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Does a House of Congress Have Standing Over Appropriations?: The House of Representatives Challenges the Affordable Care Act

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**DOES A HOUSE OF CONGRESS HAVE STANDING OVER
APPROPRIATIONS?: THE HOUSE OF REPRESENTATIVES
CHALLENGES THE AFFORDABLE CARE ACT**

*Bradford C. Mank**

ABSTRACT

In U.S. House of Representatives v. Burwell, the District Court for D.C. in 2015 held that the House of Representatives has Article III standing to challenge certain provisions of the Affordable Care Act as violations of the Constitution's Appropriations Clause. The Supreme Court's jurisprudence on legislative standing is complicated. The Court has generally avoided the contentious question of whether Congress has standing to challenge certain presidential actions because of the difficult separation-of-powers concerns in such cases. In Raines v. Byrd, the Court held that individual members of Congress generally do not have Article III standing by simply holding office to challenge an allegedly unconstitutional statute. In a 2015 decision, Arizona State Legislature v. Arizona Independent Redistricting Commission, the Court distinguished Raines as a case involving individual legislators and relied on its 1939 decision in Coleman v. Miller in holding that the Arizona Legislature had standing as an institution to challenge an allegedly unconstitutional limitation on its legislative authority. In its Chadha and its Windsor decisions, the Court suggested, but did not directly hold that Congress or a house of Congress has standing in some circumstances to defend its institutional constitutional authority. The Arizona, Chadha and Windsor decisions implicitly support congressional standing in Burwell. The Article argues in favor of institutional congressional standing by Congress, a house of Congress or a duly authorized committee to defend core constitutional authority possessed by Congress, but against legislative suits merely challenging how the executive branch implements a particular federal statute

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* James Helmer, Jr. Professor of Law and Associate Dean for Academic Affairs, University of Cincinnati College of Law, P.O. Box 210040, University of Cincinnati, Cincinnati, Ohio 45221-0040, Telephone 513-556-0094, Fax 513-556-1236, e-mail: brad.mank@uc.edu. All errors or omissions are my responsibility. In *Does United States v. Windsor (the DOMA Case) Open the Door to Congressional Standing Rights?*, 76 U. PITT. L. REV. 1 (2014), I discussed some issues relating to congressional standing. However, the House suit concerning the Affordable Care Act involves somewhat different questions than those addressed in that article, and my analysis in that article also has to be modified in light of two 2015 decisions, the *Arizona State Legislature* decision discussed *infra* Part II.B and the *U.S. House of Representatives v. Burwell* decision discussed *infra* Part III.

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INTRODUCTION

In *U.S. House of Representatives v. Burwell*, U.S. District Judge Rosemary M. Collyer of the U.S. District Court for the District of Columbia in 2015 held that the U.S. House of Representatives has Article III standing to challenge certain provisions of the Patient Protection and Affordable Care Act (“Affordable Care Act” or “ACA”)¹ as violations

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (explaining that the ACA seeks “to increase the number of Americans covered by health insurance and de-

of the U.S. Constitution's Appropriations Clause.² The Supreme Court's and lower federal courts' jurisprudence on legislative standing is complicated.³ In its 1939 decision in *Coleman v. Miller*, the Supreme Court held that twenty Kansas state senators, who constituted exactly half of the Kansas State Senate, could file a mandamus action against the Secretary of the Senate of the State of Kansas to contest whether the State Senate had in fact ratified the Child Labor Amendment to the Federal Constitution.⁴ By contrast, in its 1997 decision in *Raines v. Byrd*, the Court held that individual members of Congress generally do not have Article III standing by simply holding office to challenge an allegedly unconstitutional statute even if Congress has enacted a statute purporting to grant standing to any legislators to challenge that statute, unless the legislator can prove she suffered a personal concrete injury from its passage similar to any ordinary litigant.⁵ The broad approach to legislative standing in *Coleman* and the narrower approach in *Raines* are in some tension, although it is possible to distinguish these two cases because they involve very different facts.⁶ In a 2015 decision, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court distinguished *Raines* as a case involving individual legislators and relied on *Coleman* in holding that the Arizona Legislature had standing to challenge Proposition 106, a statewide citizen's initiative that delegated redistricting authority to an independent commission.⁷ The *Arizona State Legislature* Court explicitly avoided the contentious question of

crease the cost of health care"); see also *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015) ("The [ACA] adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market.").

- 2 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 70–76 (D.D.C. 2015) (holding that "the constitutional trespass alleged in this case would inflict a concrete, particular harm upon the House for which it has standing to seek redress"). The Appropriations Clause states in part: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7.
- 3 Bradford C. Mank, *Does United States v. Windsor (the DOMA Case) Open the Door to Congressional Standing Rights?*, 76 U PITT. L. REV. 1, 22–30 (2014) (discussing legislative standing cases and acknowledging the difficulty of analogizing these cases to situations involving Congress); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 358–63 (2015) (noting that lower courts have "greatly struggled with" congressional standing issues); see *infra* Part II.
- 4 *Coleman v. Miller*, 307 U.S. 433, 435–46 (1939) (involving the vote in the Kansas Legislature); see *infra* Part II.
- 5 *Raines v. Byrd*, 521 U.S. 811, 821–30 (1997) (holding that state legislators do not suffer injury to themselves which would give them Article III standing).
- 6 Mank, *supra* note 3, at 25–26 (discussing how *Raines* distinguished *Coleman* on the basis that the latter decision concerned "the fundamental issue of whether a purported legislative action established a valid law or not"); see *infra* Part II.
- 7 *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015).

whether the U.S. Congress has standing to challenge certain presidential or executive actions because of the difficult separation-of-powers concerns in such cases.⁸

The *U.S. House of Representatives v. Burwell* suit may finally force the Supreme Court to address whether Congress has standing to bring a suit against the President. There is a stronger argument for granting legislative standing in this case because the appropriations power is a core constitutional power given to the House and an entire house of Congress filed suit rather than just individual legislators.⁹ A more difficult question is whether Congress may challenge any alleged legal breach by the executive branch.¹⁰

Part I will discuss the basics of Article III standing and the separation-of-powers concerns raised by congressional suits against the President.¹¹ Part II examines the complex issues involving legislative standing.¹² Part III explores the reasoning in *U.S. House of Representatives v. Burwell*.¹³ Part IV examines the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*.¹⁴ Part V discusses the majority opinion and two dissenting opinions in *United States v. Windsor*.¹⁵ The Conclusion argues in favor of institutional congressional standing by Congress, a house of Congress, or a duly authorized committee to defend core constitutional authority possessed by Congress, but against legislative suits merely challenging how the executive branch implements a particular federal statute.¹⁶

I. INTRODUCTION TO ARTICLE III STANDING¹⁷

The Constitution does not expressly require that each plaintiff suing in a federal court prove standing; nevertheless, the Supreme Court has interpreted Article III's limitation of judicial authority to

8 *Id.* at 2665 n.12 ("The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here.").

9 *See infra* Part II.

10 *See infra* Parts I, IV, and Conclusion; *see also* Mank, *supra* note 3, at 22–30, 40–62 (discussing competing arguments for and against finding congressional standing).

11 *See infra* Part I.

12 *See infra* Part II.

13 *See infra* Part III.

14 462 U.S. 919, 919–59 (1983) (holding that Congress may not create a power for itself to have a legislative veto over executive actions); *infra* Part IV.

15 *United States v. Windsor*, 133 S. Ct. 2675 (2013); *infra* Part V.C–E.

16 *See infra* Conclusion.

