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STANDING FOR CONGRESSIONAL PARTIES: MATCHING INJURIES WITH INSTITUTIONS

*Branden Lewiston**

I. INTRODUCTION

Imagine it is summer 2019, and President Trump's plan to build a wall on the southern border fails to overcome a filibuster in the Senate; nonetheless, he remains committed to building the wall. Finding that Mexico refuses to foot the bill in Congress's stead, Trump redirects a small portion of funds from other budgets into a Department of Homeland Security (DHS) account designated for financing the wall. DHS then hires contractors and begins construction. Congressional leaders are outraged—President Trump has usurped their power of the purse. In a rare moment of bipartisanship, Congress passes legislation over a presidential veto directing DHS to return the funds to the proper budgets and to cease payments to contractors. Trump ignores the directive. DHS continues building the wall. Does Congress have standing to sue the President?

Although fanciful, this scenario parallels a recent suit by the House of Representatives against the Obama administration.¹ In *House v. Burwell*, the House sued the Department of Health and Human Services for allegedly spending billions of unappropriated dollars, plus failing to implement the so-called employer mandate in the Affordable Care Act.² Congress itself did not file suit—Democrats in the Senate would have made that impossible—but the House sued as an institutional plaintiff after passing an authorizing resolution.³ The Obama administration responded that the House did not have standing.⁴ The United States District Court for the District of Columbia split the baby, holding that the House had standing for the appropriation claim but not the enforcement claim.⁵ The court then ruled for the House on the merits but stayed the injunction pending appeal.⁶

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1. See *United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015).

2. *Id.* at 57.

3. *Id.* at 63.

4. *Id.* at 67, 70.

5. *Id.* at 75–76.

6. *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 189 (D.D.C. 2016).

The standing claim in *House v. Burwell* was “novel and largely unprecedented.”⁷ However, in an era of divided government and gridlock, executive action becomes increasingly appealing.⁸ The prospect of an unfulfilled agenda tempts presidents to act unilaterally. The Obama administration even trumpeted its executive actions in response to congressional gridlock with the slogan “We Can’t Wait.”⁹ President Trump has promised to follow suit with wide-ranging executive actions of his own.¹⁰ When presidents unilaterally implement controversial aspects of their agenda, members of Congress in the opposition will use all the tools at their disposal to thwart that action.¹¹ If the ruling in *House v. Burwell* stands, the congressional suit will be one of Congress’s tools.¹²

Although the standing decision in *House v. Burwell* is novel, the Supreme Court has addressed some related standing questions. As will be discussed in more detail below, the Court granted standing to individual legislators in *Coleman v. Miller*¹³ and *Powell v. McCormack*,¹⁴ but it denied standing to members of Congress in *Raines v. Byrd*.¹⁵ The Court has granted

7. Jonathan Adler, *House Obamacare Lawsuit Clears First Major Hurdle (In Part)*, WASH. POST (Sept. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/10/house-obamacare-suit-clears-first-major-hurdle-in-part/?utm_term=.9b4b70cfbef0. See also Lyle Denniston, *Judge: Billions Spent Illegally on ACA Benefits*, SCOTUSBLOG.COM (May 12, 2016), <http://www.scotusblog.com/2016/05/judge-billions-spent-illegally-on-aca-benefits/> (“It is highly unusual for courts to allow one house of Congress, or individual lawmakers, to sue in federal court.”).

8. See Jaime Fuller, *Executive Actions: An Increasingly Common Way for Congress to Hate Presidents*, WASH. POST (Nov. 17, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/11/17/executive-actions-an-increasingly-common-way-for-congress-to-hate-presidents/?utm_term=.317a9d3ddd2; Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html>.

9. Dan Pfeiffer, *We Can’t Wait*, WHITEHOUSE.GOV (Oct. 24, 2011), <https://obama.whitehouse.archives.gov/blog/2011/10/24/we-cant-wait>.

10. See, e.g., Paige W. Cunningham, *Tom Price: Legislation Only Part of Repealing Obamacare*, WASH. EXAMINER (Mar. 15, 2017), <http://www.washingtonexaminer.com/tom-price-legislation-only-part-of-replacing-obamacare/article/2617524>; Yousef Saba, *Trump Announces Executive Actions for Day One*, POLITICO (Nov. 21, 2016), <http://www.politico.com/story/2016/11/donald-trump-executive-actions-231726>.

11. See Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL’Y 209, 281 (2001) (predicting continued suits from legislators).

12. A party has standing when they suffer a concrete, particularized injury that is traceable to the defendant’s actions and redressable by the court. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

13. 307 U.S. 433, 456 (1939).

14. 395 U.S. 486, 549 (1969).

15. 521 U.S. 811, 830 (1997).

standing to the Arizona state legislature,¹⁶ and it has permitted congressional chambers to defend federal laws as intervenors or amici.¹⁷ In *United States v. Windsor*, Justices Alito and Scalia debated each other on whether the House had standing in their respective dissents.¹⁸ The slate of congressional standing doctrine is neither full nor blank. Throughout its decisions, the Court has yet to articulate a complete and coherent theory of congressional standing. Instead, as often occurs, the Court has provided only narrow decisions, each relevant to a theory of congressional standing, but none sufficient on its own to provide such a theory.¹⁹

This Article contributes to the discussion of congressional standing by arguing that standing differs for various congressional parties. Congressional standing is appropriate when the congressional party's power or right matches the alleged injury. For instance, the House did not have standing to sue in *House v. Burwell*,²⁰ but Congress would have. Defenders and critics of congressional standing alike have failed to meaningfully distinguish between Congress as an institutional plaintiff and a chamber of Congress as a plaintiff.²¹ This includes the district court in *House v. Burwell*,²² academic commentators,²³ and Supreme Court justices.²⁴ Unlike other defenses of congressional standing, this Article sharply distinguishes between standing for Congress, chambers of Congress, and members of Congress. Each type of congressional party only has standing when powers specifically held by that congressional party are infringed. Congressional standing is proper if, and only if, the alleged infringement matches the plaintiff's right.

The Article proceeds as follows: Part II provides a background on congressional standing, both in Supreme Court precedent and in scholarly literature;²⁵ Part III argues in favor of standing for congressional parties

16. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

17. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 927 (1983); *United States v. Windsor*, 570 U.S. 744, 755 (2013).

18. 570 U.S. at 778–818.

19. *See cases cited supra* notes 13–18.

20. *United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 75–76 (D.D.C. 2015).

21. *See infra* notes 22–24.

22. *Id.* at 71 (arguing that “the House has suffered a concrete, particularized injury that gives it standing to sue” because “Congress (of which the House and Senate are equal) is the only body” that has spending power).

23. *See infra* Part I.B.

24. *See Windsor*, 570 U.S. at 804–05 (Alito, J. dissenting) (asserting that the “House of Representatives . . . suffered . . . an injury” when “Congress’ legislative power” was impaired).

