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# Honoring Dan Meltzer—Congressional Standing and the Institutional Framework of Article III: A Comparative Perspective

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HONORING DAN MELTZER—CONGRESSIONAL  
STANDING AND THE INSTITUTIONAL  
FRAMEWORK OF ARTICLE III: A  
COMPARATIVE PERSPECTIVE

Vicki C. Jackson\*

Dan Meltzer was a superb federal courts scholar, an enormously generous colleague, a truly inspiring teacher, and a dear friend. His untimely death was a huge loss, in all of these respects. His first published paper, on *jus tertii* standing, in the *Harvard Law Review* of 1974, argued for the widening of standing in some cases.<sup>1</sup> This was a theme to which he returned, for example, in his 1988 *Columbia Law Review* piece on civil rights plaintiffs as private Attorneys General in seeking deterrent remedies.<sup>2</sup>

One of Dan's last published papers considered executive branch responsibilities to execute and defend Acts of Congress, especially those whose constitutionality the Administration deemed reasonably open to doubt.<sup>3</sup> In that paper he noted, in a typically careful long footnote, the issue of standing of the House of Representatives in the then-pending *Windsor* litigation;<sup>4</sup> Dan addressed more generally the issue of congressional standing, pointing out in

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\* Thurgood Marshall Professor of Constitutional Law, Harvard Law School. With deep thanks to Dick Fallon, John Manning, Judith Resnik, Tara Grove, Mark Tushnet, Jamal Greene, Russell Miller, and Sujit Choudhry for helpful conversations along the way, and to the editors of this law review for their research assistance on the footnotes.

1 Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974) (reliably attributed to Dan by several of his friends).

2 Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988).

3 Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012).

4 *Id.* at 1211 n.133; *see also* United States v. Windsor, 133 S. Ct. 2675 (2013). I was appointed by the Supreme Court in the *Windsor* case to serve as amicus curiae for the purposes of arguing that the government's agreement with a lower court decision finding the DOMA unconstitutional deprived the Court of jurisdiction over the government's appeal of that decision, and that a congressional committee lacked standing to appeal the judgment. The Court rejected the first argument and did not reach the second. *See id.* at 2684–89.

his inimitably careful, fair, and clear fashion how much was unresolved, or in doubt, about the possibility.<sup>5</sup> And I recently learned from Irv Nathan that Dan had been helpful to him as an academic when Irv, as Counsel to the U.S. House of Representatives, was involved in litigation to compel Harriet Miers, as White House Counsel, to provide information to the House—issues on which, Irv told me, Dan then recused himself when he became White House principal deputy counsel.<sup>6</sup>

What Dan would have written on, had he not been deprived of the opportunity by the fates, is unknown. I would not presume even to speculate. But the topic of government standing is one that, based on his past work, I believe would have engaged his interest. And as we shall see, analysis can be well informed by Dan's work on the role of courts and constitutional remedies.

Apart from Dan's interests, my second set of reasons for addressing issues relating to congressional standing in this Essay is that government standing, writ large, is, for our times, something like what "public interest" standing was in the 1970s for my generation in law school—a set of cutting edge issues about who could invoke the judicial power of the United States.<sup>7</sup> Consider the number of significant cases in just the last decade that have turned on some aspect of government standing. In addition to *Windsor*, that same Term the Court decided *Hollingsworth v. Perry*,<sup>8</sup> finding that proponents of a proposition to amend the state constitution of California lacked standing to defend the constitutionality of the amendment that they had sought when the attorney general of the state refused to defend the law or to appeal from a lower court ruling finding the provision unconstitutional. Distinguishing permanent government officeholders from private citizens who played a temporary role in initiating the process of amending the state constitution by initiative, the Court found that the latter lacked any particular stake in the controversy different from that of other citizens<sup>9</sup>—and did so notwithstanding that the California Supreme Court found that the proposition initiators were proper parties to defend the constitutionality of the amendment that resulted even when the state attorney general declined to do so.<sup>10</sup>

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5 See Meltzer, *supra* note 3, at 1202–05.

6 Emails from Irvin Nathan to author (Dec. 18, 2015 & Jan. 6, 2016) (on file with author). These events are also recounted in Irvin B. Nathan, *Protecting the House's Institutional Prerogative to Enforce Subpoenas*, in *WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES AND PRAGMATICS OF LEGISLATIVE INQUIRY* (Morton Rosenberg ed., forthcoming 2016).

7 Significant cases from this time period included *Sierra Club v. Norton*, 405 U.S. 727 (1972), and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). See also Schlesinger v Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Laird v. Tatum, 408 U.S. 1 (1972).

8 133 S. Ct. 2652 (2013).

9 *Id.* at 2662.

10 See *id.* at 2657.

In *Massachusetts v. EPA*,<sup>11</sup> the Court upheld the standing of the State of Massachusetts to challenge the Environmental Protection Agency's (EPA) failure to consider issuing regulations relating to the reduction of greenhouse gases from new motor vehicles to combat global warming and climate change. The Court upheld standing notwithstanding scientific and empirical uncertainty about the likelihood of global warming and about the degree of causation and traceability—typical elements of standing analysis—that the plaintiff could show on the facts. Even though in arguably analogous cases involving private plaintiffs the Court had rejected standing,<sup>12</sup> the Court emphasized that the state's character as a state had special significance for the standing inquiry, warranting "special solicitude" for its "stake in protecting quasi-sovereign interests."<sup>13</sup>

More recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>14</sup> the Court upheld the standing of a state legislature to challenge a state constitutional amendment that provided for the use of a nonpartisan commission to draw district lines in the state. The Arizona Legislature advanced a claim that such a law deprived it of the power granted it under the U.S. Constitution to decide on the time, place, and manner of elections to the Congress.<sup>15</sup> The Court agreed that the legislature had standing, since the allegation, if accepted, was that the special prerogative of the state legislature under the U.S. Constitution had been, in effect, "completely nullified" by the state law.<sup>16</sup>

11 549 U.S. 497 (2007).

12 See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 497–99 (2009) (rejecting standing of organization based on statistical likelihood that its members would be harmed by the implementation of the challenged regulations); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 (1992) (Scalia, J., joined by the Chief Justice and Justices White and Thomas) (concluding that, because of uncertainty over how much of a difference the U.S. contribution of ten percent of funding would make to the decision whether to construct a dam, which dam in turn might threaten the environment for certain endangered animals, the plaintiffs would have lacked standing even if they had met the requirement of Article III injury); cf. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that a plaintiff who had been assaulted by the local police lacked standing to seek an injunction against the chokehold practice to which he had been subjected because there was no reason to think that he would in the future be subjected to it any more than any other citizen of Los Angeles).

13 *Massachusetts v. EPA*, 549 U.S. at 520. The Court further noted that when states joined the Union they gave up the right to employ military force against other states, or to make agreements with foreign states, or to regulate in areas preempted by Congress, *id.* at 519, implying that states should accordingly enjoy broader standing to enforce congressional enactments through litigation.

14 135 S. Ct. 2652 (2015).

