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But the transformation this court has wrought in its own powers necessarily runs much farther than that. If Congress, its Houses, or its members can sue the President for a declaration of abstract legal right, it must follow that the President may, by the same token, sue Congress. For example, Presidents at least since Franklin Roosevelt have objected to the device known as the congressional veto on the grounds of its unconstitutionality. Had they understood our constitutional system as this court now understands it, these Presidents need not have waited for a private person to raise the issue in *INS v. Chadha*, 103 S. Ct. 2764 (1983), to obtain a declaration of the unconstitutionality of that device, but could have sued Congress at any time. This court may become a potent supplement to the checks and balances the Constitution provides. Under the majority's reasoning, whenever the President vetoes a bill that, in his judgment, requires him to execute an unconstitutional law or invades his legitimate constitutional

than a generalized grievance, while the pocket veto would be treated as occasioning an injury "to the members' rights to participate and vote on legislation in a manner defined by the Constitution." 733 F.2d at 951. The grounds for this difference in treatment are that a legislator has "a right and a duty to participate" in the process by which a bill becomes law. *Id.* at 952. That may be, but the legislator whose vote is nullified by a pocket veto *has* exercised his right and fulfilled his duty—it is the impairment of his lawmaking power that, on this court's analysis, gives him standing to sue. Since that impairment occurs whenever a President fails to enforce the law as Congress intended it, enforcement challenges must be heard if this court's rationale is to be fairly applied. Thus, this court's view of standing, applied in a principled fashion, would move the obligation to "take Care that the Laws be faithfully executed" out of article II of the Constitution and divide it between articles I and III.

powers and Congress overrides his veto, the President may sue before the ink is dry for a judicial declaration of unconstitutionality. We will become not only a party of the legislative process but perhaps the most important part.

Indeed, if unlawful interference with one's official powers is enough to confer standing I do not know why members of the judiciary should not join in the game, with the added advantage, of course, that one federal judge's lawsuit claiming a right to powers denied would be heard and decided by other federal judges. Thus, when Congress limited the habeas corpus jurisdiction of the District Court for the District of Columbia, there is no reason, under the majority's rationale, why a district court judge, or a judge of this court who had lost appellate jurisdiction, should not have sued Congress and the President for a declaration of unconstitutionality. In this court he would, apparently, have won, *see Pressley v. Swain*, 515 F.2d 1290 (D.C. Cir. 1975) (en banc); *Palmore v. Superior Court of the District of Columbia*, 515 F.2d 1294 (D.C. Cir. 1975) (en banc), though he would not have succeeded in the Supreme Court, *see Swain v. Pressley*, 430 U.S. 372 (1977).

Intra-branch disputes also must succumb to this court's plenary interpretation of its own powers. *See, e.g., Vander Jagt*, 699 F.2d 1166. Individual legislators now have standing to sue each other, the Houses of Congress, other bodies composed of legislators, such as committees and caucuses, and so on. Virtually every internal rule, custom, or practice by which the internal operations of Congress are regulated is reviewable at the discretion of this court at the behest of disgruntled legislators. That means, for example, that the opponents of a filibuster have

standing to sue for an injunction directing the filibuster to cease. Legislators who were not selected to serve on the committees of their choice have standing to challenge the manner in which the selection process was conducted. Indeed, this court has so held. *Vander Jagt*, 699 F.2d at 1170. No matter how intrusive the relief sought, this court has jurisdiction so long as the legislator can show some relationship between the congressional behavior he challenges and his own influence and effectiveness as a legislator. Congress, in short, is subject to judicial oversight to whatever degree this court, exercising its newly-invented powers of equitable discretion, decides supervision is warranted, or, as one of our cases puts it, not "startlingly unattractive." *Vander Jagt*, 699 F.2d at 1176 (quoting *Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977)). It appears that our constitutional jurisdiction now rests less upon law than upon aesthetic judgments.

The same reasoning, of course, applies to disputes within the Executive and Judicial Branches. The head of an agency who believes that another agency has improperly encroached on an area confided to his administration by statute or regulation no longer need bring the dispute before the President, for the courts stand ready to resolve it.⁴ Beyond that, a cabinet officer aggrieved by an Executive Order or any other exercise of presidential power, one which arguably requires him to violate an act of Congress, can proceed to challenge the offending directive in federal court, where declaratory judgment and in-

⁴ The majority clearly believes that *Chapman v. FPC*, 345 U.S. 153 (1953), establishes that this is already the law, but as shown *infra* at pp. 47-51, that case does not at all have the import the majority ascribes to it.

junctive relief are available to set the President right. Presumably, a district judge whose jurisdiction had been limited by a court of appeals decision could seek rehearing *en banc* or petition the Supreme Court for a writ of certiorari. According to this court's rationale, I should be able to petition the Supreme Court for a writ of certiorari or of mandamus to overturn the result in this case because it unconstitutionally alters my duties and powers as an article III judge.⁵

Nor must it be forgotten that the Constitution contemplates areas of authority for the states, areas in which the national government is not to impinge. Should Congress enact a law that arguably is beyond its powers and that has an impact upon citizens of the several states, it would seem, under this court's reasoning, that members of a state legislature, whose jurisdiction had been ousted, would have standing to sue the national executive to enjoin enforcement of that law. Certainly the State itself would have standing. States, after all, have constitutional functions and powers as surely as Congress does.

Enough has been said perhaps to indicate the breathtaking transformation of the judicial function, the relationships between the branches of the national government, and the relationships between fed-

⁵ Lest this be regarded as fantasy or burlesque, it should be noted that this very sort of litigation within the judicial branch is being attempted. See *In re Robson and Will, petition for mandamus or in the alternative for cert. filed*, 58 U.S.L.W. 3552 (U.S. Feb. 5, 1985) (No. 84-1127) (United States District Judges seeking relief against Court of Appeals on grounds that Court of Appeals improperly substituted its discretion for that of the District Court, and exceeded its authority by ordering a remedy that is contrary to law). The possibilities seem boundless.

eral and state governments that waits at the end of the road upon which this court has set its foot. It is clear from the cases that even this first step is illegitimate.

II.

It is easily demonstrated from several different lines of cases that the doctrine of congressional standing is ruled out by binding Supreme Court precedent. These lines of authority will be examined separately, and I will then suggest that they are but facets of the same set of considerations.

A.

It has been noted already that the rationale upon which the majority accords standing to members of Congress and the Senate in this case would equally permit suits by states to challenge federal laws or actions that seem to impinge upon their sovereignty. But this result, of course, contravenes *Massachusetts v. Mellon*, 262 U.S. 447 (1923), and does so in a way that shows both the impropriety of the doctrine of governmental standing and the impropriety of that doctrine even if confined, illogically, to suits by congressmen.

In *Massachusetts v. Mellon*, the Commonwealth of Massachusetts brought an original action in the Supreme Court against various federal officials to enjoin, as unconstitutional, enforcement of the Maternity Act. 262 U.S. at 478. The statute provided appropriations to be apportioned among states that would comply with the law's provisions for the purpose of federal-state cooperation to reduce maternal and infant mortality and protect the health of mothers and infants. *Id.* at 479. Massachusetts, in an argument exactly parallel to that the majority ad-

vances here, claimed that the Maternity Act was a usurpation of power not granted to Congress, but reserved to the States, by the Constitution. The State asserted standing because its "rights and powers as a sovereign State . . . [had] been invaded." *Id.* The Supreme Court responded that

in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. . . . [T]his Court is . . . without authority to pass abstract opinions upon the constitutionality of acts of Congress

Id. at 484-85.

In the present case we are asked to pass an abstract opinion upon the constitutionality of an act of the President. Unlike the Supreme Court, the majority here complies with that request. But, if *Massachusetts v. Mellon* is right, the majority is wrong. If, on the other hand, the majority is right, its rationale would, as already noted, lead to the overruling of *Massachusetts v. Mellon*, not merely in its general approach, but on the specific situation presented there: all states would have standing to challenge any action by any branch of the federal government even though nothing more concrete than disagreement about constitutional powers was at stake. Since this court is not empowered to overrule *Massa-*

chusetts v. Mellon,⁶ I think the reasoning of that case requires a conclusion that there is no standing here.

⁶ The majority claims that *Massachusetts v. Mellon* is "in no respect . . . contrary" to the majority's position. Maj. op. at 11 n.14. But the majority then proceeds to explain that case and cases that came afterward, such as *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled on other grounds*, *Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985) (Nos. 82-1913 & 82-1951), in a way that shows *Massachusetts v. Mellon* to be contrary to its position in every respect. Thus, the majority quotes a passage from that decision pointing out that Massachusetts complained of federal usurpation of the reserved powers of the states "by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent." Maj. op. at 11 n.14 (quoting 262 U.S. at 483). The majority concludes its discussion with the statement that "*Massachusetts v. Mellon* did not establish that governmental officials and entities necessarily and always lack standing to raise claims of infringement of lawful functions. Rather, the case explicitly leaves open the possibility of suit by a state when 'rights of the State falling within the scope of the judicial power' are at stake, a possibility later to become an actuality in, e.g., *National League of Cities*." Maj. op. at 11 n.14. That neatly expresses my point, not the majority's. The difference between *Massachusetts v. Mellon* and *National League of Cities* is that in the former only an injury to governmental powers was alleged while in the latter states and cities were required by federal statute to expend money. See *National League of Cities*, 426 U.S. at 846-47. That was the concrete injury in fact that conferred standing. The case now before us alleges only a usurpation of governmental powers and hence, on the teaching of the two Supreme Court decisions cited, is outside our jurisdiction. In short, *Massachusetts v. Mellon* is to *National League of Cities* as the present case is to the *Pocket Veto Case*.