17 The discussion of standing in Part I relies upon my earlier standing article cited in footnote 3.

actual “Cases” and “Controversies” as imposing constitutional standing requirements.¹⁸ The Supreme Court has formulated a three-part test for constitutional Article III standing that requires a plaintiff to demonstrate that: (1) he has “suffered an injury-in-fact,” which is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”; (2) “there [is] a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”; and (3) “it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”¹⁹

A plaintiff bears the burden of proof for all three standing requirements.²⁰ Thus, for an Article III court to have jurisdiction over a suit, at least one plaintiff must prove he has standing for each form of relief sought.²¹ Federal courts must dismiss a case for lack of jurisdiction if no plaintiff demonstrates the three Article III standing requirements.²²

18 The constitutional standing requirements are derived from Article III, Section 2, which provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2; *see also* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006) (explaining why the Supreme Court infers that Article III’s case-or-controversy requirement necessitates standing limitations and clarifying that “[i]f a dispute is not a proper case or controversy, the courts have no business deciding it”). *See generally* Michael E. Solimine, *Congress, Separation of Powers and Standing*, 59 CASE WES. RES. L. REV. 1023, 1036–38 (2009) (discussing a scholarly debate on whether the Framers intended the Constitution to require standing to sue).

19 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (second, third, and fourth alterations in original) (citations omitted) (internal quotation marks omitted). *See* Nash, *supra* note 3, at 347 (quoting the same).

20 *See DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Lujan*, 504 U.S. at 561 (same).

21 *See DaimlerChrysler*, 547 U.S. at 351–52 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)) (confirming that “a plaintiff must demonstrate standing separately for each form of relief sought”).

22 *See id.* at 340–41 (emphasizing the importance of the case-or-controversy requirement); *Laidlaw*, 528 U.S. at 180 (adding that courts have an affirmative duty at the outset of the litigation to ensure that litigants satisfy all Article III standing requirements).

As discussed above, standing requirements are grounded in fundamental constitutional principles inferred from Article III's explication of the judicial authority of federal courts. For example, Article III standing principles prohibit advisory opinions as unconstitutional because such opinions are not based on an actual "case" or "controversy."²³ Moreover, Article III standing requirements are based on fundamental separation-of-powers principles inferred from the Constitution's three-branch form of government, which includes the division of powers between the judiciary and political branches of government so that the "Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'"²⁴

Congress may not authorize suits that violate fundamental standing principles.²⁵ However, different members of the Supreme Court have disagreed concerning the degree to which separation-of-powers principles restrict Congress's authority to authorize standing to sue in federal courts for private citizen suits challenging executive branch decisions.²⁶ Furthermore, there are also significant separation-of-powers concerns when Congress or a house of Congress seeks standing to sue the President.²⁷ Article II of the Constitution requires that the President "take Care that the Laws be faithfully executed."²⁸ As will be discussed in Part IV, Justice Antonin Scalia, in his dissenting opinion in *United States v. Windsor*, argued that the executive branch has the exclusive authority in most circumstances under Article II's

23 See *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) ("Article III of the Constitution restricts the power of federal courts to 'Cases' and 'Controversies.' . . . Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'") (citations omitted).

24 *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotation marks omitted), *partially abrogated on other grounds by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)).

25 See *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *Lujan*, 504 U.S. at 573; see also Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 5 (2015) (emphasizing the fundamental principle of the judiciary's "scrupulous adherence to standing requirements").

26 Compare *Lujan*, 504 U.S. at 573–78 (concluding that Articles II and III of the Constitution limit Congress's authority to authorize citizen suits by any person lacking a concrete injury and citing several recent Supreme Court decisions for support), *with id.* at 580 (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . ."), and *id.* at 602 (Blackmun, J., dissenting) (arguing that the "principal effect" of the majority's approach to standing was "to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates").

27 See *infra* Parts II–IV.

28 U.S. CONST. art. II, § 3.

Take Care Clause to defend, or not to defend, federal statutes.²⁹ However, he acknowledged that there may be an exception for legislative standing when Congress defends a core institutional power.³⁰ Some academics go further than Justice Scalia by arguing that executive authority under Article II's Take Care Clause is absolutely exclusive and would bar any suits by Congress challenging the enforcement or non-enforcement of a federal statute.³¹ Because of separation-of-powers issues raised by Article II's Take Care Clause, the question of legislative standing is controversial, as Part II will show.³²

II. LEGISLATIVE STANDING

Whether Congress has Article III standing to challenge a presidential action or inaction raises complicated questions.³³ For instance, Congress or a house of Congress has stronger grounds for

29 United States v. Windsor, 133 S. Ct. 2675, 2700–05 (2013) (Scalia, J., dissenting) (arguing that the executive in most circumstances has exclusive authority to defend federal statutes under Article II, thus excluding congressional standing to intervene even when the President refuses to enforce a law); see *infra* Part IV.D.

30 See *Windsor*, 133 S. Ct. 2675, at 2700; see also Matthew I. Hall, *Standing of Intervenor Defendants in Public Law Litigation*, 80 *FORDHAM L. REV.* 1539, 1548–49 (2012) (“*Chadha*, in short, held only that Congress has a sufficient institutional stake to support a case or controversy where it seeks to defend a power granted to it by a statute. *Chadha* does not hold that Congress may intervene to defend any challenged federal statute . . .”).

31 Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 *CORNELL L. REV.* 571, 572–76, 625–30 (2014) (arguing that Article II’s Take Care Clause gives the executive branch the exclusive authority to defend federal laws thus precluding congressional standing to intervene even when the President refuses to enforce law). But see Brianne J. Gorod, *Defending Executive Nondefense and the Principle-Agent Problem*, 106 *NW. U. L. REV.* 1201, 1219–20 (2012) (“Defending [a] law . . . does not focus on the operation of the law and generally will not affect its operation at all. . . . [T]he Executive simply provides the court with its understanding of what the Constitution requires . . .”); Bethany R. Pickett, Note, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 *NW. U. L. REV.* 439 (2016) (arguing that Congress should have institutional standing when a President refuses to enforce a federal statute). See generally Stern, *supra* note 25, at 11–16 (discussing competing scholarly views on the issue of congressional standing).

32 See *infra* Part II.

33 See Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem*, 81 *FORDHAM L. REV.* 577, 582–98 (2012) (arguing that Congress as an institution, or either house, has standing to defend a statute that the President refuses to defend, but acknowledging counter-arguments); Mank, *supra* note 3, at 23; Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 *DUKE L.J.* 1183, 1209–13 (2012) (“[I]t is uncertain whether Congress or one of its houses may intervene as a party or simply file a brief as an amicus and whether, if it may intervene, it enjoys all of the rights of a party at the district court level to depose and summon witnesses, gather and introduce documents, and the like.”); *id.* at 1210 n.133 (discussing cases).

standing than individual members when it is suing to defend a legislature's institutional powers.³⁴ Furthermore, some important legislative standing cases have involved state or territorial legislators that do not raise the same type of separation-of-powers concerns that arise when Congress sues the President.³⁵

A. *Legislative Standing Cases, 1939–2014: Coleman and Raines Define the Line for Legislative Standing*

1. *Coleman v. Miller*

In *Coleman v. Miller*, the Supreme Court held that twenty Kansas state senators could seek a writ of mandamus against the Secretary of the Senate of the State of Kansas to contest whether the Kansas State Senate actually ratified the Child Labor Amendment to the U.S. Constitution.³⁶ There had been a tie vote of twenty to twenty in the Kansas Senate for the proposed Amendment, and the Lieutenant Governor, the presiding officer of the Kansas Senate, had broken the tie by voting in favor of the Amendment.³⁷ The twenty state senators who voted against the Amendment argued that amendments to the U.S. Constitution must be enacted by state legislators only and that state executive officials should not vote on proposed amendments.³⁸ The Supreme Court of Kansas denied the writ because it concluded on the merits that the Amendment was validly enacted because the Lieu-

34 *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (“We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. . . . We therefore hold that these individual members of Congress do not have a sufficient ‘personal stake’ in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.”); Mank, *supra* note 3, at 23; *see infra* Parts II–IV.