15 U.S. CONST. art I, § 4; see also Brief for Appellant at 24, *Ariz. Legislature*, 135 S. Ct. 2652 (No. 13-1314).

16 *Ariz. Legislature*, 135 S. Ct. at 2665 (quoting *Raines v. Byrd*, 521 U.S. 811 (1997), and its interpretation of the standing decision in *Coleman v. Miller*, 307 U.S. 433 (1939)). Thus, the Court wrote,

In this short Essay, I focus on only one aspect of the broader question of government standing to sue: congressional standing. For one thing, separation of powers problems are more acutely presented in federal level disputes. In its decision on the state legislature's standing in the Arizona nonpartisan electoral commission case, the Court specifically distinguished the issue of congressional standing from that of state legislative standing:

The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court's standing analysis, we have noted, has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."<sup>17</sup>

Moreover, the governmental standing decisions in the Court's recent cases attracted considerable and sharp dissents. In *Windsor*, although a majority found the issue justiciable, several Justices argued in dissent that the issue was not a justiciable controversy because the government appealed from a judgment with which it agreed and that it defended.<sup>18</sup> Moreover, there was vigorous disagreement between Justices Scalia and Alito (both dissenting) about congressional standing in *Windsor*,<sup>19</sup> an issue the majority did not reach, having found the government itself to be a proper party. But Justice Alito argued that, where the President refuses to defend the constitutionality of a law enacted by Congress, Congress or its parts should have standing to defend the constitutionality of laws,<sup>20</sup> and Justice Scalia argued that such a congressional role is inconsistent with the properly limited powers of federal courts and that Congress has other means by which to confront a President with whose constitutional positions it disagrees.<sup>21</sup>

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*Coleman*, as we later explained in *Raines*, stood "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."

*Id.*

17 See *id.* at 2665 n.12 (quoting *Raines*, 521 U.S. at 819–20 (alteration in original)).

18 *United States v. Windsor*, 133 S. Ct. 2675, 2697–703 (2013) (Scalia, J., dissenting). Justice Scalia's dissenting opinion, which argued that the case did not meet justiciability requirements by virtue of the government's agreement with the decision below from which the government had petitioned for review, was joined on this point by Chief Justice Roberts and Justice Thomas. Justice Alito agreed with the three other dissenters that the government's petition for review did not present a proper case or controversy, but concluded that an intervening congressional committee did have standing to appeal. *Id.* at 2711–14 (Alito, J., dissenting).

19 Compare *id.* at 2703–05 (Scalia, J., dissenting), with *id.* at 2712–14 (Alito, J., dissenting).

20 *Id.* at 2714 (Alito, J., dissenting).

21 *Id.* at 2703–05 (Scalia, J., dissenting).

Given an increased interest by parts of the Congress, especially the House of Representatives, in seeking to intervene in ongoing litigation, there are pressing new issues in the lower federal courts: U.S. District Court Judge Rosemary Collyer recently upheld congressional standing to challenge an asserted violation of the Appropriations Clause in connection with spending under the Affordable Care Act, while rejecting the House's standing on a claim that the Secretary of the Treasury essentially misinterpreted the statute.<sup>22</sup> And House leadership had threatened to bring an action challenging the President's executive orders on immigration.<sup>23</sup> A large number of state governments, however, brought an action challenging those executive orders, in which more than eighty House members appeared on an amicus brief.<sup>24</sup> The Court has recently granted certiorari to the Fifth Circuit's decision in that case, which upheld the state governments' standing to sue.<sup>25</sup>

So these are pressing issues, and difficult ones, and ones which, I think, will tend to cut across traditional divides of federal courts law.

## I. HOW TO DEVELOP AN ANALYTIC FRAMEWORK

In thinking about the body of Dan Meltzer's work, it seemed to me it advances at least three themes important to successful analysis of problems of government standing: sensitivity to context, to a range of interpretive sources, and to remedial issues.

First, Dan's scholarly work and his conversations were always exquisitely sensitive to how differences in context might affect legal analysis.<sup>26</sup> It might

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22 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 69–76 (D.D.C. 2015). The case involved a challenge to the implementation of a part of the Affordable Care Act of 2010, Section 1402, which provides offset credits for insurance companies. The House of Representatives claimed, inter alia, that the way in which the statute was being implemented violated the Appropriations Clause, because monies had never been appropriated to fund the implementation. *Id.* at 57, 63.

23 See, e.g., Cristina Marcos, *House Plots New Lawsuit Against Obama's Immigration Orders*, HILL (Jan. 27, 2015), <http://thehill.com/blogs/floor-action/house/230868-house-preparing-to-sue-obama-over-immigration>.

24 Amici Curiae Brief of Members of Congress, et al., *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238).

25 *United States v. Texas*, 136 S. Ct. 906 (2016), *granting cert. to Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). The case was argued April 18, 2016, but had not been decided as this went to press.

26 See, e.g., Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2511 (1993) (describing himself as “an inveterate interest-balancer” and arguing that “a model of habeas corpus as providing convicts with a federal forum to compensate for the lack of removal jurisdiction cannot lead to sound results—nor, I suspect, can any other single model”); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 295 (1990) (disagreeing with Paul Bator and arguing that whether Congress has power to provide for non-Article III legislative courts ought to be determined, not based on a general rule allowing adjudication in legislative courts if subject to appellate review in Article III courts, but by a more contextualized scrutiny of, inter alia, the strength of the purposes of a legislative decision to provide for non-Article III federal adjudication); see also Meltzer, *supra* note 3, at 1209, 1229–31 (noting that powerful

thus be important to consider the many very different contexts in which issues of government standing at the federal level can arise.<sup>27</sup> Analyzing the House's standing to seek judicial enforcement of a subpoena, as in the *Harrriet Miers* case,<sup>28</sup> may raise quite different problems or concerns than the House's standing to sue executive branch officials for failing to defend the constitutionality of a federal statute.<sup>29</sup> Analyzing a challenge by the Senate to the constitutionality of particular recess appointments, or to the failure to obtain ratification of international agreements, may raise different concerns than analyzing congressional standing to sue the executive branch for failing to "take care" that a law be faithfully executed, as when the dispute arises out of an interpretive disagreement. There are a wide array of distinctive kinds of disputes that can arise between Congress, or its parts, and the executive branch. Consider the Appropriations Clause,<sup>30</sup> or the Declare War Clause,<sup>31</sup> or any of the specifically enumerated powers of the Congress in Article I—are those different from or similar to challenges to asserted violations of the President's Article II "Take Care" Clause obligations?<sup>32</sup> In another paper I hope to lay out a more detailed typology and analysis,<sup>33</sup> but these will provide some indication of the range. And one of Dan Meltzer's great intellectual strengths was his ability to help us see how what seems like a single question is actually many questions.

Second, we could learn from Dan's work and that of his frequent coauthor, Dick Fallon, to look at the range of sources that courts have typically

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arguments based on the "slippery slope" idea can be overused, but arguing that in the context of whether the government should defend the Defense of Marriage Act they were of legitimate concern for four specified reasons, while at the same time treating the DOMA as "misguided, offensive, and quite possibly unconstitutional" and recognizing the "seriousness of contemporary discrimination against gays and lesbians"). Without necessarily endorsing his conclusions in any of these articles, the point I am making here is the careful, contextualized way he reasoned.

27 For a broader argument that standing in general reflects a kind of fragmentation of analysis across different substantive areas, see Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015).