B.

The Supreme Court's decisions about suits over "generalized grievances" are closely related to *Massachusetts v. Mellon* and require the same result here. The merits of the dispute offered us turn upon the interpretation of article I, section 7, clause 2 of the Constitution. That is a task for which courts are suited, and I would have no hesitation in reaching and deciding the substantive question if this were a suit by a private party who had a direct stake in the outcome. *The Pocket Veto Case*, 279 U.S. 655 (1929), was, of course, just such a suit.⁷ This action, how-

⁷ In *The Pocket Veto Case*, Congress passed a bill authorizing certain Indian tribes to present their claims against the United States to the Court of Claims. 279 U.S. at 672. The bill was presented to the President less than ten days before an intersession adjournment, *id.*; the President neither signed the bill nor returned it to the originating house, and the bill was not published as a law. *Id.* at 673. The Indian tribes took the position that the bill became law, and filed a petition in the Court of Claims raising various claims in accordance with the terms of the bill. The United States defended on the ground that the bill had not become law under article I, section 7, and the Court of Claims dismissed the petition for that reason. *Id.* The Supreme Court allowed a member of the House Committee on the Judiciary to appear as an amicus, but there was no suggestion that any legislator had standing to sue. *Id.*

Wright v. United States, 302 U.S. 583 (1938), followed the same format. Congress passed a bill giving the Court of Claims jurisdiction to adjudicate Wright's claim against the United States. 302 U.S. at 586. The United States opposed Wright's petition, arguing that the bill had never become law, and the Court of Claims agreed. *Id.* Moreover, the same pattern is evident in the other Supreme Court cases that have interpreted the presentation clause. *Edwards v. United States*, 286 U.S. 482 (1932), involved a private bill giving the Court of Claims jurisdiction to adjudicate Edwards' claim against

ever, is not. This is an action by representatives of people who themselves have no concrete interest in the outcome but only a "generalized grievance" about an allegedly unconstitutional operation of government. It is well settled that citizens, whose interest is here asserted derivatively, would have no standing to maintain this action.⁸ That being so, it is impos-

the United States; the Court of Claims certified to the Supreme Court the question whether the bill became law, given that it had been signed by the President after a final adjournment but within ten days of presentation. *Id.* at 485. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899), differs only in that there Congress passed a bill authorizing the Attorney General to bring suit in the Court of Claims to determine whether an award made by a United States Commission to *La Abra* had been obtained by fraud. 175 U.S. at 441. Consequently, in *La Abra* the private party, rather than the government, raised the defense that the bill had not become law, because signed by the President during a congressional recess. *Id.* at 446, 451. These cases provide no support for conferring standing to raise presentation clause issues on congressional plaintiffs.

⁸ It is also well settled that the states would not have standing to assert such generalized grievances on behalf of their citizens. *Massachusetts v. Mellon* also holds that a State, as *parens patriae*, may not "institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof," because "it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government." 262 U.S. at 485-86. The Supreme Court recently reaffirmed that holding in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), while indicating that a state would have standing as *parens patriae* to "secure the federally created interests of its residents against private defendants." *Id.* This illustrates, rather dramatically one would think, that what is a sufficient injury in fact when asserted against a private defendant may, for reasons of separation of powers and federalism, be deemed

sible that these representatives should have standing that their constituents lack.

The Supreme Court has repeatedly rejected the proposition that one who sues as a citizen or taxpayer, alleging nothing more than that the government is acting unconstitutionally, has standing to sue. A naked claim that a constitutional violation has occurred, the Court has said, "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract

insufficient to confer standing against a branch of the federal government. It is precisely these reasons of separation of powers and federalism that compel the parallel conclusion that injury to governmental powers does not constitute an injury in fact or a judicially cognizable injury, as the Supreme Court has elaborated those terms in connection with the article III standing requirements.

Lest this point be misunderstood, I emphasize that I do not read either *Mellon* or *Snapp* as holding that the prohibition on state *parens patriae* suits against the federal government is in all cases a constitutional limitation rather than a prudential one. In my view, that prohibition is a constitutional requirement where, as in *Mellon*, individuals within the state would lack standing to sue because they have suffered no injury that is judicially cognizable under article III. To permit Congress to confer standing on a state in such a case would be to authorize evasion of the constitutional standing requirements by allowing the state as a representative of its citizens to sue when those who are represented could not. But where private individuals could satisfy the injury in fact requirement of article III, there is no threat to separation of powers or to federalism in allowing Congress to confer *parens patriae* standing on the state as the representative of persons who have suffered a concrete injury and would themselves have standing. Consequently, in this second category of cases the rule is prudential and, although fully binding on the courts until Congress acts, may be eliminated by congressional enactments.

injury." *Schlessinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 217 (1974). See *United States v. Richardson*, 418 U.S. 166 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972); *Ex parte Levitt*, 302 U.S. 633 (1937). This is true even though "citizens are the ultimate beneficiaries of those [constitutional] provisions," *Reservists*, 418 U.S. at 227. Taxpayers face the same bar. In *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923), the Court denied standing to a federal taxpayer who alleged that a spending bill was unconstitutional. Despite the fact that such bills may have the effect of taking money from the individual taxpayer and putting it to a purpose the Constitution interdicts, the general rule is still that the taxpayer lacks standing because he "suffers in some indefinite way in common with people generally." *Id.* at 488. See *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 476-81 (1982). Thus, these legislators lack standing in their individual, as opposed to their representative, capacities. The majority appears to concede that, insisting only upon representative standing.

Yet, the legislators on whom this court has bestowed standing have alleged only two things—an unconstitutional act and an impairment of their constitutional powers as a result of that act. It is clear that the citizens and taxpayers these legislators represent would not have standing if they alleged that the same unconstitutional act had impaired the official powers of their representatives. That would be true despite the fact that citizens and taxpayers are the "ultimate beneficiaries" of the constitutional powers their representatives possess. Indeed, that was precisely the argument that was rejected in *Reservists*, where the plaintiffs alleged that they, as

citizens and taxpayers, had been deprived "of the faithful discharge by members of Congress . . . of their duties as members of Congress, to which all citizens and taxpayers are entitled." 418 U.S. at 212 (*quoting* Petition for Certiorari at 46).

If the people of the United States would not have standing to bring this action (and it is undeniable that they would not), then how can the representative of the people have standing that their constituents do not? The only possible answer is that elected representatives have a separate private right, akin to a property interest, in the powers of their offices. But that is a notion alien to the concept of a republican form of government. It has always been the theory, and it is more than a metaphor, that a democratic representative holds his office in trust, that he is nothing more nor less than a fiduciary of the people. Indeed, as I show in Part III below, the Framers of the Constitution most certainly did not intend to allow suits such as this, which means they did not conceive of the powers of elected representatives as apart from the powers of the electorate. It is for that reason that Judge Scalia was entirely correct in stating that "no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold." *Moore*, 733 F.2d at 959 (Scalia, J., concurring).

Justice Frankfurter's separate opinion in *Coleman v. Miller*, 307 U.S. 433, 460 (1939), made the same point on behalf of himself and Justices Black, Roberts, and Douglas:

We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators [who challenged the state's ratification of an amendment to the United States Constitution] could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names.

Id. at 467. He said that injuries to voting procedures "pertain to legislators not as individuals but as political representatives executing the legislative process." *Id.* at 470. The Court majority did not disagree with this so far as suits in federal courts were concerned, but found an interest sufficient to confer standing only because the suit came from a state court that had found standing under state law. *Id.* at 446. Justice Frankfurter's analysis thus remains fully applicable to the action before us now.

This court now necessarily adopts as a premise to its reasoning that legislators, and other members of government, have a private individual stake in their official powers that is separate from their fiduciary role. If not, it is utterly anomalous to allow the representative to sue when those he represents may not. One might as well drop the pretense, allow not only legislators but citizens and taxpayers to sue, and declare *Richardson*, *Reservists*, and *Frothingham* overruled and Justice Frankfurter's *Coleman* analysis rejected. Though the majority does not declare it,

that is what it has effectively accomplished for this circuit with the doctrine of congressional standing.

C.

The Supreme Court last Term handed down a decision that makes clear both the foundations of standing doctrine and the utter incompatibility of those foundations with this court's congressional-standing superstructure. In *Allen v. Wright*, 104 S. Ct. 3315 (1984), Justice O'Connor, writing for the Court majority, restated fundamentals to which we should revert every time an expansion of standing is contemplated.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476 (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Id. at 3324. She specified the foundations of the doctrine: "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Id.* at 3325. Moreover,

the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and

as a necessity," *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892), and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83, 97 (1968). See *Valley Forge*, 454 U.S., at 472-473.

Id. The concept of congressional standing, born in this circuit and relied upon by the majority today, is inconsistent with every one of the criteria laid down in this passage from *Allen v. Wright*.

