter . . . the [E]xecutive is not claiming to have the final say on legal implementation—or even interpretation."); see also Greene, *supra* note 8, at 592 (contending that, if Congress sues for a declaratory judgment on the constitutionality of a law, Congress is not "controlling

“[e]nforcing the law requires the Executive Branch to make determinations about how the law should be implemented and what it should look like in practice,” whereas defending the law “does not focus on the operation of the law and generally will not affect its operation at all.”<sup>76</sup> Some judges and commentators who believe that Article II requires a President to enforce the law acknowledge that the President may refuse to defend that same law.<sup>77</sup> By contrast, Professor Tara Leigh Grove argues that the President lacks Article III standing to invoke federal jurisdiction or to appeal a case upon refusal under Article II’s Take Care Clause to defend a federal statute on behalf of the government or United States, and that the President lacks any independent or separate institutional authority as head of the Executive Branch to intervene in a case upon refusal to defend the interests of the United States.<sup>78</sup>

If the defense of federal laws is not an exclusive Executive function, it is arguably legitimate for Congress or other agents, such as court-appointed private attorneys, to defend a federal law that the President refuses to defend.<sup>79</sup> Furthermore, if a President is unenthusiastic about defending a particular statute, Congress, a House of Congress, or a court-appointed private attorney might provide a better defense of the law.<sup>80</sup> It might be necessary for a court to appoint a

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the execution of law”). *But see* Grove & Devins, *supra* note 9, at 582–83 (“Litigation over the meaning and constitutionality of federal statutes is a crucial part of the execution of federal law.”); *id.* at 624–29 (rejecting the argument that defending a statute is different from enforcing it and arguing that only the Executive may defend federal statutes).

<sup>76</sup> Gorod, *supra* note 2, at 1219–20.

<sup>77</sup> *Ameron, Inc. v. United States Army Corps of Eng’rs*, 787 F.2d 875, 889 (1986) (criticizing the argument that a President may refuse to enforce a statute as “dubious at best,” but acknowledging the Executive’s “undisputed” authority to “even refuse to defend in court, statutes which he regards as unconstitutional”); Gorod, *supra* note 2, at 1219–21; Gressman, *supra* note 7, at 382–84 (arguing that the President has a constitutional duty to enforce all federal laws but acknowledging that “the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted”).

<sup>78</sup> Grove, *supra* note 9 (manuscript at 3–39, 52–58). Professor Grove places some limits on her argument that a president lacks Article III standing to invoke federal jurisdiction if he or she refuses to defend a statute by observing: But I do not claim that the executive has a duty to defend federal laws when another party invokes federal jurisdiction (at trial or on appeal), nor do I attempt to determine whether the executive has a duty to enforce some (or all) federal laws. Those are important Article II questions, but they are not questions of standing. *Id.* (manuscript at 5).

<sup>79</sup> Gorod, *supra* note 2, at 1247–55; Rider-Longmaid, *supra* note 8, at 308, 311; *see also* Devins & Prakash, *supra* note 5, at 572, 574 (arguing that a law’s proponents or beneficiaries should defend the statute rather than an unwilling President).

<sup>80</sup> Gorod, *supra* note 2, at 1239–55; Rider-Longmaid, *supra* note 8, at 308, 311; *see also* Devins & Prakash, *supra* note 5, at 572, 574 (arguing that a law’s proponents or beneficiaries should defend the

private attorney to defend a statute because Congress' willingness to defend a particular statute is often driven by partisan considerations, and Congress or a House of Congress has only occasionally sought to defend federal laws that the DOJ declined to defend.<sup>81</sup> Most of the relatively rare cases in which Congress or a House of Congress files suit involve some type of direct institutional conflict between Congress and the President.<sup>82</sup> The most notable case was *INS v. Chadha*,<sup>83</sup> which was extensively discussed in both the majority and the two main dissenting opinions in *Windsor*.<sup>84</sup> Each year, a handful of individual members of Congress or small groups of members file amicus briefs in the Supreme Court on a wide range of issues, but their briefs appear to carry little weight as far as affecting Court decisions in the absence of the endorsement of Congress as an institution or a House of Congress.<sup>85</sup> Justice Kennedy's opinion in *Windsor* implies that federal courts should give more weight to amicus briefs filed by Congress as an institution or a House of Congress, at least in circumstances where the Executive does not defend a federal statute.<sup>86</sup>

Even accepting the general premise that the Executive Branch should not robotically defend statutes it believes are unconstitutional, there is a question whether Congress or the federal courts would have the opportunity to review or

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statute rather than an unwilling President). *But see* Grove, *supra* note 9 (manuscript at 56) (rejecting the argument that the Executive Branch would do a poor job of defending a statute opposed by a President because "the institutional culture and traditions of the [DOJ]" lead to effective defense of statutes that the President "deems invalid").

<sup>81</sup> Devins & Prakash, *supra* note 5, at 551–55 (“[W]e could only locate three post-1978 episodes where lawmakers took meaningful aim at the DOJ’s failure to enforce or defend federal statutes”); Frost, *supra* note 2, at 947–50 (observing that Congress rarely intervenes in litigation and also arguing that congressional litigation is often more driven by partisan considerations than institutional prerogatives); Grove & Devins, *supra* note 9, at 595 (“From December 1975 to May 2011, the DOJ notified Congress that it would not defend provisions of seventy-five statutes. In only five of these cases did either chamber step in to defend the federal law (sometimes as amicus, sometimes as intervenor).”).

<sup>82</sup> Frost, *supra* note 2, at 946–47 (reviewing small number of empirical studies of amicus briefs by individual members of Congress and finding that they appear to have little impact on Supreme Court decisions).

<sup>83</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>84</sup> *See* Parts IV–VI below.

<sup>85</sup> Frost, *supra* note 2, at 946–47 (reviewing a small number of empirical studies of amicus briefs by individual members of Congress and finding that they appear to have little impact on Supreme Court decisions).

<sup>86</sup> *See* Part IV below.

challenge the Executive Branch's assessment of unconstitutionality.<sup>87</sup> A middle position is that the Executive Branch should not defend an obviously unconstitutional statute, but that it may be appropriate for the Executive Branch to nominally enforce a possibly constitutional statute, even if the President personally believes it is unconstitutional, to preserve adequate judicial review and an opportunity for Congress or either House to weigh in on any litigation.<sup>88</sup> As discussed *infra*, one persuasive reason for encouraging the Executive Branch to enforce a potentially unconstitutional statute is because the law is unclear whether Congress or either House of Congress has the authority or Article III standing to defend a statute that the President refuses to defend.<sup>89</sup> As discussed below in Part II.C, the Obama Administration and Attorney General Eric Holder adopted a middle approach in the *Windsor* litigation by continuing to enforce DOMA Section 3 despite their view that the provision was unconstitutional.<sup>90</sup> Professor Grove, however, argues "that the [E]xecutive's enforcement obligation carries with it a duty to defend" because "the [E]xecutive has standing to file suit and appeal—not on its own behalf but as the representative of the United States."<sup>91</sup>

### B. *The Complicated Issue of Legislative Standing*

Regardless of the debate regarding whether a President ought to refuse to enforce a law that he or she believes is unconstitutional, it is undisputed that the Executive Branch has, on some occasions, refused to enforce or defend a duly enacted statute.<sup>92</sup> In some cases, there may not be a private litigant with standing to

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<sup>87</sup> Greene, *supra* note 8, at 580–82.

<sup>88</sup> *Id.* at 581 ("My arguments against interpretive obligation are not arguments against judicial review, and inter-branch interpretive dialogue is enhanced when the President gives the courts an opportunity to weigh in on his (non)enforcement decisions based on his reading of the Constitution."); Meltzer, *supra* note 2, at 1199–1205 (arguing that it is appropriate for the Executive Branch to decline to defend a statute that is clearly unconstitutional, but acknowledging that more difficult questions are raised in rare cases where the Executive refuses to defend a statute that has plausible arguments for constitutionality).

<sup>89</sup> See Greene, *supra* note 8, at 582–98 (arguing Congress or either House has standing to defend a statute that the president refuses to defend, but acknowledging counterarguments); Meltzer, *supra* note 2, at 1209–13 ("[I]t is uncertain whether Congress or one of its houses may intervene as a party or simply file a brief as an amicus and whether, if it may intervene, it enjoys all of the rights of a party at the district court level to depose and summon witnesses, gather and introduce documents, and the like."); *id.* at 1210–11 n.133 (discussing cases).

<sup>90</sup> See Part II.C below.

<sup>91</sup> Grove, *supra* note 9, at 20–21.

<sup>92</sup> Meltzer, *supra* note 2, at 1196–1208 (discussing the Executive Branch's historical practice of declining to enforce some statutes).

challenge the President's refusal to enforce the statute. For example, if President Obama grants tax benefits to same-sex couples despite contrary language in Section 3 of DOMA, private taxpayer suits challenging allegedly excessive expenditures or tax benefits are generally prohibited as impermissible generalized grievances under Article III standing doctrine, except perhaps in the rare circumstance that the government allegedly favors a particular religious group over other religions.<sup>93</sup> Whether Congress has Article III standing to sue when the Executive refuses to enforce a federal statute on grounds that it is unconstitutional raises complicated questions.<sup>94</sup> For example, it might make a difference whether Congress or a House of Congress is the party filing suit, rather than individual members.<sup>95</sup> Additionally, some important legislative standing cases have involved state or territorial legislators, and it is not always clear how such cases analogize to situations where Congress is involved.<sup>96</sup>

In 1939, the Supreme Court in *Coleman v. Miller* held that twenty Kansas state senators could file a mandamus action against the Secretary of the Kansas Senate to contest whether the state Senate had in fact ratified the Child Labor Amendment to the Federal Constitution.<sup>97</sup> It was undisputed that there had been a twenty-to-twenty tie vote in the Kansas senate regarding passage of the proposed Amendment, and that the Lieutenant Governor (the presiding officer of the Kansas Senate) had broken the tie by voting in favor of the Amendment.<sup>98</sup> The twenty state senators who voted against the Amendment argued that amendments to the Federal

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<sup>93</sup> See *Winn*, 131 S. Ct. at 1441–49 (discussing Article III barriers to taxpayer standing).

<sup>94</sup> See *Greene*, *supra* note 8, at 582–98 (arguing Congress or either House has standing to defend a statute that the president refuses to defend, but acknowledging counterarguments); *Meltzer*, *supra* note 2, at 1209–13 (“[I]t is uncertain whether Congress or one of its houses may intervene as a party or simply file a brief as an amicus and whether, if it may intervene, it enjoys all of the rights of a party at the district court level to depose and summon witnesses, gather and introduce documents, and the like.”); *id.* at 1210–11 n.133 (discussing cases).

<sup>95</sup> *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (“We attach 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. . . . We therefore hold that these individual members of Congress do not have a sufficient ‘personal stake’ in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.”).

<sup>96</sup> See, e.g., *Coleman v. Miller*, 307 U.S. 433, 435–46 (1939) (involving a vote in the Kansas legislature); *Gutierrez v. Pangelinan*, 276 F.3d 539, 542–47 (9th Cir. 2002) (involving a bill passed by the Guam territorial legislature).

<sup>97</sup> *Coleman*, 307 U.S. at 438–46.

<sup>98</sup> *Id.* at 436–38.



