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CONGRESSIONMEN IN COURT: THE NEW PLAINTIFFS*

The Honorable Carl McGowan**

The last decade has seen the birth and the coming of age of a new kind of lawsuit: one brought by a member of Congress challenging an action of the executive branch as injurious to some interest he or she claims to have as a legislator. Senators and Representatives, either singly or in small groups, have invoked the judicial power for purposes such as forcing the executive to publish as law a bill that had been the subject of an allegedly improper pocket veto,1 granting the House of Representatives the right to vote on the cession of the Panama Canal,2 and continuing in effect our mutual-defense treaty with Taiwan despite presidential action purportedly terminating it.3 In these and other cases, the congres-
sional plaintiffs arguably attempted to circumvent the political process by obtaining in court a remedy that could be obtained from Congress.

Serious separation-of-powers questions inevitably accompany any effort by members of the legislature to enlist the judiciary's aid in a dispute with the executive. The issues involved typically are poorly suited for judicial resolution. Moreover, any intrusion by the judiciary into a dispute between its coequal branches seems fraught with difficulties. The problems are multiplied when the plaintiff could have obtained from Congress the substantial equivalent of the judicial relief sought, because in such cases the court is asked to intrude into the internal functionings of the legislative branch itself.

These problems have troubled congressmen and judges alike. In a lengthy discussion on the Senate floor two days after oral argument on the Taiwan treaty case in the court of appeals, several Senators decried judicial-branch involvement in the dispute. Majority Leader Robert Byrd said that "treaty termination... should be resolved between the Senate of the United States and the President. It should not be left to the judicial branch to decide an issue we should confront here." Senator Jacob Javits was "very unhappy... to see the procedures of the Senate and the relationships between the Senate and the President under the Constitution determined by a court." Senator Harry F. Byrd, Jr., while maintaining that Senate approval was required, declared it to be "unfortunate... that the courts are involved in this."

These comments coincided with those of a very distinguished and uniquely qualified witness who earlier had testified by invitation before the Senate Foreign Relations Committee on a sense of the Senate resolution stating that Senate approval is required to terminate any mutual-defense treaty. That witness was the Honorable Dean Rusk of the University of Georgia School of Law. Professor Rusk said to the Committee:

I, myself, believe that the question of the continuing validity of a treaty, and especially a mutual defense treaty, is not a matter for the courts. This is a political matter of the highest

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* Id. at S16,688.
* Id. at S16,691.
importance, on which the courts have neither the competence nor the responsibility. It is a question for the political branches of the Government, and if there are differences between a President and a Congress, these differences should be worked out and resolved by political processes.

The late Chief Justice Earl Warren visited our law school shortly before his death and, on that occasion, reminded us that if each branch of the Federal Government were to pursue its own constitutional powers to the end of the trail, our system simply could not function. It would freeze up like an engine without oil. . . .

Judges have also been acutely aware of the problems inherent in these suits. In a 1977 case holding that a member of the House of Representatives lacked standing to complain of allegedly illegal CIA activities and appropriations when his own legislative reform proposals to this end had failed of enactment, Judge Wilkey noted that expansive concepts of standing in this context “would lead inevitably to the intrusion of the courts into the proper affairs of the co-equal branches of government.” In the Taiwan treaty case, Judge Wright, speaking for himself and Judge Tamm as the two members of the court of appeals en banc who concluded that the congressional plaintiffs lacked standing, commented that the issue was “rooted in the dynamic relationship between the two political branches” and that hearing the suit would invite “additional unnecessary, and potentially dangerous, judicial incursions into the area.”

The courts have responded to these concerns by pressing a variety of doctrines into service to restrict the access of congressional plaintiffs to the courts. The district courts and courts of appeals have relied chiefly upon the standing doctrine to dismiss suits where the congressional plaintiffs could not show concrete injury to their legally protected interests. Last year, however, the Supreme

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10 See, e.g., Reuss v. Balles, 584 F.2d 461 (D.C. Cir.), cert. denied, 439 U.S. 997 (1978) (congressman lacked standing to complain about appointment of members of Federal Reserve Open Market Committee because his power was not diminished thereby); Metcalf v.
Court relied upon the ripeness and political question doctrines, rather than standing, in simultaneously granting certiorari and directing the dismissal of the complaint in the Taiwan treaty case.\textsuperscript{11}

None of these traditional forms of judicial restraint adequately addresses the special problems posed when congressmen sue the executive branch. The standing, political question, and ripeness doctrines are notoriously difficult to understand and to apply, and they fail in varying degrees to account for the underlying separation-of-powers concerns. After discussing these problems, this Article suggests that a better approach is available through the use of the courts' traditional discretion to grant or withhold equitable relief. The Article then turns to two cases to demonstrate that application of this equitable discretion to congressional-plaintiff actions is compatible both with our constitutional scheme and with the legitimate rights of legislators.

I.

The first case to have any substantial effect on later developments\textsuperscript{12} was \textit{Kennedy v. Sampson},\textsuperscript{13} decided by the court of ap-
peals in 1974. Senator Kennedy sued two executive-branch officials to compel publication of an act of Congress as law, contending that the President had failed to achieve a valid pocket veto by relying upon Congress's Christmas recess as the period within which the bill would expire if not signed. Senator Kennedy alleged that he had suffered injury in fact to his interests as a legislator sufficient to establish his standing because the pocket veto had nullified his vote in favor of the bill. The Government responded that only a majority of a house of Congress had standing to challenge the nullification of its vote by the executive. The court rejected that argument, noting that present standing rules allowed one member of a group that had suffered a common injury to sue, even if other members of the group chose not to do so.

