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## THE SUPREME COURT AS A CONSTITUTIONAL COURT

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Political institutions are always works in progress. Their practical duties and aims as instruments of governance may not always match their constitutional blueprints or historical roles. Political offices might not always have the power to do what their constituent officers either need or want to do. A polity's assessment of whether the desired power is a need or a want may indeed mark a boundary between law and politics in the domain of institutional structure. The law gives, or is interpreted to give, political organs the tools they need to function effectively. They must fight for the rest.

Dissonance between form and function pervaded the dispute that led to last Term's decision in *National Labor Relations Board v. Noel Canning*.<sup>1</sup> The President has a constitutional duty to take care that the laws be faithfully executed.<sup>2</sup> Part of that duty consists in appointing officers to staff administrative agencies created by Congress to fulfill the missions set forth in their organic statutes. Here, the five-member National Labor Relations Board ("NLRB" or "Board") could not perform its mission — most prominently, resolving claims of unfair labor practices — because the Senate had delayed votes (or credibly threatened to do so) on several of President Obama's nominees to fill Board vacancies.<sup>3</sup>

In response, the President engaged in what Professor David Pozen calls "constitutional self-help."<sup>4</sup> Article II of the Constitution conditions the executive appointment power on "the Advice and Consent of the Senate"<sup>5</sup> but further provides that the President "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate,

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<sup>1</sup> 134 S. Ct. 2550 (2014).

<sup>2</sup> U.S. CONST. art. II, § 3. This Comment places to one side the significant controversy over application of the Take Care Clause to independent agencies. See generally Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 1945–2004, 90 IOWA L. REV. 601 (2005).

<sup>3</sup> New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638 (2010) (holding that the NLRB requires a quorum of three members to make decisions); see also David Nakamura & Felicia Sonmez, *Obama Defies Senate, Puts Cordray in Consumer Post*, WASH. POST, Jan. 5, 2012, at A1.

<sup>4</sup> David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. (forthcoming Oct. 2014).

<sup>5</sup> U.S. CONST. art. II, § 2, cl. 2.

by granting Commissions which shall expire at the End of their next Session.”<sup>6</sup> President Obama purported to exercise this recess appointment power for three Board vacancies on January 4, 2012, when he appointed Sharon Block, Terence Flynn, and Richard Griffin to the Board.<sup>7</sup> The appointments were made the day after the Senate conducted a pro forma ritual gaveling in the second session of the 112th Congress but nineteen days before the Senate would next conduct formal business. Per the Administration’s interpretation of Article II, this period was a “Recess of the Senate,” and so (absent Senate confirmation or a superseding appointment)<sup>8</sup> the three NLRB appointments would last until the first session of the 113th Congress ended in January 2014.

From the perspective of Senate Republicans and Noel Canning, a cola distributor serving as the nominal respondent, there were three problems with these appointments. First, under their reading of Article II, the President’s authority to make recess appointments is active only *between* rather than *within* formal sessions of the Senate. That is, recess appointments are valid only when made during the period following an adjournment *sine die* — one of indefinite length — and preceding the gaveling in of a new session. Second, even if the Senate had been in recess as defined by Article II, the Recess Appointments Clause is triggered only for vacancies that arise during the recess itself. None of the three NLRB vacancies qualified. Finally, even if the President may fill preexisting vacancies through recess appointments, and even if an intrasession recess may count for this purpose, the Senate might not have been in any kind of recess (or might have been in too short a recess) on January 4, 2012. The pro forma sessions, in which a single Senator gavels in and then immediately adjourns a session every three days or so, were designed in part to keep the Senate in perpetual operation as a means of preventing recess appointments. In other words, the specter of unilateral appointments by the President during an intrasession recess had led Congress to its own form of self-help.

By a 5–4 margin, the Court rejected the first two of these claims and accepted the third, holding that pro forma sessions of the Senate were sufficient to prevent a recess of adequate length to activate the President’s unilateral appointment power.<sup>9</sup> In so doing, the Court abided significant disruption to the work of the NLRB and narrowly averted more. Had the Court accepted all of the arguments of Noel

<sup>6</sup> *Id.* art. II, § 2, cl. 3.

<sup>7</sup> Nakamura & Sonmez, *supra* note 3.

<sup>8</sup> Five new Board members were confirmed by the Senate on July 30, 2013. Press Release, The White House, Statement by the President on the Confirmation of the National Labor Relations Board (July 30, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/30/statement-president-confirmation-national-labor-relations-board> [http://perma.cc/7KVZ-XJEA].

<sup>9</sup> *Noel Canning*, 134 S. Ct. at 2556–57.

Canning, the NLRB would have consistently lacked a quorum from August 28, 2011, when a term expiration left only two legally appointed Board members, until July 30, 2013, when the Senate confirmed five of President Obama's nominees to the Board as part of a deal between the President and Senate Republicans. During that nearly two-year period, the Board issued more than 1,300 decisions, more than 1,000 of which appear to have been legally invalid in light of the Court's holding.<sup>10</sup> More broadly, each of the last six Presidents, and at least thirteen of the last sixteen, has made recess appointments within sessions of the Senate.<sup>11</sup> At least thirty-seven Presidents, perhaps including Washington, have made recess appointments for vacancies that arose prior to the recess itself.<sup>12</sup> Had Justice Scalia's concurring opinion agreeing with all three of Noel Canning's arguments prevailed, the legitimacy, if not the legality, of actions taken by every officer so appointed would have been in doubt.<sup>13</sup>

*Noel Canning* raised an unusual number of interesting constitutional questions. What should a court do if and when it finds that the text of the Constitution and historical practice are at odds?<sup>14</sup> How much deference should the Court give the executive branch in interpreting the reach of the President's own constitutional authority? What weight should be given to implicit congressional acquiescence in executive constitutional construction? How should that acquiescence be measured? How should constitutional adjudicators respond when the meaning of the text becomes unmoored from its purposes?

None of these questions has escaped the notice of commentators, but an antecedent question has. Much of the academic discourse around *Noel Canning* has focused on questions of constitutional interpretation. This Comment invites us to think of the case instead — or

<sup>10</sup> See *Board Decisions*, NLRB, <http://www.nlrb.gov/cases-decisions/board-decisions> (last visited Sept. 28, 2014) [<http://perma.cc/JS6E-6TTE>] (listing published NLRB decisions); *Unpublished Board Decisions*, NLRB, <http://www.nlrb.gov/cases-decisions/unpublished-board-decisions> (last visited Sept. 28, 2014) [<http://perma.cc/62NT-RDLF>] (listing unpublished NLRB decisions).

<sup>11</sup> See Brief for the Petitioner app. A, at 9a–64a, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), 2013 WL 5172004, at \*1A.

<sup>12</sup> See *id.* app. B, at 65a–89a, 2013 WL 5172004, at \*1AA. The timing of vacancies filled through recess appointments by Presidents Washington and Jefferson was disputed by the parties and was not resolved by the Court. See *Noel Canning*, 134 S. Ct. at 2612 n.14 (Scalia, J., concurring in the judgment).

<sup>13</sup> *Noel Canning*, 134 S. Ct. at 2577 (majority opinion).

<sup>14</sup> The Court's opinion lends credence to Professor Richard Fallon's view that interpreters tend to reason toward an equilibrium that avoids tension between different sources of constitutional wisdom. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987); see also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. (forthcoming 2014), <http://ssrn.com/abstract=2392101> [<http://perma.cc/KCL9-3DYC>] (arguing that the perceived clarity of constitutional text is sometimes constructed by practice).

better, in addition — as implicating fundamental questions of constitutional design, and judicial design in particular. As Part I explains, *Noel Canning* is as much about *when* the Court should engage interpretive questions as it is about *how* it should do so. Political practice carries no guarantee of political settlement, and there may be instances in which the Court does better to forestall practice in the name of definitive resolution. In this case, the President made the recess appointments on January 4, 2012, and recess-appointed Board members began issuing decisions the same month, yet *Noel Canning* was decided more than 900 days later. Debate between the President and the Senate over the scope of the Recess Appointments Clause began in the eighteenth century, but the Court chose to resolve it in 2014. These delays are not the happy by-product of political constitutionalism; they are serious side effects of the Court's own traditional decisional procedures.

Part II explores those procedures and their limitations in greater detail. The Court's criteria for certiorari reflexively encourage ripening of issues in lower courts with no special attention to the costs and benefits of doing so in particular classes of cases. An emergency petition brought soon after the D.C. Circuit ruled in Noel Canning's favor could have brought the issues before the Court a full Term earlier, but the petition was quickly denied.<sup>15</sup> The claimed constitutional injury in this case was to the Senate and its institutional prerogatives, yet the case was prosecuted by a private citizen, the Noel Canning Corporation. The Court's narrow decision validating the Senate's pro forma sessions was sufficient to resolve the entire case, but leaving it at that — which, to the Court's credit, it did not — would have left considerable uncertainty in other pending cases.

Different procedural choices would have mitigated or eliminated some of these problems. Permitting early or even abstract review of the constitutionality of recess appointments of this sort would have enabled the Court to authoritatively resolve the conflict before the appointees could take office and issue coercive and reliance-generating orders. Granting standing to the Senate itself, or to a minority of the Senate, would have ensured that the timing and scope of litigation closely matched the claimed constitutional harm. Explicitly empowering the Court to formulate broad decisional rules and remedial orders that extended beyond the parties to the case would have left it free to respond to significant downstream legal questions immediately and without apology.

