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Litigating Challenges to Federal Spending Decisions:

The Role of Standing and Political Question Doctrine

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Introduction

The political question doctrine and the rules of standing have long performed similar functions within the judicial system. Their primary role has been to keep judges a safe distance from politics by confining them to disputes between parties pursuing their private interests. At the time of *Marbury v. Madison*,[1] the two doctrines were in fact thought to be two sides of the same coin. As two scholars put it, under *Marbury*: "Standing is just the obverse of political questions. If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question."[2] Of course, standing and political questions are no longer defined in opposition to each other. But, the fact the two doctrines are intended to play similar roles in preserving the separation of powers means that they may be still be functionally interchangeable to some degree. Indeed, there is reason to think that much of the work that was once done by political question doctrine in keeping "public rights" cases out of court, has now been turned over to standing doctrine.[3]

Perhaps because the two doctrines perform such similar functions, they are also both subject to similar criticisms. First, both doctrines – when used to deny a hearing on the merits – are criticized as abdications of the judicial role to say what the law is. Such an abdication, the argument goes, waters down the practical value of important rights and, in fact, runs the risk that

[1] 5 U.S. (1 Cranch) 137 (1803).
[2] HOWARD FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 231 (2d ed. 1987).
[3] *See* Part VI *infra*; *see also* Linda Sandstrom Simard, *Standing Along: Do We Still Need The Political Question Doctrine?* 100 DICK. L. REV. 303, 306, 333 (1996) ("By categorizing the political question attributes set out in *Baker* in terms of cognizability and redressability, the overlap between the political question doctrine and the modern standing doctrine becomes apparent. Specifically, because the modern standing doctrine requires the federal courts to interpret the three requirements of standing – injury, causation, and redressability – in light of the principles of separation of powers, one may argue that the standing analysis as it has evolved has subsumed the concerns that led the Court in *Baker* to declare an issue to be a nonjusticiable political question. In essence, it appears that the two doctrines have converged.").

certain constitutional provisions will be rendered underenforced or entirely unenforceable.[4] Second, both doctrines are criticized for their indeterminacy and, hence, their vulnerability to the political biases of judges. By allowing judges to avoid the merits of cases on the basis of such open-ended concepts as "injury-in-fact" and "judicially manageable standards," both standing[5] and political question doctrine[6] confuse litigants and invite judges to resort to their ideological predispositions.

This Briefing Paper analyzes the shadow cast by these two analogous doctrines on the federal budget process. Part I briefly describes the historical context for contemporary standing doctrine. Part II describes the current doctrine and its application to federal spending cases. Part III explains the unique doctrine of 'taxpayer standing.' Part IV describes the Supreme Court's doctrine governing implied rights of action – an area of law closely related to standing – and its implications for challenges to conditional spending programs. Part V discusses political question doctrine and its application to challenges to federal spending decisions. Part VI briefly discusses the overlap between the two doctrines and offers some tentative explanations for the predominance of standing as an explanation for finding a case non-justiciable.

I. Historical Origins of Standing Doctrine

[4] *Compare* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 149 (4th ed. 2003) ("critics of the political question doctrine argue that it confuses deference with abdication….Also, a blatant disregard of the Constitution's requirements…should not be tolerated by the federal courts.") *with id*. at 97 ("standing doctrine can be criticized as the Court's abdicating the judicial role in upholding the Constitution. The argument is that the Court inappropriately deemed some parts of the Constitution to be enforceable only through the political process.").

[5] *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court"); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758 (1999) (describing standing as "a tool [] to further [judges'] ideological agendas"); William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 223 (1988) (referring to the "apparent lawlessness of standing cases" and their "wildly vacillating results").

[6] *See e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1295 (2006) (noting the irony that "the ultimate judgment of judicial manageability or nonmanageability implicates a discretion very like that which the Court seeks to limit when it insists that constitutional adjudication cannot occur in the absence of judicially manageable standards.").

Before the last half century, standing to sue was not a contested issue in federal courts. Access to court was determined by the substantive law at issue,[7] and the limited number of common law actions, governed by strict pleading requirements, kept most suits within the confines of what we would now consider an Article III "Case or Controversy." Although early courts certainly sought to identify the "proper parties" to the suit before it, and sometimes distinguished between public and private rights, they did not use the term standing, nor did they view the identification of proper parties as a requirement of Article III.[8] For example in the famous case *Frothingham v. Mellon*,[9] the plaintiff argued that the Maternity Act of 1921, which provided federal support for state anti-infant mortality programs, usurped a traditional prerogative of state government in violation of the Tenth Amendment.[10] The plaintiff claimed an injury on the grounds that the Maternity Act would cause her to pay more taxes than she otherwise would have. Without using the language of standing, the Supreme Court rejected that claim because the plaintiff's expected future tax liability resulting from the Act was "comparatively minute and indeterminable" and that "the effect upon future taxation" was "remote, fluctuating and uncertain."[11]

But in the post-New Deal era, the rise of the administrative state, the relaxation of pleading requirements and the broadening of certain constitutional limits on governmental action loosened the rules of who could bring suit and on the basis of what injury. In 1968, the Supreme

[7] *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 – 51 (1988); Fletcher, *supra* note 5, at 224 – 25.
[8] *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); *but see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 712 – 18 (2004).
[9] 262 U.S. 447 (1923).
[10] *Id*. at 479 – 80. The plaintiff also argued that the program had resulted in a taking of her property without due process of law. *Id.*
[11] *Id*. at 487.

Court rejected the *Frothingham* approach in *Flast v. Cohen*.[12] In *Flast*, the plaintiffs claimed that a federal statute had violated the Establishment Clause by directing public funds to religious schools. As in *Frothingham*, the plaintiffs in *Flast* argued that their injury arose from their status as taxpayers. This time, however, the Court granted the plaintiffs standing, representing a important change in public access to challenge governmental actions, and, in particular, spending decisions. *Flast* has come to stand for the high watermark of expansive standing doctrine and a characteristic product of the Warren Court's willingness to bring the adjudication of public rights within the federal courts.[13] In the decades since, the Burger and Rehnquist Courts have pulled back from *Flast* in important ways.[14] But the Court has not completely shut the door to plaintiffs seeking to vindicate public rights, as long as those plaintiffs can meet three requirements: that they have suffered an injury in fact, that their injury was caused by the defendant's alleged conduct, and that their injury is redressable by the courts. The next section examines these requirements.

II. Contemporary Standing Doctrine and Challenges to Federal Spending

Courts have frequently stated that standing analysis should focus entirely on the circumstances of the plaintiff and not on the nature of the legal right invoked or the remedy sought. Although scholars have questioned whether considerations of rights and remedies in fact drive standing questions below the surface,[15] it is at least true that such considerations rarely make it in to the doctrine explicitly. Thus, in most circumstances, challenges to federal spending decisions are analyzed under general standing principals. One exception to that rule arises when

[12] 392 U.S. 83 (1968).
[13] *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 128 – 29 (5th ed. 2003).
[14] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).
[15] *See* Fletcher, *supra* note 5 , at 238 – 39; Richard H. Fallon, Jr., *Justiciability and Remedies*, UVA L. REV. (forthcoming 2006).

plaintiffs base their injury solely on their status as taxpayers. That doctrine, 'taxpayer standing,' is discussed in Part III. This Part describes the basic elements of general standing doctrine with an eye toward how the doctrine is applied to federal spending cases.