25. *See infra* Part II.

when the alleged injury matches the party's constitutional powers;²⁶ Part IV discusses separation-of-powers concerns inherent in permitting standing for congressional parties;²⁷ Part V explores whether standing for congressional parties should extend to claims of executive non-enforcement rather than only direct executive infringements on congressional power;²⁸ and then, the article briefly concludes.²⁹

II. BACKGROUND

Standing doctrine has historically had precious little to say about congressional parties. The Supreme Court has never directly confronted the question of whether Congress or a chamber of Congress has standing to challenge executive action. But in the past few years, a handful of academic commentators have begun to take congressional standing doctrine more seriously.³⁰ The overall thrust of both precedent and scholarship is that Congress and its chambers do not have standing to sue the executive and that members of Congress have standing only to guard against vote nullification or its equivalent.³¹

A. Supreme Court Precedent

Congressional standing doctrine traces to *Coleman v. Miller*.³² In *Coleman*, the Court granted standing to a group of state legislators in Kansas challenging their executive branch.³³ The state senate had deadlocked on a vote for a constitutional amendment, and the lieutenant governor of Kansas provided the decisive vote to approve of adopting the amendment.³⁴ The dissenting state legislators sued, contesting the right of the lieutenant governor to vote on constitutional amendments.³⁵ The dissenting legislators reasoned that their votes had been essentially nullified by the lieutenant governor casting a decisive vote.³⁶ The Court found that the plaintiffs had "an interest in maintaining the effectiveness of their votes" sufficient to grant standing.³⁷ The Court emphasized that their votes "would have been

26. See *infra* Part III.

27. See *infra* Part IV.

28. See *infra* Part V.

29. See *infra* Part IV.

30. See discussion *infra* Section II.B.

31. See discussion *infra* Sections II.A, II.B.

32. 307 U.S. 433, 437 (1939).

33. *Id.* at 446.

34. *Id.* at 436.

35. *Id.*

36. *Id.* at 436–38.

37. *Id.* at 438.

decisive in defeating the ratifying resolution” if the lieutenant governor did not cast a vote.³⁸ The Court then ruled against them on the merits, holding that it was for Congress to decide whether Kansas ratified the constitutional amendment.³⁹

In *Bond v. Floyd* and *Powell v. McCormack*, the Court permitted a state legislator and a member of Congress, respectively, to challenge their chamber’s attempt to refuse to seat them after being duly elected.⁴⁰ In *Bond*, the Georgia House of Representatives refused to seat an elected representative because of his anti-war viewpoints.⁴¹ The Court did not specifically address standing, but it nonetheless heard the representative’s case and ruled in his favor.⁴² In *Powell*, a member of Congress was excluded by the House because of personal scandals.⁴³ Again, the Court did not directly address standing, but it explicitly found an Article III case or controversy.⁴⁴ In both cases, the legislator had standing to challenge his exclusion from his respective institution.⁴⁵

The Court had another occasion to address congressional standing in *Raines v. Byrd*.⁴⁶ Six members of Congress who voted against the Line Item Veto Act subsequently sued and challenged its constitutionality, alleging that the statute undermined the effect of the members’ votes.⁴⁷ The statute permitted the President to cancel certain tax or funding provisions in legislation.⁴⁸ The Court held that the individual members of Congress did not have standing because they did not suffer a “concrete injury.”⁴⁹ The Court described their injury as an “abstract dilution of institutional legislative power” insufficient to confer standing.⁵⁰ That is, the members’ votes were given full effect, so they had not suffered an injury.⁵¹ The Court explained that the institutional injury “necessarily damages all members of Congress and both Houses of Congress equally.”⁵² The only injury was to Congress’s institutional legislative powers, not to the members’ voting

38. *Coleman*, 307 U.S. at 441.

39. *Id.* at 446–50, 456.

40. *Bond v. Floyd*, 385 U.S. 116, 188 (1966); *Powell v. McCormack*, 395 U.S. 486, 489 (1969).

41. *Bond*, 385 U.S. at 118–28.

42. *Id.* at 136–37.

43. *Powell*, 395 U.S. at 489–90.

44. *Id.* at 495–96.

45. *Powell*, 395 U.S. 486; *Bond*, 385 U.S. 116.

46. *Raines v. Byrd*, 521 U.S. 811, 813–14 (1997).

47. *Id.* at 814.

48. *Id.* at 814–15.

49. *Id.* at 830.

50. *Id.* at 826.

51. *Id.*

52. *Raines*, 521 U.S. at 821.

powers.⁵³ The Court specifically noted that neither chamber had approved of the members' suit.⁵⁴

The Court has also addressed whether congressional chambers can defend a statute in the executive's stead. *Immigration and Naturalization Service v. Chadha* concerned an immigration statute that permitted a chamber of Congress to veto the Service's decision to suspend deportation proceedings.⁵⁵ The House vetoed the Service's suspension of deportation proceedings against Chadha.⁵⁶ Chadha sued, arguing that the statute was unconstitutional, and the I.N.S. agreed.⁵⁷ Before the Supreme Court, both the House and the Senate separately intervened to defend the constitutionality of the statute.⁵⁸ The Court held that the case presented an Article III case or controversy and that Congress was a "proper party" to defend the statute.⁵⁹ The Court then ruled against the congressional parties on the merits.⁶⁰

A similar issue came before the Court in *Windsor*.⁶¹ The Obama administration declined to defend the Defense of Marriage Act (DOMA) in court.⁶² However, the administration continued to enforce DOMA, thus granting private plaintiffs standing to challenge it.⁶³ The House, through its Bipartisan Legal Advisory Group (BLAG), intervened to defend the law in district court.⁶⁴ The House lost in district court, and both BLAG and the Department of Justice (DOJ) appealed.⁶⁵ The Solicitor General also filed a Petition for a Writ of Certiorari.⁶⁶ The Second Circuit affirmed the district court, and the Supreme Court granted review on both the constitutionality of DOMA and on two questions related to whether BLAG could defend the law.⁶⁷ The case then presented the Court with the question of whether BLAG—and by extension, the House—had standing to defend a federal law in the executive's stead.⁶⁸ However, the Court did not decide the issue, instead holding that the federal government had standing, and because the DOJ appealed and filed the cert. petition, it was unnecessary for the Court to

53. *Id.*

54. *Id.* at 829.

55. *I.N.S. v. Chadha*, 462 U.S. 919, 924–26 (1997).

56. *Id.* at 926–28.

57. *Id.* at 928.

58. *Id.* at 928, 930 n.5.

59. *Id.* at 930–31.

60. *Id.* at 959.

61. *United States v. Windsor*, 570 U.S. 744, 744 (2013).

62. *Id.* at 753–54.

63. *Id.* at 754–56.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Windsor*, 570 U.S. at 754–56.