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<sup>15</sup> Emergency Application for Partial Stay of Injunction Pending Appeal in the U.S. Court of Appeals for the Second Circuit, or in the Alternative, Petition for Writ of Certiorari and Partial Stay of Injunction Pending Resolution of the Petition, *HealthBridge Mgmt., LLC v. Kreisberg*, 133 S. Ct. 1002 (2013) (No. 12A769) [hereinafter HealthBridge Petition].

Procedural devices that would have addressed the “when” problem in *Noel Canning* — abstract review, institutional standing, and *erga omnes* decisional authority — are familiar to constitutional courts, common in Europe and Latin America, that are specifically empowered to adjudicate public law disputes.<sup>16</sup> The forms these courts take are meant to fit the powers they exercise. The time is ripe to consider whether the U.S. Supreme Court might better match form to function without substantial disruption to its institutional DNA.

The details matter, but brevity and prudence caution against completely developing them here. Part III offers the following preliminary suggestion: where constitutional disputes concern a *rule* that specifies the division of powers between governmental institutions, the Court should be permitted to engage in abstract review, to grant institutional standing to public organs, and to bind nonparties to the case.<sup>17</sup> Indeed, the very notion of a “case” as the unit of adjudication is a poor fit for the purely public nature of the disputes this Comment contemplates, and of which *Noel Canning* is exemplary. The notion of a constitutional rule, as distinct from a standard or principle, draws on the new originalism literature, which increasingly distinguishes between the hardwired parts of the Constitution that are more susceptible to a fixed meaning and the more open-ended provisions that are necessarily and appropriately subject to construction over time through evolving political practice and judicial decision rules.<sup>18</sup> Constitutional rules embody a design preference in favor of greater certainty at the cost of inflexibility in the face of new information or changing values.<sup>19</sup> Rules are therefore relatively well suited to expeditious resolution of conflicts over how they should be applied.

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<sup>16</sup> See VICTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES 4–5 (2009); Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS 38, 41 (Louis Henkin & Albert J. Rosenthal eds., 1990).

<sup>17</sup> Whether these changes would require a statute, a constitutional amendment, both, or neither depends on contested views about the availability of public rights of action and the requisites of constitutional settlement. *See infra* Part III.

<sup>18</sup> See, e.g., JACK M. BALKIN, LIVING ORIGINALISM 14–16 (2011).

<sup>19</sup> See Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (“[A] rule’s force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.”). As discussed below, this Comment’s proposal would therefore exclude fights over the meaning of deliberately underspecified standards such as “[t]he executive Power.” U.S. CONST. art. II, § 1, cl. 1; *see infra* p. 149; *see also* Thomas Jefferson, Proposed Constitution for Virginia (1783), reprinted in 3 THE WRITINGS OF THOMAS JEFFERSON 320, 326 (Paul Leicester Ford ed., 1894) (noting that “executive powers” in the proposed Virginia Constitution were “those powers only, which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary” and remarking that “[t]he application of this idea must be left to reason”).

This suggestion complements rather than displaces the academic focus on interpretation as the core of the dispute in *Noel Canning*. The case has been styled as a clash between constitutional text and political practice, but a court operating on a common law dispute resolution model should not confront this conflict.<sup>20</sup> The prospect that decades or even centuries of practice might be jettisoned based on linguistic analysis of the constitutional text is an artifact of an aggressive originalism, a kind of unbridled civil law thinking.<sup>21</sup> Both proponents and detractors of new originalism have noted its indifference to judicial restraint.<sup>22</sup> Judicial activism is hardly new, but if it is to be reactionary rather than progressive, restoring the past without regard to what has followed, then greater attention to its procedural prerequisites is needed.<sup>23</sup>

Professor Alexander Bickel famously argued for a third way, an essential adjunct to the Court's power either to invalidate or to validate the actions of the political branches.<sup>24</sup> By relying on what Bickel called the “passive virtues” — refusal to grant substantive review through use of tools such as the standing, mootness, ripeness, and political question doctrines — the Court could reserve its precious legitimating power for instances in which it would have the courage to exercise that power according to principle.<sup>25</sup> But what if we assume the Court to be tempted not by excessive expediency but by blind adherence to principle?<sup>26</sup> In that case, we might wish above all to discipline the exercise of principle through procedural devices that facilitate its coexistence with practical realities. Accommodating practice and principle might sometimes require the

<sup>20</sup> See Henry Paul Monaghan, *Essay, On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 725–28 (2012) (contrasting the common law mode with “this generation’s version of original understanding theory, with its endless, mindnumbing, hairsplitting linguistic refinements,” *id.* at 726); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 897 (1996) (“If practices have grown up alongside the text, or as a matter of interpreting the text, or even in contradiction of the text, those practices too are entitled to deference if they have worked well for an extended time.”).

<sup>21</sup> See Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1490–94 (2009); see also Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 40 (Amy Gutmann ed., 1997) (describing judicial interpretation based on evolving normative standards as “a common-law way of making law”).

<sup>22</sup> See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 750–51 (2011); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 608 (2004).

<sup>23</sup> See David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 813–14 (2004) (noting the tension between “justiciability criteria that aim to make adjudication concrete” and using “abstract formalist reasoning to resolve cases on the merits”).

<sup>24</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 69–70 (1962).

<sup>25</sup> See *id.* at 111–98.

<sup>26</sup> See *Noel Canning*, 134 S. Ct. at 2617 (Scalia, J., concurring in the judgment) (“We should . . . take every opportunity to affirm the primacy of the Constitution’s enduring principles over the politics of the moment.”).

Court not only to avoid deciding what it otherwise would but also to decide what it otherwise would not. Here, then, is a fourth way.

### I. THE PROBLEM OF *NOEL CANNING*

*Noel Canning* was a case of first impression at the Supreme Court, but the issues it raised have been sources of political and legal debate since the beginning of the Republic. Indeed, the greatest of *Noel Canning*'s many curiosities may be why this set of questions did not reach the Supreme Court until now. As this Part explains, it is not because the questions are easy and it is not because politics has settled them: the Executive has nearly always interpreted the recess appointment power broadly and Senators have nearly always interpreted it narrowly. Rather, the Court had never answered these questions solely because of its own adjudicatory procedures.

The purpose of the Recess Appointments Clause is clearer than its text. In the ordinary course, the Constitution gives the power of appointment jointly to the President and to the Senate.<sup>27</sup> The two exceptions to this power are for inferior officers, whose appointment Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments,"<sup>28</sup> and for vacancies covered by the Recess Appointments Clause. In the Nation's early years, Congress typically went into recess for six to nine months between sessions.<sup>29</sup> The President's recess appointment power therefore enabled him to fill key governmental offices during the long periods when the Senate was unavailable to give advice and consent.

An immediate question arose as to whether a vacancy filled under this clause had to arise during the recess. The text seems clear on this point. The clause refers to "all Vacancies that may happen during the Recess of the Senate."<sup>30</sup> Contemporaneous dictionaries suggest that "happen" had about the same meaning as it does today, that it refers to a definite event rather than an underlying condition.<sup>31</sup> The language is perhaps susceptible to a reading that regards "that may happen" as equivalent to "that may exist,"<sup>32</sup> but besides being strained on its face, this reading renders the phrase superfluous.<sup>33</sup>

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<sup>27</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>28</sup> *Id.*

<sup>29</sup> Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1500–01 (2005).

<sup>30</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>31</sup> See Rappaport, *supra* note 29, at 1503.

<sup>32</sup> *Noel Canning*, 134 S. Ct. at 2568.

<sup>33</sup> See *id.* at 2606–07 (Scalia, J., concurring in the judgment); Rappaport, *supra* note 29, at 1504.

The text being against the President's preferred reading, supporters of a broad recess appointment power, including the *Noel Canning* majority, have rested on its purpose.<sup>34</sup> If the clause means to enable the President to ensure the continuous operation of the government, it should not much matter whether the vacancy arose during the recess or not.<sup>35</sup> Of course, this reading enables some gamesmanship that can create an end run around the advice and consent process, but (perhaps until recently) history has not borne out this concern. Moreover, a strict reading would enable the Senate to engage in its own form of gamesmanship, by delaying or refusing to hold votes on nominees. The longstanding presidential practice of making recess appointments for preexisting vacancies lends considerable interpretive weight to the broader view,<sup>36</sup> but it still sits uncomfortably with the text.

Whether the President may deem an adjournment during a session of the Senate as "the Recess" for the purpose of the Recess Appointments Clause is no less difficult a question. At the time of the clause's adoption, it was probably not contemplated that the Senate would adjourn for any significant length of time except between sessions.<sup>37</sup> Doing so would impose considerable transportation burdens on Senators. Now that technology has eviscerated this burden, it is unclear whether to understand the recess formally, as the period between official sessions — which today can be trivially brief<sup>38</sup> — or functionally, as any period during which the Senate is practically unavailable to give advice and consent.

The *Noel Canning* majority opted for the functional reading, but there is no obvious answer to this question. At the founding, "the Recess" referred to a definite event, but one cannot say whether that is because it so happened to be a single event at the time or because there can only ever be one "Recess of the Senate" for any two sessions. In linguistic terms, "the Recess of the Senate" could have been used either attributively, to refer uniquely to the period between formal sessions, or referentially, to describe a break in proceedings for which the words "the Recess" served in 1787 (but no longer today) as an adequate substitute.<sup>39</sup> There is no recorded debate at the Philadelphia

<sup>34</sup> See *Noel Canning*, 134 S. Ct. at 2568–70.

<sup>35</sup> See *id.*; 1 Op. Att'y Gen. 631, 632 (1823).

<sup>36</sup> See *Noel Canning*, 134 S. Ct. at 2570–71.

