
LEADING CASES

CONSTITUTIONAL LAW

Article III — Justiciability — Legislative Standing — Virginia House of Delegates v. Bethune-Hill

Legislative standing is litigated with increasing frequency,¹ and yet it is characterized by “various ad hoc pronouncements” amounting to “a grab bag of inconsistent rationales that offer little guidance to litigants and lower courts.”² The doctrine encompasses “a multitude of distinct and unrelated types of claims that have little in common other than the presence of a legislative litigant.”³ According to one observer, failure to adequately distinguish between these claims has created “a mess.”⁴

Last Term, in *Virginia House of Delegates v. Bethune-Hill* (*Bethune-Hill II*),⁵ the Supreme Court held Virginia’s House of Delegates did not have standing to appeal a decision that its legislative districts were unconstitutional.⁶ In dissent, Justice Alito critiqued the majority for what he saw as an impermissible blurring between congressional standing and state legislative standing, the former of which implicates separation-of-powers concerns that, he argued, are not present in the latter.⁷ If Justice Alito were correct that separation-of-powers concerns only impact congressional standing, then such standing would always be harder to achieve than state legislative standing — assuming otherwise similar circumstances⁸ — and *Bethune-Hill II* could easily be extended to congressional standing cases. However, while Justice Alito’s

¹ For example, the U.S. House of Representatives recently stepped in to defend the Affordable Care Act, after the Trump Administration declined to do so. David G. Savage, *White House Lawyers Aim to Scrap the Entire Affordable Care Act. One Critic Says That’s “Legal Nuttery,”* L.A. TIMES (May 3, 2019, 2:23 PM), <https://www.latimes.com/politics/la-na-pol-healthcare-trump-court-texas-challenge-obamacare-20190503-story.html> [<https://perma.cc/LZL3-T6ZP>].

² Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 3–5 (2016); see also Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 342 (2015).

³ Hall, *supra* note 2, at 4. It includes questions of whether legislators have suffered an individual injury sufficient to invoke standing, whether there have been injuries to a legislature’s powers, whether a legislature has been injured by a failure to enforce or defend laws, and whether a legislature can have standing on behalf of the larger government. *Id.* at 4–5. These questions go not to whether one can argue in court — rather, “[s]tanding is the authority to invoke a court’s jurisdiction and thereby subject others to judicial process.” Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1359 (2014).

⁴ Hall, *supra* note 2, at 5.

⁵ 139 S. Ct. 1945 (2019).

⁶ *Id.* at 1950.

⁷ See *id.* at 1958 (Alito, J., dissenting).

⁸ See, e.g., Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPPERDINE L. REV. 1, 37 (2015) (“The Supreme Court’s resistance to standing by members of Congress to represent

concern about blurred lines has merit, his critique is ultimately misguided. Justice Ginsburg’s majority opinion relied on state legislative standing cases, and the congressional standing cases she cited are not necessary for her conclusion. Further, the Court has previously characterized separation of powers in this context as a limit on federal *judicial* power, rather than legislative. These judicial separation-of-powers concerns are certainly relevant to state legislative standing questions in federal court. The difference between state and federal legislative standing is important, but it is not as simple as Justice Alito argued. Courts should therefore be cautious in extending *Bethune-Hill II* to the federal context.

After the 2010 Census, Virginia’s state legislature redrew the state’s legislative districts.⁹ One stated goal in the process was compliance with section 5 of the Voting Rights Act¹⁰ (VRA) and its prohibition of retrogression in the ability of minority communities to elect their candidates of choice.¹¹ In an effort to achieve this goal, legislators ensured that twelve House districts had black voting-age populations of at least fifty-five percent.¹² The maps were passed by the legislature and received preclearance from the U.S. Department of Justice.¹³

Shortly after, several voters sued in federal court, alleging an Equal Protection Clause violation.¹⁴ Although the suit was brought against other state entities, the House of Delegates and its Speaker intervened to defend the districts.¹⁵ A three-judge district court panel¹⁶ ruled for the State, finding race was not the predominant factor in drawing eleven of the twelve districts, and in the twelfth, the use of race was narrowly tailored to further a compelling interest in avoiding retrogression.¹⁷

On appeal, the Supreme Court, in an opinion by Justice Kennedy, upheld the lower court’s ruling on the twelfth district but vacated and remanded in regard to the other eleven districts.¹⁸ It held that compliance with traditional redistricting principles alone cannot disprove

the federal government in federal court has not extended to legislative standing by state legislators under state law.”)