68. *Id.*

determine whether the House also had standing.⁶⁹ In their respective dissents, Justices Scalia and Alito debated whether the House would have standing, with Scalia answering “no” and Alito responding “yes.”⁷⁰

Most recently, the Court addressed whether a state legislature can have standing in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.⁷¹ A constitutional amendment passed by ballot initiative took redistricting power away from the Arizona legislature and gave it to the Independent Redistricting Commission.⁷² The Elections Clause of the U.S. Constitution arguably gave redistricting power to the Arizona legislature, so the legislature sued.⁷³ The Court held that the Arizona legislature plausibly suffered an institutional injury—loss of its redistricting power.⁷⁴ The Court reasoned that this case was in line with *Coleman* because the Arizona legislature’s vote over redistricting would now be completely nullified by the redistricting commission.⁷⁵ The Court therefore found that the legislature had standing, although it then ruled against the legislature on the merits.⁷⁶

B. Scholarship on Congressional Standing

Little ink has been spilled by academic commentators on the question of congressional standing, although in recent years, a handful of scholars have begun to discuss the issue.⁷⁷ The most recent round of scholarship primarily focuses on re-litigating *House v. Burwell*, with some commentators defending the Court’s decision⁷⁸ and others arguing that it did not go far enough in granting congressional standing.⁷⁹ Only a few scholars

69. *Id.* The Court also held that BLAG’s participation satisfied prudential adversity concerns, but the Court sharply distinguished between those concerns and Article III standing.

70. *Id.* at 778–91, 803–04.

71. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015).

72. *Id.*

73. *Id.* at 2659.

74. *Id.* at 2663–65.

75. *Id.* at 2665.

76. *Id.* at 2671.

77. *See infra* notes 78–81.

78. *See* Bradford C. Mank, *Does A House of Congress Have Standing over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141, 188 (2016) (defending the district court’s decision in *House v. Burwell* on both theories of standing).

79. *See* Bethany R. Pickett, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 459–60 (2016) (arguing that the House should have had standing to challenge the executive’s failure to enforce the employer mandate).

have acknowledged the potential difference in standing for Congress and a chamber of Congress, and such acknowledgments have been in passing.⁸⁰

Defenses of congressional standing have failed to delineate between whether a chamber of Congress or only Congress itself could have standing. In 1983, an early scholarly defender of congressional standing declared that “either house of Congress would *unquestionably* have standing” to defend statutes in court.⁸¹ The note argued that Congress suffers an injury when the executive refuses to defend a duly-passed statute, but it failed to question whether that injury confers standing to chambers of Congress or only Congress itself.⁸² This oversight is not limited to defenders of congressional standing: commentators skeptical of congressional standing have similarly avoided this issue.⁸³ More recent commentators offer more of the same. Bethany Pickett, writing in 2016, defended congressional standing in cases of executive non-enforcement, such as in *House v. Burwell*.⁸⁴ However, her argument does not distinguish between when Congress would have standing and when a chamber would have standing.⁸⁵ Other defenders of congressional standing after *House v. Burwell* take the same approach.⁸⁶

A few commentators have acknowledged the potential difference between standing by Congress and standing by a chamber, but only in passing. Tara Grove and Neal Devins, in their critique of congressional standing, argue that the bicameralism requirement precludes unicameral standing.⁸⁷ They vividly argue that “neither house of Congress has standing to defend their joint work product in court.”⁸⁸ However, Grove and Devins do not then conclude that Congress can defend its work product.⁸⁹ What is more, Grove and Devins do not situate their critique of unicameral standing in standing jurisprudence—they focus on “normative political and historical

80. See, e.g., Bradford C. Mank, *Does United States v. Windsor (the Doma Case) Open the Door to Congressional Standing Rights?*, 76 U. PITT. L. REV. 1, 55 (2014) (asserting without discussion that bicameralism does not bar one chamber of Congress from having standing); Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 575–76 (2014) (arguing that Congress never has standing, and briefly mentioning that bicameralism precludes either chamber from defending their “joint work product”).

81. *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 986–87 (1983) (emphasis added).

82. *Id.*

83. Arend & Lotrionte, *supra* note 11, at 221.

84. Pickett, *supra* note 79, at 458–61.

85. *Id.*

86. Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 378–79 (2015); Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 22 (2015).

87. See Grove & Devins, *supra* note 80, at 627.

88. See *id.*

89. Instead, they dismiss the possibility as unlikely. *Id.* at 614.

analysis,” not particularized injuries.⁹⁰ Also, they do not consider whether bicameralism blocks unicameral standing when the work product is not “joint,” but rather specific to that chamber, such as in the advice and consent context with the Senate.⁹¹ Other commentators have followed suit, briefly mentioning that bicameralism may affect unicameral standing without delving into the implications,⁹² or noting without elaboration that both chambers may suffer an injury when Congress is injured.⁹³

III. WHEN CONGRESS CAN SUE THE PRESIDENT

A congressional party should have standing when the alleged infringement plausibly intrudes on a right held by the plaintiff. The emphasis here is whether the right really belongs to the plaintiff, or whether it properly belongs to a different congressional party. This article discusses three types of congressional parties: Congress itself, chambers of Congress, and members of Congress. This article describes when each type of congressional party does and does not have standing. Then, this article argues that resolving the question of congressional standing on a party-by-party basis strikes an appropriate separation-of-powers balance.

A. Congress as a Plaintiff

Congress should have standing to sue the executive when powers assigned to it by the Constitution are allegedly infringed. For instance, under the facts of *House v. Burwell*,⁹⁴ Congress would have standing to challenge the Obama administration’s alleged appropriation of funds. The Constitution gives Congress sole authority to appropriate federal funds.⁹⁵ The Obama administration allegedly usurped that power by appropriating funds for the Affordable Care Act without congressional approval.⁹⁶ If the executive branch exercises a right constitutionally assigned to Congress, then

90. Jack M. Beermann, *Congress’s (Less) Limited Power to Represent Itself in Court: A Comment on Grove and Devins*, 100 CORNELL L. REV. ONLINE 166, 167 (2014).

91. *Id.* at 173 (“Grove and Devins never analyze whether the Constitution’s bicameralism requirement applies to congressional litigation.”).

92. See Mank, *supra* note 78, at 186–87. See also Douglas R. Prince, *Should Congress Defend Its Own Interests Before the Courts?*, 33 STAN. L. REV. 715, 715 (1981) (arguing against standing for members of Congress without distinguishing between standing for Congress itself compared to a chamber).

93. Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 593–94 (2012).

94. *House v. Burwell (Burwell I)*, 130 F. Supp. 3d 53, 59–64 (D.D.C. 2015).

95. U.S. CONST. art. I, § 9; *House v. Burwell*, 185 F. Supp. 3d 165, 168–69 (D.D.C. 2016).

96. *Burwell I*, 130 F. Supp. 3d at 63.

Congress has suffered a concrete and particularized injury sufficient to establish standing.

Conventional standing doctrine states that a party has standing when they suffer a concrete, particularized injury that is traceable to the defendant's actions and redressable by the court.⁹⁷ The traceability and redressability prongs do not pose a great challenge to congressional standing—in many instances, it will be clear that the executive infringed on Congress's power and that the court could enjoin the executive from continuing to do so. The question of whether Congress suffers a concrete, particularized injury when its powers are infringed by the executive poses a bigger obstacle.