<sup>37</sup> See *id.* at 2564–65.

<sup>38</sup> In 1903, President Theodore Roosevelt made 160 recess appointments in the split second between the end of one formal session and the gaveling in of a new one. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 416 (2005).

<sup>39</sup> See generally Keith S. Donnellan, *Reference and Definite Descriptions*, 75 PHIL. REV. 281 (1966) (identifying both attributive and referential functions of definite descriptions).

Convention on the meaning of these words, and the text itself cannot tell us whether the attributive or the referential reading is correct.

The referential reading raises the further question of whether it is for the President or for the Senate to decide that the Senate is unavailable. The Constitution describes the recess appointment authority as a “Power” of the President,<sup>40</sup> but the same Constitution says that the Senate “may determine the Rules of its Proceedings.”<sup>41</sup> Either view can lead to abuse of discretion and frustrate constitutional purposes. If the President may declare the Senate to be in recess any time it adjourns, then the recess appointment power may be enlarged to encompass even very short breaks in proceedings. If the Senate may declare itself not to be in recess even if it is unable to conduct business, as the Court effectively allowed in *Noel Canning*,<sup>42</sup> then it may prevent recess appointments even when it is unavailable to give its advice and consent.

Political practice has not settled these difficult questions. Nearly every President has used the recess appointment power to fill vacancies that arose during Senate sessions. And yet prominent framers like Alexander Hamilton, a well-known supporter of executive power, and Edmund Randolph, the Nation’s first Attorney General, denied that the President had that authority.<sup>43</sup> Attorney General William Wirt wrote in 1823 that restricting the power to vacancies that arise during the recess was “most accordant with the letter of the [C]onstitution.”<sup>44</sup> In 1863, the Senate Judiciary Committee described a contrary view of the text as “a perversion of language”<sup>45</sup> and “forced and unnatural.”<sup>46</sup> That same Senate passed a statute denying any pay to recess appointees who filled a preexisting vacancy.<sup>47</sup> The law, now known as the Pay Act, persists in modified form.<sup>48</sup>

<sup>40</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>41</sup> *Id.* art. I, § 5, cl. 2.

<sup>42</sup> As the Court noted, the Senate in fact could have conducted business via unanimous consent during a pro forma session, *Noel Canning*, 134 S. Ct. at 2555, but this option — which could be blocked by a single Senator — was practically unavailable for President Obama’s appointments.

<sup>43</sup> See Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 94, 94–95 (Harold C. Syrett ed., 1976); Edmund Randolph, Edmund Randolph’s Opinion on Recess Appointments (July 7, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 165, 165–67 (John Catanzariti ed., 1990).

<sup>44</sup> 1 Op. Att’y Gen. 631, 632 (1823).

<sup>45</sup> S. REP. NO. 37–80, at 5 (1863).

<sup>46</sup> *Id.* at 6.

<sup>47</sup> Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646 (codified as amended at 5 U.S.C. § 5503 (2012)).

<sup>48</sup> The modern version permits pay to recess appointees to an office whose vacancy arose within thirty days of the recess, for previously unnominated appointees to an office with a nomination pending before the Senate at the end of a session, or for appointees to an office whose nominee was rejected by the Senate within thirty days of the recess. 5 U.S.C. § 5503(a).

Likewise, most modern Presidents have filled vacancies during intrasession Senate recesses even as the practice was known to be constitutionally suspect. The first executive opinion directly to consider the question, the 1901 opinion of Attorney General Philander Chase Knox, denied that the President could make recess appointments during formal sessions of the Senate.<sup>49</sup> Consistent with the Knox opinion, intrasession recess appointments were infrequent before 1947 and did not become routine until the Carter Presidency.<sup>50</sup> The Senate has enacted several sense-of-the-Senate resolutions since then objecting to or suggesting limitations on the practice,<sup>51</sup> and Senators from both parties have expressed their opposition in litigation.<sup>52</sup> We should not expect much more in the way of institutional opposition to the Executive's view of the recess appointment power. Party discipline, collective action problems, and a well of veto points give the single-headed Executive an inherent tactical advantage over the Senate. As Professors Curtis Bradley and Trevor Morrison write, "Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment."<sup>53</sup>

In this case, that imbalance resulted in a Court decision that blessed what Justice Scalia called, with some justification, an "adverse-possession theory of executive authority."<sup>54</sup> The Senate's recourse to pro forma sessions to prevent recess appointments is, again to quote Justice Scalia, an "odd contrivance,"<sup>55</sup> but it is the political equilibrium that longstanding executive practice understandably backed the Court into endorsing.

<sup>49</sup> 23 Op. Att'y Gen. 599, 604 (1901).

<sup>50</sup> See Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2212–13 (1994).

<sup>51</sup> S. Res. 213, 99th Cong., 131 CONG. REC. 22,419 (1985) (enacted); S. Res. 430, 98th Cong., 130 CONG. REC. 23,341 (1984) (enacted); see also Carrier, *supra* note 50, at 2231–32.

<sup>52</sup> See Brief of Senate Republican Leader Mitch McConnell and 44 Other Members of the U.S. Senate as *Amici Curiae* in Support of Respondent Noel Canning at 16–18, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), 2013 WL 6228469, at \*16–18 [hereinafter Senators' Brief]; Brief of Amicus Curiae Senator Edward M. Kennedy in Support of Petitioner on the Second Question Presented at 5–20, *Franklin v. United States*, 544 U.S. 923 (2005) (No. 04-5858), 2004 WL 2326801, at \*5–20. The Senate Legal Counsel prepared but did not file a brief on behalf of the Senate in *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), vacated in part as moot, 1994 WL 163761 (D.C. Cir. 1994) (per curiam). 139 CONG. REC. 15,266–74 (1993) (statement of Senator Mitchell).

<sup>53</sup> Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414–15 (2012); see also *Noel Canning*, 134 S. Ct. at 2605 (Scalia, J., concurring in the judgment) ("In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch.").

<sup>54</sup> *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring in the judgment).

<sup>55</sup> *Id.* at 2617.

## II. COMMON LAW COURTS IN A PUBLIC LAW SYSTEM

Sometimes difficult constitutional questions remain judicially unresolved because they are political questions.<sup>56</sup> For example, the Constitution is vague as to whether the President may commit troops to a military operation without congressional authorization. In 1973 Congress passed the War Powers Resolution, which notionally forbids Presidents from doing so for extended periods.<sup>57</sup> Presidents since have tended to disclaim the Resolution's legal authority while nonetheless purporting to comply with it.<sup>58</sup> The constitutionality of the War Powers Resolution is a classic political question, and it is likely that the Court would see it as such if given the chance.<sup>59</sup> At issue are the contours of the executive power itself, shaped more by "contemporary imponderables" than by "abstract theories of law."<sup>60</sup> The Court does better to let the political process settle certain questions because those questions have no answer apart from constitutional politics.<sup>61</sup>

As the *Noel Canning* decision makes clear, and for reasons Part III explores in greater depth, the meaning of the Recess Appointments Clause is different. The Constitution grants the recess appointment power to the President directly, but it does not follow that the nature of a recess is a policy determination or is discretionary. To the degree the clause is ambiguous, its ambiguity is accidental; it does not inhere in the nature of the power conferred. The questions at issue in *Noel Canning* evaded Supreme Court review for so long not because they were political questions but because the Court just hadn't gotten around to them.

There are at least two reasons for the Court's reticence. First, although lower courts have addressed some issues related to recess appointments, there was no conflicting lower court authority on the questions raised in *Noel Canning* until the D.C. Circuit's January 2013 decision. Every prior federal court decision to address any of the three questions answered in *Noel Canning* had answered them in favor of the President's reading of the recess appointment power.<sup>62</sup> The procedural

<sup>56</sup> See *Baker v. Carr*, 369 U.S. 186, 210 (1962).

<sup>57</sup> 50 U.S.C. §§ 1541–1548 (2012).

<sup>58</sup> See *Bradley & Morrison*, *supra* note 53, at 467.

<sup>59</sup> See *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Ange v. Bush*, 752 F. Supp. 509, 511–15 (D.D.C. 1990).

<sup>60</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>61</sup> See John Marshall, Speech in the House of Representatives of the United States on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (Mar. 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 103 (Charles T. Cullen ed., 1984) (stating that some legal questions "[are] questions of political law, proper to be decided . . . by the executive and not by the courts").

<sup>62</sup> *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (upholding the constitutionality of intrasession recess appointments and of recess appointments to fill preexisting vacancies), *cert.*

complexity of a challenge to a recess-appointed officer further reduced the likelihood of a clean split developing in a posture likely to arouse the Court's interest. For example, when the Court considered whether to review the Eleventh Circuit's decision in *Evans v. Stephens*<sup>63</sup> — a constitutional challenge to the recess appointment of Judge William H. Pryor Jr. to that court — several procedural obstacles made the case a poor vehicle for Court review. Justice Stevens identified three such obstacles in his opinion respecting the denial of certiorari: the case reached the Eleventh Circuit in an interlocutory posture, the lower court did not treat the presence of Judge Pryor on appellate panels as a jurisdictional question, and the case featured the added complexity of a recess appointment of an Article III judge, which is rare in recent decades.<sup>64</sup> Even if *Evans* had created a split with the Second or Ninth Circuits, certiorari might have been denied.