⁹ *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill I)*, 137 S. Ct. 788, 795 (2017).

¹⁰ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

¹¹ *Id.* It was not until after the redistricting process was completed that the U.S. Supreme Court issued *Shelby County v. Holder*, 570 U.S. 529 (2013), invalidating the formula that had been used to subject jurisdictions like Virginia to preclearance under the VRA. *Id.* at 551–57.

¹² *Bethune-Hill I*, 137 S. Ct. at 794.

¹³ *Id.* at 796.

¹⁴ *Id.*

¹⁵ *Bethune-Hill II*, 139 S. Ct. at 1950.

¹⁶ Per federal law, “an action . . . challenging the constitutionality of . . . the apportionment of any statewide legislative body” must be heard by a three-judge district court panel, 28 U.S.C. § 2284(a) (2012), and is directly appealable to the U.S. Supreme Court, *id.* § 1253.

¹⁷ *Bethune-Hill I*, 137 S. Ct. at 796–97.

¹⁸ *Id.* at 794–95.

racial gerrymandering.¹⁹ The proper standard requires a court to consider all available evidence and decide whether race was the “pre-dominant motive for the design of the district as a whole.”²⁰ The Court remanded this question to the district court.²¹

After a new bench trial, the district court panel found that race had been the predominant factor in the eleven districts, and “the intervenors ha[d] not [shown] that the legislature’s use of race was narrowly tailored to achieve the compelling state interest of compliance with Section 5 of the VRA.”²² Thus, the map violated the Equal Protection Clause. However, the court gave the legislature a chance to draw new maps.²³ Virginia’s Attorney General subsequently announced that the State would not appeal the decision; however, the State House filed its own appeal.²⁴ The State defendants moved to dismiss the appeal, arguing that the intervenor House did not have standing to challenge the lower court’s decision.²⁵ Further, when the legislature failed to pass a new plan by the court’s deadline, “that court entered a remedial order delineating districts for the 2019 election.”²⁶ The House appealed that order as well, and the defendants again moved to dismiss.²⁷

The Supreme Court granted the motions to dismiss, holding that the intervening House of Delegates did not have standing to appeal.²⁸ Writing for the Court, Justice Ginsburg²⁹ noted the basic requirements of Article III standing: “a concrete and particularized injury, that . . . is fairly traceable to the challenged conduct, and . . . is likely to be redressed by a favorable decision.”³⁰ To appeal a decision the primary party has declined to challenge, an intervenor must independently demonstrate standing.³¹ Justice Ginsburg concluded that the House, “a

¹⁹ *Id.* at 798–99.

²⁰ *Id.* at 800.

²¹ *Id.*

²² *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 137 (E.D. Va. 2018).

²³ *Id.* at 181 (quoting *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015)).

²⁴ *Bethune-Hill II*, 139 S. Ct. at 1950.

²⁵ *Id.*

²⁶ *Id.* at 1950 n.1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Justice Ginsburg was joined by Justices Thomas, Sotomayor, Kagan, and Gorsuch.

³⁰ *Bethune-Hill II*, 139 S. Ct. at 1950. Such outlines of the traditional requirements of Article III standing are common in the Court’s legislative standing cases. *See, e.g., Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2663 (2015) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). However, as Professor Richard Fallon has observed, “it is understandable that concepts advanced with private challenges to governmental action in mind[, such as these traditional requirements,] would apply awkwardly to later cases in which governments and their officials claimed standing as plaintiffs or appellants.” Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1105 (2015).