35 *See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 n.12 (2015) (explaining that its decision only addressed legislative standing for state legislatures and not standing when Congress sues the President, which raises separation-of-powers concerns absent in the former type of case); *Coleman v. Miller*, 307 U.S. 433, 435–46 (1939) (involving a vote in the Kansas Legislature); *Gutierrez v. Pangelinan*, 276 F.3d 539, 542–47 (9th Cir. 2002) (involving bill passed by Guam territorial legislature); Mank, *supra* note 3, at 23–24, 27; *see infra* Parts II.A.2, II.B.

36 *Coleman*, 307 U.S. at 438–46 (holding that the twenty state senators had a Fifth Amendment right to have their vote given effect and that the state court abridged that right); Mank, *supra* note 3, at 23–24.

37 *Coleman*, 307 U.S. at 436–38 (holding that the court has jurisdiction since twenty state senators had a Fifth Amendment right to have their votes given effect).

38 *Id.* at 436. The Kansas House of Representatives subsequently voted to ratify the Amendment. *Id.*

tenant Governor may cast the deciding vote on proposed amendments.³⁹

After granting certiorari, the U.S. Supreme Court, in an opinion by Chief Justice Charles Evans Hughes, determined that the twenty Kansas state senators had standing to sue because they had an interest in the “effectiveness of their votes” and whether their votes were “given effect.”⁴⁰ He explained,

We find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.⁴¹

Crucially, the Kansas senator-plaintiffs were not complaining about the state executive’s implementation or interpretation of a law, but instead whether the Lieutenant Governor had interfered with the legislative process to nullify their votes as a legislative body.⁴²

2. *Raines v. Byrd*

In *Raines v. Byrd*, the Supreme Court held that individual members of Congress normally do not have Article III standing by merely holding office to challenge an allegedly unconstitutional statute, despite Congress’s enactment of a statute purporting to grant standing to legislators to challenge that statute,⁴³ unless the legislator can demonstrate he has suffered a personal concrete injury from its passage like any plaintiff.⁴⁴ Senator Robert Byrd and several other members of Congress in *Raines* alleged that the Line Item Veto Act⁴⁵ damaged the institution of Congress by unconstitutionally expanding the president’s veto authority, but the Court determined that individual members of Congress could not sue based on possible generalized harm to the legislature when they failed to demonstrate that “their

³⁹ *Id.* at 437.

⁴⁰ *Id.* at 438 (holding that the twenty state senators had a right under the Constitution that was denied in this instance); Mank, *supra* note 3, at 24.

⁴¹ *Coleman*, 307 U.S. at 446.

⁴² See U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 66–67 (D.D.C. 2015) (interpreting the *Coleman* decision).

⁴³ The statute provided that any member of Congress could assert a constitutional violation and sue for declaratory or injunctive relief to challenge the Line Item Veto Act. *Raines v. Byrd*, 521 U.S. 811, 815–16 (1997).

⁴⁴ *Id.* at 821–30 (differentiating between the injury suffered to a legislator as a political power and as a private injury); Mank, *supra* note 3, at 24–26.

⁴⁵ See Line Item Veto Act, Pub. L. 104–130, 110 Stat. 1200 (1996).

claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.”⁴⁶ Also, the Court noted that “[w]e attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.”⁴⁷ Thus, the *Raines* decision did not address whether Congress or a house of Congress has standing as an institution to challenge executive actions.⁴⁸

The Court in *Raines* distinguished its decision in *Coleman* and strongly implied that case was still good law.⁴⁹ After reviewing the issues and decision in *Coleman*, the *Raines* decision commented:

It is obvious, then, that our holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.⁵⁰

The *Raines* decision distinguished *Coleman* from the facts in its case by explaining that only *Coleman* involved the fundamental issue of whether a purported legislative action established a valid law or not: “There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step.”⁵¹ Additionally, the *Raines* decision distinguished the facts in its case from those in *Coleman* by observing that “the institutional injury they

46 *Raines*, 521 U.S. at 820; see also *id.* at 821, 830 (recognizing that the claim was not for a private personal injury). By contrast, a member of Congress might be able to sue to defend his personal interest in holding his seat in Congress. *Id.* at 820–21 (discussing Powell v. McCormack, 395 U.S. 486, 496, 512–14 (1969) (holding that a member of Congress could sue to challenge his exclusion from the House of Representatives and his loss of his salary)).

47 *Id.* at 829 (stating that the appellees have not alleged any injury to themselves).

48 See *id.* at 829–30 (rejecting standing for individual members of Congress, but observing that both houses opposed their suit against the Line Item Veto Act); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 67–69, 71–72 (D.D.C. 2015) (interpreting the *Raines* decision); Mank, *supra* note 3, at 25.

49 *Raines*, 521 U.S. at 821–29; Mank, *supra* note 3, at 25. But cf. Nash, *supra* note 3, at 351–53 (arguing that *Raines* read *Coleman* narrowly, and that *Raines* even suggested that *Coleman* might not apply to standing for congressional suits, but also suggested that congressional institutional standing might be valid).

50 *Raines*, 521 U.S. at 823 (footnote omitted). In footnote eight of the *Raines* decision, the Court explained that it was not deciding whether *Coleman* could be distinguished neither on the grounds that the Court in *Coleman* viewed what it concluded to be the senators’ interest in maintaining the effectiveness of their votes as a basis for invoking federal interest, nor on the grounds that *Coleman* did not involve the separation-of-powers issues involved in congressional suits. *Id.* at 824–25 n.8.

51 *Id.* at 826; Mank, *supra* note 3, at 25–26.

allege is wholly abstract and widely dispersed (contra, *Coleman*)”.⁵² Moreover, the *Raines* decision justified the denial of standing for members of Congress on the grounds that Congress could simply repeal the disputed statute or exempt appropriations bills from its application; the Court emphasized that its decision does not address the question of whether Congress or a member of Congress has standing when it cannot repeal the disputed statute.⁵³ Accordingly, the *Raines* decision usually prevents suits by individual members of Congress who allege that a statute has diminished the institutional authority of the legislative branch, especially where Congress may simply repeal a disputed statute.⁵⁴

Raines, nevertheless, potentially allows the possibility of a suit challenging whether a federal statute is an effective law or not, similar to the *Coleman* decision. However, the *Raines* decision explicitly declined to address whether a suit comparable to *Coleman* can be filed by members of or a house of Congress. It also declined to explicitly address whether such a suit would be barred by separation-of-powers concerns or other factors not applicable to *Coleman*, which involved state legislators.⁵⁵ The *Raines* decision did not consider suits where Congress or a house of Congress argues that executive action has arguably diminished Congress’s institutional authority, which is discussed in Parts IV and V.⁵⁶ The *Raines* decision also failed to consider cases where a plurality of Congress might have grounds to challenge an action that requires a two-thirds supermajority of Congress or a house of Congress, such as approval of a treaty by the U.S. Senate.⁵⁷

After the *Raines* decision, lower courts have rejected suits by individual legislators that allege that an executive official has improperly implemented a law, but individual legislators still may be able to sue if they allege, as in *Coleman*, that an executive officer has interfered with the legislative process so as to raise questions whether a law was validly enacted.⁵⁸ For instance, in *Russell v. DeJongh*, a senator in the Virgin

52 *Raines*, 521 U.S. at 829.

53 *Id.* at 829–30; Mank, *supra* note 3, at 26.