The second significant and related set of reasons why these issues had not previously reached the Supreme Court is the difficulty in reaching a court of any kind in the first instance. Although there have been thousands of recess appointments made during intrasession recesses and made to fill preexisting vacancies,<sup>65</sup> many such appointments were to offices whose occupants were unlikely to (or could not easily be shown to) cause justiciable injuries. The day-to-day activities of the Engraver of the Mint or the Deputy Postmaster or members of the Corporation for Public Broadcasting do not ordinarily give rise to individual litigation. Even recess appointees holding more significant offices, such as heads of Cabinet departments, may not often cause direct injuries to potential plaintiffs, and where they do, their actions are often nonjusticiable policy decisions. Moreover, individuals subject to actions taken by recess-appointed officers may be barred from challenging an officer's commission under the *de facto* officer doctrine,<sup>66</sup> or

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<sup>denied</sup>, 544 U.S. 942 (2005); United States v. Woodley, 751 F.2d 1008, 1012–13 (9th Cir. 1985) (en banc) (holding that the recess appointment power may be invoked for a vacancy that existed at the start of the recess), *cert. denied*, 475 U.S. 1048 (1986); United States v. Alocco, 305 F.2d 704, 712–15 (2d Cir. 1962) (same); *In re Farrow*, 3 F. 112 (N.D. Ga. 1880) (same); *see also* Gould v. United States, 19 Ct. Cl. 593, 595–96 (1884) (stating that a recess appointment during a “temporar[y] adjourn[ment]” of the Senate was legally valid).

<sup>63</sup> 387 F.3d 1220.

<sup>64</sup> *Evans v. Stephens*, 544 U.S. 942, 943 (2005) (Stevens, J., respecting the denial of certiorari).

<sup>65</sup> *Noel Canning*, 134 S. Ct. at 2562.

<sup>66</sup> This doctrine insulates from review acts taken by an allegedly invalid federal officer. *See* *Ryder v. United States*, 515 U.S. 177, 180 (1995). At oral argument in *Noel Canning*, Justice Scalia suggested that the doctrine would apply in the case of judges whose recess appointments were declared invalid, but that is far from clear. Transcript of Oral Argument at 5, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-1281\\_d102.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_d102.pdf) [http://perma.cc/G2ZX-XUZN]; *see also* *Nguyen v. United States*, 539 U.S. 69, 77–78 (2003) (suggesting that the doctrine applies to “merely technical” defects but not to statutory provisions embodying more significant policy determinations (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (internal quotation marks omitted))); Kathryn A. Clokey, Note,

their lawyers may be unaware of the legal controversy surrounding the Recess Appointments Clause. It is the rare employment lawyer or criminal defense attorney who thinks (or has the temerity) to raise a constitutional challenge to the nature of the recess under which an NLRB member or sentencing judge was appointed. And indeed, a fair number of recess appointees are quickly confirmed by the Senate, as has happened with all but one of the fourteen Supreme Court Justices to have been so appointed.<sup>67</sup>

We may live in the age of statutes but our courts have retained the procedural hallmarks of the common law.<sup>68</sup> They accept cases when a complaining party has standing to litigate the issue in court, and not before. They rely on the parties themselves, and no one else, to define the scope of litigation. They decide the questions necessary to grant relief to the prevailing party, and no more.<sup>69</sup> The Supreme Court is different, to a degree. It is self-conscious about its role as an apex court, one that announces rules of decision that control lower court judgments across the country, hence its focus in case selection on federal law conflicts among those courts.<sup>70</sup> The Court often, but not always, crafts its own questions presented without depending on the parties' presentation of the issues.<sup>71</sup> But the Court is nonetheless reluctant to decide cases, and particular issues within those cases, before it is necessary to do so.<sup>72</sup>

The notion of a "vehicle" to decide particular questions implies a kind of supplementary "standing" — beyond the usual injury-in-fact and so forth — to appear before the Supreme Court. A case might raise an important federal question or might implicate an issue on

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*The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1126 (1985).

<sup>67</sup> The recess-appointed Supreme Court Justices are Thomas Johnson (1791), John Rutledge (as Chief Justice, 1795), Bushrod Washington (1798), Alfred Moore (1799), Henry Livingston (1806), Smith Thompson (1823), John McKinley (1837), Levi Woodbury (1845), Benjamin Curtis (1851), David Davis (1862), Oliver Wendell Holmes (1902), Earl Warren (as Chief Justice, 1953), William Brennan (1956), and Potter Stewart (1958). Rutledge's nomination as Chief Justice was subsequently rejected by the Senate. John S. Castellano, Comment, *A New Look at Recess Appointments to the Federal Judiciary* — United States v. Allocco, 12 CATH. U. L. REV. 29, 36 (1963).

<sup>68</sup> See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

<sup>69</sup> Justice Brandeis identified these and other prudential rules in his well-known concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

<sup>70</sup> SUP. CT. R. 10(a).

<sup>71</sup> See GRESSMAN ET AL., SUPREME COURT PRACTICE 459–61 (9th ed. 2007); Monaghan, *supra* note 20, at 689.

<sup>72</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 937 (2010) (Stevens, J., concurring in part and dissenting in part) (referring to the "cardinal" principle of the judicial process: "[i]f it is not necessary to decide more, it is necessary not to decide more" (quoting PDK Labs. Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment))).

which the lower courts are divided, but an awkward factual posture or a petitioner's failure to raise the issue cleanly at earlier stages of litigation might lead the Court to decline review.<sup>73</sup> Consider *Noel Canning* itself. As noted above, the Court denied certiorari in an earlier case implicating the same questions, possibly because of its procedural posture. And immediately after the D.C. Circuit invalidated the NLRB appointments in *Noel Canning*, a nursing care management company called HealthBridge filed an emergency petition seeking to avoid a Board enforcement action against it.<sup>74</sup> The Court denied that petition even though it was clear that cert would be sought, and almost certainly granted, in *Noel Canning*.

The procedural obstacles that delayed the Court's consideration of the issues in *Noel Canning* have been described as salutary features of our system, and in many cases, there is something to this.<sup>75</sup> A federal court's reviewing authority rests on the notion that the judicial power is activated by an injured party's properly pleaded prayer for relief.<sup>76</sup> Those whose injuries have not materialized must resort to the political process for relief, and the courts understand themselves as apart from that process.<sup>77</sup> Courts' capacity to issue coercive orders is an adjunct to their role as passive, interstitial adjudicators who do only what they must, and no more.<sup>78</sup> Even the Supreme Court understands itself to rely on the lawyers to frame the issues and to apprise it of relevant facts.<sup>79</sup> This passive posture is said to facilitate the Court's independence and preserve its institutional resources, which are meager in comparison to those of Congress and the President.<sup>80</sup>

Waiting for issues to percolate within the lower courts also allows the Court the benefit of those courts' views, in addition to those of the political actors who must navigate the law under uncertainty. In *Noel Canning*, the void in Supreme Court opinions was filled by the

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<sup>73</sup> See *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 917–18 (1950) (Frankfurter, J., respecting the denial of the petition for writ of certiorari).

<sup>74</sup> HealthBridge Petition, *supra* note 15.

<sup>75</sup> See PAUL M. BATOR ET AL., HART & WECHLSEER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67–69 (3d ed. 1988).

<sup>76</sup> See Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

<sup>77</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77 (1992).

<sup>78</sup> There is some tension between this notion and the Supreme Court's discretionary certiorari jurisdiction. See Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 702 (1989) (reviewing PAUL M. BATOR ET AL., *supra* note 75).

<sup>79</sup> See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). As Professor Amanda Frost notes, the Court often departs from this norm but does so tacitly and typically without theoretical justification. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 450–51 (2009).

<sup>80</sup> Frost, *supra* note 79, at 460–61.

decisions of three federal courts of appeals and significant legal opinions offered by the Office of Legal Counsel, the Attorney General, the Solicitor of the Treasury, and the Comptroller General, as well as multiple Senate reports and Senate floor statements.<sup>81</sup> The Court was also able to observe the actions of the political branches, most notably the appointments themselves and the legislative responses to them, which added to the collective wisdom the Court drew upon when it finally decided the case for itself.

But it is important to remember that, here, legal uncertainty was a cost, not the purpose, of the Court's delayed consideration of the merits. As HealthBridge's emergency application noted, companies subject to adverse NLRB action were refusing to comply with NLRB orders in the wake of the D.C. Circuit decision even as the Board itself was continuing to issue potentially invalid decisions.<sup>82</sup> The Board also appointed numerous regional directors while lacking a quorum.<sup>83</sup> Regional directors have extensive adjudicative, investigatory, and prosecutorial powers,<sup>84</sup> and all of those actions are now subject to legal challenge. Richard Cordray was appointed as head of the Consumer Financial Protection Bureau on the same day as the NLRB appointments at issue in *Noel Canning*, and various actions taken by that agency have been litigated.<sup>85</sup> Judges whose appointments were in question had presided over federal trials and had sat on appellate panels.<sup>86</sup> The President and the Senate were unsure of their constitutional powers, which in turn fostered uncertainty as to how each institution should conduct its internal affairs. For example, Senators had been negotiating over the continued use of the Senate filibuster without knowing how effectively a minority could block or delay executive appointments. Resolution of the issues in *Noel Canning* was so urgent

<sup>81</sup> See, e.g., *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1 (2012), <http://www.justice.gov/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion.pdf> [http://perma.cc/BZR8-PYWX].

<sup>82</sup> HealthBridge Petition, *supra* note 15, at 1.

<sup>83</sup> See G. Roger King & Bryan J. Leitch, *The Impact of the Supreme Court's Noel Canning Decision — Years of Litigation Challenges on the Horizon for the NLRB*, BLOOMBERG LAW, Jun. 27, 2014, <http://www.bna.com/impact-supreme-courts-n17179891624> [http://perma.cc/XAY4-AYLG].