To establish standing to sue in federal court, the plaintiff must meet three requirements. He must show that he has been injured, that his injury was caused by the plaintiff's alleged conduct and that his injury is redressable by the court. The remainder of this Part describes these requirements in turn and then briefly discusses how standing doctrine was applied to the multiple challenges to the Line Item Veto Act.

a. Injury in Fact

The first and most important requirement for standing to sue in federal court is that the plaintiff establish an "injury in fact."[16] The injury must be to a legally protected interest that is both "concrete and particularized and actual or imminent, not conjectural or hypothetical."[17] In practice, the cases have broken the injury-in-fact rule into a few separate requirements:

i. Particularized Injuries and Generalized Grievances

The Court has applied the principle that an injury must be particular to the plaintiff has been in two distinct ways. First, the Court must be able to draw a link between the injury alleged and the specific plaintiffs at bar. In *Sierra Club v. Morton*,[18] the plaintiffs challenged the U.S. Forest Service's approval of ski resort on public land. The Court denied standing because, although there was potentially a cognizable injury, none of the named plaintiffs were themselves among the injured.[19] The practical result of *Sierra Club* was to require classes of plaintiffs to

[16] Ass'n of Data Processing Services Organizations, Inc., v. Camp, 397 U.S. 150, 153 (1970).
[17] *Lujan*, 504 U.S. at 560 (1992).
[18] 405 U.S. 727 (1972).
[19] *Id.* at 734 – 35.

find at least one in their numbers who could claim a direct and imminent injury from the defendant's conduct. In the context of suits to compel the federal government to meet its spending obligations, this requirement has been fairly easy to satisfy. Faced with a broad class of plaintiffs, courts have typically been willing to conclude after a cursory review that at least one plaintiff would suffer an injury from the withholding of funds.[20]

In addition to showing that they are among the injured, plaintiffs must show that the injury alleged is particular to them and not merely a "generalized grievance" that is "common to all members of the public."[21] In the context of the federal budget process, the Court employed this rationale in *United States v. Richardson*[22] to deny standing to plaintiffs who claimed that, through its secret budgeting practice, the CIA violated the Constitution by failing to produce "a regular Statement and Account of the Receipts and Expenditures of all public Money."[23]

However, the rule against granting standing for generalized grievances was subsequently narrowed in *Federal Election Commission v. Akins*.[24] In that case, a group of voters sued to challenge the Federal Election Commission's ruling that the American Israel Public Affairs Committee (AIPAC) was not a "political committee." Designation as a political committee would have required AIPAC to make certain disclosures regarding its contributions and expenditures. The plaintiffs claimed that they were injured by not being able to access this information. The FEC responded by arguing that the plaintiffs should be denied standing

[20] *See e.g.*, City of New Haven, Connecticut v. United States, 634 F.Supp. 1449, 1453 n.3 (D.D.C. 1986) (upholding standing for a broad class of cities and community groups challenging constitutionality of the Impoundment Control Act and stating, without further explanation, that "[t]he Court's review of the interests asserted…discloses that at least one plaintiff is immediately concerned with each of the programs affected by the deferrals and will likely benefit if the funds are restored."); Dabney v. Reagan, 542 F.Supp. 756, 763 (D.C.N.Y 1982) (granting standing to a broad coalition of parties challenging the Reagan Administration's failure to spend funds appropriated for solar technology and stating "this array of plaintiffs includes representatives of every interest conceivably concerned with the implementation of the Act…I am satisfied, without analyzing the question in detail in this expedited opinion, that someone in the plaintiffs' ranks has the requisite standing).
[21] United States v. Richardson, 418 U.S. 166, 176 – 77 (1974); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984).
[22] 418 U.S. 166 (1974).
[23] U.S. CONST., Art. I, § 9, cl. 7.
[24] 524 U.S. 11 (1998).

because they alleged no more than a "generalized grievance" in that any harm they suffered was substantially shared by "all or a large class of citizens."[25] Writing for the Court, Justice Breyer conceded that earlier cases had denied standing for generalized grievances. However, on Justice Breyer's reading, the harm alleged in those cases "was not only widely shared but…also of an abstract and indefinite nature."[26] Thus, among other important consequences of the *Akins* decision discussed below, it now appears that a plaintiff may sue to vindicate a generalized grievance as long as that grievance is deemed concrete rather than abstract.

ii. "Actual or Imminent" Injuries

To establish an injury in fact, the injury must also be "actual or imminent, not conjectural or hypothetical."[27] Although these various terms describe overlapping concepts, there are a few cases that highlight their distinctive aspects. For instance, a vivid example of the imminence requirement came in *Los Angeles v. Lyons*,[28] in which a man who alleged that he was injured by the use of a police choke hold, but who was barred for recovering for such injuries, sued to enjoin the Los Angeles Police Department from future use of the choke hold. The Court denied him standing on the ground that there was an insufficient probability that he, Lyons, would suffer another choke hold and thus insufficient grounds to believe the injunction would prevent an imminent injury.[29]

An example of the actuality requirement came in the case of *Whitmore v. Arkansas*.[30] Whitmore, a death row prisoner, sought to intervene in the case of another death row prisoner

[25] *Id*. at 23.
[26] *Id.*
[27] *Lujan*, 504 U.S. at 560.
[28] 461 U.S. 95 (1983)
[29] *Id*. at 108 – 09.
[30] 495 U.S. 149 (1990).

who had waived his right to appellate review.[31] Whitmore argued that he would be injured because, by not appealing, the other prisoner's relatively heinous crime would not be included in the state database and thus not available as a basis for comparison with his own crime.[32] The Court held that Whitmore's alleged injury was "too speculative to invoke the jurisdiction of an Art. III court"[33] and that it was "nothing more than conjecture" that adding the other prisoner's crime to the database would affect his own sentence.[34]

Both *Lyons* and *Whitmore* may be contrasted with *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, in which an environmental group sued to make a local polluter pay civil penalties to the government.[35] The plaintiffs claimed that the penalties were necessary to deter the defendant from future violations about which they had a reasonable apprehension. The Court found this injury alleged by the plaintiffs to be sufficient to grant standing.[36] The Court distinguished *Lyons* on the grounds that, although in both cases the plaintiffs sought to prevent future misconduct by the defendants, the plaintiffs' fear of future pollution was more reasonable in *Laidlaw* than was Lyon's fear that he would again be subject to a police choke hold.[37]

b. Injury in Fact, Separation of Powers, and Congressional Latitude to Define Actionable Injuries

The requirement that the federal courts only hear cases in which there has been an 'injury in fact' has been justified as necessary both to ensure the quality of adjudication and to protect the separation of powers. The injury in fact requirement safeguards the quality of adjudication, the argument goes, by ensuring that only parties with adequate incentives to litigate make it into

[31] *Id*. at 161 – 66.
[32] *Id*. at 156 – 57.
[33] *Id*. at 157.
[34] *Id*.
[35] 528 U.S. 167 (2000).
[36] *Id*. at 183.
[37] *Id*. at 184 – 85.

court and by presenting the most useful set of facts for evaluating the merits of the claim.[38] But the justification that is most central to the doctrine, and which is of particular relevance in the context of the federal budget process, is that without an injury in fact the courts may overstep their proper role in the separation of powers. In *Richardson*, Justice Powell argued that by denying standing for a generalized injury, the Court was following the principle that its proper role "lies in the protection it has afforded the constitutional rights and liberties of individual citizens….not [in] some amorphous general supervision of the operations of government."[39] As Justice Scalia has written, "standing is a crucial and inseparable element of [separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the process of self-governance."[40]

Yet, the principle that standing ought to serve as a means to extricate the courts from the process of self-governance is in tension with a line of cases in which the Court has refused to recognize congressional grants of standing. In the 1970s and 1980s, the Court took a permissive posture, allowing Congress gradually to expand its grants of standing to private parties enforcing public rights.[41] In effect, although it viewed the injury in fact test as a constitutional requirement, the Court in those years took the concept of "injury" as one that was susceptible to congressional definition through its extension of the right to sue. But, in the 1990s, the issue of congressional latitude to grant standing became much more contested. In *Lujan v. Defenders of*