Current standing doctrine justifies granting Congress standing when its powers are infringed. First, *Chadha* supports the notion that congressional parties suffer a concrete and particularized injury when their powers are infringed.⁹⁸ The Court permitted both the House and Senate to intervene to defend statutorily granted legislative veto powers.⁹⁹ Although the Court did not directly discuss why the House and Senate had standing in *Chadha*, the implication is that the chambers' statutory right to veto deportation suspensions was at risk, and the deprivation of that statutory right would constitute a particularized and concrete injury.¹⁰⁰ The potential injury in *Chadha* was statutory, but the reasoning applies just as strongly if Congress's constitutional powers were threatened. There is nothing in the nature of congressional power that prevents Congress from suffering a concrete and particularized injury when it is infringed.

Congressional standing finds further support in *Arizona State Legislature*.¹⁰¹ There, the Supreme Court held that the Arizona legislature had standing to challenge a provision of the Arizona Constitution adopted by ballot initiative, claiming that it violated powers assigned by the U.S. Constitution to the Arizona legislature.¹⁰² The Court reasoned that the Arizona legislature plausibly suffered an "institutional injury" by being deprived of a constitutionally assigned right.¹⁰³ Similarly, Congress suffers an institutional injury when the executive infringes on its constitutionally assigned powers. However, the Court in *Arizona State Legislature*

97. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

98. *I.N.S. v. Chadha*, 462 U.S. 919, 939–40 (1983).

99. *Id.*

100. *United States v. Windsor*, 570 U.S. 744, 783 (2013) (Scalia, J., dissenting) ("Because *Chadha* concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers.").

101. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2652 (2015).

102. *Id.* at 2659.

103. *Id.* at 2664.

specifically limited its holding to the state context: “[t]he case before us does not touch or concern the question whether Congress has standing to bring a suit against the President.”¹⁰⁴ The Court provided two reasons, discussed below, that this case does not decide the question of congressional standing.¹⁰⁵ Neither undermines the support that *Arizona State Legislature* provides for this Article’s defense of congressional standing.

First, the Court noted that “[t]here is no federal analogue to Arizona’s initiative power.”¹⁰⁶ True, but so what? Even if there were a federal referendum process, a law passed through that process could violate Congress’s constitutionally assigned powers just the same as an executive action. The initiative was just the mechanism by which the Arizona legislature’s constitutionally assigned power was allegedly infringed. The reasoning of *Arizona State Legislature* does not turn on whether the alleged infringement of the legislature’s powers came via the ballot initiative or executive action—the Court instead focused on the fact that the legislature’s power would be “nullified.”¹⁰⁷ If anything, an executive action infringing on Congress’s constitutional sphere represents a stronger case for congressional standing than a violation via referendum. It is more constitutionally repugnant for an overreaching executive to usurp congressional power than for the people do to so via a referendum. If the Arizona legislature’s constitutional power was violated by the governor controlling redistricting, it should have standing to challenge that action just the same. Similarly, whether Congress has standing to challenge alleged violations of its power by the executive should not turn on the lack of a federal initiative.

The Court’s second justification for limiting the holding to the state context was that “a suit between Congress and the President would raise separation-of-powers concerns absent here.”¹⁰⁸ The Court here lays its finger on the major concern with granting standing to congressional parties. Tradition and prudence counsel against the judiciary engaging in turf disputes between the political branches.¹⁰⁹ If *Arizona State Legislature* does not decide the issue of congressional standing, separation-of-powers concerns would be why. Separation of powers as an element of congressional standing will be discussed more fully in Part IV.¹¹⁰

104. *Id.* at 2665 n. 12.

105. *Id.*

106. *Id.*

107. *Ariz. State Legislature*, 135 S. Ct. at 2665.

108. *Id.* at 2655 n. 12.

109. *See, e.g., United States v. Windsor*, 570 U.S. 744, 779–81 (2013) (Scalia, J., dissenting).

110. *See infra* Part III.

From *Arizona Legislature*, we know that legislatures can suffer institutional injuries when their constitutional powers are infringed.¹¹¹ And from *Chadha*, we know that congressional chambers can have standing when statutorily granted rights are infringed.¹¹² Together, then, these cases demonstrate that Congress suffers a concrete, particularized injury when its powers are usurped by the executive branch, and in such a situation, it has standing to defend itself.¹¹³

B. Chambers as Plaintiffs

Similarly, a chamber of Congress has standing when powers assigned to that chamber are allegedly infringed—but not when powers assigned to Congress as a whole are infringed.¹¹⁴ For instance, the Constitution gives the Senate “advice and consent” power over making treaties and appointing certain federal officers.¹¹⁵ If the President were to appoint a cabinet secretary without advice and consent of the Senate, the Senate would have standing to challenge that action.¹¹⁶ The Senate suffers a particularized and concrete injury to its powers when the President appoints a top officer without its advice and consent. If the House agreed with the President’s decision, then the Senate might not have a realistic political solution. Judicial involvement might be the Senate’s best hope for redress. In such a situation, it is altogether proper that the Senate have standing to challenge the President’s action.

This is not the situation in *House v. Burwell*. The right allegedly violated, appropriation powers, belongs to Congress, not the House.¹¹⁷ Thus,

111. *Ariz. State Legislature*, 135 S. Ct. at 2664.

112. *I.N.S. v. Chadha*, 462 U.S. 919, 939–40 (1983).

113. *Id.*; see also *Ariz. State Legislature*, 135 S. Ct. at 2664.

114. There are four explicit unicameral powers in the Constitution: The House has the power to impeach, the Senate provides advice and consent for certain nominations, and the Senate has the power to try impeachments and ratify treaties. See *I.N.S. v. Chadha*, 462 U.S. at 955 (listing unicameral powers). A statute might give a chamber unicameral power as well, as in *Chadha*. *Id.* at 925. The Origination Clause does not quite give a power to the House, and the House would have to be complicit in violating the origination requirement, likely preventing the House from suing over its violation. U.S. CONST. art. I, § 7, cl. 1. Investigatory functions also might count as a unicameral power. See generally Una Lee, *Reinterpreting Raines: Legislator Standing to Enforce Congressional Subpoenas*, 98 GEO. L.J. 1165, 1168 (2010) (discussing Congressional party standing to enforce subpoenas).

115. U.S. CONST. art. II, § 2.

116. Justice Scalia argued in dissent in *Arizona State Legislature* that the majority’s rule would indeed have granted the Senate power to challenge the President’s recess appointment in *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2595–98 (2014). *Ariz. State Legislature*, 135 S. Ct. at 2695 (Scalia, J., dissenting).