<sup>84</sup> See 29 C.F.R. §§ 101.2–.30 (2014).

<sup>85</sup> See *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D.D.C. 2013); DAVID H. CARPENTER & TODD GARVEY, CONG. RESEARCH SERV., R43032, PRACTICAL IMPLICATIONS OF NOEL CANNING ON THE NLRB AND CFPB 21–22 (2013).

<sup>86</sup> See, e.g., *Evans*, 387 F.3d 1220 (affirming the constitutional validity of Judge Pryor's recess appointment to the Eleventh Circuit); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (affirming the validity of the recess appointment of District Judge Walter Heen in a challenge by a criminal defendant).

that Noel Canning, which won at the D.C. Circuit, supported the grant of certiorari.<sup>87</sup>

And yet the Senate has had to wait literally hundreds of years for definitive resolution. The Court's standing decisions permit congressional standing only in the narrow circumstances of an injury to a member's personal rather than institutional interests. For example, the Court denied standing to a group of House members who wished to contest the constitutionality of the line-item veto because their alleged injury was "not claimed in any private capacity but solely because they [were] Members of Congress."<sup>88</sup> It is unlikely that either the Senate as a body or any of its individual members could have litigated any of the questions in *Noel Canning*, even though the institutional power of the Senate was directly at issue.

Once the Court granted Noel Canning's cert petition, Senators' participation in the case was only as amici. They were granted argument time (for which they had to petition the Court), but it was only half that of Noel Canning.<sup>89</sup> Their amicus brief was limited to 9,000 words,<sup>90</sup> half the length of Noel Canning's merits brief.<sup>91</sup> The interest of forty-five Senators in the meaning and scope of the Recess Appointments Clause is self-evidently greater than that of a bottling company that happened to be at the wrong end of an NLRB decision.<sup>92</sup> Yet, had Noel Canning chosen not to seek review of that decision, had the D.C. Circuit decided in the Board's favor on the constitutional issues, or had that court decided in Noel Canning's favor on nonconstitutional issues in the case,<sup>93</sup> the Senate might still not have resolution of the issue.

The Court recognized that its ordinary procedures required modification in this case. Senate Republicans urged repeatedly in their brief that the Court could decide the case narrowly by ruling only on

<sup>87</sup> Brief of Respondent Noel Canning at 9, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), 2013 WL 2279703 (cert. brief).

<sup>88</sup> Raines v. Byrd, 521 U.S. 811, 821 (1997).

<sup>89</sup> Order of Dec. 9, 2013, 134 S. Ct. 811 (2013) (mem.).

<sup>90</sup> SUP. CT. R. 33(i)(g).

<sup>91</sup> *Noel Canning*, No. 13A209 (U.S. Aug. 28, 2013) (order granting application to exceed word limits).

<sup>92</sup> The case recalls the earlier example of *Myers v. United States*, 272 U.S. 52 (1926), in which the Court appointed counsel to defend the constitutionality of a law restricting the President's removal power. The *Myers* Court recognized that the significance of the decision did not well align with the particular interests of Frank Myers, the postmaster whose dismissal prompted the litigation. See Saikrishna Prakash, *The Story of Myers and Its Wayward Successors: Going Postal on the Removal Power*, in PRESIDENTIAL POWER STORIES 165, 171 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

<sup>93</sup> For example, Noel Canning unsuccessfully challenged the sufficiency of the evidence in support of the Board's decision. See *Noel Canning v. NLRB*, 705 F.3d 490, 493–96 (D.C. Cir. 2013).

whether a recess appointment was valid between pro forma sessions.<sup>94</sup> The Court decided exactly that, but it nonetheless also decided the other issues because of pending cases involving “similar challenges.”<sup>95</sup> The fact that other cases, or even other cert petitions, raise similar issues is not typically a sufficient reason for the Court to decide contentious questions unnecessary to resolution of the case before it.<sup>96</sup> On its face, for example, the Court’s rationale would have enabled it to decide the constitutional status of same-sex marriage when it decided that the appellants in *Hollingsworth v. Perry*<sup>97</sup> lacked standing to challenge the judgment of the district court.<sup>98</sup> A declaration of that sort would have generated immediate controversy, and the Court would have been criticized for deciding more than it had to. But in *Noel Canning*, even Justice Scalia’s concurrence was silent on the Court’s decision to settle 200 years of controversy in dicta.<sup>99</sup>

This forbearance suggests an implicit recognition that nothing would be gained, and much lost, by additional delay.<sup>100</sup> *Noel Canning* involved what this Comment calls a pure public law dispute, one in which the central interests on both sides of the case are those of public institutions rather than private citizens. The rights of private citizens might well be implicated by such disputes, but those rights are incidental to the central legal claim in the case. The Court’s real interest was not in the right of Noel Canning to a properly constituted Board; it was in the right of the President to appoint the Board’s members during a disputed recess of the Senate. Both the majority and the

<sup>94</sup> See Senators’ Brief, *supra* note 52, at 3, 8, 26. The brief devoted the first 23 of its 31 argument pages to its successful claim that the Senate’s pro forma sessions precluded recess appointments, a claim that occupied pages 49 through 66 of Noel Canning’s mostly unsuccessful seventy-one-page brief. Compare Senators’ Brief, *supra* note 52, at 4–26, with Brief of Respondent Noel Canning at 49–66, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), 2013 WL 7871669, at \*49–66.

<sup>95</sup> *Noel Canning*, 134 S. Ct. at 2558.

<sup>96</sup> Typically, a cert petition involving a question upon which a granted case might have some bearing is held until the granted case is decided. If the decision affects the disposition of the held petition, that petition can be granted, then immediately vacated and remanded for the lower courts to determine the impact of the decided case. GRESSMAN ET AL., *supra* note 71, at 339, 345–46.

<sup>97</sup> 133 S. Ct. 2652 (2013).

<sup>98</sup> *Id.* at 2668.

<sup>99</sup> To be sure, the question of whether an issue merits judicial attention even if technically unnecessary to the judgment is one of degree. In *Noel Canning*, for example, the issue the Court resolved relating to pro forma sessions bore a closer relationship to the constitutionality of intrasession recess appointments than it did to the quite independent matter of recess appointments to fill preexisting vacancies.

<sup>100</sup> *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), decided the very same day as *Noel Canning*, provides a useful contrast. In that case, the Court decided that a Massachusetts law creating a buffer zone around abortion clinics was unconstitutional, *id.* at 2541, but that strict scrutiny should not apply, *see id.* at 2534. In a concurring opinion, Justice Scalia criticized the majority for unnecessarily reaching the standard of review, the discussion of which he called “seven pages of the purest dicta.” *Id.* at 2541 (Scalia, J., concurring in the judgment).

concurrence understood, if tacitly, that we should regard as fiction the idea that the case was about the rights of any particular litigant. It was Noel Canning's very commonality with other litigants, past, present, and future, that marked the case as a pure public law dispute and urged the Court to act broadly.

Pure public law disputes are handled differently in many other countries. As part of the post–World War II wave of new constitutions, many civil law countries in Western Europe and, later, in Latin America and Eastern Europe, created constitutional courts.<sup>101</sup> These courts stand apart from the ordinary civil courts and were initially designed to handle primarily public law cases. Prominent examples include the German Federal Constitutional Court, the French Constitutional Council, and the South African Constitutional Court, though the model abounds throughout the world.<sup>102</sup> Constitutional courts are often empowered to consider abstract questions referred by governmental institutions or by minority blocs of such institutions.<sup>103</sup> As a general matter, civil law jurisdictions have less patience for delay in determining what the law is, but their tolerance for abstract review also reflects a sense that the cost of failure to clarify the bounds of public power is measured in rule of law terms.<sup>104</sup> Institutional standing is permitted because public institutions, whose representatives are accountable to the polity, are well situated to vindicate public rights.<sup>105</sup> Remedies issued by constitutional courts typically have *erga omnes* effect, and bind whomever the decision claims to reach.<sup>106</sup> The issues the court resolves are those the court believes need resolution. All of which is to say that the procedural rules of constitutional courts assume those courts to be law-declaring rather than simply dispute-resolving institutions. They do not await a “vehicle” in which an injured private party has checked the appropriate procedural boxes; legal uncertainty in the public law domain is sufficient occasion for the exercise of the constitutional court’s authority.

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<sup>101</sup> See FERRERES COMELLA, *supra* note 16, at 3–5.

<sup>102</sup> See *id.* The constitutional court model is not unique to civil law jurisdictions, as the South African example demonstrates, nor are the jurisdictional features of that model unique to Kelsenian courts. For example, the Supreme Court of Canada accepts references on abstract questions from the Canadian government. Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.

<sup>103</sup> See FERRERES COMELLA, *supra* note 16, at 7.

<sup>104</sup> See *id.* at 20–23.

<sup>105</sup> See Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POLITICS 183, 193 (1942) (“The interest in the constitutionality of legislation is . . . a public one which does not necessarily coincide with the private interest of the parties concerned. It is a public interest which deserves protection by a special procedure in conformity with its special character.”).

<sup>106</sup> See FERRERES COMELLA, *supra* note 16, at 9.

### III. THE LAW OF RULES

The U.S. Supreme Court is a constitutional court insofar as it resolves public law issues and has a self-conscious law-declaring function.<sup>107</sup> Occasionally, as in *Noel Canning*, it tailors its rules of decision and its remedial orders to its exercise of that function, but it does so ad hoc, often without discussion, and sometimes quite controversially.<sup>108</sup> This practice is in need of revision. Specifically, in pure public law disputes over constitutional rules, the Court should openly follow the lead of many of its foreign brethren. Where it otherwise has jurisdiction, the Court should be empowered to adjudicate such disputes abstractly, should recognize institutional standing by public entities, and should be prepared to resolve urgent related issues even if those issues are not pressed by or do not immediately affect the parties before it.