The *Kennedy* court did not pay special attention to the separation-of-powers concerns inherent in any effort by a single congresswoman to transform legislation into law by judicial fiat. However, because *Kennedy* did reflect current thinking about standing, it was principally relied upon by later courts in evaluating the injuries sustained by congressional plaintiffs. To be sure, many of these litigants were turned away from the courts because the alleged injuries to their "effectiveness" as legislators were not thought to rise in the President's handling of the war. Instead, the court, leaving aside the issue of whether former President Johnson had the power to engage in hostilities, declared that then-President Nixon had the power as Commander-in-Chief to wind up this country's military involvement with Indochina in an orderly fashion. Whether President Nixon was really terminating America's war effort in southeast Asia was, to the court, another political question that judges could not decide. Id. at 615-16.

*Mitchell v. Laird*, unlike *Holtzman v. Schlesinger*, declared that the plaintiff-legislators had standing to maintain their action against the executive branch. The *Mitchell* court reasoned that a judicial declaration on the legality of the Vietnam War would "bear upon" these plaintiffs' actions as legislators by providing them with useful information. Id. at 614. However, *Mitchell* was ignored in *Kennedy v. Sampson* and its authority explicitly undermined by *Harrington v. Bush*, 553 F.2d 190, 209 (D.C. Cir. 1977). The *Harrington* court pointed out that the "bears upon" test actually legitimizes advisory opinions, because plaintiffs are seeking any judicial statement regardless of its content. If the plaintiffs' injury would be redressed as well by a loss as by a victory on the merits, then they are suffering no injury in fact at all.

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13 511 F.2d 430 (D.C. Cir. 1974).
14 Id. at 432.
15 Id. at 435.
to the level of the injury sustained in *Kennedy*.

Although post-*Kennedy* cases generally had held legislators to lack standing, no court has raised significant questions about the viability of *Kennedy* itself. Thus, when *Goldwater v. Carter*, a case brought by a small group of Senators and Representatives alleging that President Carter could not terminate the Mutual Defense Treaty with Taiwan without either a two-thirds vote of the Senate or a majority of both houses of Congress,

The issue of standing had figured heavily in the *Goldwater* case even before it had reached the court of appeals. The district court had dismissed without prejudice the first suit brought by Senator Goldwater and his colleagues pending the outcome of a vote on a resolution asserting, as a general principle, the Senate's right to vote on treaty terminations. After the Senate had taken a preliminary favorable vote on the resolution, the plaintiffs returned to the district court, which now held that they had standing to challenge presidential termination of the Taiwan treaty. From the district court's determination on the merits that the treaty could only be terminated with the advice and consent of two-thirds of the

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19 See *Goldwater v. Carter*, 617 F.2d 697, 701-03 (D.C. Cir.) (en banc), judgment vacated, 444 U.S. 996 (1979) (mem.).
21 I should perhaps make clear precisely what the proceedings were in the Senate with respect to the Taiwan matter. After President Carter had given his one-year notice of termination, Senator Harry Byrd introduced his resolution stating the sense of the Senate to be that Senate approval was required to terminate any mutual-defense treaty. This was referred to the Senate Foreign Relations Committee which, after hearings, voted to replace it with a resolution detailing a number of bases upon which the President could act to terminate a treaty. The Senate voted, however, 59 to 37, to substitute the Byrd resolution for the Committee's proposal.

Before the hearing of the appeal in the court of appeals, the majority leader said that he had been conferring with Senator Goldwater and had reason to believe that an agreement could be reached. The hopes then aroused on the court's part of not having to decide the appeal vanished when, after the oral arguments, the Byrd resolution was called up for consideration and then cast into limbo when the majority leader and Senator Goldwater disagreed as to whether approval of the President's action would require a two-thirds vote or a mere majority. It seems obvious that both the majority leader and Senator Goldwater had counted the heads very carefully.
After hearing the case *en banc*, the court of appeals issued a *per curiam* opinion holding that (1) the Senators had standing to sue, but (2) the President could terminate the Taiwan treaty without the advice and consent of the Senate. The court noted that it had taken pains to distinguish two different kinds of claims, only one of which could support a finding of injury in fact. A legislator's claim that his effectiveness had been diminished because the executive had failed to administer a statute properly or had not provided the legislator with complete or accurate information had been unanimously rejected as a basis for standing after *Kennedy*. On the other hand, interference with a legislator's right to vote that amounted to a "disenfranchisement, a complete nullification or withdrawal of a voting opportunity" as measured by an objective textual standard was considered to be a cognizable injury in fact.

The difficulty in *Goldwater* was finding something akin to a disenfranchisement, a difficulty compounded by the circumstances that the Senate had not taken final action on any of the general resolutions, and that at no time did even thirty-four Senators expressly assert that they would vote against the termination of the Taiwan treaty. The court resolved the problem by noting that thirty-four Senators could never force an unwilling Senate to take a vote on any declaration of their right to block rescission of the Taiwan treaty and therefore no legislative remedy existed to which plaintiffs could be directed. Further, there was no way of ensuring that the President would heed any Senate action on the Taiwan treaty, since his opposition to giving the Senate any voice in treaty termination had been made clear beyond cavil. The court therefore held that President Carter's refusal to submit the Taiwan treaty

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23 *Id.* at 703. The reasoning employed on the merits was equally applicable to the claims of plaintiff-Representatives, see *id.* at 703-09; the discussion of standing, however, focused largely on the plaintiff-Senators, see *id.* at 702-03. Judge MacKinnon, dissenting in part, concluded that treaties could be terminated by majority vote of both houses of Congress, see *id.* at 739 (MacKinnon, J., dissenting in part).

for Senate action deprived the plaintiffs "of an opportunity to cast a binding vote" because "they ha[d] no legislative power to exercise an equivalent voting opportunity."\(^{25}\)