28 See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

29 Cf. Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014) (arguing that congressional committees or houses do have standing to enforce subpoenas, because of their Article I powers to hold hearings and investigate relevant to their legislative and impeachment authority, but do not have standing to defend the constitutionality of laws in court because the power to enforce and defend federal statutes is vested by Article II in the President).

30 U.S. CONST. art. I, § 9, cl. 7.

31 *Id.* art. I, § 8, cl. 11.

32 Judge Collyer, for example, distinguished, for purposes of congressional standing, Appropriations Clause challenges from other interpretive disputes, which could be characterized as Take Care Clause challenges, in *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015).

33 Vicki C. Jackson, *Government Standing: Typology and Analysis* (March 2016) (unpublished manuscript) (on file with author).

drawn on in deciding constitutional issues, not just one source, in resolving constitutional questions of government standing.<sup>34</sup> These sources include:

*Text*—With respect to the general question, the most immediately relevant text is found in Article III’s reference to “Cases,” “Controversies,” and the “judicial Power.”<sup>35</sup> These words beg for interpretation—what, if anything, distinguishes a “case” or “controversy” from a heated dispute about the meaning or constitutionality of a law? To resolve these questions, courts and lawyers have often turned to historical understandings;<sup>36</sup> the contemporary practices of analogous courts might also be viewed as relevant to what the “judicial power,” as compared to the legislative or executive power, may extend. The text of the Supremacy Clause,<sup>37</sup> or even the Guaranty Clause,<sup>38</sup> might be thought to bear on the scope and nature of the judicial power. And, as the above discussion of the different contexts in which government standing issues might arise suggested, there are specificities or particularities of texts that might matter for particular kinds of claims, e.g., as one district court found with respect to the Appropriations Clause.<sup>39</sup>

*History*—Dan Meltzer at times expressed skepticism that contemporary questions of standing in modern government could be resolved based on

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34 For a systematic development of the different sources of constitutional interpretation, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). The themes formalized in this paper by Professor Fallon are found immanent in much of Dan Meltzer’s work, and in the way he approached constitutional analysis across a range of issues. I draw also on a related typology of forms of constitutional argument developed by Philip Bobbitt in *Constitutional Fate*.

35 U.S. CONST. art. III, §§ 1, 2.

36 See, e.g., *FEC v. Akins*, 524 U.S. 11, 24 (1998); *Raines v. Byrd*, 521 U.S. 811, 826–28 (1997); *United Steelworkers of Am. v. United States*, 361 U.S. 39, 60 (1959) (Frankfurter and Harlan, JJ., concurring in the judgment) (“What proceedings are ‘Cases’ and ‘Controversies’ and thus within the ‘judicial Power’ is to be determined, at the least, by what proceedings were recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems. Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters such as were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (arguing that under Article III, “[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster”); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (referring to “the stuff of the traditional actions at common law tried by the courts of Westminster” in resolving the question whether certain actions were justiciable by bankruptcy judges (quoting *N. Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment))); *CFTC v. Schor*, 478 U.S. 833, 862 (1986); cf. *Croudson v. Leonard*, 8 U.S. 434, 440 (1808) (opinion of Washington, J.) (referring to decisions in “the courts of Westminster-Hall” in a case concerning the effects of a foreign court judgment in admiralty in the U.S. courts).

37 U.S. CONST. art. VI.

38 *Id.* art. IV, § 4.

39 *Id.* art. I, § 9, cl. 7.

history.<sup>40</sup> But he nonetheless plainly treated history as a relevant consideration and, in some contexts, a highly important one.<sup>41</sup> No long history of which I am aware allows parts of the federal government—and especially of Congress—to bring suits against the executive branch concerning its enforcement of the laws.<sup>42</sup> History alone is not a reason not to recognize broader

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40 See, e.g., Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538 (1998) (“[P]roperly to understand when particular remedies are constitutionally required, one must distill somewhat broader remedial principles from our constitutional text, structure, and tradition than can be drawn either from history or from a particular constitutional clause.”); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 26 [hereinafter Meltzer, *The Boumediene Decision*] (“[I]n the end, there is something more than a bit strange in trying to determine from the scanty available records whether the modern American naval base at Guantánamo Bay is more like eighteenth-century Scotland, Berwick-upon-Tweed, Ireland, or areas in the Indian subcontinent in which the East India Company operated but which remained under the formal sovereignty of the Moghul Emperor.”).

41 See, e.g., Meltzer, *supra* note 3, at 1196–1208 (discussing the historical practice of the executive in defending statutes); Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1918 (2004) [hereinafter Meltzer, *Jurisdiction and Discretion Revisited*] (discussing history of the Federal Rules of Civil Procedure); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1573–1602 (1990) (exploring history of framing of Article III through the First Judiciary Act to evaluate Akhil Amar’s “two-tier” thesis); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 8–13 (discussing historical background to the Eleventh Amendment and the basis for the “diversity repeal” theory of its purposes).

42 For a relatively early example, in which the Court upheld the justiciability of an action by the United States, as a shipper, against a regulatory body whose order was adverse to the interests of the United States as a shipper, see *United States v. Interstate Commerce Commission et al.*, 337 U.S. 426 430–31 (1949). As to Congress, in *Myers v. United States*, 272 U.S. 52 (1926), and *United States v. Lovett*, 328 U.S. 303 (1946), Congress or one of its members appeared as an *amicus curiae* to defend a federal statute. So far as I can determine, the first case in the Supreme Court in which Congress or its parts appeared as parties to defend the constitutionality of a statute was *INS v. Chadha*, 462 U.S. 919 (1983). Officers of Congress who have been sued for action taken pursuant to resolutions of the House had appeared as party litigants in other kinds of cases. E.g., *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that the action, by one elected to serve in Congress but denied a seat by vote of the House of Representatives, was not barred by legislators’ Speech and Debate clause immunity at least insofar as it named non-elected House employees (such as the Clerk and Sergeant-at-Arms of the House) as defendants); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (to similar effect in a suit for false imprisonment brought against the House Sergeant-at-Arms for detaining a witness found in contempt of Congress). And Congress or its parts have brought or intervened in actions seeking to enforce subpoenas. See *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) (upholding standing of the House of Representatives to defend and advocate for enforcement of a congressional subpoena); *Comm. on the Judiciary of the House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (upholding standing of House Committee to seek declaratory judgment that White House counsel was required to comply with subpoena for evidence and to testify) *cf.* *United States v. Nixon*, 418 U.S. 683, 694–97 (1974) (noting that the mere assertion of an inter-branch dispute is not enough to defeat jurisdiction, and upholding judicial power to rule on the validity of a subpoena, by a special prosecutor, of the President, for evidence relevant to a criminal proceeding); *U.S. House of Representatives v. U.S. Dep’t of*

forms of standing; as Dan wrote, government functions change and may require causes of action and remedies not previously in existence.<sup>43</sup> But an absence of support in historical practice suggests some caution about the parameters of judicial power.