³¹ *Bethune-Hill II*, 139 S. Ct. at 1951.

single chamber of a bicameral legislature,” did not have standing either as a representative of the state’s interests or independently.³²

Justice Ginsburg began by rejecting the House’s argument that it could step in for the State.³³ Had the State designated the House to appeal on its behalf and had the House asserted the State’s interests, standing could be transferrable — however, neither occurred.³⁴ Virginia law gives the state attorney general the exclusive responsibility to represent the State in civil litigations.³⁵ And “the House never indicated in the District Court that it was appearing” as the State’s representative — rather, “[t]hroughout this litigation, the House has purported to represent its own interests.”³⁶

Next, Justice Ginsburg rejected three arguments put forward by the House asserting it had suffered an injury sufficient to merit standing on its own behalf. First, the House was not injured simply because of “its role in enacting redistricting legislation.”³⁷ Under the state constitution, the *entire* legislature controls redistricting — not the House alone.³⁸ This fact differentiates the case from *Arizona State Legislature v. Arizona Independent Redistricting Commission*,³⁹ where the Court allowed “the Arizona House and Senate — *acting together* — to challenge” the creation of an independent redistricting commission by popular initiative.⁴⁰ And that popular initiative “*permanently* deprived the legislative plaintiffs of their role in the redistricting process,”⁴¹ whereas this court order only altered the current maps.⁴² Justice Ginsburg also distinguished *Coleman v. Miller*,⁴³ in which the Court allowed twenty state legislators to challenge the allegedly illegal ratification of an amendment they had voted against.⁴⁴ Unlike *Coleman*, *Bethune-Hill II* did not involve a question of whether legislators’ votes had been nullified, despite

³² *Id.* at 1950–51.

³³ *Id.* at 1951.

³⁴ *Id.*

³⁵ *Id.* at 1951–52. Justice Ginsburg noted that other states have empowered their legislative houses to defend the state’s laws. *Id.* at 1952. “But the choice belongs to Virginia, and the House’s argument that it has authority to represent the State’s interests is foreclosed by the State’s contrary decision.” *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ 135 S. Ct. 2652 (2015).

⁴⁰ *Bethune-Hill II*, 139 S. Ct. at 1953. The Court rejected an analogy to *INS v. Chadha*, 462 U.S. 919 (1983), where the Court allowed the House and Senate to defend a statutory congressional veto, because *Chadha* did not clearly address the House and Senate’s individual standing and the statute in question “granted *each* Chamber of Congress an *ongoing* power . . . that each House could exercise independent of any other body.” *Bethune-Hill II*, 139 S. Ct. at 1954 n.5.

⁴¹ *Bethune-Hill II*, 139 S. Ct. at 1954.

⁴² *Id.* at 1949–50.

⁴³ 307 U.S. 433 (1939).

⁴⁴ *Bethune-Hill II*, 139 S. Ct. at 1954.

having been sufficient to block the legislative act.⁴⁵ The Court analogized *Bethune-Hill II* to a congressional standing case, *Raines v. Byrd*,⁴⁶ writing that “[j]ust as individual members lack standing to assert the institutional interests of a legislature, . . . a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.”⁴⁷

Second, the House was not injured by virtue of “altered district boundaries [that] may affect its composition.”⁴⁸ Justice Ginsburg distinguished *Sixty-Seventh Minnesota State Senate v. Beens*,⁴⁹ where the Court allowed the Minnesota Senate to challenge a district court order almost halving the Senate’s size, which would have directly impacted its day-to-day operations.⁵⁰ Here, in contrast, “the House as an institution has no cognizable interest in the identity of its members.”⁵¹ Justice Ginsburg also rejected the dissent’s analogy of the House to a basketball team or string quartet, organizations that select their own members; in contrast, the House is a “representative body . . . chosen by the people.”⁵²

Third, Justice Ginsburg dismissed the notion that “causing legislators to seek reelection in districts different from those they currently represent” constituted an injury.⁵³ District boundaries are changed regularly — every ten years.⁵⁴ Indeed, the Virginia state constitution explains how to handle such changes.⁵⁵ Therefore, there should be “no representational confusion.”⁵⁶ “In short,” Justice Ginsburg concluded, “Virginia would rather stop than fight on. One House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process.”⁵⁷

⁴⁵ *Id.* Justice Ginsburg might also have noted that at the time *Coleman* was decided the Court did not require Article III standing for appeals from state court. See Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 650 n.198 (2019) (noting that the Court was willing to “review state court decisions, whenever the state court held that it had jurisdiction over the federal claim”).