Chief Judge Wright, in a separate opinion,\(^{26}\) read our *Kennedy* opinion more narrowly, drawing a distinction between nullification of votes already taken and denial of opportunities to vote.\(^{27}\) He asserted that no legislator could suffer injury in fact until Congress had suffered injury in fact, and that this could not happen until "the Executive has thwarted its will."\(^{28}\) He drew the conclusion that there was no legislative will to thwart until "Congress has spoken unequivocally."\(^{29}\) The injury suffered by Senator Kennedy was different because it was "wholly dependent on the harm to the past vote."\(^{30}\)

In a memorandum opinion, the Supreme Court vacated the court of appeals' judgment that the Senate had no right to vote on termination of this treaty on the grounds that, for one reason or another, the plaintiffs did not pose a question susceptible to judicial resolution. The justices did not conclude that the plaintiffs lacked standing. Rather, in separate opinions by Justices Powell and Rehnquist, they relied upon the doctrines of ripeness and political question, respectively.\(^{31}\)

Justice Rehnquist, joined by Justices Stewart and Stevens as well as the Chief Justice, held that the plaintiffs had presented a

\(^{25}\) Goldwater v. Carter, 617 F.2d 697, 703 (D.C. Cir.) (en banc), judgment vacated, 444 U.S. 996 (1979) (mem.).

\(^{26}\) Judge Wright's opinion was styled a concurrence, because it was a decision in favor of President Carter on the standing issue. The majority opinion had found for the President on the merits, determining that he need not have submitted the termination of the Taiwan treaty to the Senate. Judge Wright, however, disagreed with the majority on the standing issue.

\(^{27}\) 617 F.2d at 712 (Wright, C.J., concurring).

\(^{28}\) *Id.*

\(^{29}\) *Id.* (citation omitted).

\(^{30}\) *Id.* at 712 n.5.

\(^{31}\) Goldwater v. Carter, 444 U.S. 996 (1979) (mem.). Six justices concurred in summarily vacating the court of appeals' judgment. Justice Marshall, although concurring in the result, did not join either opinion. Justices Blackmun and White dissented in part, stating their desire to set the case down for oral argument. *Id.* at 1006 (White & Blackmun, JJ., dissenting). Justice Brennan dissented, arguing for affirmance of the court of appeals opinion on the grounds that the President alone has the power to grant or withdraw recognition of a foreign government and that abrogation of the treaty was a necessary consequence of the President's decision to withdraw recognition of the Taiwanese regime. *Id.* at 1006-07 (Brennan, J., dissenting).
nonjusticiable political question based upon the traditional tests articulated in *Baker v. Carr.* He noted that the Constitution was silent on the issue of treaty termination, leaving judges with no judicially manageable standards for resolution of the issue. He also relied upon the nature of the case as bearing upon the foreign relations of the United States to make his conclusion more “compelling.”

Justice Powell, unable to accept the application of the political question doctrine to treaty disputes in general, relied upon the doctrine of ripeness. He argued that the reasoning underlying Justice Rehnquist’s opinion was too broad: it would render nonjusticiable a challenge to presidential implementation of a treaty that the Senate had voted to reject because the Constitution does not state in so many words the legal effect of a treaty signed by the President but rejected by the Senate. Moreover, Justice Powell did not understand how this case fitted into the traditional categories of nonjusticiable political questions. He noted that there was neither a textual commitment of the question to a coordinate branch of government nor prudential considerations against intervention in a properly-presented treaty termination case. Disagreeing with Justice Rehnquist, Justice Powell stated that there was no lack of judicially ascertainable standards to resolve the question. “Resolution of the question may not be easy,” he said, “but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue.” Justice Powell concluded, instead, that the instant dispute was not ripe for adjudication because the Senate had never taken any final action on the resolution asserting its right to vote on treaty terminations. Thus, the Court could “not

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Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.


24 Id. at 999-1000.

25 Id. at 999.
know whether there ever will be an actual confrontation between the Legislative and Executive branches.\textsuperscript{36}

In the aftermath of Goldwater, the present learning on congressional suits against the executive appears unsettled at best. With respect to standing, the court of appeals was unable to agree upon the precise scope of Kennedy. The Supreme Court does not appear inclined to employ standing at all, but could not muster a majority for either political question or ripeness. The fault may lie not with the courts, but with the formulae that have been thought relevant to suits by congressional plaintiffs against the executive. A closer examination of the doctrines of standing, ripeness, and political question as they relate to these lawsuits seems, therefore, to be in order.

II.

When a congressional plaintiff asks for a declaratory or injunctive remedy against the executive branch, the court's decision must be grounded in an understanding of the proper function of the judicial branch in our constitutional scheme. In some cases, a court could award an equitable remedy without danger of infringing the principle of separation of powers. In other cases, however, equitable relief may result in impermissible judicial intrusion into the functions of a coordinate branch of government. The principles of law applied by a court in determining whether to hear a particular case should be capable of distinguishing between these situations.

A court's reluctance to hear a congressional plaintiff's claim on the merits is most pronounced when the dispute appears to be not with the executive branch so much as with fellow legislators. In holding that the plaintiff lacked standing as a legislator to challenge the membership of the Federal Reserve Open Market Committee when his proposed bill to change the membership had failed of passage, the court of appeals commented that "[t]his circumstance, while certainly not fatal to his standing claim, does illustrate that his actual controversy lies, or may lie, with his fellow legislators. . . ."\textsuperscript{37} In Harrington v. Bush, the court noted that the plaintiff's complaint that CIA appropriations were hidden in other budget accounts was

\textsuperscript{36} Id. at 998.

imposed by the House of Representatives through its own rules; yet appellant had sued, not the House, but . . . the Executive Branch. . . . What appellant would have us do here is to intervene on behalf of one member of the Legislative Branch to change 'the rules of its proceedings' adopted by the entire body of the House. This we should not do.\textsuperscript{38}

In these circumstances, the separation-of-powers concerns are most acute. The court said in Harrington \textit{v.} Bush that "[i]n deference to the fundamental constitutional principle of separation of powers, the judiciary must take special care to avoid intruding into a constitutionally delineated prerogative of the Legislative Branch."\textsuperscript{39} The cases in which a plaintiff has tried and failed to gain relief from his colleagues, or not tried at all, present judges not with a chance to mediate between the two political branches but with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking. Usually, the named defendant is an executive branch official, leaving the real disputants behind on Capitol Hill when the plaintiff removes the dispute to a federal courthouse. This meddling with the internal decisionmaking processes of one of the political branches extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power.