54 Mank, *supra* note 3, at 26.

55 *Raines*, 521 U.S. at 824 n.8 (declining to decide whether a suit by federal legislators similar to *Coleman* would be appropriate); Mank, *supra* note 3, at 26.

56 See Nash, *supra* note 3, at 376–78 (criticizing *Raines* for failing to consider congressional challenges involving issues other than vote nullification); *infra* Parts IV and V.

57 See Nash, *supra* note 3, at 376–77 (noting that *Raines* does not account for likely scenarios in which Congress should have standing but are obstructed under the holding).

58 See *Campbell v. Clinton*, 203 F.3d 19, 20–24 (D.C. Cir. 2000) (applying *Raines*’s approach of denying legislative standing for individual members of Congress in a case alleging the President violated the War Powers Act because members have a legislative remedy and therefore do not need to sue in federal court); Mank, *supra* note 3, at 26; see also Cheno-

Islands territorial legislature sued to void certain judicial commissions because the Governor had allegedly failed to follow proper appointment procedures.⁵⁹ Dismissing the case for lack of standing, the Third Circuit explained the difference between cases like *Raines* that deny legislative standing and *Coleman*'s recognition of standing:

The courts have drawn a distinction . . . between a public official's mere disobedience of a law for which a legislator voted—which is not an injury in fact—and an official's "distortion of the process by which a bill becomes law" by nullifying a legislator's vote or depriving a legislator of an opportunity to vote—which is an injury in fact.⁶⁰

Furthermore, the Third Circuit interpreted the *Coleman* exception for legislative standing as applying to only cases where legislators had no effective political remedy, such as a President's decision to terminate a treaty, or at least where a supermajority was needed to overturn an executive decision.⁶¹ On the other hand, similar to *Raines*, the Virgin Islands' "Legislature was free to confirm, reject, or defer voting on the Governor's nominees," and, accordingly, there was no compelling reason to allow a legislative member to sue in court when the political process could provide an effective remedy.⁶²

3. *Pocket Veto Cases*

In pocket veto⁶³ cases addressing whether a President's or territorial governor's inaction causes a bill to become a law or not to become a law, lower courts have followed *Coleman*'s approach to find legislative standing, although the Supreme Court has never resolved the issue.⁶⁴ In *Kennedy v. Sampson*, a pre-*Raines* decision, Congress

weth v. Clinton, 181 F.3d 112, 113–17 (D.C. Cir. 1999) (applying *Raines*'s approach of denying legislative standing for individual members of Congress in a case alleging the President's executive order for the protection of rivers exceeded his authority and diminished congressional authority); see also Greene, *supra* note 33, at 584–85 (discussing the reasoning behind *Raines* and *Chenoweth* in light of the *Coleman* holding).

59 491 F.3d 130, 131–33 (3d Cir. 2007); Mank, *supra* note 3, at 26–27.

60 Russell v. DeJongh, 491 F.3d, 130, 135 (3d Cir. 2007).

61 *Id.* at 135–36 (explaining that a key feature of *Coleman* and several lower-court cases was that "the challenged actions in those cases left the plaintiffs with no effective remedies in the political process"); Mank, *supra* note 3, at 27.

62 Russell, 491 F.3d at 136; Mank, *supra* note 3, at 27.

63 U.S. CONST. art. I, § 7 implicitly gives the President the authority to pocket veto legislation in certain circumstances where Congress is adjourned:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

64 See Gutierrez v. Pangelinan, 276 F.3d 539, 542–47 (9th Cir. 2002) (applying the *Coleman* decision to hold that the Governor of Guam had standing to challenge the Guam Su-

passed a bill that President Richard Nixon neither signed nor formally vetoed, but he had issued a memorandum of disapproval that stated his decision not to sign the bill in an implied effort to pocket veto the bill under Article I, Section 7 of the U.S. Constitution.⁶⁵ Citing *Coleman*, the D.C. Circuit held that Senator Edward Kennedy had standing to determine whether the bill had become law:

In the present case, appellee has alleged that conduct by officials of the Executive branch amounted to an illegal nullification not only of Congress' exercise of its power, but also of appellee's exercise of his power. In the language of the *Coleman* opinion, appellee's object in this lawsuit is to vindicate the effectiveness of his vote. No more essential interest could be asserted by a legislator. We are satisfied, therefore, that the purposes of the standing doctrine are fully served in this litigation.⁶⁶

In 1999, the D.C. Circuit in *Chenoweth v. Clinton* addressed whether the *Kennedy* decision was still good law in light of the *Raines* decision and other decisions restricting the scope of Article III standing.⁶⁷ The D.C. Circuit concluded that *Kennedy* "may survive as a peculiar application of the narrow rule announced in *Coleman*."⁶⁸ The *Chenoweth* decision explained:

Although *Coleman* could be interpreted more broadly, the *Raines* Court read the case to stand only for the proposition that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified." . . . Even under this narrow interpretation, one could argue that the plaintiff in *Kennedy* had standing. The pocket veto challenged in that case had made ineffective a bill that both houses of the Congress had approved. Because it was the President's veto—not a lack of legislative support—that prevented the bill from becoming law (either directly or by the Congress voting to override the President's ve-

preme Court decision that his failure to sign a bill resulted in a pocket veto preventing the bill from becoming law); see also *Chenoweth v. Clinton*, 181 F.3d 112, 116–17 (D.C. Cir. 1999) (concluding that prior D.C. Circuit cases finding legislative standing in pocket veto cases are probably still good law because they are controlled by *Coleman* decision); see also Greene, *supra* note 33, at 586–88 (arguing that pocket veto cases fall within *Coleman*'s legislative standing rule); Mank, *supra* note 3, at 27–29.

65 511 F.2d 430, 432 (D.C. Cir. 1974); see also *Barnes v. Kline*, 759 F.2d 21, 26 (D.C. Cir. 1985) (holding that individual members of Congress and congressional leaders had standing in a pocket veto case). Congress had adjourned within eight days of the bill's passage, but the Senate appointed an agent to take messages from the president to avoid a pocket veto. *Kennedy v. Sampson*, 511 F.2d 430, 432 (D.C. Cir. 1974).

66 *Kennedy*, 511 F.2d at 436.

67 181 F.3d at 114–17; Mank, *supra* note 3, at 28–29.

68 *Chenoweth*, 181 F.3d at 116.

to), those in the majority could plausibly describe the President's action as a complete nullification of their votes.⁶⁹

In pocket veto cases, individual legislators may be able to sue to determine, as in *Coleman*, whether a law was effectively ratified by the legislator or nullified by the President or governor.⁷⁰

4. *Institutional Authority Cases, Especially Congressional Subpoenas*

Several decisions in the D.C. Circuit have concluded or suggested that a house of Congress or its committees has standing to sue to protect the institutional authority of Congress or that house, especially in cases involving congressional subpoenas.⁷¹ Professor Jonathan Remy Nash agrees that Congress generally has standing to seek information because obtaining such information is central to its legislative oversight, voting, and drafting functions.⁷² He explains that a functionalist approach to standing, including the need of Congress to gather information, is more likely to support congressional standing than a formalist approach to standing that favors traditional common law adjudication and avoids having courts resolve intra-branch disputes between Congress and the President.⁷³ Addressing the more difficult question of congressional suits challenging the executive's nondefense or nonenforcement of laws, however, Professor Stern argues that "the scholarly debate over congressional standing to enforce or

69 *Id.* at 116–17; see also Nash, *supra* note 3, at 360–61 (arguing that even if *Kennedy* and *Coleman* survive according to the *Chenoweth* decision, that decision took a narrow view of when Congress has standing to challenge executive branch actions).

70 Mank, *supra* note 3, at 27–29 (discussing the foundation set by *Coleman* for courts to analyze legislative standing in pocket veto cases).