This may be seen by contrasting two opposing conceptions of the role of the federal courts in our polity. The first, and more traditional, view is that federal courts sit to adjudicate disputes between litigants; the power of the courts derives entirely from the necessity to apply the law to concrete controversies. Judges interpret the Constitution and apply it only out of necessity, and as a last resort, because the Constitution is law and may not be ignored by a court of law. In the course of adjudication, the court may have to declare a statute enacted by Congress unconstitutional or it may have to make the same declaration concerning an act of the President. That is an awesome power, but it is confined, limited, and tamed because it is exercised only when the need to decide a concrete controversy makes it inevitable. It is "merely the incidental effect of what *Marbury v. Madison* took to be the judges' proper business—'solely, to decide on the rights of individuals.'" Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 884 (1983) (footnote omitted). This view

of the powers of the federal judiciary is the one reiterated by the Supreme Court in *Allen v. Wright*.

Tocqueville understood the genius that underlay this definition of the judicial role:

[B]y leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.

. . . .

[T]he American judge is brought into the political arena independently on his own will. He judges the law only because he is obliged to judge a case. . . . It is true that, upon this system, the judicial censorship of the courts of justice over the legislature cannot extend to all laws indiscriminately, inasmuch as some of them can never give rise to that species of contest which is termed a lawsuit. . . . The Americans have often felt this inconvenience; but they have left the remedy incomplete, lest they should give it an efficacy that might in some cases prove dangerous.

¹ A. De Tocqueville, *Democracy In America* 106-07 (T. Bradley ed. 1945).

The competing view, which this court adopted with the congressional standing doctrine, is that "the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best convenient vehicles for doing so and at worst nui-

sances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge*, 454 U.S. at 489. The *Valley Forge* Court could not have been clearer in rejecting this position: "This philosophy has no place in our constitutional scheme." *Id.* Yet, by means of its invention of standing for officials or branches of government to seek the continual arbitration of this court in their legal disputes with one another, this court has adopted, as the law of this circuit, the philosophy decisively rejected in *Valley Forge* and *Allen v. Wright*.⁹

⁹ The majority insists that *Allen v. Wright* has "nothing to do with 'governmental standing,'" but it concedes that *Allen v. Wright* emphasized that "the traditional standing criteria" are "grounded in, and are to be applied with reference to, the principle of separation of powers." Maj. op. at 11 n.14. The majority cannot have it both ways. My disagreement with the majority, put in the technical terms of traditional standing criteria, is over whether impairment of governmental powers is a judicially cognizable injury, that is, an "injury in fact" for purposes of article III. Just as *Massachusetts v. Mellon* demonstrates that considerations of federalism limit the category of judicially cognizable injury in controversies between a state and the United States, *Valley Forge* and *Allen v. Wright* show, not only in their general approach but in their specific application of the "traditional standing criteria," that considerations of separation of powers have the same limiting effect. In *Valley Forge* the Court held that the unconstitutional government conduct plaintiffs had alleged did not constitute a judicially cognizable injury, because "[a]lthough [they] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485. Yet, as the *Valley Forge* Court undoubtedly was aware, psychological consequences are familiar bases for claims in other legal contexts. The Supreme

The difference between the two conceptions of the judicial power may be stated more succinctly. In the traditional view, it is the necessity to decide a case that creates a court's duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177

Court's refusal to treat the psychological effects of allegedly unconstitutional government conduct as judicially cognizable "can only mean that the Court perceives that to confer standing in such cases would impermissibly alter its function." *Vander Jagt*, 699 F.2d at 1178 (Bork, J., concurring).

Similarly, in *Allen v. Wright*, although recognizing that the stigmatizing injury caused by racial discrimination will confer standing in some circumstances, 104 S. Ct. at 3327, the Court held that the plaintiffs did not have standing because they were not personally subject to the discrimination they challenged. *Id.* To treat this "abstract stigmatic injury" as cognizable, the Court stated, would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

The *Allen v. Wright* Court's treatment of the "fairly traceable" requirement even more clearly takes a separation-of-powers approach. The "fairly traceable" requirement "examines the causal connection between the assertedly unlawful conduct and the alleged injury." 104 S. Ct. at 3326 n.19. Yet, though the Court recognized that the challenged IRS tax-exemption practices might make some difference to the ability of plaintiffs' children to receive a desegregated education, and though it conceded that that harm is not only judicially cognizable but "one of the most serious injuries recognized in our legal system," *id.* at 3328, it nonetheless held that the causation requirement was not met. Why? Because, the Court said, "we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement." *Id.* at 3330 n.26. It is evident, then, that the majority's assertion that *Allen v. Wright* is irrelevant to governmental standing is unsupportable, and ignores both that opinion's general approach to the purposes of the standing doctrine and its application of the technical standing criteria.

(1803). In the new view, it is the court's desire to pronounce upon the law that leads to the necessity to create a case. This is a case created by the court. There would be no case or controversy here but for fabrication of the doctrine of congressional standing.

The court has fashioned a doctrine, in contradiction of *Allen v. Wright*, that transforms it from a tribunal exercising its powers "only in the last resort, and as a necessity" to a governing body for the entire federal government, available upon request to any dissatisfied member of the Legislative, Executive or Judicial Branch. Plainly, the courts of this circuit, if no other, are now not the last but the first resort. We have abandoned concern that our performance be "consistent with a system of separated powers" for a role of continual and pervasive intrusiveness into the relationships of the branches and, indeed, relationships within the branches. Nor can it be said even that the disputes we invite are those "traditionally thought to be capable of resolution through the judicial process," for no one ever thought, until we did, that courts should step directly between the other branches and settle disputes, presented in the abstract, about powers of governance. Moreover, as Alexander M. Bickel said, "the 'standing' and 'case' requirement creates a time lag between legislation and adjudication, as well as shifting the line of vision. Hence it cushions the clash between the Court and any given legislative majority" A. Bickel, *The Least Dangerous Branch* 116 (1962). In this respect, the standing requirement is like the requirement of ripeness, another of the traditional aspects of dispute resolution through the judicial process.

Congressional standing, which must expand into governmental standing for the President, the judiciary, and the states, if its rationale is honored, completely dispenses with the traditional, limited function of the judiciary and violates every one of the criteria for constitutional standing laid down by the Supreme Court in *Allen v. Wright*.

D.

Just as *Allen v. Wright* teaches that standing requirements are built around the constitutional concept of "separation of powers," *Massachusetts v. Mellon* suggests that those same requirements also play a vital part in the parallel constitutional concept of federalism. As separation of powers and federalism apply in a context like this one, the fundamental consideration appears to be the need to limit the role of the courts in the interplay of our various governmental institutions. The role of the courts is limited, not excluded, since a person denied a monetary benefit or other concrete interest could invoke the authority of the courts by asserting that a bill had become law because of the invalidity of a pocket veto. The difference between a judicial function limited by the doctrine of standing and one not so limited lies in the relative dominance of the judicial branch, in the timing of judicial action, and in the number of constitutional principles generated that curb the powers and freedoms of other governmental units.

As Judge Scalia recently observed, "[t]he degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them." Scalia, *supra*, 17 Suffolk U.L. Rev. at 892. A federal

judiciary that is available on demand to lay down the rules of the powers and duties of other branches and of federal and state governments will quickly become the single, dominant power in our governmental arrangements. The concept of the fragmentation of power, upon which both the ideas of the separation of powers and of federalism rest, will be, if not destroyed, at least very seriously eroded. *See generally The Federalist* No. 51, at 351 (J. Madison) (J. Cooke ed. 1961) (explaining that both separation of powers and the division of power between state and federal governments serve to protect the liberty of the governed by dividing the power of government). A majority of Supreme Court Justices will have something very like the power to govern the nation by continuously allocating powers and inhibitions to every other governmental institution. As Chief Justice John Marshall put it in a speech to Congress:

A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary.

Speech of the Honorable John Marshall to the United States House of Representatives, 18 U.S. (5 Wheat.)

Appendix at 3, 16 (1820). The concept of standing prevents this undesirable centralization of authority by severely limiting the occasions upon which courts are authorized to lay down the rules for governments and institutions of government.

Standing requirements, like the requirement of ripeness, also delay the invocation of judicial power. This means that there is time for the real impact of laws and actions to become clear, thus making the constitutional inquiry less abstract and more focused. The law is given a chance to go into effect and have some impact upon persons in the society so that its constitutionality can be judged according to its real effects upon real persons in real circumstances. The courts are enabled to think about real interests and claims, not words. Constitutional adjudication should operate upon the basis of realities, not general propositions.

A firm standing concept also decreases the number of occasions upon which courts will frame constitutional principles to govern the behavior of other branches and of states. There will thus be fewer constitutional principles of that sort in the system. That, too, is a benefit. The business of government is intensely practical and much is accomplished by compromise and accommodation. The powers of the branches with respect to one another, as well as the reciprocal powers of the federal and state governments, ebb and flow as the exigencies of changing circumstances suggest. It is proper and healthful that this should be so. These matters should not be always settled at the outset by declarations of abstract principle from an isolated judiciary not familiar with the very real and multitudinous problems of governing. Fluid relationships should not be frozen and the play

removed from the joints of government. That is precisely the tendency that must come into being, however, if elimination of standing requirements permits the explosive proliferation of constitutional declarations about governmental powers.

Our democracy requires a mixture of both principle and expediency. As Professor Bickel put the matter:

[T]he absolute rule of principle is . . . at war with a democratic system. . . .

No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden.