Abstract review does not mean *ex ante* review. The latter would include Madison's proposed Council of Revision, a quasi-legislative body that would have had the power to review statutes for constitutionality before they were promulgated.<sup>109</sup> The French Constitutional Council prominently exercises this power, but it is an uncommon model.<sup>110</sup> Abstract review, in contrast, is the power to review legislation or executive action before there is an injury to a private plaintiff.<sup>111</sup> This power is "nearly universal" in Europe.<sup>112</sup> American federal courts traditionally have heard neither *ex ante* nor abstract questions, but entertaining the former would more radically transform judicial involvement in the political process.

Institutional standing could apply to Houses of Congress, the President, an administrative agency, or a state entity. It could also mean standing for a subset of a legislative body. For example, Article 93 of the German Basic Law empowers the federal government, a *Land* government, or one-quarter of the *Bundestag* (the lower house of parliament) to initiate constitutional review by the Federal Constitutional

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<sup>107</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Monaghan, *supra* note 20, at 668–69.

<sup>108</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 922 (1973) ("The opinion strikes the reader initially as a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner's regulations.").

<sup>109</sup> See Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J. L. & POL. 459, 485–90 (2012).

<sup>110</sup> See ALEC STONE SWEET, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 8 (1992).

<sup>111</sup> See ALEC STONE SWEET, *GOVERNING WITH JUDGES* 44–45 (2000).

<sup>112</sup> Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 633 n.2 (2004).

Court.<sup>113</sup> Certain kinds of federalism disputes can be reviewed on application of the *Bundesrat* (the upper house) or individual *Länder*,<sup>114</sup> and municipalities have constitutional standing to litigate their rights to self-government, which are guaranteed by Article 28 of the Basic Law.<sup>115</sup> In the U.S. context, institutional standing could likewise be tailored to fit particular kinds of disputes. Thus, the Senate (or a minority bloc thereof) could be empowered to litigate issues arising from recess appointments, but standing could be denied to the House. Such standing would be an adjunct to existing notions of individual standing by an injured party. Notably, granting standing to the Senate (or a portion of it) would lend considerable weight to the argument — much debated in *Noel Canning* — that the absence of a challenge to Executive power constitutes acquiescence in its exercise.<sup>116</sup>

The Court has been known on occasion to resolve issues neither before it nor necessary to its judgment. It did so in *Noel Canning*, in *Marbury v. Madison*,<sup>117</sup> in *Dred Scott v. Sandford*,<sup>118</sup> and in countless other cases. The Court has given little guidance on when it will stretch its decisional authority and when it will not. In many cases the decision as to the scope of a judgment or remedial order is likely to be context-specific, taking into account the consequences of legal uncertainty, the internal power dynamics on the Court, and ambient politics. In other cases, what constitutes holding and what is *dictum* might not be obvious,<sup>119</sup> or the resolution of issues outside the scope of the judgment might be inadvertent.<sup>120</sup> There is no general law of *dicta* and this Comment does not seek to establish one. But it follows from the validity of abstract review and institutional standing that the rules of decision and remedies announced under such circumstances should not be limited to a particular plaintiff and defendant.<sup>121</sup>

Of course, a great many constitutional disputes concern the division of powers between public entities, and many of the issues those disputes

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<sup>113</sup> GRUNDEGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 93 (Ger.).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*, art. 28.

<sup>116</sup> See *Noel Canning*, 134 S. Ct. at 2559, 2571–73; *id.* at 2604, 2614, 2616 (Scalia, J., concurring in the judgment).

<sup>117</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>118</sup> 60 U.S. (19 How.) 393 (1857).

<sup>119</sup> Pierre N. Leval, Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1257–58 (2006).

<sup>120</sup> See *Massachusetts v. United States*, 333 U.S. 611, 639 (1948) (Jackson, J., dissenting) (“[I]f I have agreed to any prior decision which forecloses what now seems to be a sensible construction of this Act, I must frankly admit that I was unaware of it.”).

<sup>121</sup> Indeed, where abstract review and institutional standing would have been appropriate, rules of decision and remedies should not be limited even in cases, such as *Noel Canning*, in which review was in fact concrete and in which the nominal plaintiff was in fact a private citizen.

raise are considered justiciable. Canonical cases such as *Marbury*, *McCulloch v. Maryland*,<sup>122</sup> and *Youngstown Sheet & Tube Co. v. Sawyer*<sup>123</sup> are clearly of this nature, as are any number of federalism-related cases. Indeed, in a system of limited federal power, virtually any claimed limitation on federal authority can be characterized as a dispute in which the interests of public entities populate both sides of the conflict. There is nothing irrational in suggesting that the concerns raised in this Comment might warrant a more liberal procedural orientation toward such cases than is typical in U.S. federal courts. *McCulloch* makes the point. As Chief Justice Marshall recognized and thought germane, declaring in 1819 that the Bank of the United States was unconstitutional would have undermined the legal validity of a great deal of economic practice over several decades and would have upset financial and political reliance on the Bank's continued operation.<sup>124</sup> There is a case to be made, then, that the Court should have addressed the Bank's constitutionality in 1791 rather than when it did.

Part of this Comment's charge, however, is not merely to offer changes in the Court's form that might respond to its public law functions but to do so in a spirit of respect for the Court's institutional core. The proposal therefore comes with three significant limitations that would bracket *McCulloch* and indeed the great majority of the Court's prior decisions. First, the notion of a *pure* public law dispute suggests that the public institutional interests on both sides of litigation are primary rather than incidental or purely instrumental. It is sometimes said that such interests are always instrumental, that constitutional design is in the service of individual liberty.<sup>125</sup> This is partly true, as the Constitution tells us.<sup>126</sup> But individual liberty is more relevant to some nominally structural claims — for example, whether the President may take control of steel mills or whether Congress may enact a particular criminal statute — than others — for example, whether a state may tax a federal instrumentality. Deciding the centrality of individual versus institutional interests would require the exercise of judgment on the margins, but this is neither unusual nor fatal. Permitting abstract review, institutional standing, and broader decisional and remedial power would not, after all, require the Court to displace its existing post hoc individualized review.<sup>127</sup>

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<sup>122</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>123</sup> 343 U.S. 579 (1952).

<sup>124</sup> See *McCulloch*, 17 U.S. (4 Wheat.) at 401–02.

<sup>125</sup> See, e.g., *Noel Canning*, 134 S. Ct. at 2592–93 (Scalia, J., concurring in the judgment).

<sup>126</sup> See U.S. CONST. pmlb.

<sup>127</sup> Some form of individual complaint review coexists with many of the world's constitutional courts. See FERRERES COMELLA, *supra* note 16, at 7–8.

Most cases in which the Court grants argument time to members of Congress as such are ones in which granting standing to those members in the first instance would not be imprudent. Such cases are rare, but they tend to involve pure public law disputes. For example, in *INS v. Chadha*,<sup>128</sup> when the Solicitor General refused to defend the constitutionality of a one-house legislative veto that circumscribed the Attorney General's power to suspend deportation, the Court permitted members of Congress to defend the veto.<sup>129</sup> Not every instance of executive nondefense of a statute constitutes a pure public law dispute, as the refusal to defend could be grounded on the view that a law infringes on individual rights.<sup>130</sup> But in *Chadha*, congressional "standing" was grounded *both* in executive nondefense and in a distinct claim of congressional institutional interest in hemming the discretion of administrative agencies.<sup>131</sup> In such cases, executive nonfeasance is itself a defense of executive prerogative, and so the dispute is, at its core, a separation of powers conflict.<sup>132</sup>

The presence of an injured individual litigant may well be consistent with the understanding that a conflict is one in which public institutional interests predominate. Jagdish Chadha, who faced imminent deportation following the one-house veto, had a clear interest in the resolution of *Chadha*. But the constitutional question focused not on the right to suspend deportations but rather on the power of legislative veto. The former was just a vehicle for the Court's consideration of the latter. A more difficult case testing the necessary level of individual interest is *Gonzales v. Raich*,<sup>133</sup> in which California residents who grew marijuana locally for medical purposes sued the federal government to enjoin enforcement of federal drug laws. Those laws undermined the state's policy choice to permit therapeutic marijuana use, and so one could argue that *Raich* represented a pure public law dispute between the federal government and the state of California. Some federalism disputes may indeed be characterized as pitting a state's policy prerogatives against those of the federal government. But many such cases implicate background principles rather than particular constitutional

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<sup>128</sup> 462 U.S. 919 (1983).

<sup>129</sup> See *id.* at 940 ("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.").

<sup>130</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2683–84 (2013).

<sup>131</sup> See 462 U.S. at 967–68 (White, J., dissenting).

<sup>132</sup> See, e.g., *United States v. Lovett*, 328 U.S. 303, 304–07 (1946) (discussing appointment of congressional counsel to defend a statute that the Executive argued infringed on executive removal power).

<sup>133</sup> 545 U.S. 1 (2005).

texts.<sup>134</sup> They would accordingly fall outside this Comment's proposal for a different reason, discussed below.