71 *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 67–68, 78 (D.D.C. 2015) (outlining recent District of Columbia cases, many of which held in favor of legislative standing).

72 Nash, *supra* note 3, at 343, 358, 363–67, 373–75, 388 ("Beyond the Court's narrow construction of congressional function in *Raines*, Congress gathers information, and therefore should have standing to vindicate that information-gathering function."). While the U.S. Constitution does not explicitly authorize Congress's authority to hold hearings and gather information, the Supreme Court has recognized the power of Congress to conduct investigations based upon practices dating to the early days of the Republic, as well as in colonial legislatures and the British Parliament. *Id.* at 363–65; see also *McGrain v. Daugherty*, 273 U.S. 135, 161 (S.D. Ohio 1927) (recognizing the authority of Congress to hold hearings and take testimony based on historical record and functional reasons rather than on set provisions).

73 Nash, *supra* note 3, at 363–75. Professor Nash acknowledges that the *Raines* decision was "unnecessarily stingy in its understanding of congressional function," but argues that the view that the *Raines* decision calls "into question constitutional standing when a congressional committee enforces a subpoena against an executive branch actor, but not otherwise, is implausible." *Id.* at 369–75.

defend federal statutes has pitted formalists categorically opposing such standing against functionalists who view Congress's ability to bring suit in certain circumstances as a necessary mechanism to prevent executive arrogation of power," that the Supreme Court has taken a "hybrid" or inconsistent approach combining elements of formalism and functionalism in its separation-of-powers decisions, that the Court has avoided firmly deciding congressional standing issues because of the tension between its formalist and functionalist decisions, but that the Court is unlikely to recognize legislative challenges to a President's failure to defend or enforce a federal statute.⁷⁴

In *United States v. AT&T*, the D.C. Circuit held that the House of Representatives had standing to sue in an official capacity to demand information from the executive branch pursuant to Congress's investigatory powers,⁷⁵ although the court remanded the case back to the district court and urged the executive and legislative branches to settle a difficult case.⁷⁶ The functionalist approach to congressional standing underlies the *AT&T* decision, which involved a dispute over congressional subpoenas that sought to compel information from AT&T related to warrantless wiretaps that the executive branch refused to release for national security reasons.⁷⁷ The D.C. Circuit concluded it had federal subject matter jurisdiction over the case,⁷⁸ and also held that it was "clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."⁷⁹ The *AT&T* decision determined that the Supreme Court's decision in *U.S. v. Nixon*,⁸⁰ which had involved an "analogous conflict between the executive and judicial branches and stands for the justiciability of such a case," had "establish[ed], at a minimum, that the mere fact that there is a conflict between the legislative and executive branches . . . does not preclude judicial resolution of the conflict."⁸¹ However, the D.C. Circuit remanded the case because it determined that the complicated national security questions involved

74 Stern, *supra* note 25, at 51–58.

75 551 F.2d 384, 391 (D.C. Cir. 1976). Although formally designated as a lawsuit between the United States and AT&T, the latter's only interest was "to determine its legal duty" under a congressional subpoena that the executive had advised it to ignore. *Id.* at 385, 388–89.

76 *Id.* at 385, 391–95.

77 *Id.* at 385–88.

78 *Id.* at 388–89.

79 *Id.* at 391.

80 418 U.S. 683 (1974).

81 *AT&T*, 551 F.2d at 390 (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)).

required more fact finding by the district court before courts could resolve the political question justiciability issues raised, and it urged the executive and legislative branches to settle the difficult questions in the case.⁸²

Several more recent decisions in the U.S. District Court for the District of Columbia have followed the *AT&T* decision's approach in finding that a house or a congressional committee has standing or jurisdiction to sue the executive branch to seek information from the executive branch pursuant to its investigatory powers. In *Committee on Oversight & Government Reform v. Holder*, the district court found that "neither the Constitution nor prudential considerations require judges to stand on the sidelines. There is federal subject matter jurisdiction over this complaint, and it alleges a cause of action that plaintiff has standing to bring."⁸³ The court cited the *AT&T* decision, the *Nixon* decision, and a district court decision in *Committee on the Judiciary v. Miers*,⁸⁴ which is discussed below, for the proposition that federal courts may resolve disputes between the political branches over congressional requests for information.⁸⁵ The *Committee on Oversight & Government Reform* decision distinguished the *Raines* decision as involving only individual members of Congress and not the institutional interests of a duly authorized committee of Congress.⁸⁶ Furthermore, while it raised concerns about the potential "problems that could arise if individual executive officials or Members of Congress were to challenge the merits of decisions committed to the other branch of government in a lawsuit," the district court in *Committee on Oversight & Government Reform* concluded that the *Raines* decision had not decided whether Congress may sue to protect its institutional interests.⁸⁷

In *Committee on the Judiciary*, the district court held that the House Committee on the Judiciary, which was acting on behalf of the entire House of Representatives, had standing to bring a civil action to enforce congressional subpoenas issued to senior presidential aides.⁸⁸ The court relied upon the *AT&T* decision and concluded that case "survive[d]" the *Raines* decision.⁸⁹ The district court distinguished its

82 *AT&T*, 551 F.2d at 390-95.

83 979 F. Supp. 2d 1, 4 (D.D.C. 2013).

84 558 F. Supp. 2d 53 (D.D.C. 2008).

85 *See Comm. on Oversight & Gov't Reform*, 979 F. Supp. 2d at 4, 9-12, 16 (citing *AT&T*, *Nixon*, and *Committee on the Judiciary*).

86 *Id.* at 13-14.

87 *Id.* (discussing *Raines v. Byrd*, 521 U.S. 811, 828-30 (1997)).

88 558 F. Supp. 2d at 55-56, 67-71.

89 *Id.* at 67-71.

facts involving an institutional injury from the suits filed by individual members of Congress in *Raines*.⁹⁰ “But the Court has never held that an institution, such as the House of Representatives, cannot file suit to address an institutional harm. Because the issues presented by *Raines* and [AT&T] were not the same, one cannot conclude that *Raines* overruled or undermined [AT&T].”⁹¹ Furthermore, the *Committee on the Judiciary* decision reasoned that both its case and the AT&T decision involved concrete issues involving the enforcement of congressional subpoenas, whereas “the purported injury [in *Raines*] was wholly hypothetical.”⁹² Accordingly, the district court in *Committee on the Judiciary* held that a House committee had standing to sue to enforce congressional subpoenas issued to senior presidential aides.⁹³

In *U.S. House of Representatives v. Department of Commerce*, the U.S. District Court for the District of Columbia concluded “that [the House of Representatives] has properly alleged a judicially cognizable injury through its right to receive information by statute and through the institutional interest in its lawful composition” when it sued to obtain census information guaranteed to it by a statute and “necessary to perform a constitutionally mandated function” in apportioning the number of members to each state.⁹⁴ The court held that the House of Representatives suffered a concrete and particularized informational injury when the President and the Census Bureau failed to provide information about statistical sampling techniques used by the Bureau in the 2000 Census that a statute required the executive branch to provide to Congress.⁹⁵ The court distinguished the *Raines* decision as involving a suit by individual legislators and not involving the institutional interest of the House in how the Census is counted for purposes of apportioning seats in that body.⁹⁶ The court explained: “And, the institutional interest is not widely dispersed [as it was in *Raines*]; it is particularized to the House of Representatives because the House’s composition will be affected by the manner in which the Bureau conducts the Census.”⁹⁷ Thus, in the D.C. Circuit, both the AT&T decision and at least three district court decisions support the institutional authority of Congress, a house of Congress, or a duly authorized committee to receive information pursuant to valid subpoenas or

90 *Id.*

91 *Id.* at 70.