⁴⁶ 521 U.S. 811 (1997).

⁴⁷ *Bethune-Hill II*, 139 S. Ct. at 1953–54. *Raines* had held that individual members of Congress could generally not assert an institutional injury, outside of exceptional cases. *Raines*, 521 U.S. at 820–21, 823 (distinguishing *Coleman*, 307 U.S. 433, where the Court upheld standing for legislators who had the votes to defeat a legislative act but whose votes were nullified).

⁴⁸ *Bethune-Hill II*, 139 S. Ct. at 1954.

⁴⁹ 406 U.S. 187 (1972) (per curiam).

⁵⁰ *Bethune-Hill II*, 139 S. Ct. at 1954.

⁵¹ *Id.* at 1955.

⁵² *Id.* Justice Ginsburg also noted that when *Beens* was decided, the Court had not yet held that intervenor status was insufficient to establish standing on appeal. *Id.*

⁵³ *Id.* at 1955.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1956.

⁵⁷ *Id.*

Justice Alito dissented.⁵⁸ He argued the House had suffered a “fundamental” injury in fact sufficient to invoke Article III standing, focusing on the second of the House’s three arguments for its injury.⁵⁹ Justice Alito wrote, “[w]hen the boundaries of a district are changed, the constituents and communities of interest present within the district are altered . . . [and t]he cumulative effects of all the decisions that go into a districting plan have an important impact on the overall work of the body.”⁶⁰ “Districting matters.”⁶¹ The House, Justice Alito explained, is like a string quartet or basketball team, each of which has a legitimate interest in how its members are chosen and who those members are.⁶² Justice Alito argued that “even if the effect of the court order was greater in *Beens* than it is here, it is the existence — not the extent — of an injury that matters for purposes of Article III standing.”⁶³

Finally, Justice Alito accused Justice Ginsburg of disregarding traditional standing requirements,⁶⁴ and instead relying on “some other, only-hinted-at reason”: *Raines v. Byrd* and the “federal separation-of-powers concerns” it raised.⁶⁵ He pointed to the Court’s citation of *Raines*’s requirement of a “judicially cognizable” injury, and cited to briefs by the United States, writing as an amicus, and the State, which drew analogies to federal separation of powers.⁶⁶ Justice Alito called such arguments “seriously flawed because the States are under no obligation to follow the Federal Constitution’s model.”⁶⁷ Rather, “separation of powers (or the lack thereof) under a state constitution is purely a matter of state law.”⁶⁸

In his closing paragraphs, Justice Alito implied that Justice Ginsburg’s majority opinion was subtly — but crucially — influenced

⁵⁸ Justice Alito was joined by Chief Justice Roberts and Justices Breyer and Kavanaugh.

⁵⁹ *Bethune-Hill II*, 139 S. Ct. at 1956 (Alito, J., dissenting). Justice Alito did not address the first prong of Justice Ginsburg’s argument: that the House could not assert standing on behalf of the State. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1957. As Professor Richard Pildes notes, “[t]hese comments . . . are in tension with one argument Justice Scalia made in his plurality opinion in *Vieth* [*v. Jubelirer*, 541 U.S. 267 (2004)], in which he argued it is ‘impossible to assess the effects of partisan gerrymandering’ because who knows how voters will vote from election to election.” Richard Pildes, *Justice Alito’s Dissent in Bethune-Hill II*, ELECTION L. BLOG (June 17, 2019, 9:03 AM), <https://electionlawblog.org/?p=105644> [<https://perma.cc/HSV2-DNM9>]; see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019) (“Experience proves that accurately predicting electoral outcomes is not . . . simple.”).