A. Bickel, *supra*, at 64. While all branches of government are obliged to honor the Constitution, the declaration of constitutional principle with binding effect is primarily the task of the federal courts. If the federal courts can routinely be brought in to branches of the federal government disagree, every time the federal and the state governments contend, then we will indeed become a "principle-ridden," in fact a judge-ridden, society. Traditional standing requirements are a principal barrier between us and that unhappy condition.

The arguments just made indicate that, except where a conventional lawsuit requires a judicial resolution, much of the allocation of powers is best left to political struggle and compromise. Indeed, it was to facilitate and safeguard such a continuing process that the checks and balances of the Constitution were created. It was to allow room for the evolution of

the powers of various offices and branches that the Constitution's specification of those powers was made somewhat vague. The Framers contemplated organic development, not a structure made rigid at the outset by rapid judicial definition of the entire subject as if from a blueprint. The majority finds this plan inadequate and the idea of political struggle between the political branches distasteful, at best "time-consuming," at worst involving "retaliation." Maj. op. at 16. Just so. That is what politics in a democracy is and what it involves. It is absurd to say, as the majority does, that a "political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case." *Id.* That is a judgment about how the Constitution might better have been written and it is not a judgment this or any other court is free to make. Moreover, I know of no grave consequences for our constitutional system that have flowed from political struggles between Congress and the President. This nation got along with that method of resolving matters between the branches for 185 years, until this court discerned that the nation would be better off if we invented a new role for ourselves. And, of course, it is true that matters of government will be much neater, if less democratic, to the extent that judges undertake to decide them in the first instance. One must not, furthermore, take seriously the majority's promise that this court's congressional standing doctrine "will help to preserve, not defeat, the separation of powers." Maj. op. at 16. As I have shown, there is no principled way to limit the judicial power the majority would have us take for our own,

and the result must inevitably lead to the destruction, not the preservation, of the separation of powers.

As I show next, those who framed, proposed, and ratified our Constitution chose a different mixture of principle and compromise for our polity, a different process of growth, struggle, and accommodation when they chose the role to be played by courts.

III.

Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution. The doctrine of congressional or governmental standing is doubly pernicious, therefore, because it flouts not only the rules enunciated and applied by the Supreme Court but the historical meaning of our basic document as well. The criteria of *Allen v. Wright* are not simply Court-made; they reflect and express the design of the Framers of the Constitution. No other conclusion is possible from a consideration of what the Framers did and did not do.

At the outset of the Constitutional Convention, Governor Randolph presented a series of resolutions framed by the Virginia delegation and commonly called the Virginia Plan. As Farrand says, "[t]hese resolutions are important, because amended and expanded they were developed step by step until they finally became the constitution of the United States." M. Farrand, *The Framing of the Constitution of the United States* 68 (1913). The eighth resolution proposed that the new national legislature be controlled by placing a veto power in a Council of Revision consisting of the executive and "a convenient number of the National Judiciary." 1 M. Farrand, *The Records*

of the *Federal Convention of 1787*, at 21 (1st ed. 1911). A Council so composed would be controlled by the votes of the judiciary, and the latter would in that way heavily influence, and often control, the relationship between the President and Congress. By vetoing or refusing to veto, the judiciary could uphold one branch against the other and make itself the umpire of the constitutional system, not in the last resort or as a necessity, but on a continuing, front-line basis. The judiciary would, as well, be drawn up immediately next to the legislative process and decide what was to be law and what was not on the basis of abstract reasoning, without the benefit conferred by the passage of time, the cooling of passions, and an issued framed in a concrete factual setting.

We do not, of course, know all of the reasons why the members of the Convention repeatedly defeated the proposal for a Council of Revision.¹⁰ But we do

¹⁰ The Council of Revision was initially rejected when Gerry's motion "which gave the Executive alone without the Judiciary the revisionary control on the laws" was adopted. 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 104 (1st ed. 1911) (June 4, 1787). On three occasions thereafter Madison and Wilson renewed the proposal for the Council of Revision, each time without success. 1 M. Farrand, *supra*, at 138, 140 (June 6, 1787); 2 M. Farrand, *supra*, at 73, 80 (July 21, 1787); 298 (Aug. 15, 1787). Gerry raised the objection that the power of judicial review was sufficient to protect the judiciary from "encroachments on their own department," and protested that review of public policy was no part of the judicial function. 1 M. Farrand, *supra*, at 97-98. King and Dickinson argued in addition that the proposal would dilute the executive's unitary character and make it less accountable for the use to which this power was put. *Id.* at 139, 140. Strong worried that the judges might be unable to be impartial in interpreting the laws if they were given a

know the effect the Council would have had upon our constitutional arrangements and upon the role of the courts—effects remarkably similar to those that would result from the final adoption of this circuit's doctrine of governmental standing—and we do know that the idea was rejected.

There are, however, more, and stronger, inferences to be drawn from the work of the Convention than merely those that may be drawn from the rejection of the Council of Revision. We know, for example, that the Convention drafted article III of the Constitution in a way that does not contemplate suits directly between the branches of government. Article III extends "judicial power" to various categories of "cases" and "controversies," which itself indicates the Framers had in mind a role for the judiciary similar to the common-law function with which they were familiar. It is perhaps more noteworthy that article III creates, as specific, independent categories of federal judicial power, "controversies" between states, between a state and citizens of another state, and so on. Given that listing, it is incredible that Framers who intended to extend judicial power to direct controversies between Congress and the President failed to include so important a category in their recitation.

The drafters, moreover, singled out especially sensitive categories of judicial power for the original jurisdiction of the Supreme Court. Thus, article III

part in making them, 2 M. Farrand, *supra*, at 75, Luther Martin pointed out that the judges could not be presumed more expert in legislative affairs than the legislators, *id.* at 76, and Ghorum urged that the judges might well sacrifice the executive rather than support him against the legislature. *Id.* at 79.

gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." Had they contemplated that the federal courts would regularly supervise relationships between Congress and the President, the Framers would undoubtedly have placed that class of cases within the Supreme Court's original jurisdiction. That inference is made certain by the fact that article III contemplated that "inferior [federal] courts" might not be established at all. In fact, federal question jurisdiction was not given to the lower federal courts for almost a century after the framing of the Constitution. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. That fact also demonstrates that the political branches were not to sue each other. The Framers simply cannot have contemplated that disputes directly between Congress and the President would be decided in the first instance in any of the thirteen existing state court systems.

It is notorious that the Constitution nowhere mentions any power of judicial review. That fact has been much bruited in the never-ending debate over the legitimacy of the power asserted in *Marbury v. Madison*. It is entirely conceivable, of course, that Framers who thought the Constitution would be law, and who made it supreme law in article VI of the Constitution, simply assumed that the Constitution would be applied by the courts when cases arose requiring it. Indeed, there are a number of comments preserved from the Convention debates that suggest this is precisely what some members did assume.¹¹ But it is absolutely inconceivable that Fram-

¹¹ See, e.g., 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 97 (1st ed. 1911) (remarks of Gerry);

ers who intended the federal courts to arbitrate directly disputes between the President and Congress should have failed to mention that function or to have mentioned judicial review at all. The statesmen who carefully spelled out the functions of Congress and the President and the details of how the executive and legislative branches might check each other could hardly have failed even to mention the judicial lynchpin of the constitutional system they were creating—not if they had even the remotest idea that the judiciary was to play such a central and dominant role.

The intentions of the Framers need not be derived entirely from the records of the Constitutional Convention, nor even from the structure and language of the document itself. Courts may and frequently do look to evidence of what was said and done immediately after the original act of composition. Consider, for example, Hamilton's well-known defense of the institution of judicial review in *The Federalist* No. 78. That defense, in essence, is that the limitations on the constitutional powers of Congress "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." *The Federalist* No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961). It is important that Hamilton's discussion of judicial review is immediately preceded by a passage in which he repeatedly emphasizes the comparative impotence of the judiciary. The enormous power that

109 (remarks of King); 2 M. Farrand, *supra*, at 76 (remarks of L. Martin); 93 (remarks of Madison); 299 (remarks of Gouverneur Morris). *But see* 2 M. Farrand, *supra*, at 298 (remarks of Mercer); 299 (remarks of Dickenson).

the judiciary would acquire from jurisdiction over inter- and intra-branch disputes would have made a mockery of his quotation of Montesquieu to the effect that "of the three powers above mentioned [the others being the legislative and the executive], the JUDICIARY is next to nothing." *Id.* at 523 n.* (*quoting* Spirit of Laws, vol. 1, at 186). Had Hamilton even suspected that disagreements between the popular branches over their respective powers were "cases" or "controversies" within the meaning of article III, it is not to be believed that he would have described the judiciary as "from the nature of its functions, . . . always . . . the least dangerous to the political rights of the constitution" *Id.* at 522. In fact, the judiciary would be the branch most dangerous to those political rights.