On the other hand, the judiciary cannot refuse to entertain disputes merely because they do not admit of simple resolution or implicate key constitutional concerns. Judges should not refuse to hear the claim of any litigant, even a legislator whose dispute is with his colleagues, without consistent application of a principled rationale. If, under the general rules regulating the adjudication of cases and controversies, a congressional litigant has standing and tenders a justiciable claim, then the courts cannot simply refuse in their discretion to decide the merits unless they provide sound reasons of general applicability for their decision. Professor Herbert Wechsler has said that "[t]he courts have both the title \textit{and the duty} when a case is properly before them to review the actions of the other branches in the light of constitutional provisions."\textsuperscript{40}

\textsuperscript{38} 553 F.2d 190, 214 (D.C. Cir. 1977).
\textsuperscript{39} Id. (footnote omitted).
\textsuperscript{40} Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 Harv. L. Rev. 1, 19 (1959) (emphasis added).
Chief Justice Marshall warned, in *Cohens v. Virginia*:41

[This court . . . must take jurisdiction, if it should. The judiciary cannot . . . avoid a measure, because it approaches the confines of the constitution. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.]

The duty to decide justiciable cases, according to Professor Wechsler, is embedded in the doctrine of judicial review itself, as enunciated by Chief Justice Marshall in *Marbury v. Madison*. Professor Wechsler argues that if, as *Marbury* maintains, "[i]t is . . . the province and duty of the judicial department, to say what the law is,"42 then "there is no [discretionary] escape from the judicial obligation."43 In an analogous vein, Professor Gerald Gunther laments those who would transform a narrow ability to decline adjudicating certain cases into a "virtually unlimited choice in deciding whether to decide."44 Reliance on unprincipled grounds to avoid adjudication, Professor Gunther warns, can "frequently inflict damage upon legitimate areas of principle."45 He notes a final irony: unprincipled refusals to adjudicate justiciable cases where "there is an obligation to decide" are really "a virulent variety of free-wheeling interventionism."46

Therefore, it is important to arrive at a principled basis for denying some congressional plaintiffs a judicial forum, lest the desire to avoid undue intervention in the affairs of the political branches find expression in unreasoned — and unreasonable — refusals to adjudicate.

III.

In thinking about the use of the standing doctrine in these con-

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41 19 U.S. (6 Wheat.) 264, 404 (1821).
42 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
44 Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 17 (1964). Although Professor Gunther was speaking of the Supreme Court’s discretion to forbear deciding cases, his comments are, if anything, more applicable to the other article III courts, which lack the discretionary control over their dockets granted to the Supreme Court by its *certiorari* jurisdiction.
45 *Id.* at 22.
46 *Id.* at 25.
gressional plaintif cases, one is struck by the coincidence of the rise of the congressional suit against the executive with a series of remarkable fluctuations in the rigor of the standing doctrine. When Kennedy was handed down in 1974, the panel relied upon Association of Data Processing Service Organizations, Inc. v. Camp, a then-recent Supreme Court case greatly liberalizing the law of standing. The Camp Court established a two-part test for standing: injury (1) in fact, and (2) to an interest that the relevant law arguably seeks to protect. The Kennedy court’s inquiry into standing was structured along those lines, and found that nullification of an individual legislator’s vote was an injury against which the Constitution arguably provides protection.

Camp, however, has been far from the last word from the Supreme Court on standing. Warth v. Seldin added a third requirement: plaintiffs must establish that “prospective relief will remove the harm” caused by defendants. In Simon v. Eastern Kentucky Welfare Rights Organization, decided the next year, the Supreme Court further tightened standing requirements by imposing upon plaintiffs the duty to show that their injury was fairly traceable to the actions of the defendants. It was perhaps the restrictive tenor of these cases that led courts to scrutinize the claims of congressional litigants with particular care during this time.

Recent years, however, have seen a relaxation of the standing rules. In Duke Power Co. v. North Carolina Environmental Group, Inc., the Court added to the requirement of injury in fact only the burden of establishing that the injury would never come to pass but for the defendant’s conduct. Although the Duke Power decision professed fealty to the more restrictive lines of cases exemplified by Warth and Simon, the long chain of factual assumptions that it embodied has led Professor Davis to anoint it as one of the two most “liberal” standing decisions ever handed down by

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48 Id. at 152-53. See also Barlow v. Collins, 397 U.S. 159 (1970); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).
51 See, e.g., Harrington v. Bush, 553 F.2d 190, 205-06 & n.68 (“The precedential value of [Mitchell and Kennedy] for appellant lies in the degree to which the reasoning employed continues to be consistent with the broader framework established by the Supreme Court.”).
the Supreme Court.63

My purpose in briefly reviewing the general law of standing is not to criticize its development or present state, but merely to indicate that lower court judges have at least been dealing with a moving target. Whatever problems exist in applying the concept of standing to congressional litigants — and I believe that there are serious ones — are compounded by the continuing fluidity of the standing doctrine itself. It can hardly be surprising, therefore, that judges have not completely resolved the issue of congressional access to courts in the six years that saw dramatic changes in the doctrine most commonly applied to reject these suits.

The troubles with the use of standing in this context run deeper, however, than any lack of constancy in the concept itself. Its application to congressional plaintiffs leads judges, who start with the two firm principles running through virtually all of these cases, into a contradiction. The first principle is that the requirements of standing apply with equal rigor to congressional and private plaintiffs. The court in Harrington v. Bush said: "[T]here are no special standards for determining Congressional standing questions."64 The second requirement is that the plaintiff suffer an injury that his colleagues cannot redress. Thus, when congressional plaintiffs have sought to accomplish through the courts what they were unable to persuade their colleagues to do, they usually have been remitted to their legislative remedies.