117. The implementation/non-enforcement theory in *House v. Burwell* is dealt with below. See *infra* Part V.

Congress is the appropriate plaintiff. The court in *House v. Burwell* stated that “[t]he Congress (of which the House and Senate are equal) is the only body empowered by the Constitution to adopt laws directing monies to be spent from the U.S. Treasury.”¹¹⁸ Yet, the court nonetheless concluded that “the House has suffered a concrete, particularized injury that gives it standing.”¹¹⁹ The court never explains this discrepancy, but it seems to reason that the House’s constitutional role would be undermined if its parent body, Congress, suffered an injury.¹²⁰ The court states that the “role of the House would be meaningless” if Congress lost its exclusive appropriation power.¹²¹ That is, the court seems to acknowledge that Congress is the truly injured party, and that the House is only injured by extension.¹²²

Raines complicates this injury-by-extension defense of standing for the House. The Supreme Court held in *Raines* that six members of Congress did not have standing to claim that a statute violated Congress’s constitutional powers.¹²³ The Court described the alleged injury as an “abstract dilution of institutional legislative power.”¹²⁴ Congress suffered the injury, not the members, and the Court refused to grant the members standing merely because Congress suffered an injury.¹²⁵ To be sure, the Court concluded by “attach[ing] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action.”¹²⁶ In *House v. Burwell*, the House itself is the plaintiff,¹²⁷ but the reasoning in *Raines* nonetheless cuts against the House having standing to challenge a violation of the appropriation power.¹²⁸

Just as individual members of Congress do not have standing to challenge executive actions allegedly violating the powers of Congress as an institution, individual chambers of Congress also lack standing in such cases. In both *Raines* and *House v. Burwell*, the alleged injury occurred at a higher institutional level than that of the respective plaintiffs.¹²⁹ That is, in both cases the parent institution of the respective plaintiffs suffered the real injury, and the dilution analysis in *Raines* points against inferring an injury by a constituent party.¹³⁰ *Raines* explained that the alleged injury was to “all

118. *House v. Burwell*, 130 F. Supp. 3d 53, 71 (D.D.C. 2015) (emphasis added).

119. *Id.* (emphasis added).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Raines v. Byrd*, 521 U.S. 811, 816 (1997).

124. *Id.* at 826.

125. *Id.*

126. *Id.* at 829.

127. *Burwell*, 130 F. Supp. 3d at 53.

128. *Raines*, 521 U.S. at 816.

129. *Id.*; *Burwell*, 130 F. Supp. 3d 53.

130. *Raines*, 521 U.S. at 826.

[m]embers of Congress *and* both Houses of Congress equally.”¹³¹ The injury was diluted among the constituent parts of Congress and, therefore, only fully particularized for Congress itself.¹³² For individual members, the injury is two institutional levels up—the individual member would only be injured insofar as his or her chamber is injured, and that chamber is only injured insofar as Congress itself is injured. For an individual chamber, the injury is only one institutional level off, but the injury still does not match the plaintiff.

That difference in the degree of dilution perhaps explains why the court in *House v. Burwell* failed to delineate between an injury to Congress and an injury to the House.¹³³ The court in *House v. Burwell* attempted to distinguish *Raines*, arguing that in *Burwell* there is no “dilution” of legislative power, whereas in *Raines* the power was diluted among the members of Congress.¹³⁴ The court is certainly right that the legislative power is not diluted 535 ways in *House v. Burwell*. Instead, the dilution is two ways—between the House and the Senate. However, dilution remains; it is just a matter of degree. The House itself does not suffer an undiluted, particularized injury when the executive allegedly violates Congress’s appropriations power—only Congress does. Therefore, only Congress would have standing.

Justice Alito, dissenting in *Windsor*, argued that the House has standing to defend a federal statute, although he does not explicitly distinguish between when Congress would have standing compared to the House.¹³⁵ Alito argued that the House was a “necessary party” to the passage of the statute.¹³⁶ Here, Alito read *Coleman* as saying that the state legislators had standing because their votes “would have carried the day” absent outside intervention.¹³⁷ He then used this argument to distinguish *Raines*, concluding that the members of Congress in *Raines* did not have standing because those members were not “the pivotal figures” in the legislation at issue.¹³⁸ Therefore, Alito’s argument for single-chamber standing turned on the fact that the single chamber is a necessary actor in a statute’s passage. Because that chamber is necessary for the statute’s passage, the chamber should have standing to defend it—and, possibly, challenge the executive for failing to properly implement it.

131. *Id.* at 821 (emphasis added).

132. *Id.*

133. The decision remains on appeal.

134. 130 F. Supp. 3d at 71.

135. *United States v. Windsor*, 570 U.S. 744, 805 (2013).

136. *Id.*

137. *Id.*

138. *Id.*

Justice Alito's reading of *Coleman* and *Raines* is more plausible than the district court's in *House v. Burwell*, but it also has its problems.¹³⁹ To start, Alito never explicitly connected the "necessary" criterion to standing jurisprudence.¹⁴⁰ Normally, standing jurisprudence asks whether the party has suffered a particularized, concrete injury.¹⁴¹ As Alito acknowledged, Congress suffers such an injury when its legislative powers are infringed,¹⁴² but Alito never explained why the House *also* suffers a particularized injury just because its action is necessary for Congress to legislate.¹⁴³ Certainly, the House would suffer an injury if Congress acted without its consent. That would be the equivalent of vote nullification, but that is quite different from Alito's conclusion that the House suffers an injury when Congress's powers are infringed simply because the House's consent is a necessary part of congressional action.

Alito might connect his argument to the injury element of standing jurisprudence by arguing that the injury to Congress is passed on to its chambers. This is the same type of "abstract dilution of institutional legislative power" that the Court found in *Raines* which does not grant standing.¹⁴⁴ Even if this constitutes a real injury suffered by the chamber, it is not a "particularized" injury as required by standing jurisprudence. The "particularized" element of the injury requirement means that the plaintiff is injured in a "personal and individual way."¹⁴⁵ The House is not injured in an "individual way" when Congress's powers are infringed. Instead, it is only affected by virtue of being a constituent chamber of Congress. The injury is secondary; it is derivative, not concrete and particularized. If the chambers only suffer an injury by extension, then Congress, rather than the chambers, should be the appropriate plaintiff.

Alito's argument also leads to absurdities. Imagine that the House sues the executive for appropriating funds without authorization. Alito's theory would grant the House standing, because the House is necessary for the passage of an appropriations bill. Now imagine that the Senate disagrees with the House and files an amicus brief—or even intervenes—in favor of the executive. The House and Senate, then, would be on opposite sides of a

139. Justice Scalia criticized Alito's defense of single-chamber standing on separation-of-powers grounds. That critique is valid, but it is addressed in the separation-of-powers section of this article rather than here. See *infra* Part IV.

140. *Windsor*, 570 U.S. at 805.

141. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

142. See *Raines v. Byrd*, 521 U.S. 811, 816 (1997); *infra* Part IV.

143. *Windsor*, 570 U.S. at 805.

144. *Raines*, 521 U.S. 811, 826 (1997).