[38] For example, in *Baker v. Carr*, the Court referred to the "personal stake" needed for the "illumination of difficult constitutional questions." 389 U.S. 186, 204 (1962).
[39] *Richardson*, 418 U.S. at 188-92 (Powell, J., concurring). Along similar lines, Chief Justice Burger argued that "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." *Id*. at 179 (majority opinion).
[40] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFF. U. L. REV. 881, 881 (1983).
[41] *See e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (granting standing to sue for discrimination under the Fair Housing Act to an African-American "tester" – someone who presented himself as the purchaser of a home for the purposes of gathering information on discriminatory practices); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

Wildlife,[42] the Court denied standing to plaintiffs suing under the "citizen-suit" provision of the Endangered Species Act.[43] The plaintiffs sued to enjoin a Department of the Interior regulation that would have reduced the protection of species abroad on the grounds that it had failed to comply with certain procedural requirements. The plurality opinion written by Justice Scalia disregarded the fact that Congress had drawn the grant of standing as widely as possible and instead proceeded to dismiss for lack of standing, on the grounds that the plaintiff's alleged injury was neither imminent, concrete, nor redressable.[44] However, in a concurring opinion necessary to form the majority, Justice Kennedy noted his view that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[45] Justice Kennedy voted to deny standing only because Congress had been too vague in specifying the injury. The Endangered Species Act granted standing to "any person" to redress "any violation," and thus, according to Justice Kennedy, failed to "relate the injury to the class of persons entitled to bring suit."[46]

But *Lujan* was not the last word on the question of congressional grants of standing. In *Federal Election Commission v. Akins*,[47] the Court appeared took a more deferential view of Congress's power to designate legally cognizable injuries. In that case, like in *Lujan*, Congress had created a citizen suit provision allowing "any party aggrieved" to sue for violation of the Federal Election Campaign Act. The court remarked that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly."[48] The Court then found

[42] 504 U.S. 555 (1992).
[43] The provision stated that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency…alleged to be in violation of any provision of this chapter." *Id*. at 571 - 72.
[44] *Id*. at 578.
[45] *Id*. at 580 (Kennedy, J., concurring in part and concurring in the judgment).
[46] *Id*.
[47] 524 U.S. 11 (1998).
[48] *Id*. at 12.

that the plaintiffs had properly alleged an "informational injury."[49] This type of injury had not been clearly recognized before and its satisfaction of the injury in fact requirement seemed to run counter to *Richardson*, in which the plaintiff's lack of information about CIA spending did not suffice to establish injury. It is certainly possible that *Akins* will be limited in the future to enable only claims to redress informational injuries. But the Court's willingness in *Akins* to recognize a new type of injury at the prompting of Congress may also possibly signal a return to the pre-*Lujan* period in which the Court typically deferred to congressional grants of standing.

c. Causation

To satisfy the standing requirement the plaintiff must also show that defendant's alleged conduct has caused her injury. In *Simon v. Eastern Kentucky Welfare Rights Organization*,[50] the Court described the test for causation, requiring that the injury "fairly can be traced to the challenged action of the defendant, and not an injury that results from the independent action of some third party not before the court."[51] In that case, the plaintiffs who lacked medical insurance alleged that they had been harmed by an IRS Revenue Rule that limited the amount of free care hospitals were required to provide to retain their tax-exempt status. The Court denied standing for lack of causation and redressability, reasoning that it was "purely speculative" that plaintiffs' lack of care was caused by the Revenue Rule.[52] Similarly, in *Allen v. Wright*,[53] the Court denied standing to a class of African-American schoolchildren who argued that the IRS had failed to meet its statutory obligation to deny tax-exempt status to racially discriminatory private schools and thus had harmed them by perpetuating de facto segregation of the public

[49] *Id*. at 24.
[50] 426 U.S. 26 (1976).
[51] *Id*. at 41 – 42.
[52] *Id*. at 45 – 46.
[53] 468 U.S. 737 (1984).

schools. The Court denied standing on the grounds that it was uncertain that the discriminatory policies of the private schools had in fact been caused by the IRS's grant of tax exempt status.[54]

Both *Simon* and *Allen* demonstrate a demanding version of the causation requirement. In both cases the Court denied standing to plaintiffs challenging budget decisions that were linked to their injuries only through some sort of probabilistic effect or market mechanism. Taken to its logical limits, this approach would vastly curtail standing to challenge federal budget decisions, since so much federal spending is at the discretion of the agencies. For instance, under a strict version of the causation requirement, even an organization that is in the class of purported beneficiaries of a canceled federal spending provision might lack standing unless that organization had received earmarked funding. After all, it is always possible that the agency could have denied funding to that particular organization anyway, just as it was possible that the hospital might have nonetheless denied care to the plaintiffs in *Simon* even under the more favorable tax provisions.

Happily for plaintiffs challenging federal spending, however, the Court has not consistently committed itself to the strict causation rule articulated in *Simon* and *Allen*. For instance, in *Clinton v. New York*,[55] a cooperative of potato growers challenged the cancellation under the Line Item Veto Act of a tax break given to the owners of food processing facilities who sold their facilities to farmers' cooperatives. The Court granted standing because the potato growers had concrete plans to purchase a processing facility and because groups like theirs were the intended beneficiaries of the provision – even though they were not actually the parties that would claim the tax break. The Court did not seriously question whether there was a causal relationship between the cancellation of the tax break and this particular cooperative receiving a

[54] *Id*. at 757.
[55] 524 U.S. 417 (1998)

better price. The Court was satisfied with the fact that the tax break benefited the cooperative through some sort of probabilistic market mechanism, referring to the tax break as a "statutory bargaining chip" accruing to the benefit of the cooperative.[56]

A second set of examples in which courts have taken a relaxed view of the causation requirement comes in cases where there is a large and diverse class of plaintiffs.[57] As mentioned above, in those cases the courts' standing analysis tends to be rather cursory, resting on the notion that at least one of the plaintiffs must have suffered an injury caused by the cancellation of spending. For example, in *Dabney v. Reagan*,[58] the district court granted standing to a broad collection of plaintiffs challenging the Reagan Administration's decision to cancel funding for solar power. The court bypassed the traditional injury-in-fact and causation analyses – and thus the problem of agency discretion – on the grounds that the class of plaintiffs included "representatives of every interest conceivably concerned with the implementation of the Act."[59]

d. Redressability

To establish standing, the plaintiff must also show that his injury is likely to be redressed by the remedy sought. The redressability requirement is very close to the causation requirement because if the defendant's conduct did not cause the plaintiff's injury, the court's remedy is also not likely to redress the injury. For this reason, the two requirements are frequently analyzed together.[60] Nonetheless, the distinctiveness of the redressability requirement can be seen in cases where the court focuses on the inadequacy of the remedy sought. For example, in *Linda R.*

[56] *Id*. at 432.
[57] *See supra* note 20.
[58] 542 F.Supp. 756 (D.C.N.Y 1982).
[59] *Id*. at 763.
[60] *See* CHEMERINSKY, *supra* note 4, at 75 (quoting Warth v. Seldin, 422 U.S. 490, 505 (1975)).