There can be no peaceful coexistence between, on the one hand, the notion that legislators are treated like any other plaintiff for standing purposes, and, on the other, the idea that courts should rigorously scrutinize whether the congressional plaintiff's true quarrel is with his colleagues, rather than the executive. There is no general requirement that a private litigant employ self-help before seeking judicial relief.65 Nor should there be, because an ordinary plaintiff, having suffered injury in fact within the contemplation of the law he invokes, is entitled to his day in court. If the plaintiff passes the standing test and presents a justiciable dispute,

64 553 F.2d 190, 204 (D.C. Cir. 1977) (emphasis omitted).
it is assumed that the political branches have decided to commit such disputes to the judiciary and, barring extraordinary circumstances, that is a judgment which courts are bound to respect.\(^6\)

The underlying difficulty is that the reasons for restricting suits by legislators against the executive have little to do with the standing doctrine. Standing, although reflecting a desire for judicial restraint,\(^7\) does not address the separation-of-powers concerns inherent in any suit by a legislator against the executive branch. Nor should this be surprising, for standing has always been thought of as turning upon the relationship of plaintiff to claim,\(^8\) not upon the relationship of plaintiff to defendant that is so troublesome here. The issue is not the relationship of defendant's conduct to plaintiff's injury, as in \textit{Warth} or \textit{Simon}. Instead, the issue is plaintiff's status as a member, but not an authorized representative, of a political branch seeking to impose his will upon the other political branch.

The inability of the standing doctrine to reflect separation-of-powers concerns is reflected by the inability of its central notion, injury in fact, to encompass our special rules of legislator standing. Consider the requirement that the legislator lack collegial remedies. Senator Goldwater was no less injured by President Carter's refusal to submit the Taiwan treaty for termination before the

\(^6\) In attempting to reconcile these competing principles, judges also run the risk that, particularly in light of the current uncertainty of the standing doctrine, rules of standing adopted to control congressional access to courts will later be applied to deprive private litigants of their day in court.

\(^7\) The standing doctrine is based, in part, on article III's commitment to the judiciary of only "Cases" and "Controversies." See \textit{Association of Data Processing Serv. Orgs. v. Camp}, 397 U.S. 150, 151-52 (1970); \textit{Flast v. Cohen}, 392 U.S. 83 (1968). However, beyond this article III core lies a range in which courts, for prudential reasons "closely related to Art. III concerns but essentially matters of judicial self-governance," may dismiss the claim even though plaintiff presents a constitutionally sufficient injury. \textit{Warth v. Seldin}, 422 U.S. 490, 500 (1976). Thus, standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society." \textit{Id.} at 498 (citations omitted).

\(^8\) See \textit{Flast v. Cohen}, 392 U.S. 83, 102 (1968) ("Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power."); \textit{P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM} 156 (1972) [hereinafter cited as \textit{HART & WECHSLER}] ("the question of standing . . . is . . . whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons. . . .")).
Senate's preliminary vote on its resolution than afterwards. In addition, the general understanding of injury in fact does not admit of our distinction between objective injuries sufficient for standing and purely subjective injuries that are not. In circumstances other than congressional suits against the executive, a subjective injury is often considered to be injury in fact. Certainly, the plaintiffs in SCRAP, who had standing based upon their lessened enjoyment of Washington-area parks caused by alleged disincentives to recycling,\textsuperscript{59} suffered injuries no less subjective than did Representative Harrington, who claimed that lack of information about illegal CIA activities hampered his effort to oversee and monitor that agency.\textsuperscript{60}

The use of the standing doctrine to address the separation-of-powers concerns arising when federal legislators sue the executive branch in federal court is fraught with difficulties both in theory and in application. Although it has been the most popular method of judicial self-restraint in these cases, the recent Supreme Court decision in \textit{Goldwater}, which made no use of the term, suggests that its day may have passed insofar as these lawsuits are concerned. It remains to be seen whether the doctrines that the Court has used in its stead are either more elegant in their conception or more satisfying in their execution.

IV.

Justice Rehnquist came within one vote of rallying a majority of the Court around the proposition that the challengers of the Taiwan treaty termination had tendered a nonjusticiable political question. That relatively warm embrace of the political question doctrine, however, does not establish its worth nor ensure its triumph. Aside from the Taiwan treaty case, the recent history of the doctrine has been one of judicial indifference and scathing scholarly attack. The result has been to expose shortcomings in the doctrine that render it unsuitable for service in the analysis of congressional-plaintiff cases.

The last Supreme Court case to rely in any way upon the politi-


\textsuperscript{60} Harrington v. Bush, 553 F.2d 190, 200-03 (D.C. Cir. 1977).
cal question doctrine was the 1973 case of *Gilligan v. Morgan*,\(^{61}\) in which the Court dissolved a mandatory injunction to reform the Ohio National Guard because of perceived deficiencies in the case.\(^{62}\) These deficiencies included the “advisory nature” of the decree, the possibility that no controversy existed, standing problems, the difficulties of supervising the remedy, and the nature of the issue presented as “subjects committed expressly to the political branches of government.”\(^{63}\) It was the last ground that sounded very much like application of the political-question doctrine. The most recent case to rely squarely on the doctrine was *Colegrove v. Green*,\(^{64}\) a 1946 reapportionment case whose vitality was wholly sapped sixteen years later by *Baker v. Carr*.