145. *Lujan*, 504 U.S. at 560 n. 1.

suit about the powers of Congress, even though such power could only be exercised by both chambers acting together.¹⁴⁶

Another absurdity: If a bill passes the House by one vote, then every member who voted yes was a necessary party to its passage. By Alito's reasoning, that might mean every member now has standing to challenge the executive if the law goes unenforced. However, if the bill passed by five votes, then, echoing *Raines*, a single member would not have standing.¹⁴⁷ A coalition of five members, though, would be a necessary party, and as a group, they would have standing. If being a "necessary party" to the exercise of congressional power is sufficient to generate standing, then such silly vote-counting exercises seem inevitable.

Alito also pointed to *Chadha* for support.¹⁴⁸ He argued that *Chadha* "suggested" that Congress suffered an institutional injury sufficient to grant standing.¹⁴⁹ That may be true, but *Chadha* does not imply that a chamber has standing to protect powers assigned to Congress.¹⁵⁰ Instead, in *Chadha*, the powers in question were unicameral—each chamber could exercise a legislative veto independently—and both chambers intervened to defend their unicameral powers.¹⁵¹ Alito responded that this is a "distinction without a difference."¹⁵² This Article's defense of congressional standing supplies the difference: a congressional party only has standing when powers assigned to that party are infringed. In *Chadha*, each chamber had a statutory power that was threatened with "destruction."¹⁵³ The chambers both intervened in their individual capacity, just as would be appropriate under this Article's theory of party-specific congressional standing.¹⁵⁴

Fundamentally, Alito's argument is inconsistent with this Article's conception of the constitutional role of the chambers vis-a-vis Congress. Article I provides that "[a]ll legislative Powers . . . shall be vested in a Congress . . . which shall consist of a Senate and House of

146. This scenario is not so far-fetched. Forty Senators filed an amicus brief opposing the House Bipartisan Legal Advisory Group in *Windsor*. If Democrats had a sufficient majority, it could have been the Senate itself filing that amicus rather than just a collection of Senators. See Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

147. *Raines*, 521 U.S. 811.

148. *Windsor*, 570 U.S. at 804–05 (2013) (Alito, J., dissenting).

149. *Id.* at 804.

150. See *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

151. *Id.* at 933–34.

152. *Windsor*, 570 U.S. at 805 (Alito, J., dissenting).

153. *Id.* at 783 (Scalia, J., dissenting) (explaining that in *Chadha* the unicameral legislative veto was threatened).

154. *Chadha*, 462 U.S. at 931 n. 5.

Representatives.”¹⁵⁵ Also, bicameralism precludes the House from exercising independent legislative authority.¹⁵⁶ Only Congress has legislative power,¹⁵⁷ and the powers of Congress differ fundamentally from those of its constituent chambers or members.¹⁵⁸ Congress is more than the sum of its parts. Only Congress, therefore, suffers an injury when legislative powers assigned to it are infringed. Chambers, on the other hand, have standing not to defend Congress’s constitutional powers, but rather only to defend powers specific to the chamber.

C. Members as Plaintiffs

Compared to what the Supreme Court has said about standing for Congress or its chambers, case law on standing for individual legislators is rich. This Article’s defense of congressional standing comports with the Court’s case law for standing for members of Congress. Members can have standing, but only in narrow circumstances where their constitutionally assigned powers are violated. The Constitution grants members the right to be seated in and vote on matters before their respective chamber.¹⁵⁹ Also, members have a few discrete rights, such as guaranteed compensation.¹⁶⁰ Only when one of these narrow rights are violated would a member have standing to sue the executive.

The trio of *Coleman v. Miller*, *Powell v. McCormack*, and *Raines v. Byrd* provides the contours of standing for members of Congress.¹⁶¹ *Coleman* found that state legislators have an “interest in maintaining the effectiveness of their votes” sufficient to provide standing.¹⁶² That is, the

155. U.S. CONST. art. I, § 1.

156. See Grove & Devins, *supra* note 80, at 574 (“[D]efense of federal statutes by the House or the Senate violates an additional constitutional norm: bicameralism. The Constitution divides the legislature into two separate and distinct chambers . . . and thus largely prohibits unilateral action by either chamber.”).

157. The Presentment Clause would not likely pose a barrier to a single chamber authorizing a suit because authorizing a suit does not constitute legislative action subject to presentment. See Beerman, *supra* note 90 at 173 (“Congressional litigation is not legislative action because it does not have the purpose or effect of altering anyone’s legal rights either inside or outside the legislative branch.”).

158. See *United States v. Ballin*, 144 U.S. 1, 7 (1892) (“The two houses of congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the Members who compose the body, and its action is not the action of any separate Member or number of Members, but the action of the body as a whole.”).

159. See, e.g., U.S. CONST. art. I, § 3, cl. 1

160. *Id.* § 6, cl. 1.

161. *Coleman v. Miller*, 307 U.S. 433 (1939); *Powell v. McCormack*, 395 U.S. 486 (1969); *Raines v. Byrd*, 521 U.S. 811 (1997).

162. 307 U.S. at 438.

legislators in *Coleman* did not allege that the power of their vote was undermined because the state senate's power was infringed, but rather that their individual votes were not given effect within the state senate because of a decisive outside influence—the lieutenant governor.¹⁶³ Similarly, in *Powell v. McCormack*, the Court found an Article III case or controversy when a member of Congress challenged the House's attempt to exclude him from taking his seat without formal expulsion.¹⁶⁴ The right to take his seat was personal to the member. To be sure, *Powell* involved a member challenging action by his chamber rather than the executive.¹⁶⁵ But if anything, the member's case for standing would be *stronger* if the President rather than the House refused to let him take his seat in Congress.¹⁶⁶ Irrespective, the member in *Powell* had a personal prerogative that he could defend in federal court.¹⁶⁷

Raines distinguishes both *Coleman* and *Powell* in holding that six members of Congress could not challenge the constitutionality of the Line Item Veto Act as diluting their voting power by diminishing Congress's role in appropriations.¹⁶⁸ *Raines* held that the alleged injury was “institutional,” not “personal” to the members of Congress.¹⁶⁹ The Court explained that this was unlike *Coleman*, because in *Raines* the members' votes “were given full effect” and continue to be given full effect.¹⁷⁰ In *Coleman*, there was “vote nullification,” whereas in *Raines* there was only “abstract dilution of institutional legislative power.”¹⁷¹ *Raines* distinguished *Powell* on the same grounds: unlike in *Powell* where the member was “singled out,” the claim in *Raines* is only an “institutional injury.”¹⁷²

The unifying thread of these three cases is that members of Congress have standing when *their* right to vote on matters before Congress is allegedly infringed.¹⁷³ That right might be infringed by the member's chamber refusing to seat them, as in *Powell*,¹⁷⁴ or it might be infringed by vote nullification via an outcome-determinative executive action, as in

163. *Id.* at 436–38.

164. 395 U.S. at 514.

165. *Id.*

166. In that situation, the House might also have standing to challenge the executive because the Constitution provides it with exclusive control over its members, not the executive. See U.S. CONST. art. I, § 5, cl. 1.

167. 395 U.S. 486.