S. v. Richard D,[61] the plaintiff sued to enjoin the state to prosecute the father of her child for failure to pay child support.[62] There was no discussion as to whether the district attorney's non-enforcement of the child support statute had *caused* the plaintiff's injury – a question that would have been difficult to comprehend. Instead, the Court denied the plaintiff standing on the grounds that her injury was not redressable. The Court reasoned that, even if she succeeded in causing the state to bring a prosecution action, that alone would not guarantee that the father would pay child support, only that he would be incarcerated.[63]

e. Application of General Standing Principles: The Line Item Veto Act

A useful illustration of the application of general standing principles to the budget process came in the wake of the Line Item Veto Act. The Act was challenged by three sets of litigants, one of whom had standing to sue and two of whom did not. Taken together these three cases confirm the intuitive notion that standing is fairly easy to obtain for parties who claim a right to direct federal spending, but very difficult to obtain for parties who claim some other sort of injury arising out of the canceled spending. In *National Treasury Employees Union v. United States,*[64] a union representing federal employees challenged the constitutionality of the Act. The injuries they alleged were that the Act had forced them to expend more resources lobbying the executive branch to prevent unfavorable budget decisions and that the Act had impaired their ability to secure the passage of favorable budget provisions.[65] But because the President had not yet used the line item veto on any legislation – let alone legislation favorable to the union – the D.C. Circuit held that the case was non-justiciable both because it failed the imminence

[61] 410 U.S. 614 (1973).
[62] The plaintiff, a mother of an illegitimate child, argued that the constitutionality of Texas' child support statute violated the Equal Protection Clause insofar as it only required the state to prosecute child support cases on behalf of legitimate children. *Id*. at 616.
[63] *Id*. at 618.
[64] 101 F.3d 1423 (D.C. Cir. 1996).
[65] *Id*. at 1425 – 26.

requirement for standing and because it was unripe.[66] In *Raines v. Byrd*,[67] a group of Members of Congress alleged that they had been injured by the Act because it diluted the power of their votes, divested them of their constitutional role in the repeal of legislation, and altered the balance of power between Congress and the Executive to their detriment.[68] The Court denied them standing on the ground that the alleged injury was insufficiently concrete and particularized. The Court noted that the Members of Congress at bar had not been "singled out for specially unfavorable treatment" nor had they been deprived of something to which they were personally as opposed to institutionally entitled.[69]

Finally, in *Clinton v. New York*,[70] the Court granted standing to both plaintiffs challenging the Act. One plaintiff was the New York City Health and Hospitals Corporation, which claimed an injury when the President vetoed a bill that would have allowed it to retain millions of dollars in taxes it had levied against in-state Medicare providers without having to submit a waiver request. The Court granted standing and rejected the argument that New York was not injured because the federal government had yet to act on the waiver request.[71] The second plaintiff, described above, was a cooperative of potato growers that claimed injury when

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[66] *Id*. at 1430 – 31.
[67] 521 U.S. 811 (1997).
[68] *Id*. at 816.
[69] *Id*. at 821. The Supreme Court had confronted the issue of legislative standing on two prior occasions. In *Coleman v. Miller*, 307 U.S. 433 (1939), the Court denied standing for members of the Kansas legislature who claimed that a constitutional amendment in the state had been improperly ratified, thus undermining the power of their votes. The Court threw out the suit as a political question. However, four Justices stated the view that the legislators lacked the personal interest required for standing, and three Justices would have granted standing. *Id*. at 438, 469 – 70. In *Powell v. McCormack*, 395 U.S. 486 (1969), a Member of Congress sued to collect back pay for a period in which he was improperly denied his seat in Congress. The Court granted him standing on the theory that he had a personal interest in the outcome. Taken together, *Coleman*, *Powell* and *Raines* stand for the rule that legislators have standing to pursue their own personal interests affected by the legislative process, but not their institutional interests.
[70] 524 U.S. 417 (1998).
[71] *Id*. at 430 ("The self-evident significance of the contingent liability is confirmed by the fact that New York lobbied Congress for this relief, that Congress decided that it warranted statutory attention, and that the President selected for cancellation only this one provision in an Act that occupies 536 pages of the Statutes at Large. His action was comparable to the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial of a multibillion dollar damages claim.").

the President vetoed a tax break for owners of food processing plants who sold their plants to farmers' cooperatives. The Court held that the plaintiffs had alleged a sufficient injury because they had concrete plans to purchase a processing facility and because farmers' cooperatives were the intended beneficiaries of the tax provision, even though it was actually the plant owners who would claim the tax benefit.[72]

III. Taxpayer Standing

There is one area of standing doctrine under which plaintiffs challenging federal spending decisions face unique rules for getting into court. The doctrine of 'taxpayer standing' governs claims by plaintiffs who allege they have suffered injury by having been forced to share in the cost of an unconstitutional expenditure. Because a rule that generally allowed standing for taxpayers would effectively gut all standing limitations in suits against the government, the Court has made taxpayer standing quite difficult to attain.

The restrictive doctrine of taxpayer standing applies when two conditions are met. First, the plaintiff alleges an injury *only* on the grounds of her status as a taxpayer.[73] Because taxpayer standing is rarely granted, plaintiffs challenging allegedly unconstitutional spending will want to claim that they have been injured in more than just their capacity as taxpayers. For example, in *Heckler v. Mathews*,[74] a male plaintiff challenged a provision in the Social Security Act that allocated greater payments to women than to men. The plaintiff was able to get into court on a theory of stigmatic harm resulting from the perpetuation of "archaic and stereotypic notions"[75] of gender without needing to invoke his status as a taxpayer. Second, the restrictive rules of taxpayer standing apply only when the plaintiff claims that the spending violates the

[72] *Id*. at 432 – 33.
[73] *See Flast v. Cohen*, 392 U.S. 83, 102 (1968).
[74] 465 U.S. 728 (1984).
[75] *Id*. at 739.

Constitution. As mentioned above, statutory claims to *compel* spending are dealt with under the general framework of standing analyses. Statutory claims to *block* spending tend to fall under doctrine of implied rights of action discussed below.[76]

The modern test for taxpayer standing was first set forth in *Flast v. Cohen*.[77] In *Flast*, taxpayers claimed that the federal Department of Health, Education and Welfare's disbursal of funds for use in religious schools violated the Establishment Clause. Rather than follow *Frothingham*, which appeared to foreclose taxpayer standing entirely, the Court held that taxpayer status is sufficient to establish standing when two conditions are met. First, the taxpayer's challenge must be aimed at an exercise of congressional power under the taxing and spending clause. "It will not be sufficient," the Court noted, "to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."[78] Second, "the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[79] The first of these conditions is straightforward and was easily satisfied in *Flast* because the plaintiffs were arguing that the spending itself was unconstitutional.[80] The second condition is more difficult to comprehend. In

[76] We have found no cases in which a plaintiff possessed an express right of action to challenge a federal spending provision and in which standing presented an issue. If such a case were to arise it seems likely that a court would analyze it under the general rules of standing. For instance, in *Lujan*, the plaintiff challenged the validity of a regulation that may have led to the funding of certain types of projects abroad. The Court appeared to analyze the injury as if the federal government had already undertaken these expenditures. There did not appear to be any distinct doctrine applied on the basis that plaintiff had challenged a spending decision rather than some other type of governmental action. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[77] 392 U.S. 83 (1968).
[78] *Id*. at 102.
[79] *Id*. at 102 – 03.
[80] *Id*. at 103.