Indeed, the only discussion in *The Federalist* of possible judicial involvement in disputes between the President and Congress comes in connection with the impeachment power. The problem, Hamilton says, was to create "[a] well constituted court for the trial of impeachments." *The Federalist* No. 65, at 439 (A. Hamilton) (J. Cooke ed. 1961). He defines that court's jurisdiction in terms of those offenses that derive from "the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." *Id.* He then considers, and rejects, the proposal that the Supreme Court should have been given this jurisdiction, in part on the grounds that it lacks the independence and authority to discharge this delicate task without a dangerous confrontation with one branch or the other. *Id.* at 441. The majority's doctrine of congressional stand-

ing brings the two political branches before us as adversaries just as much as would giving trials of impeachments to the judiciary. Today's dispute is only over a pocket veto that has little continuing importance, but the invitation we now issue will ultimately bring before us the most profound and agitated issues of politics and government. The task of umpiring disputes between the coordinate branches which this court has agreed to undertake is no more suited to judicial competence than trial by impeachment, and raises the same or greater dangers of repeated and head-on confrontation with the other branches that underlie Hamilton's objections.¹² Thus, the whole tenor of Hamilton's authoritative discussion of the Judicial Branch is completely inconsistent with the existence of the jurisdiction the majority claims to possess.

A similar point may be made about Hamilton's discussion of the President's veto power in *The Federalist* No. 73. Hamilton asserts that the use of the veto power to prevent "the passing of bad laws" was

¹² Tocqueville saw this point as well. After speaking of the American practice of leaving the invocation of judicial power to contests of private interest, he said:

I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. The laws would consequently be attacked when the power from which they emanated was weak, and obeyed when it was strong; that is to say, when it would be useful to respect them, they would often be contested; and when it would be easy to convert them into an instrument of oppression, they would be respected.

1 A. de Tocqueville, *supra*, at 107.

only a secondary purpose of its adoption by the Framers. "The primary inducement to conferring the power in question upon the executive," he says, "is to enable him to defend himself." *The Federalist* No. 73, at 495 (A. Hamilton) (J. Cooke ed. 1961). The risk is that "he might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote." *Id.* at 494. Thus, "the case for which the veto power is chiefly designed [is] that of an immediate attack upon the constitutional rights of the executive." *Id.* at 497. But, if this court's governmental standing doctrine is correct, Hamilton has described a power that is largely superfluous. The President would not need to defend himself through the veto power—he could at once challenge any "vote[s]" or "resolutions" that endangered his "constitutional rights" as President in the courts.

Even the Anti-Federalists did not urge the existence of such unbounded judicial power as an objection to the proposed constitution. The most detailed Anti-Federalist critique of judicial review was supplied by the pseudonymous Brutus, whose principal argument was that the federal courts would by constitutional interpretation bring about "an entire subversion of the legislative, executive and judicial powers of the individual states." H. Storing, *The Complete Anti-Federalist* 2.9.139 (1981). His description of judicial review is revealing: when the legislature enacts laws that the court judges to be unconstitutional, "the court will take no notice of them," and this will discourage the legislature from passing "laws which they know the courts will not execute." *Id.* at 2.9.148. Had Brutus thought the courts were free not only to refuse to execute an unconstitutional law, but to review it for unconstitu-

tionality where no question of execution had arisen, his argument would have gained immeasurably from some mention of that fact. There is none.

It must be concluded, therefore, that those who drafted, proposed, and ratified the Constitution did not intend that the judiciary should entertain suits directly between the political branches of the national government. The judiciary they envisioned was to play no such dominant role in affairs of state. Their intention precludes the doctrine of standing devised by this court to thrust the judiciary into that leading position.

IV.

To make its standing doctrine more palatable this court has adopted a doctrine of remedial or equitable discretion. This doctrine permits the court to say that a congressional plaintiff has standing, and hence that the court has jurisdiction, and yet refuse to hear the case because the court is troubled by the separation-of-powers implications of deciding on the merits. We have no such equitable discretion, however, for "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). By claiming that discretion, the court has created for itself a kind of certiorari jurisdiction—which it took an act of Congress to create for the Supreme Court. There would be no need to violate the settled principle of federal jurisprudence that a court with jurisdiction may not decline it if the article III limits on this court's jurisdiction were adhered to.¹³

¹³ The standing requirements of article III are jurisdictional—discretion plays no part in their application. The

The introduction of discretion into the standing inquiry is therefore an attempt to change the very nature of that doctrine. Indeed, this court has plainly indicated as much: "The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion. . . . [T]his test avoids the problems engendered by the doctrines of standing, political question, and ripeness." *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). Indeed it does. The equitable discretion doctrine avoids the problems of standing, political question, and ripeness by ignoring them. But those problems are real; they relate to the properly limited role of the courts in a democratic polity. To avoid them in this way is to say that the limit upon the courts' capacity to intrude upon areas of democratic governance comes not from the Constitution but entirely from the courts' sense of fitness. That is hardly an adequate safeguard. Moreover, this court has no right to avoid the problems of standing. They arise in large part from the Constitution and the Supreme Court has made it abundantly clear, in cases such as *Valley Forge* and *Allen v. Wright*, that they must be addressed, and addressed with the separation of powers in mind.¹⁴ The doctrine of reme-

prudential standing requirements are no less jurisdictional. I am aware of no case in which the Court has held that a lower federal court may decide that those requirements need not be satisfied if the court thinks it would be inequitable to deny standing.

¹⁴ The only justification for *Riegle's* claim that separation-of-powers considerations are irrelevant to the standing inquiry was an inference from the fact that the Supreme Court

dial discretion removes separation-of-powers considerations from the jurisdictional inquiry and converts them into mere interests to be balanced. Thus, the doctrine relegates separation of powers to second-class status and subordinates the structure of our constitutional system to the discretion of this court. It is impossible for me to view that prospect with equanimity.

It is plain on the face of these developments that what we are observing constitutes a major aggrandizement of judicial power. Any lingering doubts on this score are laid to rest by this court's stated presumption in favor of exercising discretion to decide a case when, if a decision on the merits were withheld, "non-frivolous claims of unconstitutional action would go unreviewed by a court." *Riegle*, 656 F.2d at 882; see also *Moore*, 733 F.2d at 956; *Vander Jagt*, 699 F.2d at 1170, 1174 n.23. The function of the article III case-or-controversy limitations, includ-

vacated our judgment finding standing in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *judgment vacated on other grounds*, 444 U.S. 996 (1979), on grounds of nonjusticiability, with some Justices relying on the ripeness doctrine and others on the political question doctrine. *Riegle*, 656 F.2d at 880. That inference was dubious to begin with, for Justices who found the case nonjusticiable on other grounds had no need to discuss standing. The evidence, which I have already recited in Part II-C *supra*, that the Court now regards separation-of-powers considerations as inseparable from the constitutional component of standing analysis, consists of explicit statements by the Court, rather than inferences from statements the Court did not make because there was no need to make them. Therefore, even if *Riegle* was a justifiable departure from this court's established standing analysis, which I do not believe, there is no warrant whatsoever for adhering to that departure in the wake of the invalidation of the premise on which it rested.

ing the standing requirement, is, however, precisely to ensure that claims of unconstitutional action will go unreviewed by a court when review would undermine our system of separated powers and undo the limits the Constitution places on the power of the federal courts. The Supreme Court has repeatedly said that standing is not "a requirement that must be observed only when satisfied." *Valley Forge*, 454 U.S. at 489. See also *Reservists*, 418 U.S. at 227 ("[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing"); *Richardson*, 418 U.S. at 179 ("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"). In each of these cases the Court was faced with the contention that if the plaintiff was not permitted to litigate the issue, no one could. In none of those cases did the Court make the response which, if the governmental standing doctrine were correct, would have been most natural, obvious and ready to hand: that, while citizens or taxpayers have no standing to raise abstract claims about the allegedly unconstitutional operation of government, their representatives undoubtedly would. If the doctrine of governmental standing were correct, there would always be some governmental official or entity whose powers were affected by alleged violations of any particular constitutional provision. In *Richardson*, to take a single example, members of Congress could have sued to force the President to publish the budget of the Central Intelligence Agency, or to force Congress to force the President to do so, on the grounds that they had been denied an opportunity to vote to appropriate or not to appropriate funds for specific

CIA programs by virtue of the statute permitting the Agency to account for its expenditures "solely on the certificate of the Director." 50 U.S.C. § 403j(b). A similar analysis would apply to *Reservists* and *Valley Forge*. The concession that there are constitutional questions that cannot be litigated because of standing requirements is, therefore, an additional proof that there is no congressional or governmental standing.

The limits that standing places upon judicial power do not mean that many important questions of constitutional power will forever escape judicial scrutiny. Many of the constitutional issues that congressional or other governmental plaintiffs could be expected to litigate would in time come before the courts in suits brought by private plaintiffs who had suffered a direct and cognizable injury. That is entirely appropriate, and it belies the argument that this court's governmental standing doctrine is necessary to preserve our basic constitutional arrangements.

At bottom, equitable discretion is a lawless doctrine that is the antithesis of the "principled decisionmaking" that was invoked to justify its manufacture. A doctrine of remedial discretion more than "suggests the sore of rudderless adjudication that courts strive to avoid," *Vander Jagt*, 699 F.2d at 1175—it is rudderless adjudication. A sampling of the cases in which this doctrine has been invoked makes that quite clear. For example, in *Riegle* the court suggested that the equitable discretion doctrine should apply only to congressional plaintiffs, not to private plaintiffs. 656 F.2d at 881. Indeed, the *Riegle* court said that the fact that a private plaintiff would have standing to sue would weigh against hearing the congressional plaintiff on the merits, because under those circumstances the unconstitutional action or statute would

not go unreviewed. *Id.* In *Vander Jagt*, a group of congressmen sued their fellow legislators, and they sued both as congressmen and as individual voters—that is, as private plaintiffs. 699 F.2d at 1167 n.1. The court held that the plaintiffs had standing both as congressmen and as voters. *Id.* at 1168, 1169 n.4. Nonetheless, the court dismissed *all* the claims because “this case raises separation-of-powers concerns similar to *Riegle*’s.” *Id.* at 1175. Had it followed *Riegle*, the *Vander Jagt* court would have reached the merits of the private plaintiffs’ claims—a result I would have found even more objectionable than what the court actually did, *see id.* at 1183 n.3 (Bork, J., concurring), but one which would at least have had the virtue of predictability. It is hardly an argument in favor of remedial discretion that whatever standards one panel fashions the next is free to disregard on “equitable” grounds.