⁶² *Bethune-Hill II*, 139 S. Ct. at 1957 (Alito, J., dissenting).

⁶³ *Id.* at 1958.

⁶⁴ A plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.* at 1956 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

⁶⁵ *Id.* at 1958.

⁶⁶ *Id.* at 1958–59.

⁶⁷ *Id.* at 1959.

⁶⁸ *Id.*

by separation-of-powers concerns that only exist at the federal level, where courts must consider the Constitution's limits on legislative power. Justice Ginsburg did not respond to this assertion, and her opinion did not differentiate between state and federal standing. However, the critique misses the mark for three reasons. First, *Raines* was not necessary to Justice Ginsburg's argument. Second, *Raines* did not rely on separation-of-powers concerns as characterized by Justice Alito. It was aimed to limit the judiciary's power rather than the legislature's. Third, this concern for the proper role of federal courts should be present in state legislative standing cases as well as in congressional standing cases. Under Justice Alito's model, where congressional standing is consistently harder to establish than state legislative standing, *Bethune-Hill II* might bar a single house of Congress from asserting standing in a similar situation. However, given the weaknesses of that model, courts should be cautious in extending the holding to the federal context.

The first problem with Justice Alito's critique is that Justice Ginsburg's conclusion did not require *Raines*, but rather rested on state legislative standing cases and traditional standing requirements. She merely analogized to *Raines*. Justice Alito was clearly correct that Justice Ginsburg's opinion did not explicitly express whether it ought to be applied to congressional standing.⁶⁹ However, in her analysis of the House's claim, Justice Ginsburg distinguished *Bethune-Hill II* from a series of *state* legislative standing cases in which the Court allowed standing,⁷⁰ writing "[t]his Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage."⁷¹ Justice Ginsburg distinguished one such case the House had cited, *Vesilind v. Virginia State Board of Elections*,⁷² reasoning that although the House had intervened as a defendant there, it was *defending* a favorable decision on appeal, as opposed to attempting to invoke a court's jurisdiction.⁷³ Therefore, standing was not required. Justice Ginsburg also differentiated a prior Supreme Court decision that New Jersey's legislature "had authority under state law to represent the State's interests," because the state law in that case had no provision

⁶⁹ This lack of clarity contrasts with *Arizona State Legislature v. Independent Redistricting Commission*, where the Court explicitly said "[t]he case before us does not touch or concern the question whether Congress has standing to bring a suit against the President." 135 S. Ct. 2652, 2665 n.12 (2015). However, some of the Court's pronouncements could be read to limit the case's reach to questions of standing to appeal, or even to the redistricting context. *Bethune-Hill II*, 139 S. Ct. at 1954.

⁷⁰ *Bethune-Hill II*, 139 S. Ct. at 1953–54.

⁷¹ *Id.* at 1953.

⁷² 813 S.E.2d 739 (Va. 2018).

⁷³ *Bethune-Hill II*, 139 S. Ct. at 1952.

similar to the Virginia law vesting the state attorney general with the exclusive authority to represent the State in civil suits.⁷⁴

Indeed, the “judicially cognizable” language from *Raines* that Justice Alito so objected to was also used in *Lujan v. Defenders of Wildlife*,⁷⁵ which did not involve legislative standing.⁷⁶ As articulated in *Raines*, a “judicially cognizable” injury requires “an invasion of a legally protected interest which is . . . concrete and particularized,”⁷⁷ and “traditionally thought to be capable of resolution through the judicial process.”⁷⁸ Neither of these requirements necessarily hinges on the presence of a federal legislative actor.

The second weakness in Justice Alito’s critique is that *Raines*’s characterization of separation of powers is focused on limiting the judiciary’s power, as opposed to the legislature’s. Chief Justice Rehnquist authored the majority opinion in *Raines*, holding that a group of congressmen did not have standing to challenge a federal law because they failed to allege a “personal, particularized, concrete, and otherwise judicially cognizable” injury.⁷⁹ He wrote that “the law of Art. III standing is built on a single basic idea — the idea of separation of powers,”⁸⁰ which he defined as the “overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere.”⁸¹ It is this view of separation of powers — one focused on regulating the judiciary — that is central to *Raines*.