*Doctrine*—Dan took the Court’s developed doctrine seriously, and much of his scholarship was devoted to the work of untangling the bases for existing doctrine and working to make more coherent the fit between different doctrines in related areas.<sup>44</sup> Indeed, his student note on *jus tertii* standing can be understood in this mold. Dan argued there that the Court had confused aspects of First Amendment “overbreadth” challenges with aspects of *jus tertii* standing. In the First Amendment “overbreadth” cases, he explained, the claim of injury made by the plaintiff was distinct from the claim of injury to the rights of a hypothetical third person.<sup>45</sup> But in *jus tertii* situations, he argued, there was a single injury both to the plaintiff and the third party whose rights were being asserted—as where physicians challenged restrictive abortion legislation as intruding on their own and their patients’ rights.<sup>46</sup> His case analysis also led him to the conclusion that

when the substantive claim is meritorious, the Court seems certain to permit its assertion; when the claim lacks merit, the Court seldom agrees to entertain it. This pattern suggests that the Court may be responding less to its asserted rule than to an unarticulated recognition of the importance, in some circumstances, of permitting the assertion of *jus tertii*.<sup>47</sup>

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Commerce, 11 F. Supp. 2d 76, 83–90 (D.D.C. 1998) (three-judge court) (upholding the House’s standing to challenge plan for conducting the census).

43 See, e.g., Meltzer, *supra* note 2, at 304 (“It may be that the most important historical function of courts has been to provide discrete remedies for concrete injuries to identifiable individuals. The common-law understanding of injury, however, is not well suited to deal with the distinctive problems of modern governments, which can cause serious harm of a systemic or probabilistic kind that does not fit into the common-law mold of identifiable injury to identifiable individuals. Deterring such harm is, to be sure, a different kind of judicial function, but one of considerable importance.” (footnote omitted)).

44 See, e.g., Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1 (1994) (exploring the source of authority for federal courts to require states to apply federal harmless error standards, given conventional understandings that there is no constitutional right to an appeal, and arguing that the *Chapman v California* harmless error rule should be understood as a form of constitutional common law); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986) (analyzing and critiquing differences between the “independent and adequate” state ground doctrine, foreclosing judicial review of constitutional violations on direct review of state court convictions, and the “procedural default” doctrine applicable on collateral federal habeas review of state court convictions).

45 See Note, *Standing to Assert Constitutional Jus Tertii*, *supra* note 1, at 423–24 (“The most common example of such an attack arises under the first amendment, when a litigant whose speech may not itself be constitutionally protected claims that the relevant statute must be struck down because it could be applied to restrict speech that cannot constitutionally be burdened.” (footnotes omitted)).

46 See *id.* at 424.

47 *Id.* at 428.

Pursuing the doctrine against asserting third party constitutional claims, he argued, showed the Court's confusing two kinds of cases: those where no claim of injury to the party plaintiff is made and those where there is.<sup>48</sup> The *Tileston* case, he argued, involved the former, as Dr. Tileston made no claim of injury to his own rights.<sup>49</sup> But in a large number of cases, he argued, the refusal to allow assertion of *jus tertii* claims would hinder the plaintiff's ability to vindicate his or her own claimed injury. Professor Meltzer argued that a factor recognized by the Court—the risk of diluting third party rights—was present in a far larger number of cases than the Court had understood and should be given far greater weight in resolving such claims.<sup>50</sup> He concluded that “[a] practice of permitting claimants to assert *jus tertii* when the injury of which they complain also deprives third parties of constitutional rights is necessary to ensure that such rights are fully protected.”<sup>51</sup>

Furthermore, he argued, such a change “would inject a greater degree of candor and consistency into Court decisions” and “permit the Court to turn its attention in *jus tertii* cases to the substantive constitutional claims presented without the risk of confusing the merits with procedural questions of standing.”<sup>52</sup> Dan Meltzer's concerns for clarity; for candor; for coherent doctrine; and for the effective protection of constitutional rights are all on display in this early piece of work.

In today's doctrinal world, the three “core constitutional” elements of standing, articulated as such in the early 1980s, are injury, causation, and traceability.<sup>53</sup> These requirements were developed in the context of claims against the government in private litigation. It seems reasonably clear that these elements are not applicable to sovereigns acting as such, at least not in the terms as they are defined in private suits against the government.<sup>54</sup> For example, the concept of “injury” behind any account of the government's “standing” to bring criminal prosecutions in all likelihood would depend on an extremely abstract and generalized conception of injury incompatible with the Court's definition of injury for private plaintiffs. It is unclear—indeed, I would say, doubtful—that the correct test for governmental standing is captured by a doctrine developed in the context of private claimant suits, notwithstanding the Court's purported application of the doctrine in cases such as *Windsor*.<sup>55</sup> (Indeed, leading scholars, including William

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48 *Id.* at 428–29.

49 *Id.* at 430 (citing *Tileston v. Ullman*, 318 U.S. 44 (1943)).

50 *Id.* at 431–32.

51 *Id.* at 443.

52 *Id.*

53 See *Allen v. Wright*, 468 U.S. 737 (1984).

54 See Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2245 (1999) (submitting “that no federal judge, if pressed, would seriously contend that Article III requires that the United States must suffer an injury in fact that is ‘personal,’ ‘concrete and particularized,’ and ‘actual or imminent’ . . . before litigation on its behalf can be brought in federal court”).

55 *United States v. Windsor*, 133 S. Ct. 2675, 2685–87 (2013).

Fletcher (now a judge of the Ninth Circuit) have argued much more generally that standing should be reconceptualized as being an inquiry about whether “cause of action” is a better way to understand the sets of issues addressed by standing.<sup>56</sup> On the other hand, the idea of trying to identify whether there is some particular injury, not shared by the citizenry in general, may prove useful in drawing the kinds of distinctions that may prove necessary in analyzing legislative standing issues, especially in light of traditional understandings that enforcement and litigation are generally for the executive branch.

*Values/Ethos*<sup>57</sup>—Dan Meltzer’s work not uncommonly recognized the importance of what we might call public values like the effective protection of constitutional rights; he also recognized that competing values may be at stake and merit consideration in resolving difficult legal questions. For example, in one paper he discussed the legitimacy of courts’ decisions, and their predictability/stability, with respect to arguably discretionary refusals to exercise jurisdiction;<sup>58</sup> in another he argued that the protection of counter-majoritarian rights should have priority over other values in debates over the allocation of Article III resources;<sup>59</sup> and in still another, he argued that, in assessing whether the *Boumediene* decision<sup>60</sup> was “justified,” it was relevant if experience had shown that under the existing regime the military could not be trusted fairly to conduct hearings, even as there were strong reasons for courts not to order the release of persons who might well be likely to reengage in terrorist activity against the United States.<sup>61</sup>

In thinking about suits by Congress, or its parts, against the President in separation of powers disputes,<sup>62</sup> one might explore the values of democracy—respect for the decisions of the democratic branches—and the rule of law. From the vantage of political democracy, suits by the legislature against the executive might be thought likely to detract from the capacities of the political processes to resolve important questions; even if the branches are in stalemate, there is an argument that if the Court can be expected to come to the rescue that expectation is not likely to contribute to the political capabilities of the other branches. However, from the vantage of the rule of law, the more legal questions a court can decide the better; a judicial decision is a

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56 William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); see also Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

57 In referring to ethos, I am referencing Philip Bobbitt’s invocation of ethical arguments in his work, *Constitutional Fate*. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

58 See generally Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, *supra* note 41.

59 Daniel J. Meltzer, *The Judiciary’s Bicentennial*, 56 U. CHI. L. REV. 423, 433 (1989).

60 *Boumediene v. Bush*, 553 U.S. 723 (2008).