92 *Id.*

93 *Id.* at 67–71.

94 11 F. Supp. 2d 76, 85–87 (D.D.C. 1998).

95 *Id.*

96 *Id.* at 89–90.

97 *Id.* at 89.

other appropriate statutory rights.⁹⁸ Furthermore, four district decisions, including Judge Collyer's recent decision regarding the Affordable Care Act, agreed that the D.C. Circuit's *AT&T* decision "survives *Raines*."⁹⁹

B. Arizona State Legislature v. Arizona Independent Redistricting Commission

The most recent Supreme Court decision on legislative standing is *Arizona State Legislature v. Arizona Independent Redistricting Commission*.¹⁰⁰ The Arizona state legislature filed suit challenging Proposition 106, a statewide citizen's initiative that assigned congressional redistricting authority to an independent commission instead of the legislature.¹⁰¹ The Arizona legislature contended that Proposition 106 violated the U.S. Constitution's Elections Clause,¹⁰² which gives state legislatures "primary responsibility" over congressional redistricting decisions.¹⁰³ The Supreme Court concluded that the Arizona legislature had standing to sue because Proposition 106 "strip[ped] the legislature of its alleged prerogative to initiate redistricting," and, therefore, that the legislature had alleged a sufficient injury in fact for Article III standing.¹⁰⁴

The *Arizona State Legislature* decision distinguished the *Raines* case by emphasizing its narrow holding "that six *individual Members* of Congress lacked standing to challenge the Line Item Veto Act" and that "[t]he 'institutional injury' at issue, we reasoned, scarcely zeroed in on any individual Member."¹⁰⁵ The *Arizona State Legislature* opinion

98 See *id.* at 86 (discussing cases recognizing the authority of a house of Congress or congressional committee to issue valid subpoenas or obtain information in support of its institutional investigatory powers); *supra* Part II.A.4.

99 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 68 (citing *Department of Commerce, Commission on Oversight & Government Reform*, and *Committee on the Judiciary*); *supra* Part II.A.4.

100 135 S. Ct. 2652 (2015).

101 *Id.* at 2658–59, 2661.

102 U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .").

103 *Arizona State Legislature*, 135 S. Ct. at 2663 (quoting Brief for Appellant at 51–3, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (No. 13-1314)).

104 *Arizona State Legislature*, 135 S. Ct. at 2663. On the merits, a divided Court determined that Proposition 106's creation of a state redistricting commission did not violate the Constitution's Elections Clause. *Id.* at 2671–77.

105 *Id.* at 2664 (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)); accord Nash, *supra* note 3, at 353 (arguing that the *Arizona State Legislature* decision distinguished *Raines*); see also *Raines*, 521 U.S. at 813–14, 821, 830); *id.* at 2664..

emphasized that there was “some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress.”¹⁰⁶ By contrast, the Arizona legislature was “an institutional plaintiff asserting an institutional injury.”¹⁰⁷

The *Arizona State Legislature* decision reasoned that the *Coleman* decision, which had recognized legislative standing, was “[c]loser to the mark” of the facts in its case.¹⁰⁸ The *Raines* decision had explained the *Coleman* decision as standing “for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”¹⁰⁹ The *Arizona State Legislature* decision concluded that the Arizona legislature had Article III standing because “Proposition 106, together with the Arizona Constitution’s ban on efforts to undermine the purposes of an initiative . . . would ‘completely nullif[y]’ any vote by the legislature, now or ‘in the future,’ purporting to adopt a redistricting plan,” and, therefore, made the case similar to *Coleman* as the case was interpreted in *Raines*.¹¹⁰ The *Arizona State Legislature* opinion explicitly avoided the issue of whether Congress, a house of Congress, or a congressional committee has standing to sue the President: “The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona’s initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here.”¹¹¹

III. U.S. HOUSE OF REPRESENTATIVES V. BURWELL

In her 2015 opinion in *U.S. House of Representatives v. Burwell*, Judge Collyer of the U.S. District Court for the District of Columbia held that the House of Representatives had Article III standing to challenge certain provisions of the Affordable Care Act as violations of the U.S. Constitution’s Appropriations Clause, which requires that all federal government spending occur only if Congress appropriates

106 *Arizona State Legislature*, 135 S. Ct. at 2664 (quoting *Raines*, 521 U.S. at 829) (alteration in original).

107 *Id.*

108 *Id.* at 2665.

109 *Id.* (quoting *Raines*, 521 U.S. at 823).

110 *Id.* (quoting *Raines*, 521 U.S. at 823–24).

111 *Id.* at 2665 n.12; accord Nash, *supra* note 3, at 353 (arguing that the *Arizona State Legislature* decision avoided the issue of congressional standing).

those public funds through authorizing legislation.¹¹² The House in its suit argued that Sylvia Burwell, the Secretary of Health and Human Services, Jacob Lew, the Secretary of the Treasury, and their respective departments had spent billions of unappropriated dollars to support the ACA in violation of the Clause.¹¹³ The ACA provides several types of subsidies, including two relevant to the lawsuit.¹¹⁴ First, to assist certain individuals with the cost of insurance on the statute's exchanges, Congress in Section 1401 of the ACA "enacted a 'premium tax credit' under the Internal Revenue Code for coverage of statutory beneficiaries with household incomes from 100% to 400% of the federal poverty level."¹¹⁵ Second, Section 1402 of the ACA includes "'cost-sharing' provisions [that] require insurance companies that offer qualified health plans through the ACA to reduce the out-of-pocket cost of insurance coverage for policyholders who qualify."¹¹⁶ "The federal government then offsets the added costs to insurance companies by reimbursing them with funds from the Treasury."¹¹⁷

The House alleged that the executive branch's funding of Section 1402 violated the Appropriations Clause.¹¹⁸ The House maintained that Section 1401 tax credits were legitimately funded by a permanent appropriation in the Internal Revenue Code.¹¹⁹ However, the House contended that "Section 1402 Cost-Sharing Offsets must be funded and re-funded by annual, current appropriations," and that Congress had not appropriated any funds of any type to make any Section 1402 payments to insurance companies.¹²⁰ Despite Congress's refusal to fund the Section 1402 offsets through a current appropriation, the House alleged that the Secretaries spent public monies on that program beginning in January 2014.¹²¹

112 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57–59, 74–76 (D.D.C. 2015) (concluding that the House had standing to sue, in the context of a case involving a challenge to the federal government's alleged spending of unappropriated funds).

113 *Id.* at 57.

114 *Id.* at 59–60.

115 *Id.* at 59 (citing 26 U.S.C. § 36B(b)(3)(A)(ii)(III) (2012); 42 U.S.C. §§ 18081, 18082 (2012); King v. Burwell, 135 S. Ct. 2480, 2487 (2015)) (describing the refundable tax credits provided under the Act and the category of individuals that qualify for them).

116 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d at 60 (citing 42 U.S.C. § 18071).

117 *Id.* (quoting 42 U.S.C. § 18071(c)(3)(A)) ("An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.").

118 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d at 60.

119 *Id.*

120 *Id.* at 60–62.

121 *Id.* at 63.