Constitution must be enacted by state legislators only and that state executive officials may not vote on proposed amendments.<sup>99</sup> After finding that it had jurisdiction over the case, the Supreme Court of Kansas ruled on the merits that the Amendment was validly enacted because the Lieutenant Governor was authorized to cast the deciding vote on the proposed amendments.<sup>100</sup> After granting certiorari, the United States Supreme Court, in an opinion by Chief Justice Hughes, concluded that the twenty state senators had standing to sue because the case was different from a mere taxpayer suit alleging a generalized grievance about alleged illegal expenditures. The Court noted that the circumstances were more similar to prior decisions that allowed state officials challenging a state statute as illegal under the Federal Constitution.<sup>101</sup> The Chief Justice wrote:

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.<sup>102</sup>

In 1997, the Court in *Raines v. Byrd* held that, by merely holding office, members of Congress do not have Article III standing to challenge a federal statute's constitutionality, even if the statute purports to grant such standing, unless the legislator can prove a personal, concrete injury from the statute's passage like any other litigant.<sup>103</sup> The plaintiffs alleged that the Line Item Veto Act harmed the institution of Congress by unconstitutionally expanding the President's veto authority, but the Court concluded that individual members of Congress could not sue based on possible generalized harm to the legislature when they had not suffered any specific personal injury.<sup>104</sup> Additionally, the Court observed that "[w]

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<sup>99</sup> *Id.* The Kansas House of Representatives subsequently voted to ratify the amendment. *Id.* at 436.

<sup>100</sup> *Id.* at 437.

<sup>101</sup> *Id.* at 438–46.

<sup>102</sup> *Id.* at 446.

<sup>103</sup> *Raines*, 521 U.S. at 821–30.

<sup>104</sup> *Id.* at 821, 830. By contrast, a member of Congress might be able to sue to defend his personal interest in holding his seat in Congress. *Id.* at 820–21 (discussing *Powell v. McCormack*, 395 U.S. 486, 496, 512–14 (1969) (holding that a Member of Congress could sue to challenge his exclusion from the House of Representatives and loss of his salary)).

attach 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.”<sup>105</sup> Accordingly, *Raines* did not address or resolve: (1) whether Congress or a house of Congress has standing as an institution to challenge or defend an allegedly unconstitutional statute; or (2) whether Congress may enact a statute giving itself standing to challenge or defend any allegedly unconstitutional statute (or perhaps at least statutes purportedly affecting the institutional authority of the Legislative Branch).<sup>106</sup>

The Court in *Raines* carefully distinguished its prior decision in *Coleman* and strongly suggested it was still good law.<sup>107</sup> After reviewing the facts and decision in *Coleman*, the Court in *Raines* observed:

It is obvious, then, that our holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.<sup>108</sup>

The Court distinguished *Raines* from *Coleman* on grounds that *Coleman* involved the fundamental issue of whether a purported legislative action established a valid law or not:

[T]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged [in *Raines*]. To uphold standing here would require a drastic extension of

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<sup>105</sup> *Id.* at 829.

<sup>106</sup> *See id.* at 829–30 (rejecting standing for individual members of Congress, but observing that both Houses opposed their suit against the Line Item Veto Act).

<sup>107</sup> *Id.* at 821–29.

<sup>108</sup> *Id.* at 823 (footnote omitted). The Court in *Raines* explained that it was not deciding whether *Coleman* could be distinguished as a case only applicable to state legislatures and not Congress because the Kansas Supreme Court had endorsed jurisdiction in the case or because *Coleman* did not involve the separation of powers issues involved in congressional suits. *Id.* at 824 n.8.

*Coleman*. We are unwilling to take that step. . . .<sup>109</sup> [T]he institutional injury they allege is wholly abstract and widely dispersed (contra, *Coleman*).<sup>110</sup>

The Court noted further that Congress could simply repeal the disputed law or exempt appropriations bills from its reach, but refrained explicitly from deciding whether standing would lie in cases where such repeal or exemption was not possible.<sup>111</sup> Thus, the *Raines* decision generally forecloses suits by individual members of Congress who allege that a statute has diminished the institutional authority of the Legislative Branch, especially where Congress may simply repeal the disputed statute. *Raines*, however, potentially leaves open the possibility of a suit regarding whether a federal statute is effective, based on an analogy to *Coleman*—although *Raines* explicitly declined to address whether members of Congress could file a suit similar to *Coleman*, or would be barred by separation of powers concerns or other factors not applicable in *Coleman*, which involved state legislators.<sup>112</sup> In understanding *Windsor*, the Court's precedent regarding legislative standing raises important questions, such as whether a President's refusal to enforce a federal statute he or she believes is unconstitutional allows legislators (or perhaps Congress or either House) to invoke *Coleman* to challenge that nonenforcement, or whether *Raines* bars at least individual legislators from challenging such nonenforcement.<sup>113</sup>

After *Raines*, lower courts have rejected suits by individual legislators that allege that an Executive official has improperly implemented a law, but do not allege, as in *Coleman*, that the legislative process has been distorted in such a way as to raise questions whether a law was validly enacted.<sup>114</sup> For example, in *Russell*

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<sup>109</sup> *Id.* at 826.

<sup>110</sup> *Id.* at 829.

<sup>111</sup> *Id.* at 829–30.

<sup>112</sup> *Id.* at 824 n.8 (declining to decide whether a suit by federal legislators similar to *Coleman* would be appropriate).

<sup>113</sup> See Greene, *supra* note 8, at 584 (discussing whether *Coleman* or *Raines* apply to legislative suits where a President refuses to enforce a federal statute).

<sup>114</sup> See *Campbell v. Clinton*, 203 F.3d 19, 20–24 (D.C. Cir. 2000) (applying *Raines*' approach of denying legislative standing for individual members of Congress in a case alleging that the President violated the War Powers Act because they had a legislative remedy and therefore did not need to sue in federal court); see also *Chenoweth v. Clinton*, 181 F.3d 112, 113–17 (D.C. Cir. 1999) (applying *Raines*' approach of denying legislative standing for individual members of Congress in a case alleging that the

*v. DeJongh*, a senator in the Virgin Islands territorial legislature sued to set aside certain judicial commissions because the governor had allegedly failed to follow proper procedures.<sup>115</sup> Dismissing the case for lack of standing, the United States Court of Appeals for the Third Circuit explained the difference between cases like *Russell* that fell within *Raines*' denial of legislative standing and *Coleman*'s recognition of standing:

The courts have drawn a distinction . . . between a public official's mere disobedience of a law for which a legislator voted—which is not an injury in fact—and an official's distortion of the process by which a bill becomes law by nullifying a legislator's vote or depriving a legislator of an opportunity to vote—which is an injury in fact.<sup>116</sup>

Additionally, the Third Circuit interpreted the *Coleman* exception for legislative standing as applying only in cases where legislators had no effective political remedy, such as a President's decision to terminate a treaty, or at least where a supermajority was needed to overturn an Executive decision.<sup>117</sup> By contrast, similar to *Raines*, the Virgin Islands legislature “was free to confirm, reject, or defer voting on the Governor's nominees,” and, therefore, there was no compelling reason to allow a legislative member to sue in court when the political process provided an effective remedy.<sup>118</sup>

In “pocket veto” cases addressing whether a President's (or territorial governor's) inaction causes a bill to become law, lower courts have followed *Coleman* to find legislative standing, notwithstanding that the Court has not resolved doubts raised by *Raines*.<sup>119</sup> Article I, Section 7 of the Federal Constitution

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President's Executive Order for protection of rivers exceeded his authority and diminished congressional authority); *see also* Greene, *supra* note 8, at 584–85 (discussing cases).

<sup>115</sup> *Russell v. DeJongh*, 491 F.3d 130, 131–33 (3d Cir. 2007).

<sup>116</sup> *Id.* at 135 (internal quotation marks omitted).

<sup>117</sup> *Id.* at 135–36, 136 n.4.

<sup>118</sup> *Id.* at 136.

<sup>119</sup> *See* *Gutierrez v. Pangelinan*, 276 F.3d 539, 542–47 (9th Cir. 2002) (applying *Coleman* to hold that the Guam Governor had standing to challenge the Guam Supreme Court decision that his failure to sign a bill resulted in a “pocket veto” preventing the bill from becoming a law); *see also* *Chenoweth*, 181 F.3d at 116–17 (concluding that prior D.C. Circuit cases finding legislative standing in “pocket veto” cases are probably still good law because they are controlled by the *Coleman* decision); *see also* Greene,

implicitly grants the President authority to “pocket veto” legislation in certain circumstances when Congress is adjourned:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

In *Kennedy v. Sampson*, a pre-*Raines* decision, Congress passed a bill that President Nixon neither signed nor formally vetoed. In an attempt to “pocket veto” the bill, Nixon did, however, issue a memorandum of disapproval announcing his decision to refrain from signing the bill.<sup>120</sup> Congress had adjourned within eight days of the bill’s passage, but the Senate appointed an agent to take messages from the President to avoid a pocket veto.<sup>121</sup> Senator Kennedy filed suit seeking a declaration with respect to whether the bill had become law.<sup>122</sup> Invoking *Coleman*, the United States Court of Appeals for the District of Columbia Circuit held that Kennedy had standing:

In the present case, appellee has alleged that conduct by officials of the executive branch amounted to an illegal nullification not only of Congress’ exercise of its power, but also of appellee’s exercise of his power. In the language of the *Coleman* opinion, appellee’s object in this lawsuit is to vindicate the effectiveness of his vote. No more essential interest could be asserted by a legislator. We are satisfied, therefore, that the purposes of the standing doctrine are fully served in this litigation.<sup>123</sup>

In 1999, the D.C. Circuit in *Chenoweth v. Clinton* considered whether *Kennedy* was still good law in light of *Raines* and other cases narrowing the scope

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*supra* note 8, at 586–88 (arguing that “pocket veto” cases fall within *Coleman*’s legislative standing rule).

<sup>120</sup> *Kennedy v. Sampson*, 511 F.2d 430, 432 (D.C. Cir. 1974); *accord* *Barnes v. Kline*, 759 F.2d 21, 26 (D.C. Cir. 1985) (holding that individual members of Congress and congressional leaders had standing in a “pocket veto” case).

<sup>121</sup> *Kennedy*, 511 F.2d at 432.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 436.

of Article III standing.<sup>124</sup> The court concluded that *Kennedy* “may survive as a peculiar application of the narrow rule announced in *Coleman*[.]”<sup>125</sup> The *Chenoweth* decision explained:

Although *Coleman* could be interpreted more broadly, the *Raines* Court read the case to stand only for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified. . . . Even under this narrow interpretation, one could argue that the plaintiff in *Kennedy* had standing. The pocket veto challenged in that case had made ineffective a bill that both houses of the Congress had approved. Because it was the President’s veto—not a lack of legislative support—that prevented the bill from becoming law (either directly or by the Congress voting to override the President’s veto), those in the majority could plausibly describe the President’s action as a complete nullification of their votes.<sup>126</sup>

In cases where a President refuses to enforce a statute based on a personal belief that the statute is unconstitutional, the issue remains whether courts should follow *Raines* to deny legislative standing (at least in suits by individual legislators), or *Coleman* to allow suits by either individual members of Congress, Congress as an institution, or either House. One argument is that *Coleman* applies to allow some types of legislative suits because the President’s refusal to enforce an allegedly unconstitutional law raises the same concern in *Coleman* as to the validity of the law.<sup>127</sup> On the other hand, *Raines* interpreted *Coleman* as applying to a law that “does not go into effect” because of procedural concerns about how it was enacted.<sup>128</sup> That is arguably different from a President deciding that a law that has been in effect is now unconstitutional and no longer enforceable, perhaps in light of evolving constitutional doctrine that would have recognized the statute as constitutional at the time of its initial enactment.<sup>129</sup> Because of complexities

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<sup>124</sup> *Chenoweth*, 181 F.3d at 114–17.