Flast, the Court found that there was a sufficient "nexus" to satisfy the second condition because one of the original and most important purposes of the Establishment Clause was to guard against the government using its spending power to "favor one religion over another or to support religion in general."[81] The Court also distinguished *Frothingham* on the second condition of the test, arguing that neither of the two constitutional protections invoked in that case – the Tenth Amendment and the Due Process Clause – specifically limited Congress' spending power.[82]

Subsequent cases applying the *Flast* test suggest that the Court is not likely to extend taxpayer standing for violations of constitutional provisions other than the Establishment Clause. In *United States v. Richardson*,[83] the plaintiff argued that the CIA's secret budget violated the clause of the Constitution that requires a regular statement and account of public funds.[84] The Court held that this allegation failed the second condition of the *Flast* test because "there is no 'logical nexus' between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency."[85] In *Schlesinger v. Reservists Committee To Stop the War*,[86] decided the same day as *Richardson*, the Court denied standing to a group of taxpayers who claimed that certain Members of Congress had violated the Incompatibility Clause[87] of the Constitution by simultaneously serving in Congress and in the reserves of the armed forces. The Court denied standing on the first condition of the *Flast* test, concluding that the challenge to Executive's decision to allow

[81] *Id*.
[82] *Id*. at 105.
[83] 418 U.S. 166 (1974).
[84] U.S. CONST. Art. I, § 9 cl. 7.
[85] *Richardson*, 418 U.S. at 175.
[86] 418 U.S. 208 (1974).
[87] U.S. CONST. Art. I, § 6, cl. 2.

Members of Congress to serve in the reserve was not a challenge to an exercise of Congress' spending power under Art. I, § 8.[88]

Eight years later in *Valley Forge Christian College v. Americans United for Separation of Church and State*,[89] the Court restricted taxpayer standing still further. In *Valley Forge*, the Court denied standing to taxpayers challenging the executive branch's grant of free property to a religious school. Even though the plaintiffs' challenge came under the Establishment Clause, the Court distinguished *Flast* for two reasons. First, the Court drew a distinction on the ground that the challenge was to an executive branch action rather than an act of Congress.[90] Second, the Court argued that the case before it was different than *Flast* because it involved a disbursal of real property rather than an exercise of the spending power.[91] By backing away from *Flast* on the basis of such seemingly irrelevant distinctions,[92] the Court seemed to signal its antipathy for taxpayer standing and, perhaps, an eventual return to the pre-*Flast* regime. However, in a more recent case, *Bowen v. Kendrick*,[93] the Court affirmed that taxpayers at least have standing to sue under the Establishment Clause. In that case, the Court granted standing for taxpayers to challenge federal grants for services relating to teen pregnancy that were going to religious organizations. The government argued that, since the grants were administered by the Executive rather than through congressional action, standing should be denied under *Valley Forge*. The Court rejected that argument, pointing out that in *Flast* itself the challenged spending had been

[88] *Schlesinger*, 418 U.S. at 228.
[89] 454 U.S. 464 (1982).
[90] *Id*. at 479.
[91] *Id*. at 480.
[92] On the first distinction, the fact that it was an executive rather than a congressional action should make no difference for the Establishment Clause. *See* CHEMERINSKY, *supra* note 4, at 93. The second distinction also seems unimportant because all property held by the federal government if sold could otherwise defray the need for taxes. Thus, the injury to a taxpayer from the alienation of government property is little different than the injury from spending.
[93] 487 U.S 589 (1988).

allocated by the executive branch.[94] In sum, the law of taxpayer standing now appears to be that a taxpayer may challenge federal spending (but not the disposition of property) regardless of the branch it originates from. The taxpayer may bring such a suit only under the Establishment Clause or some other constitutional provision that has a reasonable nexus to the spending power – although it bears mention that in the thirty-eight years since *Flast* only the Establishment Clause has met this standard.

IV. Implied Rights of Action to Challenge Federal Spending

It has been observed that the question courts face as to whether they ought to imply rights of action into federal statutes is similar to the standing question in that both determine "whether the particular plaintiff [has] a right to judicial enforcement of a legal duty of the defendant."[95] More specifically, implied right of action doctrine resembles prudential standing doctrines in that it takes place in the face of congressional silence and it usually involves a consideration of whether the plaintiff at bar is among those that Congress sought to protect in enacting the statute.

For plaintiffs challenging a spending decision made by a federal agency, finding a private right of action is not an issue. Section § 702 of the Administrative Procedure Act (APA) entitles plaintiffs to seek injunctive relief against federal agency actions[96] that are not "committed to

[94] *Id*. at 619. Under *Kendrick*, it is enough that the expenditure has been authorized by Congress – Congress need not have made the specific decision of which group would receive the funding. In *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 993 (7th Cir. 2006), Judge Posner granted standing for an Establishment Clause challenge to federally funded conferences designed to promote faith-based initiatives. Judge Posner read *Kendrick* to narrow *Valley Forge*: it was sufficient to show that the use of Congress's spending power had been necessary for the violation to occur, regardless of whether the allocative decision had been made by the Executive. *Id*. at 992 – 93.

[95] Fletcher, *supra* note 5 at 237 ("For all the Court is usually willing to say, and perhaps to see, the implied cause of action cases are unrelated to the standing cases. In fact, they raise a comparable issue.").

[96] 5 U.S.C. § 702. The APA expressly forecloses suits against Congress. 5 U.S.C. § 701. The Supreme Court has also held that APA does not authorize suits against the President. Franklin v. Massachusetts, 505 U.S. 788 (1992). However, in a few important statutes relating to federal spending, Congress has given express rights of action to challenge their constitutionality. *See* Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996) (challenged in

agency discretion by law."[97] However, the APA does not provide a right of action to challenge the conduct of recipients of federal funding – such as states and private entities – when they violate the conditions of their federal funding.

The rising use of conditional spending provisions thus makes implied right of action doctrine important to the study of federal spending. Congress frequently leverages its spending power to compel the recipient entities to meet certain conditions. In many cases, the statutes defining the conditions are silent as to whether private parties may sue to enforce them. And it is also clear from recent case law that – at least in the context of legislation arising under the spending power – the Court will not extend the right of action against state officials found in 42 U.S.C. § 1983 to statutes in which it would not imply a right of action.[98] Thus, whether the spending condition is enforced at all will often turn on the implication of a right of action – at least when the relevant federal agency lacks the political will or resources to enforce the condition itself.

In cases involving conditions on federal spending, the Court has recently been unwilling to read a private right of action into statutory silence. The most important of these cases is

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Clinton v. New York, 524 U.S. 417 (1998)); Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 § 274(b), 99 Stat. 1038 (challenged in *Bowsher v. Synar*, 478 U.S. 714 (1986)).

[97] 5 U.S.C. § 701(a)(2). It is worth noting, however, that when Congress appropriates lump sum grants to be disbursed at the discretion of the agency, courts will typically find that there is "no law to apply" and thus no jurisdiction under the APA. *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182, 192 (1993); International Union, United Auto., Aerospace & Agricultural Implement Workers of America v. Donovan, 746 F.2d 855, 863 (D.C. Cir. 1984) (upholding union members' standing to challenge disbursal of worker training grants, but denying jurisdiction on the ground that the Secretary of Labor's decision to allocate the grants was not constrained by law).

[98] In *Gonzaga v. Doe*, 536 U.S. 273 (2002), the plaintiff sued his university under the Family Educational Rights and Privacy Act of 1974 (FERPA), which states that universities receiving federal funding may not release their students' education records without written parental consent. The Court stated that for statutes imposing conditions on recipients of federal funds, a private right against the funding recipient was not to be inferred from statutory silence. *Id.* at 279 – 80 ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State") (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981)). The Court held, therefore, that the statute did not create an enforceable right and that the plaintiff could not bring a § 1983 action. The Court also stated that the question how far § 1983 extends is functionally the same as the question of when to imply a right of action. *Id.* at 283 ("[O]ur implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.").