168. *Raines v. Byrd*, 521 U.S. 811, 820–26 (1997).

169. *Id.* at 821.

170. *Id.* at 824.

171. *Id.* at 826.

172. *Id.* at 821.

173. *Coleman v. Miller*, 307 U.S. 433 (1939); *Powell v. McCormack*, 395 U.S. 486 (1969); *Raines*, 521 U.S. 811.

174. *Powell*, 395 U.S. at 514.

Coleman.¹⁷⁵ However, members do not have standing to challenge a mere dilution of the potential influence of their vote when Congress's powers are restricted, as in *Raines*.¹⁷⁶ The latter scenario implicates Congress's rights, not the rights of the members of Congress.

One can imagine a constitutional provision that would more clearly generate cases where members would have standing.¹⁷⁷ Imagine a constitutional amendment that gave individual Senators veto power over federal judicial appointments in their home state.¹⁷⁸ If either home state Senator vetoed a judicial nomination, the nomination would fail. Imagine further that the President, appalled by a Senator's intransigence, ignored that Senator's veto. The President's nominee was confirmed by the Senate at large, and the judge took their seat. In this scenario, the Senator who exercised the veto power should have standing because of an institutional injury to that Senator's constitutional office. The Constitution assigned a specific power to the Senator, and the executive allegedly violated that power. The Senator would therefore have standing.

IV. SEPARATION OF POWERS

Any defense of congressional standing must confront significant separation-of-powers concerns. Such concerns are the cornerstone of standing jurisprudence.¹⁷⁹ Separation-of-powers principles are particularly salient when standing implicates a conflict between the branches.¹⁸⁰ But just as a defense of some form of congressional standing must grapple with separation-of-powers principles, so does a blanket *denial* of congressional standing. Judicial involvement in an interbranch dispute risks disrupting an appropriate separation-of-powers balance, as does judicial abdication. A defense of congressional standing that distinguishes between different congressional parties strikes the appropriate balance between permitting limited judicial involvement in interbranch disputes without unduly embroiling the judiciary in matters best left to the political process.

175. *Coleman*, 307 U.S. at 436.

176. *Raines*, 521 U.S. at 820–21.

177. I thank Paul Clement for posing this hypothetical.

178. A similar rule—the so-called “blue slip”—already exists in non-constitutional form. See Mitchel A. Sollenberger, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, CONG. RES. SERV. (Oct. 22, 2003), <http://congressionalresearch.com/RL32013/document.php>.

179. See *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

180. See *Raines*, 521 U.S. at 819–20 (“[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute that would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”).

Prudence and tradition counsel against any far-reaching theory of congressional standing. Consistent judicial involvement in interbranch political disputes would “risk damaging public confidence that is vital to the functioning of the Judicial Branch.”¹⁸¹ The specter of a Supreme Court standing “at the apex of government, empowered to decide all constitutional questions” should caution against persistent judicial involvement in interbranch political disputes.¹⁸² One can all too easily imagine that if the decision in *House v. Burwell* were affirmed, suits against the executive by chambers of Congress would become commonplace. In response to Justice Alito’s defense of single-chamber standing in *Windsor*, Justice Scalia argued that “the opportunities for dragging the courts” into political disputes would be “endless.”¹⁸³ The judiciary’s claim to be a non-political branch would become even more tenuous than it already is. Instead, the judiciary might find itself involved in numerous turf disputes between the political branches.

A blanket denial of congressional standing raises grave separation-of-powers concerns as well. The constitutional system of separation of powers would be undermined if the President could usurp congressional power while the judiciary watched from the sidelines. Indeed, that concern prompted the Court in *Windsor* to permit the House to defend a federal statute in the executive’s stead.¹⁸⁴ This concern is further illustrated in *House v. Burwell*, where “despite an intentional refusal by Congress to appropriate funds for Section 1402, the Secretaries freely ignored Article I, § 9, cl. 7 of the Constitution and sought other sources of public money.”¹⁸⁵ While the Court has not often granted standing to congressional parties, it has struck down laws that accord too much or too little authority to one branch of government,¹⁸⁶ and it should do so even when the dispute is directly between the political branches. If the executive ignores both the Constitution and the will of Congress, the judiciary does not serve the separation of powers by inaction. Instead, such inaction harms the constitutional system of separation of powers.

It is possible to strike a balance between these two worries. Limiting congressional standing based on the congressional party imposes sharp

181. *Id.* at 833.

182. *United States v. Windsor*, 570 U.S. 774, 779 (2013) (Scalia, J., dissenting).

183. *Id.* at 790.

184. *Id.* at 762 (“[I]t poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’ enactment solely on its own initiative and without any determination from the Court.”).

185. 130 F. Supp. 3d 53, 80 (D.D.C. 2015).

186. *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (“[W]e have not hesitated to strike down provisions of law that . . . undermine the authority and independence of one or another coordinate Branch.”).

limits on suits from congressional parties, avoiding the worry of a judiciary constantly embroiled in political turf disputes. The House would not be able to sue the Obama administration under a non-appropriation theory, contra *House v. Burwell*. Also, individual members could not sue the executive when they believe Congress's powers have been infringed either, in line with the Court's decision in *Raines*.¹⁸⁷ However, congressional party suits would be permitted in narrow circumstances when the alleged injury matches the plaintiff's right. Judicial involvement in interbranch disputes remains proper when the judiciary serves as a "last resort."¹⁸⁸ This provides an opening for the judiciary to defend the constitutional system of separation of powers when, and only when, judicial involvement is necessary and appropriate.

Two countervailing forces sharply limit the number of cases where congressional parties would file suit *and* have standing to do so. On the one hand, the Constitution assigns many more powers to Congress than to its chambers, and more to chambers than to individual members.¹⁸⁹ The higher up you go, the more powers the congressional party has. Therefore, there are more chances for the executive to violate that party's powers. On the other hand, the barriers to suits by Congress are more significant than barriers to a suit by a chamber, which in turn are more significant than barriers to a suit by members. Congress can only sue when both chambers approve, which will be rare in an era of divided, partisan government. Additionally, Congress always has the option to resolve political disputes through the normal policy-making process rather than through time-consuming, risky litigation.¹⁹⁰ In most cases, a private plaintiff will have a much easier time getting into court than Congress, so Congress will not even bother trying. Chambers only need a majority of their own members to approve a suit, which still poses a significant barrier. Meanwhile, members can file suits independently with few barriers. Overall, the more power the relevant congressional party has, the more challenging procedural obstacles to defending that power in a lawsuit. These forces work against each other to ensure that proper suits by congressional parties would be rare.

V. ENFORCEMENT CLAIMS

Even if we frame the discussion of congressional standing as party specific, it still leaves open the question of what rights Congress would have

187. *Raines v. Byrd*, 521 U.S. 811, 816 (1997).

188. *Id.* at 833 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982)).

189. *See supra* note 107.