Even more remarkable has been the withering academic attack on the political question doctrine. Professor Louis Henkin succeeded in analyzing the doctrine essentially out of existence. He argued persuasively that so-called “political question” cases were almost always decisions on the merits rather than determinations that the merits were nonjusticiable.\(^{65}\) In most cases, in short, the Court “does not refuse judicial review; it exercises it.”\(^{66}\) The factors articulated in *Baker v. Carr* merely indicate the situations in which deference to the political branches on the merits is most advisable.\(^{67}\)

The only true political question cases, according to Professor Henkin, are those involving the constitutional guarantee of a republican form of government.\(^{68}\) His colleague Professor Wechsler, while not taking quite as strict a view, nevertheless believed that the doctrine, when properly conceived of as a judicial refusal to decide the merits, was limited to situations where “the Constitution has committed the determination of the issue to another

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\(^{61}\) 413 U.S. 1 (1973).

\(^{62}\) Id. at 10.

\(^{63}\) Id. Professor Louis Henkin found the Court’s reasons for denying relief to be “not clear.” Henkin, *Is There A “Political Question” Doctrine?*, 85 Yale L.J. 597, 621 (1976).

\(^{64}\) 328 U.S. 549 (1946).

\(^{65}\) According to Professor Henkin, even the dissenters in *Baker v. Carr* agreed that malapportionment was justiciable, although they believed it to be constitutional. Henkin, *supra* note 63, at 607, 616-17.

\(^{66}\) Id. at 606.

\(^{67}\) Id. at 605-06 & nn.26-27.

\(^{68}\) Id. at 608-09, 622-23.
agency of government than the courts.” This grudging scholarly and judicial treatment of the doctrine is presumably attributable at least in part to a recognition of its inherent defects. In Professor Henkin’s view, the doctrine is “an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.”

Assuming that such an ambivalent doctrine may have some utility in deciding whether legislators may sue the executive, the proper inquiry is to determine whether the Constitution commits the matter at issue to some other body. Nothing in articles II or III suggests that, assuming the court has jurisdiction, anyone but the judicial branch should decide this question. In Goldwater, Justice Rehnquist limited his discussion to the merits of the case — not the characteristics of the plaintiffs — in concluding that the issue of treaty termination has been committed by the Constitution to the political branches. He admitted, however, that the Constitution speaks not at all of treaty termination, leaving the clarity of the textual commitment of the issue in some doubt. In any case, he did not assert the applicability of the doctrine to congressional suits generally.

Justice Rehnquist also employed another strand of the political question doctrine in support of his argument: the notion that a case lacking “judicially discoverable and manageable standards for” its resolution presents a nonjusticiable political question. If the Constitution is silent on the question, he argued, then it is impossible for courts to ascertain those judicially manageable standards. Professor Henkin believes that this consideration goes not to abstaining from judicial review, but to deferring on the merits to the determinations of the political branches, absent a clear constitutional trespass. Its applicability to our problem is thus debatable.

The question of treaty termination is one that, while difficult, hardly admits of no solution. The court of appeals found other

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69 Wechsler, supra note 40, at 9.
70 Henkin, supra note 63, at 622.
74 Henkin, supra note 63, at 605-06. See note 32 supra.
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constitutional materials, international law, and past cases suggesting that the Senate had no role in the termination of a treaty, at least in the situation where the treaty consented to by the Senate has a provision for unilateral termination by either party. The court was at some pains to make clear that it decided nothing with respect to the Senate’s power to condition its consent upon resubmission to it of any presidential action to terminate. Justice Powell, explaining why he could not dispose of this case under the political question rubric, remarked that its resolution “may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue.”

Justice Powell also noted that use of the political question doctrine in the Goldwater case might lead to unsound results in cases in which judicial intervention would be more appropriate. His example was a lawsuit by senators seeking to enjoin the President from putting into effect a treaty that had been rejected by the Senate. While Justice Rehnquist might conceivably be able to discern judicially manageable standards to resolve that dispute, other examples limited to the field of treaty termination would surely present Justice Rehnquist and those who joined him with a nonjusticiable political question. Assume that Senator Goldwater had rallied all of his colleagues to the position that (1) the Senate had a right to vote on treaty terminations, and (2) the Taiwan treaty specifically should remain in effect. Even if all 100 senators had voted to continue that treaty in force, use of the political question doctrine as articulated by Justice Rehnquist would close off all avenues of judicial relief to those senators.

The political question doctrine is even less capable of resolving other types of congressional-plaintiff problems. It turns upon an examination of plaintiff’s claim, not his identity or status. When Indian tribes questioned an attempted pocket veto by President Coolidge, the Supreme Court went to the merits without even mentioning the political question doctrine. It would be hard to explain why, when Senator Kennedy presents a similar claim, his status as legislator transforms the cause of action into a nonjusticiable political question. The political question doctrine, although concerned with the separation of powers, is arguably an inappro-

74 Okanogan Indian Tribe v. United States (The Pocket Veto Case), 279 U.S. 655 (1929).
appropriate method of resolving the problems presented by congressional suits against the executive branch.

V.

Justice Powell's vote to dismiss the complaint in the Taiwan treaty case was based upon the ripeness doctrine. He said that the Senate's failure to pass a final resolution asserting its right to vote on treaty terminations left the Court unable to ascertain whether there was an actual confrontation between the executive and legislative branches. Thus, Justice Powell's use of ripeness did implicate the principle that the judiciary should stay its hand unless persuaded that a legislator's dispute is with the defendant and not with his colleagues.