Ultimately, the doctrine of equitable discretion makes cases turn on nothing more than the sensitivity of a particular trio of judges. One cannot, unfortunately, have any solid grounds for supposing that these aesthetic judgments, though subjective and varying, will at least mark out an irreducible realm of “startling[] unattractive[ness].” *Vander Jagt*, 699 F.2d at 1176. As the spectacle of public officials suing other public officials over abstract constitutional questions becomes familiar, the taint will wear off, and what seemed unattractive will appear inevitable. Alexander Pope’s dictum, though grown trite, is too apt to ignore: “Vice is a monster of so frightful mien/As to be hated needs but to be seen;/Yet seen too oft, familiar with her face,/We first endure, then pity, then embrace.” *An Essay on Man, Epistle II*, l. 217. The combination of congressional standing and equitable discretion will very probably prove to

have been but a way-station to general, continual, and intrusive judicial superintendence of the other institutions in which the Framers chose to place the business of governing.

V.

The majority maintains that its holding that appellants have standing is supported by decisions of the Supreme Court and required by binding precedent in this circuit. Neither of those claims withstands analysis.

A.

The principal Supreme Court decisions the majority deploys in support of its position are *Coleman v. Miller*, 307 U.S. 433 (1939); *United States v. ICC*, 337 U.S. 426 (1949); *Chapman v. FPC*, 345 U.S. 153 (1953); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); and *INS v. Chadha*, 103 S. Ct. 2764 (1983). An inspection of these cases, however, reveals that they do not support the revolutionary proposition for which they are conscripted.

The majority states that *Coleman v. Miller*, 307 U.S. 433 (1939), proves that "a claim that is founded on a specific and concrete harm to [lawmaking] powers" is "judicially cognizable." Maj. op. at 13-14. *Coleman* proves nothing of the kind. But the case is not merely inapposite to the point for which the majority cites it. In fact, the Supreme Court's reasoning affirmatively demonstrates that the majority is wrong and that the appellants before us have no standing to maintain this action.

In *Coleman*, a group of Kansas State Senators who had voted to reject a proposed amendment to the federal Constitution challenged in the state courts the validity of the Lieutenant Governor's tie-breaking vote in favor of ratification. 307 U.S. at 436. The

Supreme Court found that they had standing, upon a grant of certiorari, to contest the merits of an adverse decision by the Kansas Supreme Court. But Chief Justice Hughes' opinion for the majority made it clear that the Court accorded standing to obtain review of a federal constitutional question only because there existed a legal interest accepted as sufficient for standing by the highest state court. Thus, the opinion held that the state senators had "an interest in the controversy which, *treated by the state court as a basis for entertaining and deciding the federal questions*, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446 (emphasis added).

The critical importance of state court standing to obtain federal constitutional review was made even clearer by the distinction the Chief Justice drew between *Leser v. Garnett*, 258 U.S. 130 (1922), and *Fairchild v. Hughes*, 258 U.S. 126 (1922). Both cases involved suits by citizens to have the nineteenth amendment declared not a part of the Constitution. The only difference between the cases relevant to the standing issue was that *Leser* was brought in the Maryland courts and *Fairchild* was brought in a federal court.¹⁵ As the Chief Justice pointed out, the

¹⁵ The majority offers a different basis for distinguishing between *Leser* and *Fairchild*—the fact that the plaintiff in *Leser* was a citizen of Maryland, which had refused to extend suffrage to women, while the named plaintiff in *Fairchild* was a citizen of New York, which had amended its constitution to grant women suffrage. See maj. op. at 14 n.15. The majority finds this difference a "more plausible basis for distinguishing the two cases," but that would be irrelevant even if it were true. The question is not how we would distinguish those cases, but how the *Coleman* Court distinguished them, and it is clear that the basis offered by Chief Justice Hughes was

Supreme Court on the same day in opinions written by the same Justice (Brandeis, J.) took jurisdiction over the Maryland case, stating that the laws of Maryland authorized the suit, but held that the federal court was without jurisdiction because plaintiffs, having only a general interest in government according to law, an interest possessed by every citizen, had no standing. 307 U.S. at 440.

Justice Frankfurter wrote separately for himself and three other Justices to deny that the plaintiffs in *Coleman* had standing. Frankfurter clearly thought that a legislator's interest in his official powers could not confer standing in federal courts because such interests were not "matters of 'private damage.'" 307 U.S. at 470. He expressly agreed with the idea that

that in *Leser* the citizen's suit was commenced in state court and allowed to go forward under the laws of the state, whereas in *Fairchild* the suit was brought in federal court. Indeed, the Chief Justice made no mention whatsoever of the fact that the only named plaintiff in *Fairchild* was a citizen of New York. He described *Fairchild* as simply "a suit by citizens of the United States," 307 U.S. at 440.

The majority concludes that the *Coleman* Court shared its novel rationale for distinguishing *Leser* from *Fairchild*, because the Court said that "[t]he interest of the plaintiffs in *Leser v. Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case." 307 U.S. at 441. The quoted language implies, at most, only that the *Coleman* Court was unwilling to take the position that in any case in which a state court determined that the plaintiffs had standing, no matter how remote, abstract, or generalized the plaintiffs' grievance might be, the Supreme Court would be bound to review the state court's decision if it fell within the Court's statutory jurisdiction. That does not alter the fact that the *Coleman* Court perceived the interest of the Kansas legislators as of a type that would not give them standing to bring suit in federal court.

standing under Kansas law could confer standing in the United States Supreme Court. *See id.* at 465-66. He thus rejected the distinction made by *Leser* and *Fairchild* and adopted by Chief Justice Hughes in *Coleman*.¹⁶ The Court majority's adoption of that dis-

¹⁶ It may be that *Coleman* drew the distinction it did, and thus allowed review of a claim heard in a state court under state standing rules more permissive than federal standing rules, because to deny review in such cases would leave in place a body of state court interpretations of the federal Constitution that the Supreme Court could never pass upon. The result might be federal constitutional law that differed from state to state. The problem of erroneous or differing state court interpretations of the United States Constitution and laws can be avoided only if the Supreme Court accepts the state's basis of standing as sufficient for review or if it requires state courts to apply federal standing rules in order to entertain suits based on federal law.

Doremus v. Board of Education, 342 U.S. 429 (1952), can be read as adopting the latter course. In *Doremus*, the Court characterized the state court's opinion as "advisory" and dismissed the appeal (from a declaratory judgment that a state statute was constitutional) on the grounds that "because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." 342 U.S. at 434 (emphasis added). The emphasized language suggests that the Court might have vacated a state court judgment enjoining enforcement of the statute, but that the Court would simply dismiss an appeal from a state court judgment upholding the challenged statute (as the *Doremus* Court in fact did). If *Doremus* means that the Supreme Court has adopted this approach as one of general applicability, it would follow that there is yet another reason why *Coleman* lends no support to the majority's position: even *Coleman*'s narrow holding would then no longer be good law because that holding expressly rests on the state court's decision that the state senators had standing to sue under state law.

inction shows not only that *Coleman's* finding of standing is confined to cases where states recognize standing in their own courts but demonstrates also that the same plaintiffs would not have standing in a federal court. All nine Justices in *Coleman* agreed to the latter proposition. The case before us was brought in a federal court. *Coleman* proves, therefore, that the plaintiffs here have no standing. It is, to say the least, distinctly peculiar that the majority cites the case for its own contrary conclusion.

The majority draws from *United States v. ICC* the proposition that courts may not avoid justiciable controversies "simply because one or both parties are coordinate branches of the government." Maj. op. at 10. In whatever limited sense this statement may be true, it has no application where the only alleged basis for the plaintiff's standing is its powers as one of the contending branches, and hence the statement is not relevant to the present case. This is a suit in which the standing of appellants rests exclusively on an alleged impairment of their respective governmental powers. *United States v. ICC* was not that at all. Though the government was appealing an order of the ICC, its real opponents were railroads from which it sought reparations in its proprietary, not its governmental, capacity. 337 U.S. at 428. Thus the government's standing did not rest on impairment of governmental powers. As the Court said, "[t]he basic question is whether railroads have illegally exacted sums of money from the United States." *Id.* at 430. Moreover, because the railroads were present as "the real parties in interest," *id.* at 432, the situation in *United States v. ICC* was essentially the same as when the United States petitions for a writ of mandamus directed to a district court. Despite the dis-

strict judge's name on the petition, the real adversary is the party on the other side of the litigation. It is not an action by the Executive Branch against part of the Judicial Branch to determine their respective governmental powers. So, too, *United States v. ICC* was not a suit by the Executive Branch against an independent agency over their respective governmental powers.