<sup>125</sup> *Id.* at 116.

<sup>126</sup> *Id.* at 116–17 (internal quotations omitted).

<sup>127</sup> Greene, *supra* note 8, at 588–89.

<sup>128</sup> *Raines*, 521 U.S. at 823; Greene, *supra* note 8, at 588–89.

<sup>129</sup> Greene, *supra* note 8, at 588–89.

regarding whether anyone, including Congress or either House, may challenge a President's decision not to enforce an allegedly unconstitutional statute, the Obama Administration in the *Windsor* case adopted the middle position of enforcing Section 3 of DOMA, while at the same time announcing to Congress and the federal courts that it viewed that provision to be unconstitutional.<sup>130</sup>

*C. Attorney General Holder's 2011 DOMA Letter to Speaker Boehner*

In February 2011, United States Attorney General Eric Holder sent a letter to John Boehner, Speaker of the United States House of Representatives, informing him that President Obama “made the determination that Section 3 of [DOMA], as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.”<sup>131</sup> While the DOJ previously defended DOMA against legal challenges involving legally married same-sex couples in jurisdictions where circuit courts already held that classifications based on sexual orientation are subject to rational basis review, the Holder letter explained that it would not defend two pending district court cases in New York (*Windsor*) or Connecticut, because those two cases were “in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny.”<sup>132</sup>

Because there was no binding precedent in the Second Circuit with respect to the standard of scrutiny in sexual-orientation cases, President Obama and Attorney General Holder determined that they would argue that heightened scrutiny was appropriate and that Section 3 of DOMA was unconstitutional in light of that heightened scrutiny, on grounds that DOMA's legislative history indicated that same-sex marriages were denied federal benefits available to heterosexual marriages solely because of “moral disapproval of gays and lesbians and their intimate and family relationships.”<sup>133</sup> Holder argued that legislation based on mere moral disapprobation of a group protected by heightened scrutiny could not survive

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<sup>130</sup> See Part II.C below.

<sup>131</sup> Letter from Eric H. Holder, Jr., Att'y Gen., United States Dep't of Justice, to John A. Boehner, Speaker, United States House of Representatives (Feb. 23, 2011) [hereinafter Holder Letter], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>132</sup> *Id.* (citing *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.)).

<sup>133</sup> *Id.*

judicial review, and, therefore, the DOJ would refuse to defend the statute.<sup>134</sup> Holder further explained that, in the two pending district court cases, the DOJ would take the position that Section 3 of DOMA was indefensible if reviewed under heightened scrutiny, but that a reasonable argument for constitutionality could be made if the statute was only subject to rational basis scrutiny.<sup>135</sup>

Although President Obama “instructed the [DOJ] not to defend the statute” in the two pending district court cases, and Attorney General Holder agreed with that decision, Holder nevertheless explained that the federal government would enforce DOMA until Congress changed the statute or, more likely, federal courts determined that it was unconstitutional, stating:

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.<sup>136</sup>

Attorney General Holder then explained the unusual circumstances in which the DOJ declines to defend a duly-enacted federal statute, noting that:

[T]he [DOJ] has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the [DOJ] in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the [DOJ] does not consider every plausible argument to be a reasonable one. . . . [D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity, and thus there are a variety of factors that bear on whether the [DOJ] will defend the constitutionality of a statute. This is the rare case where the proper course is to forgo the defense of this statute.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

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



Moreover, the [DOJ] has declined to defend a statute in cases in which it is manifest that the President has concluded that the statute is unconstitutional, as is the case here.<sup>137</sup>

Holder's approach of "declin[ing] to defend statutes despite the availability of professionally responsible arguments, in part because the [DOJ] does not consider every plausible argument to be a reasonable one" was contrary to the view of at least some prior Attorneys General who had suggested that the Executive Branch had a duty to defend a federal statute unless it was clearly unconstitutional in light of relevant precedent or infringed on presidential authority,<sup>138</sup> although the position of presidential administrations on this issue has varied significantly throughout American history.<sup>139</sup>

Because he was aware that the House of Representatives might disagree with his opinion that Section 3 of DOMA was unconstitutional, Holder's letter concluded that DOJ attorneys would "notify the courts of [the DOJ's] interest in providing Congress a full and fair opportunity to participate in the litigation in those cases."<sup>140</sup> He also notified the House Speaker that a motion to dismiss in the two cases would be due on March 11, 2011,<sup>141</sup> giving the House notice if it sought to intervene in the case. Nevertheless, Holder also explained that the DOJ "will remain parties to the case and continue to represent the interests of the United States throughout the litigation;"<sup>142</sup> he probably took that position because the DOJ

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<sup>137</sup> *Id.* (internal quotations and citations omitted).

<sup>138</sup> *Id.* Att'y General's Duty to Defend the Constitutionality of Statutes, *supra* note 4, at 2–6 ("The [DOJ] appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid."); Devins & Prakash, *supra* note 5, at 519–20 ("Prior [E]xecutives, when they embraced the duty to defend, had emphasized that a defense was necessary whenever a court might uphold a law as constitutional. . . . Holder's distinction between plausible and reasonable arguments seems inconsistent with past practice."); *id.* at 569–70 (same).

<sup>139</sup> Devins & Prakash, *supra* note 5, at 514–20 (discussing the history of American Presidents and Attorneys General on the question of whether the Executive Branch has a duty to defend or enforce even constitutionally questionable federal statutes).

<sup>140</sup> Holder Letter, *supra* note 131.

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

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

routinely argues that it should centrally control all litigation by the United States.<sup>143</sup> It is uncertain whether Congress may formally intervene as a defendant representing the United States in litigation challenging the constitutionality of a statute that the Executive Branch refuses to defend, or whether it may only file amicus briefs without party rights.<sup>144</sup>

In his letter to House Speaker Boehner, Holder took the middle position of continuing to enforce a statute that the Executive Branch regarded as unconstitutional.<sup>145</sup> Holder did so in recognition that Congress was entitled to weigh in on the President's decision and that "the judiciary [is] the final arbiter of the constitutional claims raised."<sup>146</sup> As discussed below in Section IV, Holder's middle position enabled Justice Kennedy to find standing despite the counterargument that standing on appeal was inappropriate once the Executive Branch agreed with the district court's decision striking down DOMA Section 3 as unconstitutional.<sup>147</sup>

Predictably, commentators divided in their reaction to Holder's policy of declining to defend DOMA. Some commentators praised Holder's approach of

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<sup>143</sup> Devins & Prakash, *supra* note 5, at 538–41 (explaining the bureaucratic imperatives leading the DOJ to argue it should control all United States government litigation); Frost, *supra* note 2, at 938–39 (praising centralized control of United States litigation by the Attorney General and the DOJ).

<sup>144</sup> Meltzer, *supra* note 2, at 1209–13 ("[I]t is uncertain whether Congress or one of its houses may intervene as a party or simply file a brief as an amicus and whether, if it may intervene, it enjoys all of the rights of a party at the district court level to depose and summon witnesses, gather and introduce documents, and the like. The [DOJ] has taken the view that only the [E]xecutive [B]ranch may represent the United States in litigation, or . . . that any intervention by Congress should be limited to presenting arguments in defense of a statute's constitutionality."); *see generally* Matthew I. Hall, *Standing of Intervenor Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1566 (2012) ("[A]micus have no appeal rights, while intervenor-defendants may . . . be entitled to appeal even when their aligned parties elect not to.").

<sup>145</sup> Holder Letter, *supra* note 131.

<sup>146</sup> *Id.*

<sup>147</sup> *Windsor*, 133 S. Ct. at 2684–89; *see* Part IV below.

enforcing the law but refusing to defend it.<sup>148</sup> Other commentators argued that the Obama Administration should have defended DOMA Section 3.<sup>149</sup>

### III. *WINDSOR* IN THE LOWER COURTS

#### A. *A Brief History of Section 3 of DOMA*

In 1996, Congress enacted DOMA to address the then-novel issue of same-sex marriage.<sup>150</sup> At that time, no state recognized same-sex marriage.<sup>151</sup> The Hawaii Supreme Court in 1993, however, raised national awareness of the issue with a plurality opinion holding that the equal protection provisions of the Hawaii State Constitution required strict scrutiny review and presumptive unconstitutionality for a Hawaii statute limiting marriage to heterosexual couples; the court remanded the issue for further proceedings.<sup>152</sup> DOMA contains two operative sections. Section 2,

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<sup>148</sup> See, e.g., Dellinger, *supra* note 8 (defending the Obama Administration's decision to enforce but not to defend DOMA, noting "I don't believe that any administration is obliged to urge a court to accept propositions that the [P]resident believes are fundamentally wrong, as surely these propositions are"); Shane, *supra* note 8 (defending Holder's Letter as a "careful, highly deliberate step . . . consistent with the . . . [E]xecutive's obligations towards the Constitution and the rule of law").

<sup>149</sup> See, e.g., Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, THE VOLOKH CONSPIRACY (Feb. 23, 2011, 3:49 PM), <http://www.volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma> (criticizing the Obama Administration's decision not to defend DOMA because "the new approach invests within DOJ a power to conduct an independent constitutional review of the issues, to decide the main issues in the case—in this case, the degree of scrutiny for gay rights issues—and then, upon deciding the main issue, to decide if there is a reasonable basis for arguing the other side. If you take that view, the Executive Branch essentially has the power to decide what legislation it will defend based on whatever views of the Constitution are popular or associated with that Administration. It changes the role of the Executive [B]ranch in defending litigation from the traditional dutiful servant of Congress to major institutional player with a great deal of discretion"); Adam Winkler, *Why Obama Is Wrong on DOMA*, HUFFINGTON POST (Feb. 24, 2011, 12:01 PM), [http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom\\_b\\_827676.html](http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html) ("But now Obama has declared that if the [P]resident doesn't agree with a law—even if the courts say it's constitutional—he can choose not to defend it. This sets a terrible precedent that could well come back to haunt those who are cheering the [P]resident's decision.").

<sup>150</sup> *Windsor*, 133 S. Ct. at 2682 (discussing DOMA).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*; *Baehr v. Lewin*, 852 P.2d 44, 63–68 (1993) (plurality opinion) (holding that a Hawaii statute restricting marriage to heterosexual marriage establishes sex-based classification which is subject to the "strict scrutiny" test and presumptive unconstitutionality in an equal protection challenge pursuant to the Hawaii Constitution and remanding for further proceedings).

which was not challenged in *Windsor*, allows states to refuse to recognize same-sex marriages performed under the laws of other states.<sup>153</sup>

In *Windsor*, the lower courts and eventually the United States Supreme Court addressed Section 3 of DOMA, which amended the Dictionary Act in Title 1, § 7 of the United States Code to provide a federal definition of “marriage” and “spouse.”<sup>154</sup> Section 3 of DOMA provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>155</sup>

Section 3 of DOMA did not “forbid [s]tates from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status.”<sup>156</sup> Section 3, however, provided “a comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms” that forbid federal agencies from providing same-sex married couples with the benefits and rights provided to heterosexual married couples in over one thousand federal laws in which marital or spousal status is addressed.<sup>157</sup>

### *B. The Windsor Litigation in the Lower Courts*

In 1963, Edith Windsor and Thea Spyer began a long-term same-sex relationship.<sup>158</sup> In 1993, the couple registered as domestic partners when New York City established that new right for same-sex couples.<sup>159</sup> The couple continued to

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<sup>153</sup> See *Windsor*, 133 S. Ct. at 2682–83 (discussing DOMA Section 2, 28 U.S.C. § 1738C (2012)).