Alexander v. Sandoval.[99] In *Sandoval*, the plaintiff attempted to sue the state of Alabama for administering its driver's license tests only in English. The plaintiff sued under a regulation promulgated under Title IV of the Civil Rights Act of 1964, which bars racial discrimination by recipients of federal funding. Although Title VI did not prohibit activities producing disparate racial impacts, the regulation did. Although it was conceded that there was a private right of action under Title VI generally, Alabama argued that there was no private right of action under the regulation itself. Writing for the Court, Justice Scalia concluded that the statute did not demonstrate an intent to grant a private remedy under its regulations. Importantly, his construction of the statute seemed to weigh the fact it was a conditional spending measure against the implication of a right of action:

> Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'…[The Act] is yet a step further removed: It focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in [*Coutu*], [the Act] is 'phrased as a directive to federal agencies engaged in the distribution of public funds,'…When this is true, '[t]here [is] far less reason to infer a private remedy in favor of individual persons'…[100]

In sum, *Sandoval* will make it very difficult, if not impossible, for private litigants to enforce the conditions of federal spending unless they have an express right of action or, perhaps, if they sue under a statute into which a right of action has already been implied.[101]

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[99] 532 U.S. 275 (2001).
[100] *Id*. at 289.
[101] For instance, in *Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497 (2005), a gym teacher sued under Title IX, alleging that he had been retaliated against by the school board for complaining that the board was discriminating against female sports teams. Because the Court had already implied a right of action unto Title IX, it voted 5-4 to extend a right of action for retaliation claims under Title IX as well. Some commentators have suggested that *Jackson* may be no more than "the recognition of the continuing effects of a decision from an earlier era." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 47 (Supp. 2005).

V. Political Question Doctrine and Federal Spending Decisions

Even if standing and other jurisdictional questions are met, federal courts can decline to hear a case as a political question if they think that the question at issue must be resolved by the politically accountable branches. However, the contemporary court has only found a political question twice. Which controversies implicate political questions has been a source of much debate and confusion among commentators and courts.[102]

The political question doctrine finds its roots the same place judicial review does—*Marbury v. Madison*.[103] Chief Justice Marshall won the judiciary the broad power and duty to "say what the law is," while at the same time recognizing that some questions can only be answered by the political process beyond the courts.[104] Marshall justified taking some constitutional questions away from the judiciary on the grounds of preserving the separation of powers and keeping courts within their institutional competence.[105] As authority for this position, Justice Marshall relied mainly on the text, structure, and history of the Constitution.[106] Early courts also developed prudential concerns to justify punting controversies to the political arena.[107]

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[102] CHEMERINSKY, *supra* note 4, at 145.
[103] 5 U.S. (1 Cranch) 137 (1803).
[104] *Id*. at 170, 177.
[105] *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 249-50 (2002).
[106] *See id*. at 248-50
[107] *See id.* at 253-58. Professor Barkow discusses *Luther v. Borden*, 48 U.S. (7 How.) 1, 39-40 (1849), where the Court noted that deciding the case on the merits could lead to extensive revision of Rhode Island law and therefore justiciability examination must be done "very carefully." And in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 142 (1912), fear of having to create a new state government themselves motivated the Court's denial to hear the case.

The modern formulation of the doctrine is also concerned with separation of powers,[108] constitutional text, institutional competence, and judicial discretion. In *Baker v. Carr*, the Court laid out six factors, any one of which may make the case nonjusticiable:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[109]

The first factor involves textual analysis. The second concerns institutional competence. And the last four implicate prudential interests.[110] This Part now examines these considerations in turn.

a. Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department

A textual demonstration that another branch was meant to have the final say on the issue is likely the most important factor of the political question doctrine. The Constitution—as interpreted by the Court—leaves the final say on most issues to the judiciary. Of special note to spending challenges is the Court's indication that statutory interpretation is also characteristically the judiciary's duty.[111]

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[108] The separation of powers referred to here is that between federal branches. Political question doctrine does not concern the relationship between the federal judiciary and the states. *Baker v. Carr* 369 U.S. 186, 210 (1962).
[109] *Id*. at 217 (numbering added).
[110] Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring in judgment).
[111] United States v. Munoz-Flores, 495 U.S. 385, 391 (1990); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986); Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587, 605 (D.C. Cir. 1974).

In *Nixon v. United States*,[112] the Court refused to hear a challenge to the Senate's procedure for impeaching a federal district judge. The Court interpreted Art. I § 3, cl.6, which states: "The Senate shall have the sole Power to try all Impeachments." The word "sole" commits the impeachment authority to the Senate.[113] The Court refused to impose a limiting construction on the verb "to try" because it has multiple meanings., Since the Framers had been very precise when imposing other limitations on the impeachment process, the Court held that the Framers did not intend to include additional limitations through the word "try."[114] The Court reinforced its textual interpretation by appealing to the separation of powers and checks and balances: "In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature."[115]

The Court's textual analysis is often informed by the other factors in the *Baker* test. For example in *Nixon*: "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."[116]

b. Lack of Judicially Manageable Standards

The nature of the judiciary leaves it ill-suited to resolve particular issues. Courts are limited to only the questions and facts present in the immediate case and do not have expertise in particular areas which other branches have.[117] As an institution, courts are better suited to

[112] 506 U.S. 224 (1993).
[113] *Id*. at 229; however Justice White's concurrence argues that "sole" was meant to protect the Senate from House interference, not judicial, *Id*. at 241-42.
[114] *Id*. at 229-30, Justice White interpreted the word "try" as a judicial proceeding. He also noted that the Court is willing and able to interpret other ambiguous Constitutional words such as "commerce." *Id*. at 245-47 (White, J., concurring).
[115] *Id*. at 235.
[116] *Id.* at 228-29.
[117] CHEMERINSKY, *supra* note 4, at 147.

deciding individual rights cases as opposed to governmental structure cases.[118] But the Court has been more and more willing to go beyond its traditional role.[119]

In a useful article on the subject, Professor Fallon broke the requirement of judicial manageability into three factors. First the standard must be intelligible, as in capable of being understood.[120] Second the court will look to a host of practical desiderata including analytical bite,[121] ability to generate predictable and consistent results,[122] administrability without overreaching the courts' empirical capacities,[123] capacity to structure awards of remedies,[124] and occasionally formal realizability.[125] Third the court will employ a normative, open-ended weighing of all the factors to decide the justiciability.[126]

Application of these factors can be seen in *Vieth v. Jubelirer*[127] where the Court could not find a judicially manageable test for partisan gerrymanders in violation of the Equal Protection Clause. The plurality opinion analyzed several possible tests yet rejected all as unmanageable. The *Bandemer* test required courts to determine when political gerrymanders have denied a political group "its chance to effectively influence the political process," although effective influence could be achieved without electing any candidates.[128] This determination was too difficult and confusing to be manageable.[129] Proposed modifications by appellant borrowed

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[118] *See* Barkow, *supra* note 105, at 526 n.545 (collecting sources that indicate structural challenges are more likely to be political questions).
[119] *Id.* at 301; *see e.g. United States v. Munoz-Flores*, 495 U.S. 385, 393-95 (1990) (arguing that judicial intervention in separation of powers including separation between the two houses of Congress protects individual liberty).
[120] Fallon, *supra* note 6, at 1285.
[121] *Id.* at 1287 (standard must be rational and comprehensible in multitude of cases, not just the easy ones).
[122] *Id.* at 1289-90 (standards with relative consensus on meaning of underlying norms will be applied more consistently).
[123] *Id.* at 1291-92 (courts lack relevant facts that other branches have, prominent justification in foreign affairs cases)
[124] *Id.* at 1292-93*; see also* Nixon v. United States, 506 U.S. 224, 236 (1993).
[125] *Id.* at 1287-89.
[126] *Id.* at 1293-96. The weighing calculus is vague and opaque, and Fallon appreciates the irony of using a standard allowing a great deal of judicial discretion to decide when other standards allow too much discretion.
[127] 541 U.S. 267 (2004).
[128] *Id*. at 281-82 (quoting Davis v. Bandemer, 478 U.S. 109, 132-33 (1986)).
[129] *Id*. at 282-83.