61 Meltzer, *The Boumediene Decision*, *supra* note 40, at 59 (concluding that courts must sometimes provide “countervailing force to extreme claims by the political branches”).

62 Assuming for these purposes the suits have been properly authorized under the rules of each house or, if by one house, under its rules.

good way to obtain a clear answer about what the law requires. Where questions—especially constitutional questions—do not have clear *ex ante* answers, the value of judicial resolution and the ensuing clarity of answers for the democratic political process must be weighed against the potential detriment to political capacities, the risk that a court may choose wrong answers, and the possibility that overall democratic functioning will be enhanced by allowing answers to remain ambiguous or uncertain. There is a wonderful passage in Hart and Wechsler's discussion of congressional control of jurisdiction, about the possible benefits of not knowing ultimate answers to the question of Congress' power to foreclose judicial review of constitutional questions,<sup>63</sup> an idea about the positive effects of ambiguity or uncertainty in constitutional law<sup>64</sup> that might have broader application here.

*Consequences*—Dan Meltzer's work often partook of a deeply contextualized, humane, and pragmatic appreciation of the effects or consequences of law, including judicial doctrine. This can be seen in his paper on remedies and deterrence in the 1988 *Columbia Law Review*,<sup>65</sup> in which he developed important consequentialist arguments for why remedies for violations of federal constitutional law should have an important deterrent component. His concern for both context and consequences comes through clearly in passages such as this one:

[W]hether a deterrent remedy should be provided is—or should be—a refined and context-specific question of remedial policy, whether the question arises in a defensive or an offensive setting. . . . [T]roublesome remedial questions in constitutional cases are not found only in suits seeking offensive deterrent remedies. Rather, such questions are characteristic of an era in which large public bureaucracies often threaten a greatly expanded list of individual rights, and in which those threats are often directed not at identifiable individuals but at the public at large.<sup>66</sup>

Indeed, in that paper, Dan argued for a more expansive concept of standing to challenge asserted police violations of the Constitution in order to further the deterrent goals of the constitutional provision itself.

Would Dan have argued for expansive government standing on a similar deterrence rationale? Where constitutional rights of individuals are not what is being protected? Or in light of increasing gridlock and the need to have some degree of workable government? One does not know.

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63 See RICHARD H. FALLON JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 300 (6th ed. 2009) ("Is it perhaps politically healthy that the limits of congressional power over Supreme Court appellate jurisdiction have never been completely clarified? Does the existence of congressional power of unspecified scope contribute to the maintenance of desirable tension between Court and Congress?").

64 See Vicki C. Jackson, *Secession, Transnational Precedents, and Constitutional Silences*, in *NULLIFICATION AND SECESSION IN 21ST CENTURY CONSTITUTIONAL THOUGHT* (Sanford Levinson and Jeffrey Tulis eds., forthcoming 2016).

65 Meltzer, *supra* note 2.

66 *Id.* at 328.

But in the context of evaluating government standing and specifically congressional standing, as already intimated, there are a number of consequences to consider. First, being involved in a larger number of necessarily politically divisive controversies has potentially adverse consequences for courts. Second, there are potential consequences for the dynamic of separation of powers: for the actual interactions between the political branches arising from definitive judicial resolution of issues of separation of powers, it might be really important for courts to not get it wrong; do they have capacities to decide correctly? Do all constitutional questions have the kind of single correct answer that can endure over time, as is envisioned for judicial decisions? Third, and more broadly, for the functioning of a representative, democratic system: Will judicial intervention lead to a decline in the political branches' ability or expectation to resolve controversies between the branches using the political tools of democracy? Is definitive resolution of such issues always in the public interest? Are there benefits of legal uncertainty in some areas? Or will having more clarity about what the constitutional rules are promote a better working federal government?

All of these sources—text, history, doctrine and precedent, values and ethos, and concern for consequences—play a role in Dan Meltzer's analysis of federal courts questions and may have a role to play in developing an analytical framework for evaluating questions of standing in intergovernmental disputes.

A third set of issues bearing on the analytical framework for evaluating claims of government standing that Dan Meltzer's work suggests is his very important focus on remedies—remedies that are available to protect individuals, as was the focus of Dan's work, and here, of remedies available to protect government interests. In a great paper with Dick Fallon on remedies,<sup>67</sup> the two coauthors concluded that

two values, rather than one, underlie the law of constitutional remedies . . . . [T]he aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command. . . . [T]he remedial calculus also must include the second principle, which demands an overall structure of remedies adequate to preserve separation-of-powers values and a regime of government under law.<sup>68</sup>

That is, they argued, the Constitution did not always require that every violation or potential violation be remedied, but it did require that there is enough in the way of remedies to overall promote compliance with constitutional norms.<sup>69</sup> But in the context of disputes between the President and the Congress, what is “enough”? Must the remedies be judicial in character?

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67 Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

68 *Id.* at 1789–90.

69 *See id.* at 1776–91. Meltzer's work on remedies and standing clearly leaned in the direction of relaxing standing requirements. But this was at least in part because of the importance he ascribed to judicial protection of individual constitutional rights. *Cf. United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (“The irre-

In evaluating claims of congressional standing, it may be important to consider the broader range of remedies available to Congress as compared to individuals complaining of deprivations of rights. Congress can enact legislation to control executive action or to overcome interpretations with which it disagrees.<sup>70</sup> It can enact legislation clarifying the meaning of statutes it claims the President is misinterpreting. It can seek to remove from office by means of the constitutional procedure of impeachment executive officials, including the President, who engage in misbehavior amounting to high crimes and misdemeanors. It can hold oversight hearings to apply pressures of publicity to recalcitrant executive officials. The President, in turn, typically has great access to the media in efforts to influence political opinion; the President can veto legislation on constitutional grounds; and typically the President will have the support of most members of his or her political party in the Congress.<sup>71</sup>

Further, in evaluating the available remedies, should we consider only those remedies that can be directly asserted by Congress or its parts? If there are remedies available to individuals, would that bear on whether standing for the legislature should be recognized? If there are no individual remedies, should that bear on congressional standing? Or if there are no individuals who would meet the injury requirement, is that a signal, as the Court once suggested, that the issue is committed to the political process and thus nonjusticiable?<sup>72</sup>

In a later piece I will try to bring these factors together to both construct and evaluate a typology of government standing claims. But for purposes of

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placeable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the counter-majoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.”).

70 If Congress is seeking to affect the behavior of a sitting President, doing so by legislation may mean overcoming a veto; if Congress is concerned to assert a policy preference over the long haul, or to disagree with a judicial construction of a statute or even to attempt to avoid the impact of a judicial holding of unconstitutionality, ordinary enactment of legislation may be sufficient.

71 See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

72 See *Richardson*, 418 U.S. at 179 (majority opinion) (“It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.”); see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”).

this short Essay, I focus next on only one factor—the role of comparative constitutional law—in examining a possible expansion of standing.