<sup>154</sup> *Id.* at 2683.

<sup>155</sup> *Id.* (quoting 1 U.S.C. § 7 (2012)).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (citing DAYNA K. SHAH, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004)).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

reside in New York City but traveled to Canada to marry in 2007.<sup>160</sup> The State of New York recognized the couple's marriage as valid.<sup>161</sup>

In 2009, Spyer died and left her entire estate to Windsor.<sup>162</sup> Because DOMA denied federal recognition and benefits to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse."<sup>163</sup> Windsor paid \$363,053 in estate taxes but filed a refund request seeking full reimbursement.<sup>164</sup> The Internal Revenue Service denied her refund request because Windsor was not a "surviving spouse" under DOMA's definition of marriage.<sup>165</sup> Windsor then filed a refund suit in the United States District Court for the Southern District of New York.<sup>166</sup> Windsor argued that DOMA violated her constitutional right to equal protection, as applied to the federal government in the Fifth Amendment.<sup>167</sup>

Attorney General Holder notified the district court and House Speaker Boehner that the DOJ would not defend the constitutionality of DOMA Section 3 (while continuing to enforce it) until the federal courts decided its constitutionality.<sup>168</sup> The Bipartisan Legal Advisory Group ("BLAG") of the House of Representatives, which comprises the five majority and minority leaders of the House, voted to intervene in Windsor's case and defend Section 3 of DOMA.<sup>169</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (quoting 26 U.S.C. § 2056(a) (2012)).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

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

<sup>168</sup> *See id.* at 2683–84; *see also supra* Part II.C.

<sup>169</sup> *Windsor*, 133 S. Ct. at 2684. Pursuant to the internal rules of the House of Representatives, there is established "an Office of General Counsel for the purpose of providing legal assistance and representation to the House. . . . The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships." R. II, cl. 8 of the RULES OF THE HOUSE OF REPRESENTATIVES § 670 (The Office of General Counsel in the House of Representatives), *available at* <http://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112.pdf>; *see* Grove & Devins, *supra* note 9, at 608–10, 614–22 (discussing the history of the House of Representatives general counsel and arguing that the counsel

The DOJ did not oppose limited intervention by BLAG.<sup>170</sup> The district court denied BLAG's motion to intervene as of right, reasoning that the DOJ already represented the United States.<sup>171</sup> The district court did, however, allow BLAG to intervene as an interested party.<sup>172</sup>

In addressing the merits of Windsor's tax refund suit, the district court ruled against the United States, finding DOMA Section 3 unconstitutional and ordering the Department of the Treasury to refund the tax with interest.<sup>173</sup> Both the DOJ and BLAG filed notices of appeal.<sup>174</sup>

The Court of Appeals for the Second Circuit affirmed the district court's judgment.<sup>175</sup> The Second Circuit applied heightened scrutiny to classifications based on sexual orientation, agreeing with the DOJ and Windsor.<sup>176</sup> The United

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operates in a partisan manner following the views of the House majority leadership); *see also* Frost, *supra* note 2, at 943–45 (same). At the time of the *Windsor* litigation, the three Republican leaders in BLAG—John A. Boehner; Eric Cantor, Majority Leader; and Kevin McCarthy, Majority Whip—supported the House's intervention to defend the constitutionality of Section 3 of DOMA, but the two Democratic leaders—Nancy Pelosi, Minority Leader; and Steny H. Hoyer, Democratic Whip—declined to support the position taken by BLAG on the merits of DOMA Section 3's constitutionality in *Windsor* and other cases. *See generally* Brief on the Merits of the Bipartisan Legal Advisory Group of the House of Representatives, *U.S. v. Windsor*, U.S. Supreme Court, No. 12–307 (explaining the status of the Bipartisan Legal Advisory Group in the parties to the proceeding section of brief) (Jan. 22, 2013), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-307\\_respondents\\_BLAG.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-307_respondents_BLAG.authcheckdam.pdf); Press Release, Representative John Boehner, Speaker of the United States House of Representatives, *House Will Ensure DOMA Constitutionality Is Determined by the Court* (Mar. 9, 2011), available at <http://boehner.house.gov/news/documentsingle.aspx?DocumentID=228585>; Press Release, Representative Nancy Pelosi, *Pelosi Letter to Speaker Boehner on House Counsel Defense of DOMA* (Mar. 11, 2011), available at <http://pelosi.house.gov/news/press-releases/pelosi-letter-to-speaker-boehner-on-house-counsel-defense-of-doma>; *see also* Meltzer, *supra* note 2, at 1212.

<sup>170</sup> *Windsor*, 133 S. Ct. at 2684.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (citing FED. R. CIV. P. 24(a)(2)).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* In an unrelated case, the United States Court of Appeals for the First Circuit also held Section 3 of DOMA unconstitutional. *Massachusetts v. United States Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, Bipartisan Legal Advisory Grp. of United States House of Representatives v. Gill, 133 S. Ct. 2884 (2013).

States did not comply with the district court's judgment.<sup>177</sup> The government did not pay a refund to Windsor, and the Executive Branch continued to enforce Section 3 of DOMA.<sup>178</sup> As discussed in Part II above and Part IV below, the Obama Administration likely continued to enforce Section 3 of DOMA despite its view that the provision was unconstitutional to maintain sufficient adverseness between the parties for Article III standing, such that the Supreme Court could review *Windsor* and decide the constitutional question presented therein. There might have been no standing for Supreme Court review had the United States simply paid Windsor the refund.<sup>179</sup>

In granting certiorari on the question of DOMA Section 3's constitutionality, the Supreme Court requested argument on two additional questions: (1) whether the United States' agreement with Windsor's legal position precluded further review; and (2) whether BLAG had standing to appeal the case.<sup>180</sup> Because all parties agreed that the Court had jurisdiction to decide *Windsor*, the Court appointed Professor Vicki Jackson as amicus curiae to argue the contrary position that the Court lacked jurisdiction to hear the dispute.<sup>181</sup>

#### IV. JUSTICE KENNEDY'S MAJORITY OPINION: MAKING ADVERSENESS A PRUDENTIAL STANDING QUESTION AND USING BLAG'S INTERVENTION AS AN ADDITIONAL JUSTIFICATION FOR ADVERSENESS

In deciding whether the Court had jurisdiction to hear *Windsor*, Justice Kennedy framed the initial question as "whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here."<sup>182</sup> He first explained that it was undisputed that Windsor had standing to sue in district court to attempt to recover the estate taxes on Spyer's estate because being forced to pay an allegedly unconstitutional

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<sup>177</sup> *Windsor*, 133 S. Ct. at 2684.

<sup>178</sup> *Id.*

<sup>179</sup> *See id.* at 2686 ("It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling."); *see also supra* Parts II.B–C; *see also infra* Part IV.

<sup>180</sup> *Windsor*, 133 S. Ct. at 2684.

<sup>181</sup> *Id.* (citing *Windsor*, 133 S. Ct. at 787 (appointing Professor Vicki Jackson to submit a brief opposing jurisdiction)).

<sup>182</sup> *Id.*

tax “causes a real and immediate economic injury to the individual taxpayer.”<sup>183</sup> That the Government agreed with Windsor that DOMA Section 3 was unconstitutional did not deprive the district court of jurisdiction “to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed.”<sup>184</sup>

Controversy existed, however, about “the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.”<sup>185</sup> Professor Jackson, in her role as the Court’s designated amicus against jurisdiction, argued for dismissal on grounds that neither party had standing to appeal because the Executive Branch and Windsor agreed with the District Court’s decision, and, therefore, the Court of Appeals should have dismissed:<sup>186</sup>

The *amicus* submits that once the President agreed with Windsor’s legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.<sup>187</sup>

Justice Kennedy disagreed with Professor Jackson’s position, stating that her argument “elide[d] the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise.”<sup>188</sup> As fully discussed in Part I, the majority opinion explained the distinction between the “more flexible” prudential principles of judicial self-governance and appellate procedure, and the quite different mandatory three-part Article III standing test.<sup>189</sup> Justice Kennedy’s general explanation of the distinction is uncontroversial, but his application of prudential standing principles and Article III standing rules to the

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<sup>183</sup> *Id.* at 2684–85 (quoting *Hein*, 551 U.S. at 599).

<sup>184</sup> *Id.* at 2685.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 2685–86; *see* Part I above.



facts of *Windsor* is controversial, as is further discussed in Part IV (discussing the majority opinion) and Part V (addressing Justice Scalia's dissent).<sup>190</sup>

The majority opinion first concluded that "the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court."<sup>191</sup> Justice Kennedy explained that the United States' refusal to pay the refund ordered by the district court established a real economic injury and controversy "sufficient" for Article III jurisdiction, despite the Executive's view that *Windsor* ought to prevail.<sup>192</sup> Justice Kennedy acknowledged, that "[i]t would be a different case if the Executive had taken the further step of paying *Windsor* the refund to which she was entitled under the District Court's ruling."<sup>193</sup> Thus, President Obama's middle position of arguing that DOMA Section 3 was unconstitutional, but continuing to enforce it until the Supreme Court ruled on its constitutionality, was crucial in providing the economic injury and controversy necessary for Article III standing before the Court.<sup>194</sup>

As even Justice Scalia's dissenting opinion acknowledged,<sup>195</sup> the strongest case supporting Justice Kennedy's majority opinion is the Court's 1983 decision in *INS v. Chadha*.<sup>196</sup> One interesting connection between *Windsor* and *Chadha* is that then-Judge Kennedy wrote the Ninth Circuit's opinion in *Chadha*,<sup>197</sup> and the Supreme Court's Article III standing analysis in *Chadha* relied in part on his approach.<sup>198</sup> *Chadha* is best known for its merits holding that separation of powers principles in the Constitution forbid Congress from delegating a power to the Executive Branch, such as giving Immigration and Nationality Service ("INS")

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<sup>190</sup> See *Windsor*, 133 S. Ct. at 2686–89. But see Part V below (explaining Justice Scalia's dissenting opinion's criticism of the majority opinion).

<sup>191</sup> *Windsor*, 133 S. Ct. at 2686.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> See *supra* Part II.C.

<sup>195</sup> *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting) (citation omitted) ("The closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*.").

<sup>196</sup> *Chadha*, 462 U.S. 919.

<sup>197</sup> *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408, 411 (9th Cir. 1980).

<sup>198</sup> *Chadha*, 462 U.S. at 939–40 ("We agree with the Court of Appeals that 'Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.'").

judges the authority to decline to deport aliens whose visas expired, but then allowing one or both houses of Congress to exercise a legislative veto to override that Executive decision without going through the normal bicameral presentment process and veto procedure in the Constitution for enacting legislation.<sup>199</sup> But *Chadha* first had to address the question of Article III and prudential standing in a case where the Executive Branch did not defend the constitutionality of the statute because it diminished its authority but continued proceedings to deport Chadha despite its views on constitutionality, and where both houses of Congress sought to intervene as parties before the Supreme Court.<sup>200</sup>

With important parallels to the *Windsor* case, where the Government argued that the statute was unconstitutional but still followed it by refusing to reimburse estate taxes to *Windsor*, the *Chadha* court held that “the INS was sufficiently aggrieved by the Court of Appeals’ decision prohibiting it from taking action it would otherwise take” to be a party for appellate jurisdiction because it sought to follow the applicable statute and legislative veto ordering the deportation of Chadha even though the Executive Branch argued that the legislative veto requiring it to deport him was unconstitutional.<sup>201</sup> While holding that Congress had standing and was a proper party when it intervened before the Supreme Court, the Court in *Chadha* also held that the INS had Article III standing both at the time of the Ninth Circuit’s decision before Congress intervened and even before the Supreme Court after Congress intervened, despite the Executive Branch’s view that the statute was unconstitutional.<sup>202</sup> The majority in *Chadha* quoted with approval then-Judge Kennedy’s Ninth Circuit opinion:

[T]he INS’s agreement with Chadha’s position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals’ judgment. We agree with the Court of Appeals that “Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.”<sup>203</sup>

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<sup>199</sup> See *id.* at 944–59.