190. *See* *Arend & Lotrionte, supra* note 11, at 282 (congressional suits are rare because of alternative legislative remedies).

standing to defend. In *House v. Burwell*, the House sued the executive on two separate theories: (1) the non-appropriation theory, that the executive appropriated funds that it was not authorized to appropriate, violating Congress's appropriation powers;¹⁹¹ and (2) the employer-mandate theory, that the executive failed to implement the employer mandate, violating Congress's general legislative powers.¹⁹² Congress should have standing to challenge executive appropriations made contrary to law, as in *House v. Burwell*.¹⁹³ That is a clear usurpation of a power solely assigned to Congress by the Constitution.¹⁹⁴ However, it is not as clear if Congress suffers an injury when the executive fails to faithfully implement a statute.¹⁹⁵ The court in *House v. Burwell* concluded that it did not.¹⁹⁶ Additionally, Justice Scalia also argued against standing for enforcement claims in his dissent in *Windsor*.¹⁹⁷ He critiqued Justice Alito's defense of congressional standing for allowing Congress to go to court "not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws."¹⁹⁸ These types of enforcement-based standing claims have received comparably significant discussion in academic literature.¹⁹⁹

Congress should have standing claims against obvious executive non-enforcement. There are two constitutional hooks for Congress's injury. First, the Constitution vests "[a]ll legislative powers herein granted" to Congress.²⁰⁰ The executive usurps that power by refusing to implement a duly-passed congressional statute. Second, the President has an affirmative duty to "take Care that the laws be faithfully executed."²⁰¹ The President may have discretion in deciding how to execute a law, but he or she does not have discretion over whether a law should be executed at all.²⁰² Read together, these provisions indicate that Congress has the power to pass legislation with the expectation that its legislation will be faithfully implemented. If the President violates that power, Congress suffers a

191. *House v. Burwell*, 130 F. Supp. 3d 53, 70 (D.D.C. 2015).

192. *Id.* at 75.

193. *Id.* at 81.

194. *Id.* at 76.

195. *Id.*

196. *Id.*

197. *United States v. Windsor*, 570 U.S. 744, 788–89 (2013) (Scalia, J., dissenting).

198. *Id.*

199. *See supra* Part I.B.

200. U.S. CONST. art. I, § 1.

201. *Id.* § 3.

202. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1848–51 (2016) (describing cases where the Court has used the take care clause to impose on the President a "duty to abide by and enforce the laws enacted by Congress.").

particularized injury just the same as if the President usurped Congress's appropriations power.

The court in *House v. Burwell* disagreed.²⁰³ It described Congress's legislative authority as flowing from Article I's "most general provision."²⁰⁴ The court found that the "generalized nature" of the ineffective implementation claim precludes it from involving a particularized and concrete injury for standing claims.²⁰⁵ Another way to put it: even if Congress has legislative powers, those powers do not extend to grant Congress a legal interest in effective enforcement.²⁰⁶ Yet, if the President refuses to implement a statute or twists a statute beyond the point of recognition, that infringes Congress's legislative powers just as much as appropriating funds without congressional approval infringes Congress's appropriation powers. Justice Alito argued that "any impairment" of Congress's legislative power is a "grievous injury" to Congress's "central function."²⁰⁷ There are also constitutional hooks for Congress's injury in the vesting clause and in the take care clause. Obstinate non-enforcement functionally repeals congressional legislation.²⁰⁸ That injures Congress sufficiently for Congress to have standing to defend itself.

Justice Scalia thought congressional standing entirely inappropriate on separation of powers grounds.²⁰⁹ He was particularly worried about enforcement claims, which would allow Congress to "pop immediately into court" whenever the President "implements a law in a manner that is not to Congress's liking."²¹⁰ Indeed, Scalia seemed to concede the injury point, and instead focused his critique on the prospect of too much political litigation from Congress.²¹¹ However, a party-specific defense of congressional standing keeps the floodgates closed. If only Congress, not its chambers, has standing to challenge executive non-enforcement, the practical barriers to filing a suit on behalf of Congress, as an institution, will prevent it from routinely popping into court. Contrary to Scalia's concern that Congress will resolve implementation and enforcement disputes through litigation rather than through policy-making,²¹² Congress will likely only resort to litigation when it perceives the regular policy-making process to have failed to protect

203. 130 F. Supp. 3d 53, 75 (D.D.C. 2015).

204. *Id.*

205. *Id.*

206. See Grove & Devins, *supra* note 80, at 624.

207. *United States v. Windsor*, 570 U.S. 744, 805 (2013) (Alito, J., dissenting).

208. See Pickett, *supra* note 79, at 468.

209. *Windsor*, 570 U.S. at 788–89 (Scalia, J., dissenting).

210. *Id.* The district court in *House v. Burwell* expressed this worry as well. 130 F. Supp. 3d 53, 75 (D.D.C. 2015) (citing *Windsor*).

211. *Windsor*, 570 U.S. at 789 n. 3 (Scalia, J., dissenting).

212. *Id.* at 791 ("Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so." (emphasis in original)).

its powers. Refusing to confirm executive nominees or blocking the President's agenda seems like a much quicker and expedient resolution to a dispute with the executive than filing a suit and waiting for years of litigation to come to an end—and agenda-blocking only requires one chamber. Plus, in most cases, Congress can rest assured that private plaintiffs with clear-cut standing will attack executive actions. Only in rare cases will Congress itself be the sole plaintiff.

This Article's defense of congressional standing describes which congressional party should have standing to challenge executive actions. If any congressional party were to have standing to challenge executive non-enforcement, it would certainly be Congress rather than its chambers or members. This Article's defense of standing for congressional parties is nonetheless compatible with either granting or denying congressional standing over enforcement claims. However, because Congress suffers a similar injury in enforcement cases as it does in appropriation cases and litigation would only occur in extraordinary circumstances, Congress should have standing for enforcement claims.

VI. CONCLUSION

Congressional parties have standing to challenge executive action only when the alleged infringement matches the plaintiff's rights. Contrary to the district court in *House v. Burwell* and Justice Alito's dissent in *Windsor*, individual chambers do not have standing when the powers of Congress are infringed. However, they do have standing to defend against violations of powers specifically assigned to an individual chamber by the Constitution. Further, members of Congress can have standing too, but only when their rights—such as the right to vote on matters before their chamber—are infringed. Individual members do not have standing to defend the powers of Congress as an institution.

This limited defense of congressional standing satisfies separation-of-powers concerns brought up by both sides of the debate. Justice Scalia's concern that congressional standing will turn the judiciary into a roving monitor, perpetually involved in political turf disputes, does not apply to this Article's limited defense of congressional standing that only permits suits when the specific rights of the plaintiff are at issue. Further, the contrary concern that judicial involvement is sometimes necessary to protect the constitutional order is also resolved by this Article's limited defense of congressional standing. Congressional parties have standing to defend their powers, but only *their* powers. The increasingly cumbersome barriers to suits from congressional parties ensure that few disputes will get into court and survive standing concerns. However, those that do will involve real, concrete controversies, just as Article III requires.