It is actually Justice Souter’s concurrence in the judgment in *Raines*, which Justice Ginsburg joined, that relied on separation of powers as characterized by Justice Alito in *Bethune-Hill II*.⁸² Justice Souter observed that “[a]lthough the contest here is not formally between the political branches . . . , it is in substance an interbranch controversy about calibrating legislative and executive powers.”⁸³

The *Raines* Court explicitly declined to rest on a distinction between state and federal standing,⁸⁴ despite noting that “our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other

⁷⁴ *Id.* (quoting *Karcher v. May*, 484 U.S. 72, 82 (1987)).

⁷⁵ 504 U.S. 555 (1992).

⁷⁶ *Id.* at 575.

⁷⁷ *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (citing *Lujan*, 504 U.S. at 560).

⁷⁸ *Id.* at 819 (citing *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

⁷⁹ *Id.* at 820.

⁸⁰ *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

⁸¹ *Id.* The Chief Justice also noted “[t]here would be nothing irrational about a system” that allowed for more expansive legislative standing to assert institutional injuries. *Id.* at 828. However, “it is obviously not the regime that has obtained under our Constitution to date,” which instead “contemplates a more restricted role for Article III courts.” *Id.*

⁸² *Id.* at 830 (Souter, J., concurring in the judgment).

⁸³ *Id.* at 833.

⁸⁴ *Id.* at 825 n.8 (majority opinion).

two branches of the Federal Government was unconstitutional.”⁸⁵ The majority did not distinguish *Raines* and *Coleman* — the case involving state legislators bringing a case against legislative action they had opposed — on the grounds that state and federal legislative standing are fundamentally different. Instead, it distinguished the cases based on the positions of the legislative plaintiffs,⁸⁶ noting that “[t]he one case in which we have upheld standing for legislators (albeit *state* legislators) claiming an institutional injury is *Coleman v. Miller*.”⁸⁷ That case “stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”⁸⁸

A third weakness of Justice Alito’s critique of the *Bethune-Hill II* majority is that judicial separation-of-powers concerns *can* be influential in state legislative standing cases. Limiting the power of federal courts is a concern in cases involving state legislatures as well as in those involving Congress. Such a concern is not dependent on the identity of the parties themselves but on the nature of the controversy, and whether it is an appropriate one to be settled by a federal court.⁸⁹ Separation-of-powers concerns can also limit the politicization of the courts, a phenomenon that certainly occurs in cases involving state legislatures. Allowing legislators — whether state or federal — to easily bring suits lets them avoid compromise with the executive and other government actors and lessens the need to resolve disputes through the political process.⁹⁰ And, although Justice Alito’s separation-of-powers concerns might point to a higher bar for congressional standing than for state legislative standing,⁹¹ federalism concerns can go in the other direction. Federal courts might well be more cautious when deciding whether to settle a dispute between branches of state government than when considering a similar dispute between the federal branches.⁹² In either the

⁸⁵ *Id.* at 819–20.

⁸⁶ *Id.* at 824, 825 n.8.

⁸⁷ *Id.* at 821.

⁸⁸ *Id.* at 823 (internal citations omitted).

⁸⁹ Indeed, some might argue that this concern is better characterized as falling under the political question doctrine, rather than the legislative standing doctrine. See *Flast v. Cohen*, 392 U.S. 83, 100 (1968).

⁹⁰ Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 *IND. L.J.* 845, 846–47 (2018).

⁹¹ On the other hand, the U.S. House of Representatives recently argued that applying this ruling broadly at the federal level “would disturb the longstanding balance between coequal branches and would invite severe harm to our constitutional structure.” Supplemental Brief of the U.S. House of Representatives at 7, *Texas v. Azar*, No. 19-10011 (5th Cir. July 5, 2019) [hereinafter House Brief].