<sup>200</sup> See *id.* at 929–40.

<sup>201</sup> See *id.* at 930.

<sup>202</sup> *Id.* at 939–40.

<sup>203</sup> *Id.* (citation omitted).

Justice Kennedy's majority opinion in *Windsor* correctly relied upon *Chadha* for the principle that "even where 'the Government largely agree[s] with the opposing party on the merits of the controversy,' there is sufficient adverseness and an 'adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.'"<sup>204</sup> Justice Kennedy's majority opinion in *Windsor* argued convincingly that the Obama Administration's refusal to refund Windsor's taxes created sufficient adverseness based upon *Chadha*'s reasoning.<sup>205</sup>

Justice Scalia's dissenting opinion argued that the portion of *Chadha* addressing the standing of the INS either only stated that the agency had standing before the Court of Appeals or was dictum if it suggested that the INS had standing before the Supreme Court.<sup>206</sup> He reasoned that the INS did not have standing before the Supreme Court because it agreed with Ninth Circuit's decision holding the statute unconstitutional; in Justice Scalia's interpretation, Congress was the only party with standing before the Supreme Court in *Chadha* because it alone was genuinely adverse to the Court of Appeals' decision.<sup>207</sup> Justice Kennedy's majority opinion, however, reasoned that the Supreme Court in *Chadha* had appropriately stated that the INS had standing before both the Court of Appeals and Supreme Court because the government would have followed either court's decision to deport Chadha, despite the Executive's view that a deportation order was unconstitutional, and, accordingly, the Executive Branch was sufficiently adverse to Chadha to have standing before the Supreme Court.<sup>208</sup> Analogously, the majority concluded that the Executive Branch was sufficiently adverse to Windsor to have standing, as it refused to pay her the tax refund ordered by the district court.<sup>209</sup>

While acknowledging that a prevailing party "generally" is not aggrieved and may not appeal, Justice Kennedy cited precedent that this was a flexible prudential principle and not a mandatory Article III rule in all cases.<sup>210</sup> While concluding that

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<sup>204</sup> *Windsor*, 133 S. Ct. at 2686–87 (quoting *Chadha*, 462 U.S. at 940 n.12).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 2700–01 (Scalia, J., dissenting).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 2686 (majority opinion). See Part V below (comparing the majority opinion's reasoning and Justice Scalia's dissenting opinion on whether the INS had standing in the Supreme Court in *Chadha*).

<sup>209</sup> *Windsor*, 133 S. Ct. at 2686.

<sup>210</sup> *Id.* at 2687 (quoting *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980)).

the Obama Administration's middle approach of enforcing, but not defending, DOMA Section 3 met Article III standing requirements (because Ms. Windsor suffered an injury when the Government refused to pay her a refund after the district court entered judgment in her favor), the *Windsor* majority conceded that the Executive's approach raised prudential concerns about the need for an adversary to present the position that the provision was constitutional.<sup>211</sup> The majority, however, concluded the participation of amici curiae could meet the need for a competent adversary to argue vigorously in favor of a statute's constitutionality, despite the Executive's position that it was unconstitutional.<sup>212</sup> Similarly, in *Chadha*, the Court concluded that any prudential concern for an adversary arguing in favor of a statute's constitutionality was satisfied when the Court of Appeals "invit[ed] and accept[ed] briefs from both Houses of Congress."<sup>213</sup> By emphasizing the importance of BLAG's brief in satisfying concerns about adversarial presentation of opposing arguments, and concluding that congressional briefs played a similar role in *Chadha*, Justice Kennedy in *Windsor* suggested that, in future cases, federal courts should give significant weight to amicus briefs filed by Congress as an institution or a House of Congress, at least in circumstances where the Executive does not defend a federal statute.<sup>214</sup>

In *Windsor*, the majority concluded that "BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."<sup>215</sup> Furthermore, the majority observed that, if it dismissed *Windsor* for the prudential reason that the Executive's agreement with Windsor on Section 3's unconstitutionality precluded appellate review, the federal district courts in the nation's ninety-four districts would have no precedential guidance in not only tax refund cases, but also in litigation involving DOMA's application with respect to more than one thousand federal statutes and regulations.<sup>216</sup> Because of the important role of a Supreme Court decision resolving the constitutionality of DOMA Section 3, and BLAG's vigorous presentation in defense of the statute, the

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (quoting *Chadha*, 462 U.S. at 940).

<sup>214</sup> *See id.*

<sup>215</sup> *Id.* at 2688.

<sup>216</sup> *Id.*

majority concluded that there were strong prudential reasons for the Court to hear *Windsor*.<sup>217</sup>

While his justifications for appellate standing in *Windsor* are plausible, Justice Kennedy's majority opinion, like several past Court decisions, drew arbitrary lines between prudential and Article III standing to reach his preferred conclusion, which, in this case was that the Court had jurisdiction to address the merits of the case.<sup>218</sup> Even if one otherwise disagrees with the dissent in *Windsor*, Justice Scalia correctly observed that "[t]he Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case."<sup>219</sup> The danger of "flexible" prudential standing rules is that a majority can pick and choose whether to enforce them depending upon their views of the merits.<sup>220</sup>

The majority did not decide whether Congress or either house would have had standing to sue in its own right because of its conclusion that the Executive Branch had both prudential and Article III standing for appellate review in light of its adverse position of refusing to pay a refund to *Windsor*.<sup>221</sup> Justice Kennedy explained, "[f]or these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority."<sup>222</sup> The majority acknowledged that the Executive's refusal to defend a statute raises serious prudential questions about whether there will be an adverse defense of a statute essential for proper appellate review and that such refusals would cause significant problems if they became routine.<sup>223</sup> Part II of the majority opinion, which addressed jurisdiction and standing, concluded:

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<sup>217</sup> *Id.*

<sup>218</sup> See Chemerinsky, *supra* note 43, at 692 (arguing that the Court's distinction between prudential and constitutional standing is often arbitrary); Stern, *supra* note 43, at 1173 (same); see Part I.B below (same).

<sup>219</sup> *Windsor*, 133 S. Ct. at 2698 (Scalia, J., dissenting).

<sup>220</sup> *Newdow*, 542 U.S. at 18–25 (Rehnquist, J., concurring).

<sup>221</sup> *Windsor*, 133 S. Ct. at 2688.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 2688–89.

But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.<sup>224</sup>

## V. JUSTICE SCALIA'S DISSENTING OPINION: ONLY THE EXECUTIVE BRANCH MAY REPRESENT THE UNITED STATES AND NO ARTICLE III STANDING WHEN THE OBAMA ADMINISTRATION REALLY SIDES WITH WINDSOR

While recognizing that Windsor had standing to sue in the district court for a tax refund, Justice Scalia, in his dissenting opinion, maintained that neither party had standing to appeal the district court's decision because both Windsor and the United States agreed with that court's holding that DOMA Section 3 is unconstitutional.<sup>225</sup> Because Article III standing requires an injured party who seeks genuine redress of actual harm, Justice Scalia argued that friendly, non-adversarial parties may not sue in federal court to obtain an advisory opinion.<sup>226</sup> He contended that the Court had never allowed a suit where a petitioner sought an affirmance of the judgment against it.<sup>227</sup> Justice Scalia acknowledged that "[t]he closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*," but he stated that the two cases were distinguishable<sup>228</sup> because "two parties to the [*Chadha*] litigation disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case."<sup>229</sup>

Justice Scalia generally took the position that the Executive has exclusive authority under Article II's Take Care Clause to defend, or not to defend, federal

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<sup>224</sup> *Id.* at 2689.

<sup>225</sup> *Id.* at 2699–2700 (Scalia, J., dissenting).

<sup>226</sup> *Id.* at 2699; accord Hall, *supra* note 144, at 1550–51 ("[A]s a textual matter, the Cases or Controversies Clause seems plainly to require interested parties on both sides of the case. A one-sided 'case' or 'controversy' is an oxymoron.").

<sup>227</sup> *Windsor*, 133 S. Ct. at 2699–2700, 700 n.1 (Scalia, J., dissenting).

<sup>228</sup> *Id.* at 2700–01 (discussing *Chadha*).

<sup>229</sup> *Id.* at 2700.

statutes.<sup>230</sup> Nevertheless, he acknowledged an exception, as in *Chadha*, when Congress defends its institutional authority.<sup>231</sup> Unlike *Windsor*, Justice Scalia explained that the *Chadha* litigation involved the institutional authority of Congress and, therefore, Congress had standing to sue in that case.<sup>232</sup>

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. The Executive choosing not to defend that power, we permitted the House and Senate to intervene. Nothing like that is present here.<sup>233</sup>

As Justice Alito’s dissenting opinion argued, however, Justice Scalia’s and the United States’ argument that congressional standing in *Chadha* should be limited to rare cases when Congress is defending its institutional or procedural authority raises difficult line-drawing problems, as Congress also has a strong interest in defending federal statutes—lawmaking is its central function.<sup>234</sup> Since interpreting *Chadha* to allow congressional standing to defend federal statutes at least in cases involving congressional institutional authority potentially opens the door to expansion of that standing to other situations, some academics argue that Executive authority under Article II’s Take Care Clause is absolutely exclusive and that *Chadha* is wrong to the extent it suggests otherwise.<sup>235</sup> As a member of the

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<sup>230</sup> *Id.* at 2700–05 (arguing that the Executive has exclusive authority to defend federal statutes under Article II, thus excluding congressional standing to intervene even when President refuses to enforce a law).

<sup>231</sup> *Id.* at 2700 & n.2 (“[In *Chadha*] the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon [p]residential powers.”); *accord* Hall, *supra* note 144, at 1548–49 (“*Chadha*, in short, held only that Congress has a sufficient institutional stake to support a case or controversy where it seeks to defend a power granted to it by a statute. *Chadha* does not hold that Congress may intervene to defend any challenged federal statute. . . .”).

<sup>232</sup> *Windsor*, 133 S. Ct. at 2700 & n.2.

<sup>233</sup> *Id.* at 2700 (footnote omitted).

<sup>234</sup> *Id.* at 2713–14 (Alito, J., dissenting).