The House relied upon the *Coleman* decision in arguing that it had standing as an institution to determine whether the Secretaries had disrupted the legislative process by spending money without a current appropriation.¹²² The House invoked *Coleman* to distinguish between legislative standing in a case ascertaining whether the executive had interfered with the legislative process in contrast to more questionable suits challenging the executive's implementation or interpretation of a law.¹²³ By contrast, the Secretaries relied primarily upon *Raines* in arguing against legislative standing in the case by contending that the House has alleged only an "abstract dilution of institutional legislative power."¹²⁴

The district court followed the *AT&T* decision and the three district court decisions that had found congressional standing in cases in which Congress, a house of Congress, or a committee sought information through a subpoena or pursuant to a statute.¹²⁵ Furthermore, the district court interpreted the *Arizona State Legislature* decision as limiting the scope of the *Raines* decision to suits involving individual legislators and not to suits by a legislature as an institution, although the court acknowledged that the *Arizona State Legislature* case had explicitly avoided the question of congressional standing in suits against the President.¹²⁶ The district court conceded that it was addressing an issue of first impression because "no case has decided whether this institutional plaintiff has standing on facts such as these."¹²⁷

The district court concluded that the House had standing to challenge the Secretaries' alleged violation of the Appropriations Clause by spending "billions of dollars without a valid appropriation, in direct contravention of" the clause.¹²⁸ The court rejected the executive branch's argument that Congress does not have standing to challenge how the executive implements, interprets or executes a statute because the House's Appropriation Clause claim had nothing to do with the three types of executive action supposedly exempt from legislative suits.¹²⁹ The district court explained that:

[T]he Non-Appropriation Theory is not about the implementation, interpretation, or execution of any federal statute. It is a complaint that

122 *Id.* at 66–67.

123 *Id.*

124 *Id.* at 67 (quoting *Raines v. Byrd*, 521 U.S. 811, 826 (1997)).

125 *Id.* at 67–68.

126 *Id.* at 68–69 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664–65 n.12 (2015)).

127 *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d at 69.

128 *Id.* at 69–75.

129 *Id.* at 70–73, 75.

the Executive has drawn funds from the Treasury without a congressional appropriation—not in violation of any statute, but in violation of Article I, § 9, cl. 7 of the Constitution. The Non-Appropriation Theory, in other words, is not about how Section 1402 is being applied, but rather how it is funded.¹³⁰

The district court's view that the House may challenge the funding of a statute under the Appropriations Clause negated the executive branch's arguments that Congress does not have standing to challenge how a statute is implemented by executive officials.¹³¹

The district court determined that the House had a particularized injury in fact for standing because "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."¹³² The court reasoned that the Appropriation Clause's vesting of control of federal expenditures in Congress could be nullified if the executive could spend money without authorization.¹³³ The only means to protect the congressional power of the purse was to authorize Congress or a house of Congress to sue to enforce the clause.¹³⁴

The district court rejected the Secretaries' argument that "vindication of the rule of law" is too generalized a grievance to be adjudicated by an Article III court.¹³⁵ The executive branch had relied on *Raines* for the principle that legislators cannot sue over an abstract dilution of congressional institutional authority.¹³⁶ However, the district court rejected the executive branch's analogy to *Raines* because that decision involved a suit by only six individual legislators who could not assert institutional interests rather than an entire house of Congress as in its case.¹³⁷ The court reasoned that the House's suit over appropriations was more comparable to the Arizona legislature's institutional suit in *Arizona State Legislature* where the Court had recognized legislative standing.¹³⁸ Furthermore, the House has an institutional interest in protecting its role in the appropriations process as defined in the Constitution that is distinct from any injury to the pub-

¹³⁰ *Id.* at 70 (footnote omitted).

¹³¹ *Id.* at 70–73. *But see* Zachary Cheslock, *Taking on the President: An Uphill Battle for House Republicans*, 47 *TOL. L. REV.* 159, 169–70 (2015) (arguing that Congress does not have standing to challenge President Obama's implementation of the Affordable Care Act because Congress could amend or repeal the statute).

¹³² U.S. House of Representatives v. Burwell, 130 F. Supp. 3d at 71.

¹³³ *Id.* at 71, 73.

¹³⁴ *Id.* at 73–74.

¹³⁵ *Id.* at 71–72, 74–75.

¹³⁶ *Id.* at 71–72.

¹³⁷ *Id.*

¹³⁸ *Id.* at 71–72.

lic at large.¹³⁹ Moreover, the court reasoned that the alleged constitutional violation could not be resolved by ordinary political methods without a lawsuit because the House asserted that the executive was able to circumvent Congress's alleged denial of funding for Section 1402 offsets by obtaining money from other sources.¹⁴⁰

The court determined that the House "as an institution would suffer a concrete, particularized injury if the Executive were able to draw funds from the Treasury without a valid appropriation. The House therefore has standing to sue on its Non-Appropriation Theory, to the extent that it seeks to remedy constitutional violations."¹⁴¹ The court interpreted the Appropriations Clause to require Congress to appropriate all federal funds, and, therefore, to establish an injury to Congress or house of Congress whenever the executive spent such monies without congressional authorization.¹⁴² The court concluded that "[d]isregard" for constitutional limitations on the executive's ability to spend monies without congressional control over spending "works a grievous harm on the House, which is deprived of its rightful and necessary place under our Constitution. The House has standing to redress that injury in federal court."¹⁴³ Finally, the court reasoned that the separation-of-powers concerns raised by the executive did not preclude the court from deciding the constitutional issues in the case.¹⁴⁴ The court stated: "Despite its potential political ramifications, this suit remains a plain dispute over a constitutional command, of which the Judiciary has long been the ultimate interpreter."¹⁴⁵

However, Judge Collyer concluded that the House did not have standing to challenge the Treasury's alleged changes to the start date of the statute's employer mandate and the percentage of employees who must be offered insurance by employers.¹⁴⁶ She declined to rec-

139 *Id.* at 72–75.

140 *Id.* at 73–77.

141 *Id.* at 74. The district court rejected other counts of the complaint that essentially alleged that the executive's implementation of the statute had violated certain provisions in the statute, because the Constitution does not envision legislative supervision of executive officers and the appropriations process could remedy the alleged statutory issues without a lawsuit, presuming that the appropriation process itself was not being violated in contradiction of the Constitution. *Id.* at 74–76.

142 *Id.* at 73–77.

143 *Id.* at 77.

144 *Id.* at 79–80. *But see* Stern, *supra* note 25, at 3–4, 42–56 (arguing that separation-of-powers and political-question doctrine concerns make it unlikely that the Supreme Court will recognize congressional standing, but acknowledging that the law is not absolutely clear on this issue).

145 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d at 80 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

146 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d at 58, 74–76.

ognize congressional standing in cases where a President has allegedly misinterpreted, misapplied, or declined to enforce a statute because to allow congressional suits over possible statutory violations would result in far more potential suits than legislative standing limited to alleged constitutional violations, and because private litigants would be able to sue under the Administrative Procedure Act to challenge the Treasury's regulations under the ACA.¹⁴⁷ Both scholars and members of the Court have debated whether Congress may ever have standing to challenge a President's non-enforcement or misinterpretation of a statute, and most have recognized that courts must be extremely cautious in allowing legislative suits because federal courts should not routinely referee political disputes between the legislative and executive branches.¹⁴⁸ Part V will examine Justice Scalia's and Justice Samuel Alito's differing views on the appropriateness of congressional standing when a President declines to enforce a federal statute.¹⁴⁹

Critics of the *Burwell* decision's recognition of congressional standing argue that the case is essentially about the interpretation of whether Section 1402 constitutes a permanent appropriation or requires annual appropriations.¹⁵⁰ They agree with the Obama Administration that Congress does not have standing to challenge how a statute is implemented by executive officials.¹⁵¹ However, Professor

147 *Id.* at 75–76.

148 Compare Grove & Devins, *supra* note 31, at 573–76, 625–30 (arguing that Article II grants the executive branch the exclusive authority to defend federal statutes in court, thus precluding congressional standing and barring Congress from intervening, even when the president refuses to enforce a law), with Pickett, *supra* note 31, at 468–75 (arguing that Congress should have institutional standing when a president refuses to enforce a federal statute). See generally Stern, *supra* note 25, at 11–16 (discussing competing scholarly views on the issue of congressional standing).