from the Court's test for racial gerrymandering; however, the plurality thought these were even less manageable.[130] Adapting the tests used in racial gerrymandering was also defective because it is not discernable from the Constitution.[131] Justice Powell's concurrence in *Bandemer* was also rejected as a totality-of-the-circumstances approach to determine "fairness" that could lead to several different outcomes.[132] Justice Souter's approach was rejected on similar grounds.[133] The plurality eliminated Justice Breyer's standard of "unjustified entrenchment" of a minority in power as being imprecise.[134] Justice Kennedy gave the fifth vote affirming the lower court's refusal to hear the case; however, he stopped short of saying that partisan gerrymandering would necessarily provoke a political question. He argued that there could be judicially manageable standards for this problem, but none have manifested as of yet.[135]

c. Prudential Concerns

Instead of jumping through the doctrinal hoops of a textually demonstrable commitment and judicially manageable standards, courts can simply say taking the case would not be prudent. A court could rely on the last four *Baker* criteria and find a political question without finding a textually demonstrable commitment or lack of judicially manageable standards—although a court actually doing this is rare. The court could also use judicial discretion to deny review without actually finding a political question.

A good example of a court grappling with these options is *Vander Jagt v. O'Neill*.[136] Republican Congressmen sued the House Democratic leadership on behalf of themselves and

[130] *Id*. at 284-90 (explaining that inquiries into statewide motivations in election planning, when the lawful activity of partisanship becomes unconstitutional, and which inhabitants will vote which way are impossible for judges to make).
[131] *Id.* at 295 (rejecting Justice Stevens formulation of the test).
[132] *Id*. at 290-91.
[133] *Id*. at 298.
[134] *Id.* at 299.
[135] *Id.* at 306 (Kennedy, J. concurring in the judgment).
[136] 699 F.2d 1166 (D.C. Cir. 1983).

their constituents alleging Democrats diluted Republican power by denying them seats on House committees—including Budget and Appropriations.[137] The majority did not find a textually demonstrable commitment of Article I review to another branch or a lack of its ability to fashion a remedy.[138] Rather the court denied review based on judicial discretion to withhold relief. Telling the House how many Democrats were to be on each committee seemed "a startlingly unattractive idea, given [the judiciary's] respect for a coequal branch of government."[139] This is exactly the fourth factor from *Baker*, yet the court declined to brand the issue a political question. The court was afraid to create a "talismanic label" of these cases as political questions, but instead leave it up to future courts on a "case-by-case inquiry."[140]

Similarly, Justice Souter concurring in *Nixon* used prudential concerns without textual analysis to find a political question. [141] Souter reasoned that prudential concerns allow the Court flexibility to hear future cases where another branch's behavior has been egregious, and it would be imprudent for the court to deny review.[142] Both Souter's concurrence in *Nixon* and the *Vander Jagt* decision allow courts to revisit the issue in future cases, something not easily done after interpreting a constitutional provision as textually committed to another branch. But it is unclear whether affixing the label "political question" or merely using judicial discretion has any meaningful effect.

Another theory of judicial discretion beyond separation of powers is that it allows courts to avoid making difficult decisions that could have the effect of delegitimizing the Court. Alexander Bickel argued that in some situations—such as school desegregation—striking down

[137] *Id.* at 1167 (alleging constitutional violations under Fifth Amendment Due Process and Equal Protection, Article I, freedom of association, and right to petition the government for redress of grievances).
[138] *Id.* at 1173-74, 76.
[139] *Id.* at 1176 (internal quotations omitted).
[140] *Id.* at 1174.
[141] 506 U.S. at 252 (Souter, J. concurring in judgment).
[142] *Id.* at 253-54 (giving the example of the Senate flipping a coin to "try" impeachments as one of egregious conduct warranting judicial review).

a law would be particularly unpopular and lead to challenges of the Court's legitimacy, and upholding the law gives symbolic support to bad principles and laws. But refusing to decide the case at all allows the Court to escape the difficult position and preserve its legitimacy.[143]

d. Political Question Doctrine and Federal Spending Decisions

The political question doctrine has come into contact with federal spending mostly indirectly through foreign policy challenges, congressional self-governance, and constitutional amendments.

i. Foreign Policy

In *Planned Parenthood Federation of America v. Agency for International Development*, the plaintiffs challenged "a Presidential policy denying federal assistance to foreign non-governmental organizations that 'perform or actively promote abortion as a method of family planning in other nations.'"[144] They challenged it on free speech, privacy, and statutory grounds.[145] The district court dismissed the claim as a political question because the judiciary is incompetent to decide matters of foreign policy—the judiciary is not politically accountable and lacks informational resources; furthermore foreign policy often evades rational explanation (the hallmark of judicial decisions).[146] Most notably the court relied on the plaintiffs' indication that they wanted to challenge the policy itself as opposed to just challenging the implementation of the policy as violating their individual rights.[147] The court was unwilling to become a battlefield for the wisdom of such policies.

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[143] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 69-72, 174 (2d ed. Yale Univ. Press 1986) (1962). *But see* CHEMERINSKY, *supra* note 4, at 148-49 (noting critics of Bickel argue that the judiciary generally does not have legitimacy problems).
[144] 670 F. Supp. 538, 538 (S.D.N.Y. 1987).
[145] *Id.* at 541.
[146] *Id.* at 546-49.
[147] *Id.* at 547.

Another area of foreign policy courts will not interfere with is immigration. In the mid-1990s several states sued the federal government demanding monetary relief for State expenses incurred in educating and incarcerating illegal immigrants.[148] The states proceeded on statutory[149] and constitutional grounds.[150] The constitutional claims were uniformly dismissed as political questions because of lack of manageable standards,[151] commitment of the issue of admissions of aliens to Congress,[152] and prudential concerns.[153]

Foreign policy issues may implicate sensitive political concerns or national security and may require a broad, forward-looking decision process. Courts do not trust themselves to make such judgments. They do trust themselves to decide similar issues on a domestic level or when the dispute is between two federal branches not involving the States.[154]

ii. Congressional Self-Governance

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[148] *See e.g.* California v. United States, 104 F.3d 1086 (9th Cir. 1997); New Jersey v. United States, 91 F.3d 463 (3d Cir. 1996); Texas v. United States, 106 F.3d 661 (5th Cir. 1997).

[149] The main statutory violation was 8 U.S.C. § 1365(a) which allowed the Attorney General to reimburse State incarceration expenses for illegal aliens. States wanted the judiciary to force the Attorney General to spend her general appropriations on reimbursement. However the courts decided those appropriations were committed to agency discretion. *See California*, 104 F.3d at 1093-94; *New Jersey*, 91 F.3d at 470.

[150] *California*, 104 F.3d at1090 (alleging violations of the Invasion and Guarantee Clauses of Article IV §4, Tenth Amendment); *New Jersey*, 91 F.3d at 466 (Invasion and Guarantee Clauses, Tenth Amendment, Naturalization Clause of Article I §8, Takings Clause of the Fifth Amendment, and generalized principles of state sovereignty); Texas, 106 F.3d at 664 (Naturalization Clause, Tenth Amendment, and Guarantee Clause).

[151] *California*, 104 F.3d at 1091 (finding no manageable standards to interpret when there is an "invasion" of immigrants); *New Jersey*, 91 F.3d at 469-70 ("'Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature of the Executive than to the Judiciary.'" quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)); *Texas*, 106 F.3d at 665.