<sup>235</sup> Grove & Devins, *supra* note 9, at 573–75, 623–30 (arguing that the Take Care Clause gives the Executive exclusive authority to defend federal laws, thus excluding congressional standing to intervene even when the President refuses to enforce a law, and that *Chadha* is wrong if it recognized congressional standing to defend federal statutes even in narrow circumstances); *but see* Gorod, *supra* note 2, at 1219–20 (“Defending [a] law . . . does not focus on the operation of the law and generally will not affect its operation at all. . . . [T]he Executive simply provides the court with its understanding of

Court required to adhere to precedent, however, Justice Scalia preferred to distinguish the situation in *Chadha* from that in *Windsor* rather than adopt an absolutist interpretation of Article II that gives the President exclusive authority to defend laws.<sup>236</sup>

Justice Scalia contended further that the Executive had standing in *Chadha* when the litigation was in the Court of Appeals, but that the Executive never had Article III standing to appeal in *Windsor*.<sup>237</sup> Disagreeing with the majority, Justice Scalia argued that the United States in *Chadha* did not have standing to appeal to the Supreme Court from the Ninth Circuit's decision agreeing with the Executive Branch that the challenged statute was unconstitutional, and, similarly, the government did not have standing in *Windsor* to appeal from the district court's decision agreeing with the Executive Branch that the challenged statute was unconstitutional.<sup>238</sup> Justice Scalia attempted to explain away the language in *Chadha* that suggested that the INS had standing before the Supreme Court as either only applying to the agency's standing before the Court of Appeals or dictum because congressional intervention satisfied standing before the Supreme Court, and the INS could not have standing to appeal a favorable decision by the Court of Appeals.<sup>239</sup> Finally, Justice Scalia argued that neither party had standing to appeal from the district court's decision in *Windsor* because both *Windsor* and the Executive Branch agreed with its decision.<sup>240</sup>

To be sure, the Court in *Chadha* said that statutory aggrieved-party status was “not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.” . . . But in a footnote to that statement, the Court acknowledged Article III's separate requirement of a “justiciable case or controversy,” and stated that *this* requirement was satisfied “because of the presence of the two Houses of Congress as adverse parties.” . . . Later in its

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what the Constitution requires. . . .”); *see also* Greene, *supra* note 8, at 592 (contending that, if Congress sues for a declaratory judgment on the constitutionality of a law, Congress is not “controlling the execution of law”).

<sup>236</sup> *Windsor*, 133 S. Ct. at 2700 & n.2; Grove & Devins, *supra* note 9, at 623 (“[N]o Justice in *Windsor* challenged the power of the House or the Senate to sometimes stand in for the [E]xecutive and defend federal statutes.”).

<sup>237</sup> *Windsor*, 133 S. Ct. at 2700-01 (Scalia, J., dissenting).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 2701.



opinion, the *Chadha* Court remarked that the United States' announced intention to enforce the statute also sufficed to permit judicial review, even absent Congressional participation. . . . That remark is true, as a description of the judicial review conducted in the Court of Appeals, where the Houses of Congress had not intervened. (The case originated in the Court of Appeals, since it sought review of agency action under [8 U.S.C. § 1105a(a)]. There, absent a judgment setting aside the INS order, Chadha faced deportation. This passage of our opinion seems to be addressing that initial standing in the Court of Appeals, as indicated by its quotation from the lower court's opinion, . . . But if it was addressing standing to pursue the appeal, the remark was both the purest dictum (as Congressional intervention at that point made the required adverseness "beyond doubt," . . .) and quite incorrect. When a private party has a judicial decree safely in hand to prevent his injury, additional judicial action requires that a party injured by the decree *seek to undo it*. In *Chadha*, the intervening House and Senate fulfilled that requirement. Here no one does.<sup>241</sup>

By contrast, Justice Kennedy's majority opinion concluded that the Supreme Court in *Chadha* had appropriately stated that the INS had standing before both the Court of Appeals and Supreme Court since the government would have followed either court's decision to deport Chadha, even though the Executive disagreed with the constitutionality of a deportation order, and, therefore the Executive Branch was sufficiently adverse to Chadha to possess Article III standing in the Supreme Court.<sup>242</sup> Similarly, the majority reasoned that the Executive Branch was sufficiently adverse to Windsor to have standing to appeal to both the Second Circuit and Supreme Court since it continually declined to pay her the estate tax refund judgment issued by the district court.<sup>243</sup> Justice Kennedy's interpretation that *Chadha* appears to treat the INS as having standing in both the Court of Appeals and the Supreme Court more accurately represents the probable intent of the *Chadha* majority opinion because Justice Scalia himself acknowledged that the language could be interpreted to mean that the INS had standing before both courts.<sup>244</sup> Justice Scalia's stronger argument is that the language should be treated as dictum because the INS was not really an adverse party in the Supreme Court on

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<sup>241</sup> *Id.* at 2700–01.

<sup>242</sup> *Id.* at 2686 (majority opinion).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 2701 (Scalia, J., dissenting).

grounds that it agreed with the Court of Appeals' opinion.<sup>245</sup> But Justice Scalia failed to address Justice Kennedy's argument that the INS's position was adverse to Chadha in both the Court of Appeals and the Supreme Court, as the Executive would have obeyed the order of either court to deport, despite the Government's position that the statute was unconstitutional.<sup>246</sup>

Justice Scalia's dissenting opinion strongly disagreed with the majority opinion's view that "the requirement of adverseness" between the parties in a case is merely a "prudential" principle of standing that can be waived by the federal courts in appropriate cases.<sup>247</sup> He contended that the Court had always treated adverseness between the parties as a fundamental Article III standing requirement.<sup>248</sup> In the two Supreme Court cases cited by the majority where the Court had allowed a prevailing party below to appeal,<sup>249</sup> "[t]here was a continuing dispute between the parties concerning the issue raised on appeal," and the prevailing party below asked the Court to address issues ignored by the lower court that would significantly benefit the prevailing party if it convinced the Court to address those issues in its favor.<sup>250</sup> Disagreeing with the majority, Justice Scalia argued that the Court had never before allowed an appeal when "both parties urge[d] us to affirm the judgment below."<sup>251</sup> He contended that the mere presence of amicus curiae willing to vigorously argue the other side of the issue did not solve the requirement that there must be adverse parties to create a justiciable "case" or "controversy" as required by Article III.<sup>252</sup>

Justice Scalia candidly acknowledged that his approach, requiring truly adverse parties to establish Article III standing, would prevent Supreme Court

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<sup>245</sup> *Id.*

<sup>246</sup> Compare *id.* at 2686 (majority opinion), with *id.* at 2700–01 (Scalia, J., dissenting).

<sup>247</sup> *Id.* at 2701 (Scalia, J., dissenting).

<sup>248</sup> *Id.* at 2701–02.

<sup>249</sup> *Id.* (discussing *Camreta v. Greene*, 131 S. Ct. 2020 (2011), and *Roper*, 445 U.S. 326).

<sup>250</sup> *Id.* (explaining that the prevailing party in *Roper* "sought to appeal the [D]istrict [C]ourt's denial of class certification under Federal Rule of Civil Procedure 23" and that the prevailing police officers in *Camreta* "sought to appeal the holding of Fourth Amendment violation, which would circumscribe their future conduct; the plaintiff continued to insist that a Fourth Amendment violation had occurred").

<sup>251</sup> *Id.* at 2702.

<sup>252</sup> *Id.*

review of some statutes if the President declines to defend their constitutionality.<sup>253</sup> He explained:

That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement.<sup>254</sup>

Justice Scalia implicitly criticized the Executive's "contrivance" in enforcing DOMA Section 3 even though it viewed it as unconstitutional.<sup>255</sup> Instead, Justice Scalia suggested:

[President Obama] could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive's determination of unconstitutionality would have escaped this Court's desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written.<sup>256</sup>

From an Article II perspective, rather than Justice Scalia's Article III approach, Professor Grove even more unequivocally rejected President Obama's goal of having the Supreme Court resolve the constitutionality of DOMA while the Executive refused to defend it, arguing that the Executive "lacks the Article II power—and thus lacks Article III standing—to invoke federal jurisdiction simply to request 'a definitive verdict' on the validity of a federal law."<sup>257</sup>

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Grove, *supra* note 9, at 30–31.

Additionally, in addressing Justice Alito's legislative theory of standing (discussed in Part VI), Justice Scalia argued that our constitutional "system" instead requires Congress to directly confront undesirable Executive action, such as refusing to enforce an allegedly unconstitutional statute through legislative weapons like the denial of funding or refusal to confirm presidential appointees.<sup>258</sup> Justice Scalia does have a point that the judiciary should not be in the role of deciding every possible dispute between the Executive and Legislative Branches both because it would give judges too much power and because judges are ill-equipped to resolve every type of political dispute. Politicians are better equipped to handle political disputes than judges through the constitutional process of "confrontation" between the Executive and Congress.<sup>259</sup> But first, Justice Scalia's argument that Congress should use its legislative weapons to try to pressure a President to enforce a statute the President believes is unconstitutional, ignores the benefits of having courts resolve the constitutionality of the very small number of cases in which the Executive Branch refuses to enforce or defend a statute the President believes is unconstitutional.<sup>260</sup> Second, Justice Scalia ignores the difficulties Congress or one House faces in combating Executive refusal to enforce a law, especially if the two Houses cannot agree on concerted action.<sup>261</sup> For example, the Constitution's Article II impeachment process in theory could be used to punish Executive officers who refuse to defend a federal statute.<sup>262</sup> But the

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<sup>258</sup> *Windsor*, 133 S. Ct. at 2704–05.

<sup>259</sup> *Id.* at 2702–05 (Scalia, J., dissenting).

<sup>260</sup> Greene, *supra* note 8, at 590–91.

<sup>261</sup> See Greene, *supra* note 8, at 591 (“[A]s Carlin Meyer argues, forcing Congress to combat presidential constitutional nonenforcement outside the courts is costly, and arguably shifts the burden of action in a constitutionally inappropriate direction. After all, in the kind of case with which we’re concerned, Congress has already surmounted the difficult bicameralism and presentment process, only to find a President asserting an ex-post [E]xecutive check on properly enacted legislation. Congress could begin impeachment proceedings, or try to tie the President’s hands in other ways, but these are costly and complex and, more to the point, not directly responsive to the matter at hand. Why not get all three branches into the mix?”); see also Frost, *supra* note 2, at 960–62 (observing that congressional litigation may be necessary to address Executive nonenforcement or misinterpretation of a law because legislative amendments forcing Executive compliance may be impractical in light of the two-thirds majority needed in each House of Congress to override a presidential veto); see also Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve As Counterweight?*, 54 U. PITT. L. REV. 63, 67–68, 96–98 (1992) (arguing that courts should adopt the “middle ground” approach allowing some congressional suits against the Executive Branch for alleged nonenforcement of a law because political remedies such as cutting off appropriations or impeachment may be impractical).

<sup>262</sup> “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.” U.S. CONST. art. II, § 4.

impeachment process is an impractical means of forcing the Executive to defend laws because impeachment is time-consuming: it requires a two-thirds super majority in the Senate and a finding that presidential nonenforcement of a statute constitutes an “other High crime[] and Misdemeanor[].”<sup>263</sup>

## VI. JUSTICE ALITO’S DISSENTING OPINION: ONLY THE HOUSE OF REPRESENTATIVES HAD STANDING IN *WINDSOR*

### A. *Justice Alito’s Argument for Congressional Standing by One House When the President Refuses to Defend a Statute*

Justice Alito agreed with Justice Scalia that the United States was not a proper petitioner before the Supreme Court in *Windsor* on grounds that the government agreed with *Windsor* that the district court’s decision was correct.<sup>264</sup> Next, Justice Alito considered the “much more difficult question” of whether BLAG had standing to petition.<sup>265</sup> Unlike the majority and Justice Scalia, Justice Alito concluded that BLAG had “Article III standing in its own right, quite apart from its status as an [intervener].”<sup>266</sup>

Justice Alito contended that the House of Representatives suffered an injury in fact sufficient for Article III standing when the Executive refused to enforce DOMA Section 3, and that its authorized representative, BLAG, could sue in *Windsor* to redress that injury.<sup>267</sup> Relying upon *Chadha*’s holding that the two Houses of Congress were ““proper parties”” to defend the constitutionality of the one-house veto statute, Justice Alito argued that *Chadha* implied that Congress suffers an injury whenever it passes federal legislation that is struck down as unconstitutional, and the Executive refuses to defend the statute.<sup>268</sup> The United States sought to limit the scope of *Chadha* by arguing that it ““involved an unusual statute that vested the House and the Senate themselves each with special

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<sup>263</sup> See Greene, *supra* note 8, at 591 (arguing that the impeachment process is impractical in addressing a President’s refusal to enforce a statute); Meyer, *supra* note 256, at 96 (same). *But see* Grove & Devins, *supra* note 9, at 624 (“In separating legislation from implementation, moreover, the Constitution makes clear that Congress may not control those implementing federal law—outside the appointment, statutory, and removal mechanisms specified in the Constitution.”).