Furthermore, because the ICC is an independent agency, the President had no power to terminate the controversy by ordering the ICC to reverse its decision denying the government money damages. See *infra* at pp. 50-51. That fact constitutes an additional reason for the Court's conclusion (which the Court rested on the presence of a dispute between the government and the railroads, see 337 U.S. at 430-31) that "the established principle that a person cannot create a justiciable controversy against himself has no application here." *Id.* at 431. It also suggests that the government's standing might not have been sustained by the Court but for the ICC's status as an independent agency.

In *Chapman*, which the majority construes as allowing standing based on infringement of governmental powers, see maj. op. at 11, the Secretary of the Interior and an association of rural electric cooperatives challenged the FPC's issuance of a license to a power company to build a hydroelectric station at a site that Congress allegedly "reserved . . . for public development and so has placed . . . beyond the licensing power of the Federal Power Commission." 345 U.S. at 156. The Secretary claimed that both his general duties relating to conservation of water resources and his "specific interest" in fulfilling his statutory duty to market public hydroelectric power

were "adversely affected by the Commission's order." *Id.* The Court neither endorsed nor repudiated that argument. Its entire discussion of standing reads as follows:

We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases.

Id.

It is hard to imagine a holding more confined to its facts—for the Court supplied no rationale for its decision. But, to begin with, we may observe that in *Chapman* there were private parties on both sides of the dispute, the one defending its right to the license it had been granted by the Commission, the other claiming that its right to a preference in sales of surplus power by the Secretary had been impaired. Since the court held that the electric cooperatives had been aggrieved, within the meaning of 16 U.S.C. § 8252, by the Commission's action, its parallel holding as to the Secretary, who had been allowed to intervene in administrative proceedings before the Commission, see *United States v. FPC*, 191 F.2d 796, 799 (4th Cir. 1951), was not strictly necessary to decide the merits.

Furthermore, because the site was clearly within the public domain,¹⁷ the court may have agreed with

¹⁷ Justice Douglas, joined in dissent by Justice Black and Chief Justice Vinson, pointed out that the Roanoke Rapids

the lower court that "the United States, representing the people of the country, may have an interest in the construction of a power project," *United States v. FPC*, 191 F.2d at 800, while disagreeing with the lower court's contention that that fact "does not confer upon the Secretary of the Interior any authority to go into court for its protection." *Id.* That would make *Chapman* an instance in which the Secretary was allowed to sue on behalf of the United States over the federal proprietary interest in a site within the public domain. In this connection, it is striking that the lower court in *Chapman* read *United States v. ICC* as "hold[ing] merely that suit by the United States to protect its interests is not precluded merely because the suit must be brought against a governmental agency. Nothing is said to indicate that an officer of the government may go into court against such agency to protect the public's interest with respect to a matter as to which he is charged with

site was a part of the public domain, because (1) the Roanoke is a navigable stream over which Congress has plenary power, (2) the water power inherent in a navigable stream belongs to the federal government, and (3) the dam sites on a navigable stream are public property even if the title to the streambed is in private hands. 345 U.S. at 176. Justice Douglas thought that the public nature of the site suggested, on the merits, that Congress had not intended to authorize private development. *See id.* at 177. The Court majority disagreed, not on the grounds that the site was not in the public domain, but because it viewed the pertinent legislation as "a legislative finding that the proposed projects, no matter by whom they may be built, are desirable and consistent with the congressional standards for the ordered development of the Nation's water resources." *Id.* at 163. It is clear, then, that the Secretary was in substance alleging that rights over property in the public domain had, by the action of the Commission, improperly been vested in private hands.

no duty or responsibility." *Id.* Thus, *Chapman* may have turned simply on whether or not the Secretary was in fact charged with the duty of representing the United States' property interest in such matters—in which event, it is clear that had the Secretary not been a proper party, the Solicitor General would have been. As in *United States v. ICC*, then, standing was in all likelihood based on the government's proprietary interests rather than on infringement of the Secretary's governmental powers.

That suit by *some* member of the executive branch was appropriate is also clear, because *Chapman* involved neither an inter- nor intra-branch dispute. The FPC was created as an independent agency. See 16 U.S.C. § 792 (1982) (Commissioners appointed by President by and with the advice of the Senate for terms of five years); see also 44 U.S.C. § 3502(10) (1982) (listing the Federal Energy Regulatory Commission (the successor to the FPC) as an "independent regulatory agency"). Among other things, that means that the Commissioners are "officer[s] who occupy no place in the executive department and who exercise[] no part of the executive power vested by the Constitution in the President." *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). The dispute in *Chapman*, then, was a dispute between the Executive Branch and an agency outside the Executive Branch. That agency was a creature of Congress, charged with substantial independent responsibility and given substantial delegated powers, but not itself a coordinate branch. A solution to the dispute was not within the legal control of the President. For although no statute expressly denies that a Federal Power Commissioner can be removed by the President without cause, it is

clear from the regulatory and adjudicative functions of the Commission that, as in *Weiner v. United States*, 357 U.S. 349, 356 (1958), "we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." Since, under the rationale of *Humphrey's Executor*, the President could not order the Commission to comply with the Executive Branch's view of the public interest, a suit by the government in its proprietary capacity was the necessary means of resolving the dispute, and was clearly allowable under *United States v. ICC*.

It may be, then, that the fact that the Executive's dispute was with an independent agency was regarded by some Justices as sufficient to confer standing. It may be that some Justices were persuaded by the presence of a private party claiming a property right that the Secretary wished to extinguish. In this respect, too, *Chapman* parallels *United States v. ICC*. We cannot know the rationales of the various Justices, but there is certainly no basis for using an unexplained case as the reason for creating a general rule of standing for all branches and members of branches to assert their legal rights directly against one another when it is clear that such a general rule is contrary to article III and Supreme Court precedent.

The majority claims that *Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977), "indicat[es] that [an] incumbent President would 'be heard to assert' [a] claim that [a statute] unconstitutionally impinges upon the autonomy of the Executive Branch." Maj. op. at 8. The majority supposes that this means the President would have standing

to sue because his governmental powers had been invaded without any other injury. That is an astonishing inference to draw from a decision that has absolutely nothing to do with governmental standing and does not in any way suggest that the President could sue Congress or one of his own subordinates in the Executive Branch to defend his constitutional powers.

Former President Nixon's standing to challenge the constitutionality of the Presidential Recordings and Materials Preservation Act rested upon his allegation that the statute disposed of materials that were his personal property. 433 U.S. at 431, 435-36. He raised the constitutional prerogatives of the presidency not as a basis for standing but as grounds of substantive law that invalidated the Act. The situation was no different than when any private plaintiff who has standing because of a threat to his property advances a constitutional contention on the merits of the dispute.

The majority has apparently misinterpreted the Court's rejection of an argument that the former President could not rely upon rights pertaining to an incumbent President. This was a *jus tertii* argument—that, for prudential reasons, the federal courts should not allow a plaintiff to challenge the constitutionality of a statute on the grounds that it infringes the constitutional rights of others. See generally *Valley Forge*, 454 U.S. at 474; *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). Thus, the passage the majority cites from *Nixon v. Administrator* states only: "We reject the argument that only an incumbent President may assert such claims [of separation of powers and the presidential privilege of confidentiality] and hold that appellant, as a former President, may also be heard to assert them." 433 U.S. at 439. It is far-

fetches enough to infer from this that the Court was saying an incumbent President could sue Congress directly, but the inference disappears without a trace when it is realized that this was a *jus tertii* discussion and that the Court was not even remotely concerned with an impingement on the autonomy of the Executive Branch as a basis for standing. *Nixon v. Administrator* lends the majority no support whatever.

The majority also makes the untenable claim that *INS v. Chadha* indicates that Congress has a judicially cognizable interest in vindicating its constitutional powers. In *Chadha*, the INS, the executive agency charged with enforcing the immigration laws, agreed with Chadha that the legislative veto authorized by section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982), was unconstitutional. 103 S. Ct. at 2772. Agreeing that under these circumstances the court of appeals had rightly allowed both Houses of Congress to intervene, the Court said: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional. See *Cheng Fan Kwok v. INS*, [392 U.S. 206], 210 n.9 [(1968)]; *United States v. Lovett*, 328 U.S. 303 (1946)." 103 S. Ct. at 2778. There was, in *Chadha* as in the cases the Court cited, an aggrieved individual who sought relief that ran only against the Executive Branch: that satisfied the injury-in-fact, causation, and redressability requirements of article III. Indeed, the Court specifically held that "prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the

INS and Chadha." *Id.* Although the INS agreed that the statute requiring it to deport Chadha was unconstitutional, but for the court of appeals' ruling to that effect, the INS would have deported Chadha. *Id.* Congress, though nominally a party, was in reality much more in the position of an *amicus curiae*. No judgment could be entered against Congress, whose position as an intervenor differed from status as an amicus only in the ability to petition for certiorari. Congress' intervention, in other words, merely heightened the "concrete adverseness" of what was already a case-or-controversy. It is a far cry from that carefully limited holding to saying that Congress suffers a judicially cognizable injury when its law-making powers are infringed. *See* maj. op. at 13-14.