While Justice Powell was warranted in stressing the nature of the dispute in an effort to avoid unnecessary judicial involvement with Congress, the ripeness doctrine may not be the best way of translating these separation of powers concerns into rules of decision. Problems of ripeness usually exist when events that have not yet occurred are likely to have a significant effect on the litigation. Professor Gunther has identified some of these uncertainties:

The relationship between the parties is . . . still in flux and developing. . . . The plaintiff may not yet be able to say specifically what action he expects to take. Similarly, it may not yet be possible to say what specific actions the defendant will take against the plaintiff. The record in such a case will typically consist in part of predictions about the probable conduct of both parties; the parties' behavior turns on contingencies and requires guesses about the future.77

Two sorts of problems are raised. First, the dispute may be so unformed or hypothetical as to fall outside the article III grant of jurisdiction over cases and controversies. Thus a federal court may be without adjudicatory authority in very extreme cases, such as those calling for an advisory opinion.78 Second, a court may have power to adjudicate a marginally ripe dispute under article III, but choose not to. The court may wish to avoid a decision based on

78 See, e.g., Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Muskrat v. United States, 219 U.S. 346 (1911).
hypotheses that may never come to pass because the facts, once the dispute ripens, may suggest another outcome, or because the court believes, for many reasons based upon its desire for restraint, that it should restrict itself to cases presenting a clear and pointed dispute.

For example, the Supreme Court has recognized that judicial review of agency regulations before they are applied in specific situations can represent an undesirable intrusion upon the regulatory scheme instituted by the political branches, and has dismissed petitions for their review as unripe. Thus the ripeness doctrine, as serving judicial restraint, is not wholly incompatible with efforts to avoid intrusion in the affairs of the other two branches. Indeed, its use in Goldwater seemed appropriate, but its value in other contexts is more dubious.

It is hard to see how the ripeness doctrine could have been invoked to decide the Kennedy case, or any case where the claim depends upon alleged nullification of past votes. Senator Kennedy presented the court with a dispute turning on facts that had already occurred: the Congress had passed a bill, the President had not signed it, the defendants had not published it as law. While the court decided that case, it would be distinctly less eager to adjudicate a legislator’s claim that the executive had failed to enforce a law for which plaintiff had voted and thus had nullified his vote. But the facts supporting his claim would be no less ripe. Similarly, a legislator could allege that the executive had denied him information he needed to draft legislation or to oversee a government agency, and that dispute could be perfectly ripe, although wholly inappropriate for judicial intervention.

The problem, of course, is that the ripeness doctrine has no special sensitivity or relationship to the particular separation-of-powers concerns confronting the courts in this context. As such, its utility in the Goldwater case was essentially fortuitous and its value for future litigation is speculative.

VI.

Having toppled so many trees in the forest of judicial restraint,

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it may seem as if I have left judges with no place to hide when congressional plaintiffs come in search of a remedy operative against the executive branch. That is not the case. Although the existing methods that courts have used to forbear deciding these cases have proven unsatisfactory in varying degree, the judges who employed them were surely motivated by a proper respect for the political branches and a disinclination to intervene unnecessarily in their disputes. It may plausibly be asserted, therefore, that the best way to translate those concerns into principled decisionmaking is through the discretion of the federal court to grant or to withhold injunctive or declaratory relief.80

The federal courts have always embraced the notion that plaintiff's tender of a meritorious claim does not necessarily entitle him to equitable relief. In recent years, the Supreme Court has employed the doctrine of equitable discretion to turn away many plaintiffs seeking injunctions against pending or imminent state criminal proceedings. The leading case in this area, Younger v. Harris, explicitly "rests on the absence of the factors necessary under equitable principles to justify federal intervention. . . ."81

There have been suggestions that the Court's equitable discretion should be exercised not only upon considerations of federalism, as in the Younger line of cases, but in aid of the separation of powers as well. Concurring in Colegrove v. Green, where the Court held that reapportionment presented a nonjusticiable political question, Justice Rutledge insisted that the suit was more properly dismissed for want of equity, because an equitable remedy "may bring our function into clash with the political departments. . . ."82

Thirty years later, Professor Henkin turned to Justice Rutledge's notion of want of equity in his search for a suitable substitute for the political question doctrine. As I have already noted, Professor Henkin believed that the great majority of "political question" cases were actually determinations on the merits rather than dismissals for lack of justiciability. Since dismissal for want of

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80 This path was suggested in Note, supra note 55, at 1652-54, as a method of dealing with statutory claims. The Note suggested use of the political question doctrine to handle suits by congressmen alleging unconstitutional executive action. See id. at 1648-52.
81 401 U.S. 37, 54 (1971).
82 Colegrove v. Green, 328 U.S. 549, 564 (1946).
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equity is similarly not a determination of nonjusticiability, Professor Henkin concluded that use of equitable discretion would cut through the confusion that had overgrown the political question doctrine. He saw nothing anomalous in considering separation-of-powers questions to determine the propriety of equitable relief, given the public-interest considerations relied upon by judges to guide the exercise of their equity powers.84

Judges may employ an analogous discretion in refusing to grant plaintiff's request for a declaratory judgment. Innumerable cases have held that the granting of declaratory relief is discretionary with the court, to be exercised on the basis of reasoned judgment and sound principles.85 The separation-of-powers concerns that these congressional-plaintiff cases present are as worthy of respect as the federalism questions so often relied upon by federal courts in refusing to grant a declaratory judgment against state officials.86

Judges must, of course, have a principled standard for the exercise of their equitable discretion that will allow them to avoid intervening when the dispute is best left to the Congress, but to open the doors of the court when their failure to do so would place the constitutional system in greater peril. Their fear is that legislators will turn to the courts when the plaintiff's dispute is really with his fellow legislators. The disappointed legislator then asks the court to order the executive to do what Congress itself may not wish to be done. To avoid interfering with the work of the Congress, a court should use its equitable discretion to deny a remedy to any legislator who could get substantial relief from his fellow legislators.

This is not the same as an exhaustion requirement, because it does not merely postpone judicial relief. A legislator who unsuccessfully attempts to enlist Congress's aid will normally be unable to enlist the court's. In fact, it is far more likely under this standard that he will get an equitable or declaratory remedy when Congress, in agreement with him, takes action that is frustrated by the executive branch.