<sup>264</sup> *Windsor*, 133 S. Ct. at 2711–12 (Alito, J., dissenting).

<sup>265</sup> *Id.* at 2712.

<sup>266</sup> *Id.* at 2712 n.1.

<sup>267</sup> *Id.* at 2712–14 & n.2.

<sup>268</sup> *Id.* at 2712–13 (quoting and discussing *Chadha*).

procedural rights—namely, the right effectively to veto Executive action.”<sup>269</sup> Although Justice Alito, perhaps out of courtesy to his senior colleague, did not directly mention any of Justice Scalia’s counterarguments to legislative standing, Justice Scalia made a similar argument to the Executive Branch in arguing that legislative standing in *Chadha* was limited to rare cases where the Executive does not defend the constitutionality of an institutional legislative power.<sup>270</sup> Justice Alito, however, made the controversial argument that Congress has standing in any case where the Executive refuses to defend the constitutionality of a federal statute, because passing statutes is Congress’ “central function.”<sup>271</sup> Rejecting the government’s attempt to limit *Chadha* to cases involving special procedural legislative rights, Justice Alito reasoned:

[T]hat is a distinction without a difference: just as the Court of Appeals decision that the *Chadha* Court affirmed impaired Congress’ power by striking down the one-house veto, so the Second Circuit’s decision here impairs Congress’ legislative power by striking down an Act of Congress. The United States has not explained why the fact that the impairment at issue in *Chadha* was “special” or “procedural” has any relevance to whether Congress suffered an injury. Indeed, because legislating is Congress’ central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on.<sup>272</sup>

Justice Alito interpreted *Coleman*—which authorized twenty state senators who arguably cast the crucial votes to defeat a proposed amendment to the Federal Constitution—to support his general theory of congressional standing to defend any statute that the Executive refuses to defend and, in particular, to justify the House of Representatives as a “necessary party” having standing in *Windsor*.<sup>273</sup> He explained:

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<sup>269</sup> *Id.* at 2713 (quoting Brief for United States (jurisdiction) at 36).

<sup>270</sup> *Id.* at 2700 (Scalia, J., dissenting) (footnote omitted) (“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. The Executive choosing not to defend that power, we permitted the House and Senate to intervene. Nothing like that is present here.”).

<sup>271</sup> *Id.* at 2713 (Alito, J., dissenting).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

By striking down [Section] 3 of DOMA as unconstitutional, the Second Circuit effectively “held for naught” an Act of Congress. Just as the state-senator-petitioners in *Coleman* were necessary parties to the amendment’s ratification, the House of Representatives was a necessary party to DOMA’s passage; indeed, the House’s vote would have been sufficient to prevent DOMA’s repeal if the Court had not chosen to execute that repeal judicially.<sup>274</sup>

Justice Alito disagreed with the United States and Professor Jackson that *Raines* rejected congressional standing.<sup>275</sup> First, Justice Alito argued that “*Raines* dealt with individual Members of Congress and specifically pointed to the individual Members’ lack of institutional endorsement as a sign of their standing problem.”<sup>276</sup> By contrast, BLAG represented the entire House of Representatives.<sup>277</sup> Second, Justice Alito contended that BLAG and the House in the *Windsor* litigation played a legislative role similar to that in *Coleman*, which recognized legislative standing and, unlike that in *Raines*, which rejected the standing of individual Members of Congress who had not played a decisive role in passing or defeating the challenged legislation.<sup>278</sup> Justice Alito reasoned:

[T]he Members in *Raines*—unlike the state senators in *Coleman*—were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action. Indeed, it is telling that *Raines* characterized *Coleman* as standing “for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” Here, by contrast, passage by the House was needed for DOMA to become law.<sup>279</sup>

Some academics, however, argue that the bicameral structure of Congress requires that both Houses agree to take action and does not allow one House to take

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 2712 n.2.

<sup>278</sup> *Id.* at 2714.

<sup>279</sup> *Id.*

independent judicial action.<sup>280</sup> But the Constitution's requirements for bicameral legislative action in Article I, § 1—requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives—and § 7—requiring every bill to be passed by both the House and Senate before being presented to the President—do not directly or clearly prohibit congressional standing by one House of Congress.<sup>281</sup> Furthermore, as is implied by Justice Alito's discussion of *Coleman* and *Raines*, neither case claimed or explicitly required that all congressional litigation must be undertaken by bicameral action.<sup>282</sup>

Indirectly responding to Justice Scalia's view that the Executive has the sole authority under the Constitution to defend all federal statutes and the unbridled discretion not to defend a statute,<sup>283</sup> Justice Alito argued that Congress had the authority to defend federal statutes in those rare cases in which the Executive did not:

I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view, as I have explained, that argument is contrary to the Court's holding in *Chadha*, and it is certainly contrary to the *Chadha* Court's endorsement of the principle that 'Congress is the proper party to defend the validity of a statute' when the Executive refuses to do so on constitutional grounds. Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.<sup>284</sup>

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<sup>280</sup> Grove & Devins, *supra* note 9, at 572–75, 603–22 (arguing that bicameral principles in the constitution bar one House of Congress from defending a challenged federal statute).

<sup>281</sup> U.S. CONST. art. I, § 1 (prescribing bicameralism and presentment requirements for legislation); *Chadha*, 462 U.S. at 945–46 (discussing bicameral provisions in Article I of the Constitution).

<sup>282</sup> See *Windsor*, 133 S. Ct. at 2713–14 (Alito, J., dissenting) (discussing *Coleman* and *Raines*); see also Part II.B above.

<sup>283</sup> See *id.* at 2703–04 (Scalia, J., dissenting) (arguing that the Executive has broad discretion whether to enforce federal laws pursuant to the Take Care Clause and that Congress does not have standing without an injury to challenge Executive nonenforcement); see also *Lujan*, 504 U.S. at 573–78 (concluding Article III and Article II of the Constitution limit Congress' authority to authorize citizen suits by any person lacking a concrete injury); Grove & Devins, *supra* note 9, at 573–74, 625–32 (arguing that the Take Care Clause gives the Executive exclusive authority to defend federal laws, thus excluding congressional standing to intervene even when the President refuses to enforce a law).

<sup>284</sup> *Id.* at 2714 (Alito, J., dissenting).



On the other hand, Professor Grove argued that Article I does not confer any authority on Congress to defend or enforce federal statutes and, accordingly, that Congress lacks Article III standing to defend federal statutes in federal courts.<sup>285</sup> However, Professor Grove's interesting argument is inconsistent with *Chadha*, which she necessarily argues was wrongly decided to the extent it allowed House and Senate counsel to intervene in the case to defend the constitutionality of the statute.<sup>286</sup>

### B. Justice Scalia's Criticism of Justice Alito's Argument

Justice Scalia tried to rebut Justice Alito's argument for congressional standing and instead contended that the Executive has the sole authority under the Constitution to defend all federal statutes, except in cases like *Chadha* where Congress is defending its institutional authority.<sup>287</sup> While acknowledging that Justice Alito's theory of jurisdiction was more limited than the "majority's conversion of constitutionally required adverseness into a discretionary element of standing," Justice Scalia complained that Justice Alito's approach "similarly elevates the Court to the 'primary' determiner of constitutional questions involving the separation of powers, and, to boot, increases the power of the most dangerous branch" by establishing a new system "in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws."<sup>288</sup> While federal courts traditionally could not decide whether a disputed statute was constitutional until an injured private party filed suit, Justice Scalia contended that Justice Alito's

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<sup>285</sup> Grove, *supra* note 9, at 3–4, 39–48.

<sup>286</sup> *Id.* at 46–47 ("The Supreme Court overlooked these structural concerns [arguing against congressional enforcement or defense of federal laws] entirely in *Chadha*, when it permitted the House and Senate counsel to intervene in defense of the statute authorizing the legislative veto. . . . But the Court did not authorize intervention by any component of Congress until *Chadha*. Given the lack of historical support for the Court's assertion, and the fact that the Court did not even hold that the House or the Senate had standing to appeal, this one-sentence declaration in *Chadha* provides scant support for congressional standing to represent the federal government in court.").

<sup>287</sup> *See id.* at 2702–05 (Scalia, J., dissenting) (arguing that the President has broad discretion whether to enforce federal laws pursuant to the Take Care Clause and that Congress does not have standing without an injury to challenge executive nonenforcement); *see also Lujan*, 504 U.S. at 573–78 (concluding that Article III and Article II limit Congress' authority to authorize citizen suits by any person lacking a concrete injury); Grove & Devins, *supra* note 9, at 572–73, 625–35 (arguing that the Take Care Clause gives the Executive exclusive authority to defend federal laws, thus excluding congressional standing to intervene even when the President refuses to enforce a law).

<sup>288</sup> *Windsor*, 133 S. Ct. at 2704.

approach would create a new framework “in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress’s liking.”<sup>289</sup>

It is unclear whether Justice Scalia’s point is a fair interpretation of Justice Alito’s position because the facts of *Windsor* did not involve that situation and Justice Alito did not directly address any scenario in which Congress could challenge the Executive’s implementation of a statute, unless the President simply refused to enforce the statute on grounds that it is unconstitutional.<sup>290</sup> Justice Scalia was arguably on firmer ground when he speculated that Justice Alito’s approach to congressional standing would at least open the door for litigants to make plausible arguments in an attempt to expand legislative standing to political disputes traditionally avoided by the federal courts.<sup>291</sup> Justice Scalia argued that the reasoning of *Raines* foreclosed suits by Congress about how the Executive administers the laws of the United States, even if Justice Alito was technically correct that the decision “did not formally decide this issue” because the opinion discussed several disputes between the President and Congress about the appointment power, removal power, legislative veto, and pocket veto that traditionally were not litigated in court, but would have been settled by the federal courts under Alito’s approach to legislative standing.<sup>292</sup> Instead of Alito’s broad approach to legislative standing and judicial resolution of disputes between the two political branches, Justice Scalia argued that the Executive and Congress should use traditional political tools such as the appropriations or appointment processes if Congress is dissatisfied by a President’s nonenforcement of a statute the President believes is unconstitutional.<sup>293</sup>

## CONCLUSION

The Obama Administration’s “middle” position of continuing to enforce DOMA Section 3 while arguing that the provision was unconstitutional was crucial in allowing the United States Supreme Court to review the *Windsor* case.<sup>294</sup> The

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<sup>289</sup> *Id.*

<sup>290</sup> Compare *id.* at 2704 (Scalia, J., dissenting), with *id.* at 2711–14 (Alito, J., dissenting).