The foregoing analysis demonstrates, I think, that the cases relied upon by the majority lend it no support and that some of them show its positions to be wrong. But if a construction seemingly favorable to the majority's doctrine of general governmental standing could somehow be tortured out of one of these or some other cases, those decisions would remain anomalies and exceptions that should not be used to construct general doctrine. If we begin to generalize from aberrations, taking as our model the abnormal, we will ultimately produce not a natural but a deformed thing, a doctrine that is not Jekyll but Hyde; and that is what is being built in this circuit, a constitutional monstrosity. Constitutional doctrine should continually be checked not just against words in prior opinions but against basic constitutional philosophy. When that is done it becomes plain, as I have already shown, that the doctrine of congressional, and hence of governmental, standing has no legitimate place in our jurisprudence.

B.

It is also not the case that binding precedent in this circuit requires us to hold that appellants have standing. The majority rests this conclusion on *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), and *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3483 (U.S. Jan. 7, 1985). See maj. op. at 8, 9 n.13. That, I think, will clearly not do. In *Kennedy*, this court held that a senator had standing to challenge the legality of an intrasession pocket veto because the veto nullified his vote on the bill to which it applied. In reaching that holding, the *Kennedy* court nowhere addressed the separation-of-powers considerations that pervade the standing inquiry as articulated and applied in subsequent Supreme Court cases, notably *Valley Forge* and *Allen v. Wright*. The *Kennedy* Court's discussion of article III standing turned exclusively on a party's fitness to litigate and did not depend on separation-of-powers considerations. 511 F.2d at 433. That view of standing had been endorsed by the Supreme Court a few years before *Kennedy* was decided. See *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968). But *Flast's* view of standing has proved to be an aberration, for divorcing standing from separation-of-powers considerations inexorably leads to successive accretions to the power of the federal judiciary, a result the Framers certainly did not intend. *Valley Forge* and *Allen v. Wright* demonstrate that the Court, reversing the course it took in *Flast*, has restored separation-of-powers considerations as the central premise of the constitutional standing requirement. These recent Supreme Court decisions are flatly inconsistent with the method of analyzing the standing of congressional plaintiffs the

Kennedy court employed. At a minimum, therefore, we are bound to abandon *Kennedy's* rationale, and any reaffirmation of *Kennedy*, to be valid, must rest on a different standing analysis.

In view of the virtual identity, for purposes of standing analysis, between *Kennedy* and the litigation now before us, an effort to supply an alternative basis for *Kennedy's* result is essential if *Kennedy* is to continue to be regarded as binding precedent.¹⁸

¹⁸ Concurring in *Vander Jagt*, 699 F.2d at 1177, I suggested that we adhere to the "distinction between diminution of a legislator's influence and nullification of his vote," 699 F.2d at 1180, which the en banc court had adopted in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *judgment vacated on other grounds*, 444 U.S. 996 (1979). Under the *Goldwater* test, congressional plaintiffs have standing only if "the alleged diminution in congressional influence . . . amount[s] to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity." 617 F.2d at 702. By contrast, the position adopted by the panel opinion in *Vander Jagt* treats any substantial diminution of a legislator's influence on the legislative process as a judicially cognizable grievance. *Vander Jagt*, 699 F.2d at 1168; *see also Riegle*, 656 F.2d at 880. Upon further reflection, it seems to me that not even the *Goldwater* "nullification" test is adequate to the standing inquiry. When the interest sought to be asserted is one of governmental power, there can be no congressional standing, however confined.

To begin with, it is impossible to find in the structure of the Constitution a limited doctrine of congressional standing. The history and structure of the Constitution rule out the possibility that the Framers intended article III jurisdiction to extend to intra-branch or inter-branch disputes over infringement of official powers. That being so, there is no room to argue—nor any suggestion in the text of the Constitution—that they intended to single out the nullification of a legislator's vote for special treatment. The ultimate question is whether the provisions in the Constitution that confer various

Indeed, because none of this court's congressional standing cases, including *Moore*, rests on the premise that separation-of-powers considerations must inform the article III standing inquiry, those cases cannot possibly be binding precedent.¹⁹

governmental powers on the coordinate branches and reserve powers to the states were meant to serve as a direct and independent basis for judicial review. As I have shown in Part IV of this opinion, that is unquestionably not what the Framers intended. As I have shown in Part I, if their intentions are to be overridden in the name of vindicating constitutional grants of governmental power, they must be overridden wherever the Constitution or other law makes such a grant. The results of that rationale, as I have shown in Parts II and III, are incompatible with binding Supreme Court precedent on the subject of standing. The conclusion must be that even the *Goldwater* test allows us a jurisdiction and a power that article II forbids.

¹⁹ The panels in *Riegle* and *Vander Jagt* explicitly refused to consider separation-of-powers implications in connection with the standing inquiry. See *Riegle*, 656 F.2d at 880; *Vander Jagt*, 699 F.2d at 1170 & n.5. In *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), the court did suggest that separation-of-powers issues should play some role in its standing inquiry, *id.* at 215, but it also stated that "we do not rest our denial of standing on these separation of powers grounds." *Id.* The opinion for the *en banc* court in *Goldwater*, 617 F.2d 697, at most assigned only this supportive, nondispositive, weight to separation-of-powers considerations. In *Moore*, the panel opinion acknowledged that *Valley Forge* "reinforces the principle that where separation-of-powers concerns are present, the plaintiff's alleged injury must be specific and cognizable in order to give rise to standing." 733 F.2d at 951 (footnote omitted). But there was no discussion whatsoever of whether impairment of a legislator's official powers could be treated as judicially cognizable injury without violating that "principle." The panel contended itself with the bare assertion that "[t]he injury alleged by appellants here is to an interest positively identified by the Constitution." *Id.*

Although the majority views *Kennedy* and *Moore* as binding precedent, it offers no real defense of the standing analysis employed in those cases, or of the equitable discretion doctrine itself. Instead, the majority suggests that it need not consider the doctrine of equitable discretion here because that doctrine applies only to "actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process." Maj. op. at 12-13.

Thus the court now holds, for the first time, that Congress, or either of its Houses, has standing to sue the President for allegedly infringing its lawmaking powers, and that even the limited prudential role that the equitable discretion doctrine assigns to separation-of-powers considerations is inapplicable in such cases. That is tantamount to adopting a *per se* rule that Congress has standing to sue the President whenever it plausibly alleges an actual impairment of its lawmaking powers. But if Congress may sue under these circumstances, it should follow that a congressional plaintiff may sue whenever he plausibly alleges an actual impairment of his lawmaking powers. The harm, in each case, is of the same kind—an injury to lawmaking powers. *Kennedy* stated in dictum that the injury suffered by Congress was "direct," while the injury suffered by an individual member of Congress was "derivative" and "indirect." 511 F.2d at 435, 436. But that distinction has consistently been treated as immaterial in this court's congressional standing cases, and the majority does not purport to rely on it now. That is quite understandable, for once impairment of governmental powers is deemed sufficient to confer standing it is ob-

vious that an individual member of Congress suffers immediately rather than remotely, as those concepts are employed in the causation branch of the article III standing inquiry. Moreover, the harm to an individual legislator is much greater, for his ability to engage in political struggle with the President is far less than the ability of an entire House or of the entire Congress. The majority, if it applied the rationale for its *per se* rule consistently, would therefore abandon the equitable discretion doctrine altogether.

Instead, the majority confines that doctrine to cases in which the court believes that congressional plaintiffs are not attempting to "overturn[] the results of the legislative process." Maj. op. at 13. The legislative process, of course, is implicitly and quite arbitrarily defined as a process that ends when "Congress has passed an Act." Maj. op. at 13. That was far from obvious to the Framers, who debated at some length whether the veto improperly gave the Executive a share in legislative power. *See, e.g.,* 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 73-80 (1st ed. 1911). Thus, The Federalist had to defend the President's qualified veto power against the charge that it violated the principle of separation of powers. That defense took the form, not of denial that the veto power was a legislative power, but of an argument that separation of powers was not an absolutist principle, but one which was "entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected." *The Federalist* No. 66, at 445, 446 (A. Hamilton) (J. Cooke ed. 1961) (applying this reasoning to the Senate's power to try impeachments

and to the President's veto power). *See also* 2 M. Farrand, *supra*, at 75 (remarks of Gerry) (arguing against the Council of Revision on the grounds that "[i]t was making the Expositors of the Laws [the Judiciary], the Legislators which ought never to be done"); *id.* (remarks of Gouverneur Morris) (responding to Gerry with the observation that "the Judges in England had a great share in ye Legislation"). Would the majority contend that the Vice-President's tie-breaking vote is not part of the legislative process? Of course, if the alternative definition of the legislative process as including the veto (and, on the same reasoning, the pocket veto) were accepted, it would follow, on the majority's own reasoning, that neither Congress nor the congressional plaintiffs have standing to bring this action, for they would, on that definition, be attempting to overturn the results of the legislative process.

Apart from that, the majority offers no explanation of why a legislator who has "failed to persuade [his] fellow legislators" to enact a bill should be treated differently from a legislator who has failed to persuade them to reenact the bill to which the "pocket veto" had been applied. If "the principle that a legislator must lack collegial or 'in-house' remedies before this court will confer standing," *Riegle*, 656 F.2d at 879, is, as the majority appears to think, the sole basis for the equitable discretion doctrine, and if that principle is applied consistently, then the equitable discretion doctrine must be applied to the congressional plaintiffs in the suit before us today. That being true, the doctrine of equitable discretion should have barred the suit by Senator Kennedy in *Kennedy v. Sampson*: as the *Riegle* court pointed out, he "had collegial remedies . . . ;