Thus, a second and related limitation is that disputes in which the Court should behave as a constitutional court are those in which what is at issue is a constitutional rule rather than a standard or principle. Rules are better candidates than standards or principles for abstract review and for establishing institutional standing because the role of the political branches in interpreting and applying them is more contingent. It is not in the nature of rules to be balanced against countervailing considerations. As the German theorist Robert Alexy writes, rules have a binary character that confers their advantage as a discretion-limiting device: either rules are complied with or they are not, and a conflict between two rules requires invalidation or alteration of one of them.<sup>135</sup> Principles, by contrast, are what Alexy calls "optimization requirements,"<sup>136</sup> which "lack the resources to determine their own extent in the light of competing principles and what is factually possible."<sup>137</sup> What resources do exist are supplied by politico-legal actors, including courts, when they construct constitutional meaning over time by optimizing multiple standards and principles in light of contemporary values and factual context.

Constitutional rules are subject to political construction when they are ambiguous, but construction is necessary only to resolve the ambiguity; progressive application is not part of — indeed is antithetical to — a rule's immanent structure. Constitutional rules are part of what Professor Jack Balkin calls the constitutional "framework," the hard-wired set of operating instructions designed to set governance in motion.<sup>138</sup> We should not long tolerate ambiguity in norms of this sort, for their settlement value is often as important as their normative content. Dispute over the meaning of constitutional rules is therefore precisely the context that least rewards patience in awaiting a plaintiff who has suffered individualized harm or a political construction that liquidates constitutional meaning.<sup>139</sup> Again, *McCulloch* helps make the point.

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<sup>134</sup> See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009) (arguing that "freestanding" federalism principles should not motivate constitutional decisionmaking because interpreters should honor the compromises embodied within the constitutional text).

<sup>135</sup> ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 48–49 (2010).

<sup>136</sup> *Id.* at 47.

<sup>137</sup> *Id.* at 57.

<sup>138</sup> BALKIN, *supra* note 18, at 21.

<sup>139</sup> See Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908) ("It . . . was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.").

The constitutionality of the Bank of the United States might easily be characterized as a pure public law dispute, but — as the Court more or less said — it was not a dispute over a constitutional rule. A Constitution does not “partake of the prolixity of a legal code,” Chief Justice Marshall wrote, and so Congress must have some discretion to adapt the ways in which it will exercise its powers.<sup>140</sup>

Chief Justice Marshall said something quite different about the constitutional provision at issue in *Marbury*. Arguing that the Constitution’s allocation of original jurisdiction to the Supreme Court could not be altered by Congress, he wrote that a contrary construction would render the words of Article III “form without substance.”<sup>141</sup> The methodological shift between *Marbury* and *McCulloch* is not simply duplicity. The Constitution’s grant of original jurisdiction to the Supreme Court in specified cases is far more akin to a constitutional rule than is its grant of legislative power to Congress, and so — particularly early in the nation’s history — the mode of judicial construction was appropriately less deferential to Congress.

As with the definition of a pure public law dispute, the distinction between constitutional rules and constitutional standards or principles admits of hard cases. The hardest might be those in which the threshold question of whether a constitutional provision is a rule or a standard seems inseparable from the merits. In *Noel Canning*, for example, one could reformulate much of the disagreement between the majority and the concurrence as a dispute over whether the Recess Appointments Clause was a rule or a standard. Likewise, the disagreement between Maryland and the federal government in *McCulloch* concerned whether the lawmaking power of Congress was rule-like or standard-like. We understand it to be the latter only because *McCulloch* was decided as it was and history has vindicated that interpretation. The susceptibility of semantic meaning to political and historical construction may pose a serious challenge to the intelligibility of the rules-standards distinction in this context.<sup>142</sup>

One answer to this concern is to concede that jurisdictional questions are often attentive to the merits in ways rarely acknowledged but plain and inevitable.<sup>143</sup> Another is to recall that the rules-standards distinction motivates a prudential limitation on the proposal rather than its core. We can expect litigation over whether or not some provision is a rule or a standard in the relevant sense, and so be it. After all, as much as the distinction admits of hard cases, it also admits of easy ones. One “tell” is whether uncertainty in the interpretation and

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<sup>140</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407–09 (1819).

<sup>141</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

<sup>142</sup> See generally Bradley & Siegel, *supra* note 14.

<sup>143</sup> See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 234–39 (1988).

application of a provision results solely from textual ambiguity or whether it also results from vagueness. An ambiguous phrase is one that has multiple plausible meanings, whereas a vague phrase is one that has fuzzy margins.<sup>144</sup> Rules may be ambiguous, but ordinarily they are not vague. For example, the President's power to make appointments during the recess of the Senate is formulated as a rule, albeit an ambiguous one. Even if it is possible to read "the Recess" as an indefinite object, the use of a definite article does not naturally suggest that reading. Other examples of potential disputes over constitutional rules might include a conceivable Senate challenge to the application of the Recess Appointments Clause to Article III judges notwithstanding their life tenure,<sup>145</sup> a legislative or presidential exception to the operation of the pocket veto,<sup>146</sup> a House minority's claim that an enrolled revenue bill did not "originate" in the House of Representatives,<sup>147</sup> or a legislative objection to the President's adjournment of Congress in case of disagreement between the House and the Senate over the time of adjournment.<sup>148</sup> Adjudicating whether a constitutional norm falls more into this basket or instead approximates standards such as "the executive Power" requires judgment but is far from an existential crisis.

Historically, this Comment's proposal would have enabled members of Congress to challenge the constitutionality of the line-item veto in 1997, when the law permitting it became effective.<sup>149</sup> The Court invalidated the Act the following year but the litigation was controlled not by Congress or a subset thereof, but rather by the City of New York and by a potato farmers' cooperative.<sup>150</sup> The proposal might

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<sup>144</sup> See Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 570–71 (2010).

<sup>145</sup> See *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc).

<sup>146</sup> The Constitution provides that if Congress has through adjournment prevented the President from returning a passed bill ten days after it is presented to the President, the bill does not become law. U.S. CONST. art. I, § 7, cl. 2. In *The Pocket Veto Case*, 279 U.S. 655 (1929), the Court held that this "pocket veto" was not limited to adjournments that terminated the legislative session. *Id.* at 680.

<sup>147</sup> U.S. CONST. art. I, § 7, cl. 1. The requirement that "[a]ll Bills for raising Revenue" originate in the House has elements of a constitutional standard — the definition of a revenue measure is vague — and also elements of a constitutional rule — the definition of "originate" is not. The application of both the standard and the rule is currently being litigated in the context of the Affordable Care Act. See *Sissel v. Dep't of Health & Human Servs.*, No. 13-5202, 2014 WL 3714701 (D.C. Cir. July 29, 2014).

<sup>148</sup> U.S. CONST. art. II, § 3. This provision gives the President some leeway to circumvent pro forma sessions of the Senate under certain circumstances, and so *Noel Canning* might make litigation about it more likely.

<sup>149</sup> See Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), invalidated by Clinton v. City of N.Y., 524 U.S. 417 (1998).

<sup>150</sup> See *Clinton*, 524 U.S. at 417. The previous year, the Court had found that members of Congress did not have standing to challenge the Line Item Veto Act. See *Raines v. Byrd*, 521 U.S. 811 (1997).

likewise have allowed members of the House of Representatives to challenge the use of statistical sampling in the decennial census in light of the constitutional requirement of “actual Enumeration.”<sup>151</sup> Denying institutional standing in the case invited delay that risked the 2000 census being conducted unconstitutionally with no practical remedy. The proposal might also have affected *Chadha*, by permitting the Attorney General to obtain a declaratory judgment as to the constitutionality of the one-house veto without awaiting an individual case in which the veto was exercised. An earlier adjudication of the one-house veto might have mitigated *Chadha*’s effects, which included the simultaneous invalidation of roughly 200 legislative provisions across a wide range of regulatory domains.<sup>152</sup>

By contrast, recent claims that President Obama exceeded the power of his office in making certain unilateral modifications to the Patient Protection and Affordable Care Act<sup>153</sup> (ACA) seek to test the application of a set of constitutional standards: the President’s power to take care that the laws be faithfully executed and the lawmaking power of Congress.<sup>154</sup> The prospective operation of these separation of powers norms is not knowable in advance and the Constitution enshrines no implicit or explicit expectation that their application should be confined to discrete historical ponderables. This Comment’s proposal does not apply to litigation grounded on claims of this sort.<sup>155</sup>

Speaker of the House John Boehner’s threat to litigate the President’s power to enforce the ACA could potentially run up as well

<sup>151</sup> U.S. CONST. art. I, § 2, cl. 3. The Court could have ruled on the House’s standing in such a case in *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), but it did not reach the congressional standing question. Dissenting, Justices Stevens and Breyer would have held that the House had standing based on its “institutional interest in preventing its unlawful composition.” *Id.* at 365 (Stevens, J., dissenting) (quoting U.S. House of Representatives v. Dep’t of Commerce, 11 F. Supp. 2d 76, 86 (D.D.C. 1998)) (internal quotation marks omitted); see *id.* at 364–65.

<sup>152</sup> See 462 U.S. 919, 967 (1983) (White, J., dissenting) (“Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’”); see also Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789, 796 (“The *Chadha* decision would be less important . . . if it did not call into question so much that had been thought established about the dispersal of governmental authority.”).

<sup>153</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>154</sup> See Jonathan Weisman, *Suit Against Obama to Focus on Health Law, Boehner Says*, N.Y. TIMES, July 11, 2014, at A17.