<sup>291</sup> *Id.* at 2704 (Scalia, J., dissenting).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 2704–05.

<sup>294</sup> See Parts II.B, II.C above.

majority opinion conceded that standing before the Court of Appeals and Supreme Court would have been questionable if the Executive had simply paid Windsor her refund as ordered by the district court.<sup>295</sup> A good justification for Attorney General Holder's middle approach is that a President's nominal enforcement of a controversial statute is sometimes essential to create sufficient adverseness for appellate review because the standing of Congress in such situations is not clear even after *Windsor*, and the Obama Administration's approach enabled the Supreme Court to finally resolve the constitutionality of DOMA Section 3.<sup>296</sup>

As discussed in Parts IV and V, in *Windsor*, the majority and Justice Scalia disagreed with respect to the circumstances in which a president should decline to enforce a federal statute in general and the DOMA statute in particular.<sup>297</sup> Justice Scalia's dissent argued that a President should only refuse to enforce a statute that undermines the institutional authority of the Executive Branch, such as the legislative veto statute in *Chadha*, but that a President should not refuse to enforce a statute like DOMA for mere policy reasons.<sup>298</sup> While generally supporting the Obama Administration's middle position of enforcing but not defending DOMA Section 3, Justice Kennedy's majority opinion acknowledged that presidential nonenforcement of a statute in some circumstances can prevent judicial review to determine its constitutionality, which raises serious separation of powers concerns by nullifying Legislative power, and, therefore, a President should not routinely refuse to enforce any statute whose policies are personally disagreeable.<sup>299</sup> Whether

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<sup>295</sup> *Windsor*, 133 S. Ct. at 2686.

<sup>296</sup> See Parts II, IV above.

<sup>297</sup> See Parts IV, V above.

<sup>298</sup> *Windsor*, 133 S. Ct. at 2700 n.2 (Scalia, J., dissenting) (“[In *Chadha*] the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers. There is no justification for the Justice Department’s abandoning the law in the [*Windsor*] case.”); see also Meltzer, *supra* note 2, at 1199–1201 (“The strong tradition of defending acts of Congress also does not extend to separation-of-powers cases—at least not to those that involve a conflict between [L]egislative and [E]xecutive powers.”); *id.* at 1202–05 (observing there are only a handful of cases “in which the [E]xecutive refuses to defend a statute that involves no incursion upon [E]xecutive authority, even though colorable arguments for the statute’s constitutionality could be advanced.”).

<sup>299</sup> *Windsor*, 133 S. Ct. at 2688. (“The Court’s conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive’s failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. . . . Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave

President Obama should have refused to defend DOMA raises complex questions because, on the one hand, DOMA was passed only seventeen years earlier by large congressional majorities and signed into law by President Clinton; but, on the other hand, evolving public views on same-sex marriage have lead many people in recent years to think that DOMA's denial of federal benefits to same-sex married couples is fundamentally discriminatory.<sup>300</sup>

The *Chadha* decision provides the strongest support for the reasoning in the *Windsor* majority opinion, as even Justice Scalia acknowledged.<sup>301</sup> The *Chadha* decision appeared to state that the Executive has appellate standing in federal courts as long as it would actually enforce a law that the President asserts is unconstitutional.<sup>302</sup> Attorney General Holder's middle strategy of enforcing DOMA Section 3, even as the DOJ argued that the provision was unconstitutional, is enough for standing if the INS had standing before the Supreme Court in a similar situation in *Chadha*. However, Justice Scalia argued that the *Chadha* decision was wrong to the extent that it allowed the INS standing to appeal a favorable Ninth Circuit decision to the Supreme Court.<sup>303</sup>

The Court in *Windsor* held plausibly based on precedent that party adverseness is a flexible prudential principle and not a mandatory Article III rule.<sup>304</sup> Nevertheless, the Court in *Windsor*, like in other Court opinions, conveniently manipulated hazy distinctions between prudential and Article III standing to

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challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.”).

<sup>300</sup> Compare Meltzer, *supra* note 2, at 1208–35 (discussing conflicting arguments about whether the Obama Administration should have defended DOMA, noting “I have tried to set forth a range of reasons why the [E]xecutive [B]ranch should enforce and defend statutes such as Don't Ask, Don't Tell and DOMA—even when it views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection”), with Rider-Longmaid, *supra* note 8, at 361–62 (concluding that “by continuing to enforce DOMA while advancing exhaustive reasoning in litigation for its unconstitutionality, Obama has facilitated judicial resolution of the issue and respected the separation of powers” and also arguing that Executive non-defense of a statute is especially appropriate if the President believes statute violates fundamental equal protection rights, as in the DOMA litigation in *Windsor*).

<sup>301</sup> *Windsor*, 133 S. Ct. at 2700–01 (Scalia, J., dissenting) (“The closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*.”).

<sup>302</sup> *Windsor*, 133 S. Ct. at 2686–87 (discussing *Chadha*, 462 U.S. 939–40 & n.12).

<sup>303</sup> Compare *id.* at 2686 (arguing that the INS had standing before the Supreme Court in *Chadha*), with *id.* at 2700–01 (Scalia, J., dissenting) (disagreeing).

<sup>304</sup> *Id.* at 2685–86 (majority opinion).

determine that it had jurisdiction to address the merits of the case.<sup>305</sup> The vagueness of the line between prudential and Article III standing allows federal courts and, most notably, the Supreme Court in some cases, to find or deny jurisdiction based on whether a majority wants to decide or avoid the merits.<sup>306</sup>

Justice Scalia, in his dissent in *Windsor*, argued that neither party had an injury justifying standing and judicial review once the Executive agreed with the judgment of the district court in favor of *Windsor*.<sup>307</sup> He contended that the Court had never before allowed an appeal when “both parties urge[d] [the Court] to affirm the judgment below.”<sup>308</sup> For Justice Scalia, party adverseness was an essential requirement of Article III standing and not simply a waivable prudential principle as claimed by the majority.<sup>309</sup> Additionally, Justice Scalia made a strong argument that Article II’s Take Care Clause normally gives the Executive the exclusive authority to defend federal statutes and to refuse to defend a federal law.<sup>310</sup> Nevertheless, Justice Scalia’s dissenting opinion conceded an exception to that rule by recognizing the authority of Congress to represent itself in separation of powers cases involving its institutional authority.<sup>311</sup>

Justice Alito’s dissenting opinion appropriately raised the question of whether there ought to be another exception to the Take Care Clause that grants Executive authority over federal statutes when the President refuses to defend a statute, on

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<sup>305</sup> See *id.* at 2698–702 (Scalia, J., dissenting) (criticizing the majority for manipulating adverseness doctrine to find standing so it could decide the merits of the case); Chemerinsky, *supra* note 43, at 692 (arguing that the Court’s distinction between prudential and constitutional standing is often arbitrary); Stern, *supra* note 43, at 1173 (same); see Part I.B above (same).

<sup>306</sup> *Windsor*, 133 S. Ct. at 2698–702 (Scalia, J., dissenting) (criticizing the majority for manipulating the adverseness doctrine to find standing so it could decide the merits of the case); Chemerinsky, *supra* note 43, at 692; Stern, *supra* note 43, at 1173.

<sup>307</sup> *Windsor*, 133 S. Ct. at 2699–2702 (Scalia, J., dissenting).

<sup>308</sup> *Id.* at 2702.

<sup>309</sup> *Id.* at 2699–2702.

<sup>310</sup> *Id.* at 2700–05 (arguing that the Executive has exclusive authority to defend federal statutes under Article II, thus excluding congressional standing to intervene even when the President refuses to enforce a law).

<sup>311</sup> *Id.* at 2700 n.2 (Scalia, J., dissenting) (“[In *Chadha*] the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers.”); Grove & Devins, *supra* note 9, at 623 (“[N]o Justice in *Windsor* challenged the power of the House or the Senate to sometimes stand in for the [E]xecutive and defend federal statutes.”).

grounds that lawmaking is the central function of the Legislative Branch and such Executive action, therefore, causes injury to Congress similar to the injury in *Chadha*.<sup>312</sup> Justice Alito boldly proclaimed a new approach to congressional standing that would allow Congress or either House to defend a federal statute that the Executive refuses to defend.<sup>313</sup> Even if Justice Scalia is correct that courts have recognized that no one may have standing to defend the constitutionality of a statute,<sup>314</sup> Justice Alito correctly suggested that *Coleman* raises the possibility that those legislators crucial to a statute's passage or defeat—which arguably includes each House of Congress—should be able to challenge the Executive's nonenforcement of a federal law.<sup>315</sup> The legislative standing of legislative leaders representing a legislative house is arguably different than the Court's refusal in *Raines* to recognize standing by individual legislators.<sup>316</sup>

The majority in *Windsor* did not go as far as Justice Alito in recognizing congressional standing, but the Court's determination that "BLAG's sharp adversarial presentation of the issues satisfi[ed] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree"<sup>317</sup> opens the door for more congressional intervention in cases where a President enforces a law that the President believes is unconstitutional. Perhaps the majority was unwilling to go as far as Justice Alito because the line between legislative standing in *Coleman* and the rejection of standing for individual legislators in *Raines* is not clear.<sup>318</sup> Yet the Court's conclusion in *Windsor*, that one House of Congress may supply the necessary adverseness in litigation where the Executive refuses to defend but continues to enforce a statute is a step toward adopting Justice Alito's view of congressional standing by either House of Congress in those rare cases in which the President refuses to defend a federal statute. Because Justice Scalia made a strong argument in his dissent that Article II's Take Care Clause gives the President almost

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<sup>312</sup> *Id.* at 2713–14 (Alito, J., dissenting).

<sup>313</sup> *Id.* at 2711–14 (Alito, J., dissenting).

<sup>314</sup> *Id.* at 2699–2702 (Scalia, J., dissenting).

<sup>315</sup> *Id.* at 2711–14 (Alito, J., dissenting).

<sup>316</sup> *See id.* 2713 (discussing the legislative standing distinction between *Coleman* and *Raines*); Part II.B above (same).

<sup>317</sup> *Windsor*, 133 S. Ct. at 2687–88 (majority opinion).

<sup>318</sup> *See Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting) (discussing the legislative standing distinction between *Coleman* and *Raines*); *supra* Part II.B (same).

exclusive authority to defend federal statutes, except when Congress defends its own institutional authority as in *Chadha*, the Court arguably will not endorse Justice Alito's congressional standing theory when it is less controversial to allow limited congressional participation in a "middle" situation where the Executive nominally enforces a statute it does not defend.<sup>319</sup> By relying on BLAG's brief to satisfy concerns about adversarial presentation of opposing arguments and concluding that congressional briefs played a similar role in *Chadha*, the Court in *Windsor* implied that in future cases federal courts should give significant weight to amicus briefs filed by Congress or a House of Congress, at least in cases where the Executive does not defend a federal statute.<sup>320</sup>

Whether the Court would have recognized appellate standing for either the Executive or Congress in *Windsor* if the Obama Administration had refused to enforce DOMA Section 3 and paid a tax refund to Windsor as soon as she won in district court remains an open question that federal courts may have to confront someday.

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<sup>319</sup> *Windsor*, 133 S. Ct. at 2698–705 (Scalia, J., dissenting); see also Grove & Devins, *supra* note 9, at 573–74, 625–32 (arguing that the Take Care Clause gives the Executive exclusive authority to defend federal laws, thus excluding congressional standing to intervene even when the President refuses to enforce a law).

<sup>320</sup> See Part IV above.