## II. CONSEQUENCES AND COMPARISONS

In trying to understand the consequences for the role of courts, we might consider what light can be shed by comparative constitutional awareness. In a fascinating Comment, *The Supreme Court as a Constitutional Court*, published in 2014 in the *Harvard Law Review*, Professor Jamal Greene argued that standing doctrine should be adjusted so as to permit members of Congress to sue to resolve disputes between the legislative and executive branches in advance of the time that it takes such issues to arise in a case involving private persons.<sup>73</sup> Taking off from the decision in *National Labor Relations Board v. Noel Canning*,<sup>74</sup> Greene argued that it would have been better to have had the meaning of the Recess Appointments Clause settled years earlier, without the uncertainty over the validity of agency action created by the presence of recess appointees whose appointments might not be constitutionally valid.<sup>75</sup>

Thus, Greene argued that the Court should adjust its standing doctrine, so that “where constitutional disputes concern a *rule* that specifies the division of powers between governmental institutions, the Court should be permitted to engage in abstract review, to grant institutional standing to public organs, and to bind nonparties to the case.”<sup>76</sup> In so stating his argument, Greene limits his suggestion to those parts of the Constitution that are “hardwired” as rules, rather than as more open-ended standards suitable to development over time.<sup>77</sup>

A significant part of his argument drew on comparative experience:

Procedural devices that would have addressed the “when” problem in *Noel Canning*—abstract review, institutional standing, and *erga omnes* decisional authority—are familiar to constitutional courts, common in Europe and Latin America, that are specifically empowered to adjudicate public law disputes. The forms these courts take are meant to fit the powers they exercise. The time is ripe to consider whether the U.S. Supreme Court might better match form to function without substantial disruption to its institutional DNA.<sup>78</sup>

Greene elaborated his argument, drawing largely on European examples:

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<sup>73</sup> Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124 (2014).

<sup>74</sup> 134 S. Ct. 2550 (2014).

<sup>75</sup> Greene, *supra* note 73, at 127.

<sup>76</sup> *Id.* at 128.

<sup>77</sup> *Id.* at 146.

<sup>78</sup> *Id.* at 128 (footnotes omitted).

Abstract review . . . is the power to review legislation or executive action before there is an injury to a private plaintiff. This power is “nearly universal” in Europe. . . .

Institutional standing could apply to Houses of Congress, the President, an administrative agency, or a state entity. It could also mean standing for a subset of a legislative body. For example, Article 93 of the German Basic Law empowers the federal government, a *Land* government, or one-quarter of the *Bundestag* (the lower house of parliament) to initiate constitutional review by the Federal Constitutional Court. Certain kinds of federalism disputes can be reviewed on application of the *Bundesrat* (the upper house) or individual *Länder*, and municipalities have constitutional standing to litigate their rights to self-government, which are guaranteed by Article 28 of the Basic Law.<sup>79</sup>

I do not in this Essay engage with Professor Greene’s thoughtful arguments in favor of his proposal nor with the three limitations he proposes on its scope.<sup>80</sup> But I do want to raise questions about the comparisons he makes with constitutional courts in other countries, based on differences in constitutional history, structure, and socio-legal setting. While functional comparisons can be a useful tool for gaining information about potential consequences of adopting one rather than another interpretive rule, functional analysis must be fairly deeply contextualized in order to perform its office of enlightening rather than misleading.<sup>81</sup> And a somewhat deeper look at comparative contexts raises questions about whether what has worked reasonably well in those other systems would have similar legitimacy and similar functional effects in ours.

To begin with, the apex courts for constitutional law in the other countries he notes have been established far more recently than the U.S. Supreme Court. The significance of this fact is that decisions by authorized constitution-makers have been taken in more recent generations and have, in most of the cases he relies on, specifically authorized the exercise of the kind of abstract jurisdiction and/or legislative standing Professor Greene argues for. Current generations are more likely to feel a sense of connection with the decisions made by more recent, than more removed, forebears. The relative

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79 *Id.* at 142–43 (footnotes omitted).

80 *See id.* at 144–50 (explaining that his proposal would be limited to “pure public law” disputes, that is, those with a genuine separation of powers dispute in which Congress has more of an interest than nongovernmental individuals; the issue has to involve a constitutional rule, not a standard; and the issue has to be otherwise ripe and of the kind that courts can adjudicate). I do not understand Professor Greene to be arguing for expanded standing to bring before the courts issues that they could not hear for reasons other than standing, i.e., nonjusticiable political questions; I do understand him to argue for accelerating the speed with which the Court can decide issues that do not come before it so often because of requirements of individual standing.

81 Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 54 (Michel Rosenfeld & András Sajó eds., 2012).

rency and specificity of texts such as the German Basic Law<sup>82</sup> may provide a form of legitimacy that would not be present in the United States if the Court were to allow legislative standing more freely than it has. Of course, we have seen significant changes in standing doctrine develop through judicial decisions, so this is hardly a large barrier. Still, it is a factor worth noting.

More important, high courts in other countries that routinely handle separation of powers disputes between branches of government are often constituted as specialized “constitutional courts,” quite distinct from the “supreme courts” that sit at the apex of the ordinary court judicial hierarchy.<sup>83</sup> Why is this significant? The structure of such constitutional courts is designed to provide far more regular inputs from the political branches, resulting in less risk of a court that is dramatically out of alignment with current understandings or practices.

A principal example in Professor Greene’s paper is the German Constitutional Court. It was established under the Basic Law of 1949 as a separate constitutional court, in the European model, designed to hear constitutional cases and specifically including disputes between organs of government.<sup>84</sup> It was originally structured to sit in two “senates” or chambers, to which the justices are specifically appointed; except in rare cases, e.g., involving incapacity or disqualification of a judge, members of the First Senate do not sit on cases before the Second Senate and members of the Second Senate do not sit on cases heard by the First Senate.<sup>85</sup> The Second Senate was originally designed specifically to hear abstract review proceedings and so called “organstreit” proceedings involving disputes between organs of the national government, while the First Senate was to hear “constitutional complaints of ordinary citizens as well as referrals from other courts.”<sup>86</sup> The initial division of the senates implied that somewhat different characteristics might be desirable in those justices hearing abstract review or organstreit cases and those hearing only the more concrete disputes that have become so important a part of the German Constitutional Court’s docket. Over time, however, the numbers of individual complaints came to dwarf the other categories of juris-

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82 GRUNDGESETZ [GG] [BASIC LAW], May 23, 1949, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

83 See generally VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 500–91 (3d ed. 2014).

84 See DONALD P. KOMMERS & RUSSELL MILLER, *CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 10–24 (3d ed. 2012).

85 *Id.* at 18–19 (also noting that justices from the different senates may sit together when the Court acts as a “plenum”).