<sup>155</sup> It follows from this discussion that constitutional rules should be explicit within the constitutional text. It is awkward, at least, to suggest that settlement value is of overriding importance for a provision the Constitution omits. Thus, whether the President has exclusive and unqualified power to remove federal officers would not qualify as a dispute over a constitutional rule, even as it is perhaps a prototype of a pure public law dispute. See *Myers v. United States*, 272 U.S. 52 (1926).

against a third limitation on this Comment's proposal. As Part I emphasizes, the problem of *Noel Canning* is a problem of timing and procedural posture, not of suitability to judicial resolution altogether. The perversity of the case is not that the Court decided the meaning of the Recess Appointments Clause but that it did so two centuries into the dispute. For the purposes of this Comment, controversies that the Court avoids because it deems them political questions — as could be the fate of the Boehner suit — may remain off its docket. Likewise, disputes that are moot, or that are unripe in the sense of not having arisen at all, may remain nonjusticiable. Abstract review in this Comment's sense contemplates review in the absence of an injured individual plaintiff, not in the absence of any governmental action at all.

The distinction between ex ante and abstract review<sup>156</sup> suggests that this Comment's proposal is more likely to be available in cases of executive rather than legislative action.<sup>157</sup> An executive act — such as a recess appointment, a veto, or an adjournment — that might injure the House or the Senate in their institutional capacities inflicts harm the moment the act is completed. By contrast, an executive objection to legislation giving rise to a pure public law dispute would likely be unripe until some institutional actor performs pursuant to the act or declines to perform in fear of it.<sup>158</sup> For example, in *Chadha*, the challenged provision of the Immigration and Nationality Act<sup>159</sup> was passed in 1952 but there was no injury until a veto was actually exercised by a house of Congress or until the Attorney General was — owing to the threat of a veto — discouraged from using his authority to suspend deportation in a specific case.<sup>160</sup> In this sense, the standing rules this Comment contemplates draw upon some existing intuitions about what constitutes an Article III case or controversy.

Making this Comment's proposal a reality might, in some cases, require legislation. *Noel Canning* was able to bring suit because it had a statutory right of action under the National Labor Relations Act<sup>161</sup> to petition the federal courts for review of adverse decisions of the

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<sup>156</sup> See *supra* p. 142.

<sup>157</sup> The proposal is also more likely to be needed in cases of executive action, since the Executive has more efficient remedial options than the legislature. The President can veto legislation to which he is opposed or he can refuse to enforce it once it is promulgated.

<sup>158</sup> See *Texas v. United States*, 523 U.S. 296, 300 (1998) (finding that claims are not ripe when “contingent [on] future events that may not occur as anticipated, or indeed may not occur at all” (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)) (internal quotation marks omitted)). The practical ability of the Executive to refuse or delay enforcement of a statute also reduces its incentive to litigate the statute’s constitutionality affirmatively.

<sup>159</sup> See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214–16.

<sup>160</sup> See *INS v. Chadha*, 462 U.S. 919, 926, 933–34 (1983).

<sup>161</sup> 29 U.S.C. §§ 151–169 (2012).

NLRB.<sup>162</sup> No statute provides an across-the-board public right of action to members of Congress or the United States government to enforce the Constitution in federal court. Courts have long implied such a right of action for the government as represented by the Attorney General's office,<sup>163</sup> but implying a public right of action for Congress — much less for a minority bloc — would be unprecedented. The Line Item Veto Act<sup>164</sup> specifically provided members of Congress with a right of action to test the statute's constitutionality;<sup>165</sup> a legislative provision giving members of Congress broader authority to test the constitutionality of certain statutes or governmental acts would place this Comment's suggestion on surer jurisdictional footing.<sup>166</sup>

Whether the suggestion requires a constitutional amendment depends on one's view about the depth of the Court's devotion to traditional standing requirements, and whether they are indeed baked into Article III. As of this writing, no Supreme Court decision has ever held that members of Congress may bring suit in federal court in an institutional capacity. Still, the federal government sues in just this way nearly every time it brings a criminal prosecution,<sup>167</sup> and it has on several occasions done so to challenge legislative acts on their face be-

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<sup>162</sup> 29 U.S.C. § 160(f); *see also* 5 U.S.C. § 702 (2012) (providing for a default of judicial review under the Administrative Procedure Act).

<sup>163</sup> See Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 65 n.358, 78 (2014).

<sup>164</sup> Pub. L. No. 104-130, 110 Stat. 1200 (1996).

<sup>165</sup> *Id.* § 3, 110 Stat. at 1211.

<sup>166</sup> As discussed below, such a statute might be necessary but would not alone be sufficient to permit the Senate, the House, or their individual members to sue, as it would be unable to grant them Article III standing in any given case. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979). The disadvantage of such a statute from this Comment's perspective is that it could discourage courts from imposing appropriate prudential limits on congressional standing. *See Raines*, 521 U.S. at 820 n.3. Professors Tara Leigh Grove and Neal Devins have argued that the separation of powers disables Congress from authorizing itself to enforce federal law. *See* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 624–26 (2014). Even if generally valid, such a principle, rooted in respect for each branch's distinct role in the constitutional system, has less force when Congress claims that the Executive has violated the Constitution.

<sup>167</sup> See Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2246–48 (1999). Grove has argued that executive branch standing to enforce and defend duly enacted federal laws derives from Article II, not Article III, and so it does not automatically follow that standing to sue should be available in cases in which the Executive merely wishes to settle a constitutional question. *See* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1314–15 (2014). Grove would distinguish permissible executive standing as a constitutionally empowered representative of the United States in court from impermissible executive standing to protect the institutional interests of the presidency. *See id.* at 1326. As Grove recognizes, however, the Court seems to have rejected this distinction. *See id.* at 1319 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998)). The distinction is also inconsistent with the notion that the Executive has standing to seek the invalidation of a statute, as the Court permitted in *Chadha* and in *Windsor*. *See id.* at 1333.

fore they were enforced.<sup>168</sup> Changes to the Court's jurisprudence in the direction of other forms of institutional standing would mark a serious formal change, but this Comment has argued that doing so would be consistent with how the Court has functionally approached cases like *Chadha* and *Noel Canning*. As noted, the Court already expands or narrows its rules of decision and its remedies on a case-by-case basis. This Comment proposes merely that the Court do so somewhat more systematically, that it inject some order into its procedural law in an identifiable subset of its cases.<sup>169</sup>

That said, the success of the proposal may depend in part on a procedural change that would certainly require a statute, or better, a constitutional amendment. Pure public law disputes over constitutional rules do not require much in the way of judicial factfinding. That is, such disputes tend to be purely legal in addition to being purely public. There is accordingly little to be gained and something to be lost in submitting such controversies to the federal district courts rather than to the Supreme Court directly.<sup>170</sup> If the suggested liberalization in the Court's procedures aims above all to eliminate costly delay and legal uncertainty in resolving a class of constitutional questions, then multifarious pronouncements by different courts around the country ill serves that objective. A statutory workaround would permit immediate (perhaps even interlocutory) appeal to the Supreme Court in denominated cases. A bolder stroke would amend the Constitution to add such cases to the Court's original jurisdiction.

These kinds of design questions may be left to future elaboration. The proposal is itself a standard rather than a rule, susceptible to and welcoming of modification over time as we learn more about its consequences. One place to look for guidance would be the numerous state courts that have permitted their advisory opinion jurisdiction to evolve over many years.<sup>171</sup> The important point is to encourage the judiciary to be receptive to just this kind of learning, as itself a work in progress that seeks constantly to match its form to the functions it exercises.

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<sup>168</sup> See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

<sup>169</sup> See Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 15 (1964) ("[F]lexibility in content of jurisdictional principles is not synonymous with whim and unrestrained discretion.").

<sup>170</sup> What little may be gained does, however, include the opinion of a detached judge, which may serve as a decisional aid even if it only involves questions of law.

<sup>171</sup> See Jonathan D. Persky, Note, "*Ghosts that Slay*": A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155 (2005).

### CONCLUSION

All of this has the air of the second best. Circumstances prevented the Court from adjudicating a longstanding constitutional question and a political practice arose, if in fits and starts, over the course of centuries, to fill the gap. A natural judicial response would be strong deference to that practice, which is at least functionally what the *Noel Canning* Court showed. The risk that the Court might instantly destabilize centuries of decisionmaking is effectively managed by a Burkean or otherwise contextually sensitive approach to constitutional adjudication.<sup>172</sup> If originalism is the sickness, isn't nonoriginalism the cure?

This response rests on only a partial diagnosis. Burkean approaches to interpretation suppose that sustained practices reflect wisdom,<sup>173</sup> but those practices may instead reflect little more than power — the power of the Executive, relative to the Senate and the Court, to mobilize in favor of its preferred reading of the Constitution. The mundane, technical clauses of the Constitution — in short, its rules — are America's *Code civil*. The overriding purpose of such clauses is legal clarity, but settlement through political contestation achieves clarity only by accident. For clauses of this sort, judicial resolution should come sooner rather than later — especially if the judge is originalist, but even if he is not.

*Noel Canning* arose because the apparent clarity of the constitutional text was a temptation for formalists, and we live in a formalist age. But if we are to have formalism tomorrow or forever — and with constitutional rules, there is a case for this — then we should have it now. Hans Kelsen conceived of constitutional courts as having an explicitly legislative function,<sup>174</sup> but by adopting some of their procedures we might succeed in making the judicial branch a little bit more active and a little bit less dangerous.

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<sup>172</sup> See generally Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

<sup>173</sup> See *id.* at 371 (“The fact that a tradition has persisted provides an additional safeguard here: its very persistence might be taken to attest to its wisdom or functionality, at least as a general rule.”).

<sup>174</sup> HANS KELSEN, GENERAL THEORY OF LAW AND STATE 268 (1949) (“The annulment of a law is a legislative function, an act — so to speak — of negative legislation. A court which is competent to abolish laws — individually or generally — functions as a negative legislator.”).