[152] *California*, 104 F.3d at 1091 (Invasion Clause "constitutionally committed to political branches"); *New Jersey*, 91 F.3d at 469 (Naturalization Clause is a textually demonstrable constitutional commitment of immigration to Congress). *Texas*, 106 F.3d at 665 ("'Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'" quoting Fiallo v. Bell , 430 U.S. 787, 792 (1977))

[153] *New Jersey*, 91 F.3d at 470; *Texas*, 106 F.3d at 665 ("Courts must give special deference to congressional and executive branch policy choices pertaining to immigration.")

[154] *See* Rust v. Sullivan, 500 U.S. 173 (1991) (deciding a challenge to domestic restrictions of federal family planning funds to projects that do not provide abortion counseling); National Treasury Employees Union v. Nixon, 492 F.2d 587, 605 (D.C. Cir. 1974) (hearing a challenge to the President's refusal of a wage increase for Treasury employees, the judiciary not stepping in and resolving disputes between the two political branches would show disrespect); In re Lupron(R) Marketing and Sales Litigation, 295 F.Supp.2d 148, 162-63 (D. Mass. 2003) (hearing a challenge to Congress' Medicare pricing system, "Mere disagreement with a determination by Congress, even one with constitutional dimensions, is not normally a reason for a court to abstain on justiciability grounds.").

The Court has refused to dismiss cases challenging Congress' self-governance policies. Here, the judiciary is stuck between wanting to show deference to Congress and not to get over-involved in their internal affairs, but also wanting to protect and enforce constitutional provisions.

In *Powell v. McCormack*,[155] the House refused to seat a properly elected Representative because he had falsified reimbursement documents. The House argued that Article I, § 5 committed to the House the power to judge their own members' qualifications.[156] The Court disagreed holding that section only allowed the House to judge and exclude members because of a deficiency in the standing requirements laid out in Article I, § 2, which were not at issue.[157] The Court was concerned with letting the legislators override the majority of voters.[158] The Court further rejected the House's claim that it would be imprudent for the two branches to have different constitutional interpretations: "The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility."[159]

In *United States v. Munoz-Flores*,[160] the Court heard a challenge to a statute requiring revenue collection from people convicted of federal misdemeanors. The statute was challenged because it originated in the Senate as opposed to the House. The Court exerted its power to hear the case and interpret the Origination clause although it denied relief on the merits because the statute did not qualify as "bill for raising revenue."[161] The Court explained that individuals have an interest in "our constitutional system of separation of powers, and thus…a corresponding right

[155] 395 U.S. 486 (1969).
[156] *Id.* at 519.
[157] *Id.* at 521-22.
[158] *Id.* at 547-48.
[159] *Id.* at 549.
[160] 495 U.S. 385 (1990).
[161] *Id.* at 401.

to demand that the Judiciary ensure the integrity of that system."[162] The Court also noted that judicially manageable standards to interpret the clause will have to be developed but that such a task should be no more difficult than developing standards to interpret any other constitutional phrase.[163]

iii. Balanced Budget Amendment

Some academics argue that the constitutional amendment process should be beyond the reach of courts as amendments are the only way to overturn court decisions; others demand courts ensure amendment procedures are properly followed.[164] This controversy could come up if a balanced budget amendment gathers support. The Court has not heard a case about constitutional amendments since 1939,[165] but nonjusticiability concerns will not be in play for a balanced budget amendment as it does not overturn a Supreme Court decision.[166] Should a balanced budget amendment pass, constitutional challenges to the budget under the new amendment could be dismissed as political questions, depending on how the amendment is worded.[167]

VI. The Rise of Standing and the Fall of Political Question Doctrine

Standing and political question doctrine appear to play similar roles. Courts have justified the use of both doctrines as a means of confining the federal courts to their proper role in the separation of powers. As noted above, because both doctrines aim to keep the courts from hearing certain types of cases on the merits and because they both employ open-ended standards

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[162] *See Id.* at 393-94.
[163] *Id.* at 395-96.
[164] *See* CHEMERINSKY, *supra* note 4, at 161.
[165] Coleman v. Miller, 307 U.S. 433 (1939).
[166] CHEMERINSKY, *supra* note 4, at 164.
[167] *See* Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experience*, 12 J.L. & POL., 153, 191-92 (1996).

for doing so, they have both received the criticism of abdication of the judicial role and indifference to the enforcement of important constitutional rights.

Furthermore, over the past forty years of Supreme Court jurisprudence, the standing doctrine has come to perform more and more of the work the political question doctrine could perform. Indeed, since *Baker* the Supreme Court has only found a political question twice. Among lower courts it only survives in narrowly defined areas of the law such as foreign affairs and election law.

The interchangeable nature of the doctrines can be seen by the fact that many political question doctrine cases could just have easily been disposed on standing grounds. For example, in *Gilligan v. Morgan,*[168] the plaintiffs were students at Kent State University, many of whom had their constitutional rights violated in the course of the National Guard's response to an anti-war protest. The plaintiffs petitioned the Court to enjoin the Governor from prematurely ordering the National Guard to the scene of civil disorders and to enjoin the chief of the Guard from violating the students' rights in the future.[169] The Court dismissed the case as a nonjusticiable political question, focusing on the fact that the injunctive relief sought would have put it in a continued supervisory role over a political branch actor.[170] However justifiable this result may have been as an application of the political question doctrine, it seems that the case could have been easily disposed of through the standing doctrine. Although decided before *Los Angeles v. Lyons,*[171] the Kent State scenario would seem to fall squarely within *Lyon's*

[168] 413 U.S. 1 (1973).
[169] *Id*. at 3.
[170] *Id*. at 5.
[171] 461 U.S. 95 (1983).

imminence requirement. In both cases, there was a request for injunctive relief without anything more than speculation that the plaintiffs at bar would again suffer a constitutional violation.[172]

But merely because standing may serve as a substitute for the political question doctrine does not explain why judges largely favor it. A complete answer to that question is beyond the scope of this paper. However, one explanation may be that, unlike the political question doctrine, courts that use standing to dismiss a case may plausibly link their decisions to constitutional text, whereas courts that employ the political question doctrine may only appeal to tradition – and a somewhat meandering tradition at that. A second explanation, which we offer tentatively, is that standing may be a more flexible tool for disposing of cases. A refusal to hear the merits of the case on standing grounds leaves open the possibility that future courts may one day resolve the issue with proper plaintiffs, and thus preserves the threat of judicial intervention. By contrast, a dismissal based on the political question doctrine carves an entire legal right out of judicial enforcement and implies that no federal court will ever grant the remedy sought. If one views the separation of powers as a pragmatic doctrine that should be allowed to adapt to changing legal and political circumstances, then there may be some wisdom in this shift.[173]

Conclusion

This Briefing Paper has addressed the role of standing and political question doctrine in litigating challenges to federal spending decisions. Parts I through III discussed standing: its

[172] *See also* Simard, *supra* note 3 at 336-37 (analyzing *Nixon v. United States* as a standing case with no judicially cognizable injury).

[173] This distinction—standing as flexible and political question as permanent—may be complicated in practice. Standing can be used effectively to dispose of an issue. For example, what plaintiffs could ever meet the imminence requirement in *Lyons*? The dissent suggested that none ever could, which leaves the constitutional violation without redress through the federal courts. 461 U.S. at 113 (Marshall, J., dissenting). Conversely, the political question doctrine could be flexible. If the finding of a political question is based on prudential concerns, the court is able to continue making inquiries into the particular facts of future cases should circumstances change making continued denial of judicial review imprudent. *See Nixon*, 506 U.S. at 252-54 (Souter, J., concurring in the judgment).

historical development, the contemporary doctrine and its unique features in the context of legal challenges to federal spending decisions. Part IV discussed political question doctrine and its application to challenges to federal spending decisions. Part V discussed the overlap of the two doctrines and offered a tentative explanation for the recent dominance of standing over political question doctrine.

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