The argument is made that, even if Congress agrees with the leg-

84 Henkin, supra note 63, at 618-25 & nn.61-62.
85 See 6A Moore's Federal Practice ¶ 57.08(2) (1979).
The judiciary should stay its hand because Congress always has power to assert its will against the executive branch. This argument, if accepted, would almost always close the doors of the court even when one entire house of Congress itself appears as plaintiff. Other commentators have pointed out two significant problems with the argument. First, denying judicial relief on discretionary grounds would exalt the discretion of unelected judges over the decision of a political branch that judicial relief is appropriate. Second, remitting a particularized dispute to resolution through whatever paralytic devices Congress can muster disserves the efficient operation of our constitutional system.

Congress may be able to triumph on the issue presented to the court by refusing to vote appropriations, blocking presidential appointments, or engaging in other tactics that would frustrate the functioning of the government. The alternative to such frustration is for Congress to decide that its dispute is not worth the trouble it would cause, leaving one branch of government without any remedy at all. Surely the judiciary may have a legitimate role to play in helping a coordinate branch out of such a dilemma when Congress asserts that the executive has acted lawlessly. The congressional-standing cases have always drawn a bright line between the derivative suits, in which the legislator appears in court on behalf of himself or a small group, and those in which the legislator stands as the officially-authorized agent of a house of Congress. As Judge Leventhal said, in holding that one congressman acting as an agent for the House of Representatives could seek judicial assistance in enforcing a subpoena, “the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.”

Conceivably Congress may be able to make its wishes known by limiting a federal court’s discretion to withhold declaratory relief. As that discretion was bestowed by statute, Congress is arguably free to remove it either generally or with respect to particular cases. This ability to limit federal court discretion can be re-

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Id. at 1648.
The decision by Congress to remove a federal court’s discretion to award a declaratory judgment should not raise any constitutional concerns. Even if Congress stipulates that the courts lack discretion in one particular subject area, the courts are still free to reject the
garded as consistent with the overall notion that the decision of Congress to seek judicial review of executive action is, given the tender of a constitutionally-adequate dispute, of critical importance to any determination of justiciability vel non. The congressional decision to limit discretion is a determination that the federal courts should decide the case. In that regard, it appears to be no different from any other congressional action on a particular issue in aid of a legislator complaining of executive misconduct. In both cases, the federal court will decide the case with the support of at least one of the political branches.

Invoking the court's discretion to deny an equitable remedy when the petitioner could get adequate relief from his fellow legislators seems to be the most satisfying way of resolving these cases. It avoids the difficulties and confusions engendered by the doctrines of standing, political question, and ripeness, and affords the court wide latitude to choose the course that it believes to be most in the public interest under the precise circumstances before it. That choice obviously can comprehend adjudication on the merits as well as the staying of the court's hand.

Under this standard, both the Goldwater and Kennedy cases present extremely close questions. In the former, the senator-plaintiffs asserted that the President's notice of termination was subject to the consent of the Senate by a two-thirds vote. The Senate had, by a vote of fifty-nine to thirty-seven, amended a resolution to substitute language stating the sense of the Senate to be that its approval was required to terminate any mutual-defense treaty, but the majority leader never permitted this resolution to come to a final vote.¹ There were no proceedings of any kind in the House of Representatives related to the claim by the House plaintiffs that

claim on the merits. The freedom of the federal courts to reach a decision either way on the merits avoids the constitutional infirmities discussed in United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

¹ The power of Congress over a federal court's equitable discretion is a more murky question. It can be argued that such discretion is part of the "judicial power" and therefore can be exercised only by the tribunal from which an equitable remedy is sought. On the other hand, if it is constitutional for Congress to withdraw a federal court's equitable powers, see HART & WECHSLER, supra note 58, at 332-33, the relatively less-intrusive act of requiring courts to grant an equitable remedy to a prevailing party might seem part of Congress's power over the lower federal courts granted by article I, section 8 of the Constitution.

¹¹ See note 21 supra.
the termination required the approval of a majority of both houses.

This fact caused Justice Powell to say that it “cannot be said that either the Senate or the House has rejected the President’s claim. . . .,” and that if “the Congress chooses not to confront the President, it is not our task to do so.”92 In reaching a different conclusion as to standing, the court of appeals had stressed that, under the Senate Rules, there was no way the handful of senator-plaintiffs could force a final vote on the resolution. This perhaps only emphasizes, however, that Senator Goldwater’s grievance was really with the Senate itself.

As for Senator Kennedy, at first glance it might appear under the standard suggested here that he should have been ushered out of court. He had not even tried to pass his legislation in the new session of Congress, and no court could conclude that such an effort would be fruitless. However, Senator Kennedy might argue in response that his injury consisted in having to do over what he thought had been accomplished the first time, with consequent diminution in congressional efficiency if not in power.93 He could say that allowing the executive to double the amount of effort required to pass legislation through an unconstitutional pocket veto would be an unsound exercise of judicial discretion, and that there would be nothing to keep the President from trying that type of pocket veto again if circumstances allowed. The proper outcome of the case depends upon the injury of which Senator Kennedy complains: if it was the inability to enact the bill into law, then he should first have attempted a legislative remedy; if it was the delay and additional effort, then perhaps the course followed by the Kennedy court was justifiable. The continuing authority of the case, in the light of later developments, is at best uncertain.

Five years ago, I said that it “might . . . be unhealthy if the federal courts come to be regarded as a higher chamber where a legislator, who has failed to persuade his colleagues . . . can always renew the battle.”94 Since that time judges and legislators alike

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94 C. McGowan, Congress and the Courts 13 (University of Chicago Law School Occa-sional Paper No. 10, April 17, 1975).
have become ever more uneasy about judicial involvement in these suits. It is surely the duty of judges to say what the law is, but it is equally true that the separation of powers is part of our supreme law. It is therefore appropriate for courts to refrain from adjudicating suits brought by congressional plaintiffs when rendering a decision upon the merits would pose a greater threat to the constitutional system than would the principled exercise of judicial restraint.