86 *Id.* at 18. On the jurisdiction of the Italian Constitutional Court over disputes between constitutional organs and between subnational and central governments, as well as over the admissibility of proposals for referenda, see VITTORIA BARSOTTI ET AL., *ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT* 49–52 (2015); see also John Ferejohn & Pasquale Pasquino, *The Italian Constitutional Court*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 305–06 (Tom Ginsburg ed., 2012).

diction; both senates now hear individual complaints cases and other adjustments have been made to more evenly distribute caseload as well.<sup>87</sup>

Another important structural feature of the German Constitutional Court, one widely shared among the European constitutional courts, is that the terms of the members are limited. Originally, the members of the Constitutional Court served for eight-year renewable terms (unless they were appointed to that court from the regular judiciary, in which case they had lifetime terms).<sup>88</sup> But within the first nineteen years of its existence, a decision was made to provide for longer, nonrenewable terms for all of its justices.<sup>89</sup> German justices now serve terms of no more than twelve years; these terms are not renewable. Should the justice hit the mandatory retirement age of sixty-eight before the twelve years expires, he or she must also leave the bench.<sup>90</sup> In this way, regular, orderly turnover in the membership of the Court is achieved. Indeed, as a leading scholar of constitutional courts in Europe explains, “[t]he idea behind this arrangement is that no wide gap should emerge between the court’s constitutional jurisprudence, on the one hand, and the basic moral beliefs of the people and their political representatives, on the other.”<sup>91</sup> Similar nonrenewable terms are found in many other of the constitutional courts: in France, justices serve nine-year nonrenewable terms on the Conseil Constitutionnel; in Italy, the Constitutional Court justices also serve nine-year nonrenewable terms.<sup>92</sup> It is thus quite unlikely that, in such European constitutional courts, there could be an eleven-year period (as there was in the United States between 1994 and 2005) when no new appointments are made to the court. Although proposals have been made to move to a term limit requirement for U.S. Justices,<sup>93</sup> once the eleven-year

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87 KOMMERS & MILLER, *supra* note 84, at 19.

88 *Id.* at 22.

89 *Id.* (explaining how the German Constitutional Court, which began operations in 1951, came to have fixed, twelve-year nonrenewable terms for all its members by 1970). On the benefits of nonrenewable, staggered terms in securing both judicial independence and some regular turnover in the courts, see Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006). For a discussion of limited terms for constitutional court judges that evaluates their benefits and costs and argues in favor of retirement ages instead of short terms, see VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 100–03 (2009).

90 KOMMERS & MILLER, *supra* note 84, at 22.

91 FERRERES COMELLA, *supra* note 89, at 100.

92 BARSOTTI ET AL., *supra* note 86, at 45. In Italy, a principal way cases come to the Constitutional Court is by referrals from lower court judges in ordinary adjudication and its review function is “abstract” in these cases only in the sense that it decides only the particular issue without reference to how the case itself should be decided. However, the Italian Court also has jurisdiction over certain, more abstract, questions and over cases involving disputes between government bodies. For discussion of the Italian Constitutional court’s jurisdiction in separation of powers disputes, see *id.* at 49–53.

93 See, e.g., Calabresi & Lindgren, *supra* note 89; Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211–12 (1988).

period of stasis ended with the 2005 appointments of Chief Justice Roberts and Justice Sam Alito, agitation for this change seems to have diminished.

A third important difference has to do with the professional background of those appointed to the specialized constitutional courts: the members of these courts also tend to include persons with active experience in the organs of political democracy. (This results, in part, from the typically more decentralized appointment processes, discussed further below.) Take the German Constitutional Court as an archetype, as it is regarded in many places. It has not been uncommon in Germany, for example, for members of the Judicial Selection Committee in the Bundestag (the popularly elected chamber) to go on to serve on the Constitutional Court itself.<sup>94</sup> But the U.S. Supreme Court has *decreasingly* had persons with serious experience in political process.<sup>95</sup> As scholars describe in France, Germany, Italy, and in other countries as well, members of the constitutional courts are drawn from quite distinct pools than are the members of the “careerist” regular courts; among the backgrounds commonly found in members of the constitutional courts are experience as members of a parliament and/or as academics.<sup>96</sup> Similar developments have occurred elsewhere, especially as constitutional courts develop a stronger presence in the judicial review of the constitutionality of acts of government.<sup>97</sup>

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94 See DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY* 114, 143 (1976). As Kommers explained, the Judicial Selection Committee (JSC) selects half of the members of the Constitutional Court, acting, by a super-majority vote, on behalf of the Bundestag. *Id.* at 89, 114, 135 (eight of twelve votes in the JSC required to elect a member of the Constitutional Court). The other half is chosen by the Bundesrat by a two-thirds vote. *Id.* at 89; KOMMERS & MILLER, *supra* note 84, at 23.

95 See, e.g., Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 INT’L J. CONST. L. 652, 663 (2006) (noting change in composition of the Court towards having only persons who had previously been federal judges as nominees and appointees, a trend that “means foregoing the appointment of justices with high-level experience in the executive and legislative branches and in the private practice of law”).

96 See, e.g., JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 37–41 (1992) (describing the French Conseil Constitutionnel in March 1989 as including three former cabinet ministers (one of whom had also been a law professor); a former senator; a former company director and legal adviser; a former judge and “head of the Minister of Justice’s private office”; a former Deputy in the National Assembly; a leading advocate; and a leading constitutional and civil liberties law professor; also noting that since 1986, only two of eight appointees had held office in parliament, government or a political party); KOMMERS & MILLER, *supra* note 84, at app. B (Biographical Sketches of Federal Constitutional Court Presidents and Vice Presidents); KOMMERS, *supra* note 94, at 149 (noting that in the first roughly twenty years of the German Constitutional Court, twelve justices had backgrounds entirely in “the civil service or the judiciary”; twenty-eight had held high positions in the national or state civil services; ten had “legislative experience”; nine had spent their careers practicing law; and five had been law professors). One form of diversity of professional background in the German Constitutional Court is legally mandated: three of eight in each Senate must be from the regular courts, but the others are typically drawn from backgrounds in parliament or in academia. KOMMERS & MILLER, *supra* note 84, at 22.

97 On changes in the Chilean Constitutional Court, with a ban on Supreme Court justices serving on the Constitutional Court and increased resort to persons with experi-

Fourth, as mentioned, the institutions charged with the appointment of justices are not as constitutionally centralized as in the United States, where the President nominates for Senate confirmation all nominees to the Article III courts. By contrast, in Germany, the appointment power is divided between the two houses of the German Parliament: the Bundesrat is the chamber of the German parliament that represents the subnational units of Germany, called *laender*; members of the Bundesrat are not separately elected representatives, as in the U.S. Senate—but rather are members of the *laender* governments themselves. The Bundestag is the popularly elected chamber in the German Parliament, and its Judicial Selection Committee exercises strong influence over the entire appointment process in both houses. Still, the formal authority of the two houses results in negotiations between them that, together with a required two-thirds voting rule, has resulted in politically, regionally, and religiously diverse and balanced sets of appointments.<sup>98</sup> In France, the nine seats on the Conseil Constitutionnel are filled one-third by the President of the Republic, one-third by the President of the French Senate, and one-third by the President of the National Assembly.<sup>99</sup> Again, the diversity of formal sources facilitates a broader range of persons, as does the regularity of openings.<sup>100</sup>

To be sure, not all foreign courts that decide such issues are constituted as “constitutional courts.” Canada and Israel, for example, are exceptions. But in both Canada and Israel, there are important structural differences that are relevant. For one thing, there are mandatory retirement ages (in Israel it is seventy, in Canada it is seventy-five);<sup>101</sup> such mandatory retirement ages, in systems where judges are appointed only after a certain level of professional accomplishment, later in their lives, will still “reduce the gap” between the court and the public,<sup>102</sup> albeit perhaps to a lesser extent than nonrenewable, single terms of around a decade. Moreover, neither Israel nor Canada includes as part of its constitutional structure the principle of separation of powers: each is based on a parliamentary system, so that if there is intense conflict producing gridlock, the present government need not con-

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ence in government and academia as appointees to the Constitutional Court, see Ferejohn & Pasquino, *supra* note 86, at 310–12 (summarizing Javier Couso and Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile*, in *COURTS IN LATIN AMERICA* 99 (Gretchen Helmke and J. Rios-Figueroa eds., 2011)).