⁹² See Tom Campbell, *Executive Action and Nonaction*, 95 *N.C. L. REV.* 553, 594 (2017) (“Deferral to states’ authority to sort out their own powers, however, was the basis for the holding on

state or federal context, courts “must [in the words of Justice Alito] consider whether [an attempt to assert legislative standing] is consistent with the structure created by the Federal Constitution.”⁹³

Questions have quickly arisen as to how broadly *Bethune-Hill II*'s holding should be applied and whether it can be extended to congressional standing.⁹⁴ In the ongoing Affordable Care Act litigation, the Fifth Circuit specifically asked for briefs on the applicability of *Bethune-Hill II*,⁹⁵ with the House arguing that the federal government has statutorily authorized the House and the Senate, “separately or jointly,” to intervene when the Department of Justice refuses to defend a law.⁹⁶ Under Justice Alito's analysis, one might assume any restriction of state legislative standing should apply with equal or stronger force at the federal level, as concern for the separation of powers should only increase in a congressional standing case. However, as described above, the distinctions between state and federal legislative standing are not so simple. *Bethune-Hill II* has clarified how courts should treat single bodies of bicameral legislatures at the state level, but questions remain as to how broadly that rule should be applied.

the merits in *Arizona Independent Redistricting Commission*. Such a federalism concern suggests strongly that the Court be *more* circumspect of inserting itself into a claim by state legislators against other organs of state government than it would be to resolve a dispute between the two branches of the federal government.” (footnote omitted); see also *Raines*, 521 U.S. at 825 n.8 (noting the appellants' argument that in *Coleman*, “any federalism concerns were eliminated by the Kansas Supreme Court's decision to take jurisdiction over the case”); *id.* at 832 n.3 (Souter, J., concurring in the judgment) (agreeing with the majority opinion that “*Coleman* may well be distinguishable [from *Raines*] on the . . . ground that it involved a suit by state legislators that did not implicate . . . federalism concerns (since the Kansas Supreme Court had exercised jurisdiction to decide a federal issue)”).

⁹³ *Bethune-Hill II*, 139 S. Ct. at 1959 (Alito, J., dissenting).

⁹⁴ See, e.g., Katie Keith, *Fifth Circuit Questions Standing of Parties Defending ACA in Texas v. Azar*, HEALTH AFF. BLOG (June 28, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190628.614120/full> [<https://perma.cc/ADY2-7DWN>]. Even before the Court heard oral arguments in *Bethune-Hill II*, one Court observer predicted “this seemingly irrelevant gerrymandering dispute could enable the Trump administration to collude with a highly partisan judge to shut down the Affordable Care Act in a bevy of red states.” Ian Millhiser, *Supreme Court to Hear a Subtle but Terrifying Threat to Obamacare*, THINK PROGRESS (Nov. 13, 2018, 1:04 PM), <https://thinkprogress.org/scotus-threat-obamacare-ce7e3129ec54> [<https://perma.cc/E4RV-7WWH>].

⁹⁵ Todd Ruger, *Appeals Court Move Potentially an “Ominous” Sign for Obamacare*, ROLL CALL (June 26, 2019, 5:00 PM), <https://www.rollcall.com/news/congress/appeals-court-move-potentially-ominous-sign-obamacare> [<https://perma.cc/7T2C-UCDY>] (quoting a warning by Professor Nicholas Bagley that the “odds that the Fifth Circuit does something nasty to the health reform law have gone up”).

⁹⁶ The U.S. House argued in that litigation that Congress created exceptions to the general federal rule cited by Justice Ginsburg — that the “‘conduct of litigation’ is ‘reserved’ to DOJ by federal statute.” House Brief, *supra* note 91, at 5 (quoting 28 U.S.C. § 516 (2012)). “Federal law . . . directs DOJ to inform Congress whenever DOJ refuses to defend the constitutionality of a federal statute, ‘within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding.’” *Id.* at 6 (citing 28 U.S.C. § 530D(b)(2)).