98 See also KOMMERS & MILLER, *supra* note 84, at 24 (noting that the selection process “has consistently produced a Constitutional Court that is reflective of Germany’s most prominent political parties, regional divisions, and confessions,” although it has underrepresented women).

99 See BELL, *supra* note 96, at 28, 30, 34–41 (1992); see also JACKSON & TUSHNET, *supra* note 83, at 538; ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992). Members serve for nine-year nonrenewable terms; and every three years, each of the appointing authorities appoints one member. BELL, *supra*, at 34.

100 JACKSON & TUSHNET, *supra* note 83, at 584.

101 *Id.* at 538–40.

102 FERRERES COMELLA, *supra* note 89, at 103.

tinue in office as it generally must in presidential systems like that of the United States. In Canada, the Court does hear “advisory references,” in which it gives detailed legal “advice” on abstract but pressing legal questions.<sup>103</sup> Although nominally “advisory” and not binding, in fact these opinions are treated as constraining other actors; but the Court sometimes exercises discretion not to address questions posed in Advisory References,<sup>104</sup> so to treat them as fully equivalent to the U.S. “case or controversy” jurisdiction may not be quite accurate. And the advisory references are addressed in a very different institutional context, in which the mandatory retirement age provides for a different kind of orderly plan for renewing the Court.<sup>105</sup> The willingness of the Israeli Court to decide disputes that case or controversy limitations in the United States would foreclose is well known,<sup>106</sup> but not widely emulated and quite controversial even in Israel.<sup>107</sup>

A fifth and final point of difference to note concerns the ease or difficulty of amendment. In the United States, it is much more difficult to amend the national constitution than in virtually any of the other countries discussed.<sup>108</sup> Not only are the provisions for amendment more rigorous, gener-

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103 See e.g., Supreme Court Act, R.S.C. 1985, c. S-26, § 53 (Can.) (listing the circumstances in which the Governor-General in counsel can refer a matter to the Supreme Court). The constitutionality of the reference jurisdiction was deemed early on settled by the decision in *Attorney Gen. (Ont.) v. Attorney Gen. (Can.)*, [1912] A.C. 571 (Can. P.C.). As two scholars explained, the Privy Council relied in part on the fact that the British North America Act, 1867 (the relevant constitutional charter, now called the Constitution Act, 1867) “did not clearly separate powers, it allowed courts to perform traditionally non-judicial functions, such as rendering advisory opinions.” James L. Huffman & MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction*, 74 MINN. L. REV. 1251, 1261 (1990).

104 See Reference re Same-sex Marriage, [2004] 3 S.C.R. 698, paras. 61–71 (Can.) (exercising discretion not to answer one of four questions, the one concerning whether bans on same-sex marriage violate the Charter; the Court indicated in response to other questions that the national Parliament would have power to extend the capacity to marry to persons of the same sex).

105 Selections to the Israeli and Canadian courts are quite unlike the processes used in the United States. In Israel selections are made by a committee that has been dominated by sitting justices of the Court. In Canada the selections are made by the government, but with little to no public review process in the parliament.

106 See generally Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19 (2002).

107 See, e.g., Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 241, 242, 252–54 (Kate Malleson & Peter H. Russell eds., 2006) (noting the Israeli Supreme Court’s “unprecedented degree of intervention in the conduct of other branches of government,” which has attracted “ever-greater attention and growing criticism” within Israel, and describing significant political challenges to the Israeli Supreme Court’s jurisdiction and to the methods by which its members are selected).

108 See, e.g., Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION 237 (Sanford Levinson ed., 1995); see also ZACHARY ELKINS ET AL., THE

ally,<sup>109</sup> than in most other countries, but the current legal culture in the United States is one quite hostile to amending the national Constitution.<sup>110</sup> The difficulty of amendment magnifies the potential effects of a long entrenched Court majority forestalling democratic change.<sup>111</sup>

### CONCLUSION

These comparisons are not being made to suggest that government standing should not be expanded. Rather, they are intended to suggest the need for real caution in reasoning from the existence of abstract review in other systems to the U.S. context.

Expanding government standing increases the number of opportunities for the Court to decide cases that are highly contentious as between the branches and political parties. Such cases pose risks for the courts—of being perceived as partisan and losing the appearance of impartiality on which the judiciary's authority in part depends. Such cases also pose risks for the operation of the system, if the Supreme Court were to make an interpretation that is insufficiently based on an appreciation of the power dynamics that separation of powers rules are intended to both maintain and constrain. Such cases also pose risks to the democratic vitality of the other branches, risks that increasing the “third branch's” jurisdiction and power might diminish that of the more democratically elected branches, to the detriment of the democratic aspects of democratic constitutionalism.

Of course, other reasonably well-functioning constitutional democracies have judicial review of separation of powers disputes as an ordinary matter, and in cases that would not meet U.S. justiciability standards. There are, moreover, benefits to having the courts clarify what the legal rules are, and those benefits may seem especially strong when consensus between the political branches breaks down as to the nature and operation of those rules. But empowering classic “constitutional courts” to decide cases of conflict directly between the executive and legislatures may be different in significant respects than empowering the U.S. Supreme Court, and subordinate federal courts, to do so. Classic constitutional courts typically have regular turnover

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ENDURANCE OF NATIONAL CONSTITUTIONS 101 (2009) (describing the U.S. Constitution as “one of the [world's] most inflexible” of constitutions).

109 Thus, for example, in Germany the Basic Law can be amended by a two-thirds vote of both houses of the Parliament. See GRUNDGESETZ art. 79(2) (Ger.). In France, amendments are enacted either by majority vote in the two houses of the national legislature and approved by nationwide referendum, or, in some cases, by a three-fifths majority of the legislature alone. See 1958 CONST. art. 89 (Fr.). Both countries have seen a number of amendments since the adoption of the German Basic Law (1949) and the Constitution of the Fifth French Republic in France (1958).

110 See Vicki C. Jackson, *The (Myth of Un)Amendability of the U.S. Constitution*, 13 INT'L J. CONST. L. 575 (2015).

111 Cf. KOMMERS & MILLER, *supra* note 84, at 24 (arguing that life tenure, combined with stare decisis in the United States, raises the stakes in the U.S. appointment process for members of the Supreme Court).

on the bench, so as to assure that there are not large time lags between present constitutional experience in the political branches and the knowledge of the bench. For the U.S. Supreme Court, and the Article III judiciary as a whole, there are no provisions for such regular turnover; moreover, the Article III judiciary—especially at the Supreme Court level—functions with increasingly fewer members with actual experience in elected office, and under a Constitution whose amending process poses unusually rigorous obstacles to democratically initiated constitutional change. In other words, I am raising the question whether the scope of a court's jurisdiction ought to bear any relationship to the methods by which its members are chosen and the period of time for which they serve, as well as the amendment rules and the degree to which they allow judicial decisions to be overcome.

As I attempt, in future work, to develop a more comprehensive analytical model for understanding government standing, I will miss Dan Meltzer. But I will try to imagine his voice, pushing, probing, in a fairminded, analytically rigorous but humane way, to help clear the path towards the better answers that so many of us in our scholarship try to look for.