149 See *infra* Part V.

150 Nicholas Bagley, *Oh Boy. Here We Go Again*, THE INCIDENTAL ECONOMIST (Sept. 9, 2015, 9:34 PM), <http://theincidentaleconomist.com/wordpress/oh-boy-here-we-go-again> (criticizing Judge Collyer's view that the President's alleged violation of the Appropriations Clause provides sufficient grounds for a federal lawsuit, and arguing that that this conception, if accepted, "would mark an unprecedented expansion of judicial authority into interbranch food fights"); Walter Dellinger, Opinion, *House Republicans' Misguided Obamacare Lawsuit*, WASH. POST (Aug. 16, 2015), <https://www.washingtonpost.com/opinions/the-houses-misguided-obamacare-lawsuit/2015/08/16> (arguing that permitting the House to file suit in federal court because it does not agree with the President's interpretation of the congressionally enacted statute at issue would lead to an unprecedented expansion of the authority of federal judges).

151 Bagley, *supra* note 150 (arguing that Judge Collyer's ruling constitutes "a radical position [that] is untenable" and should be overturned on appeal); Cheslock, *supra* note 131, at 169–70 (arguing that the fact that Congress has alternative remedies to litigation at its

Jonathan Adler argues that Judge Collyer's theory of standing in the case is defensible, although he is not fully convinced by the "novel and largely unprecedented standing claim."¹⁵² He points out that when a federal district court considers a motion to dismiss it must assume the facts argued by the plaintiff, and that the House alleges that the Obama Administration has spent billions of dollars without its approval.¹⁵³ If the House's allegations are true, Adler contends the executive branch's actions are "egregious," are more than a "simple dispute over statutory interpretation," and arguably entitle the House to have standing to prevent executive abuse of its legislative authority over appropriations.¹⁵⁴ In 2016, Judge Collyer held on the merits that the Secretaries violated the Appropriations Clause, Article I, Section 9, clause 7, in using unappropriated monies to fund reimbursements due to insurers under Section 1402, but the court stayed its injunction pending appeal by either or both parties.¹⁵⁵

IV. IMMIGRATION & NATURALIZATION SERVICE V. CHADHA

The Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*¹⁵⁶ is an important constitutional precedent because of its merits holding that separation-of-powers principles in the Constitution prohibit Congress from delegating a power to the executive branch, but then authorizing one or both houses of Congress to exercise a legislative veto to override that executive decision without going through the mandated bicameral presentment process and veto

disposal through which it can oppose the ACA establishes that its challenge represents a purely political question and that it has not legitimately suffered an injury); Dellinger, *supra* note 150, at 1 (asserting that granting the House standing to sue the executive branch over interpretations of statutes would be an inappropriate and radical expansion of authority).

152 Jonathan H. Adler, Opinion, *House Obamacare Suit 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=.f3227a3ccee2 (explaining the House's argument for standing, while finding part of its argument unconvincing).

153 *Id.* (noting that, on its review of the motion to dismiss for lack of Article III standing in the case at bar, it was required to assume as fact the House's allegation "that the Administration has, in fact, spent money without legislative appropriation").

154 *Id.*

155 U.S. House of Representatives v. Burwell, No. CV 14-1967 (RMC), 2016 WL 2750934, at *19 (D.D.C. May 12, 2016).

156 462 U.S. 919 (1983); Mank, *supra* note 3, at 40-41 (synthesizing the Supreme Court's decision in *Chadha*); Hall, *supra* note 30 (explaining the parameters of Congress's ability to assert standing).

procedure in the Constitution for enacting legislation.¹⁵⁷ However, before it could decide the merits, the Court initially had to determine the question of standing for Mr. Chadha, the executive branch, and Congress.¹⁵⁸ The *Chadha* decision at least implied that Congress had standing under the circumstances of a case in which both houses of Congress had intervened as parties.¹⁵⁹ The Court initially noted that the Ninth Circuit Court of Appeals had granted the separate motions of the House and the Senate to intervene in the case, and that “[b]oth Houses are therefore proper ‘parties.’”¹⁶⁰ The Court next observed that the case was a “justiciable case or controversy under Art. III. . . . because of the presence of the two Houses of Congress as adverse parties.”¹⁶¹

The *Chadha* decision was different from the legislative standing cases in Part II because a central issue here was whether the Immigration and Naturalization Service (“INS”) had standing to appeal to the Supreme Court when it had won a decision in the court of appeals that the statute was unconstitutional; that issue received more attention from the Court than whether Congress had standing.¹⁶² “Both Houses contend that the INS has already received what it sought from the Court of Appeals, is not an aggrieved party, and therefore cannot appeal from the decision of the Court of Appeals.”¹⁶³ The *Chadha* decision, however, held “that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take” to be a party for appellate jurisdiction because the executive branch would have enforced a decision of the House to deport Mr. Chadha even though the executive argued that the legislative veto requiring it to deport him was unconstitutional.¹⁶⁴

157 See *Chadha*, 462 U.S. at 944–59 (noting that Congress had authorized Immigration and Naturalization Service judges to waive the deportation of certain aliens whose visas had expired in cases of hardship, but nevertheless concluding that the statute had violated the separation-of-powers doctrine by granting Congress the authority to override such waivers without affording the President his constitutional authority to veto any legislative override).

158 See *id.* at 929–44 (determining that Mr. Chadha had standing to challenge the legislative veto provision at issue, despite Congress’s several objections).

159 *Id.* at 931 n.6 (finding that the presence of the two houses of Congress appearing as adverse parties in the case satisfied the Article III requirement that an appeal present a justiciable case or controversy).

160 *Id.* at 930 n.5 .

161 *Id.* at 931 n.6 .

162 *Id.* at 929–44 (confirming that the INS had standing to appeal the case to the Supreme Court).

163 *Id.* at 930.

164 *Id.* at 930 (describing the process that the INS and Mr. Chadha followed in challenging the constitutionality of the legislative veto).

The *Chadha* decision implied that both the executive branch and Congress had standing in the case when it stated that “[t]he contentions on standing and justiciability have been fully examined, and [the Court is] satisfied the parties are properly before [it].”¹⁶⁵ The *Chadha* decision also stated that any prudential concerns in the case regarding whether there was an adversary arguing in favor of the statute’s constitutionality were satisfied when the Court of Appeals had “invit[ed] and accept[ed] briefs from both Houses of Congress.”¹⁶⁶ Furthermore, the Court explicitly stated that the intervention of Congress was appropriate under the circumstances of a case in which the executive refused to defend the constitutionality of a statute.¹⁶⁷ “We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”¹⁶⁸

However, by the time that the *Windsor* case was decided in 2013, thirty years after *Chadha*, the Court did not explicitly recognize standing for Congress, but did allow amicus briefs filed by one house of Congress to tip the scales in favor of justiciability in a case where the executive refused to defend the constitutionality of a statute.¹⁶⁹

V. UNITED STATES V. WINDSOR

A. Overview of *Windsor*

The law is unclear whether Congress or a house of Congress has Article III standing to intervene in a lawsuit to defend the constitutionality of a federal statute in the rare¹⁷⁰ case that a president refuses to defend such a statute.¹⁷¹ In its 2013 decision *United States v. Wind-*

¹⁶⁵ *Id.* at 943.

¹⁶⁶ *Id.* at 940.

¹⁶⁷ *Id.* at 940 (affirming Congress’s prerogative to defend the constitutionality of the legislative veto before the courts).

¹⁶⁸ *Id.*

¹⁶⁹ See *infra* Part V.B.

¹⁷⁰ See The Attorney General’s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981) (“The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.”); Meltzer, *supra* note 33, at 1198 (“[O]ne can say in general that refusals by the executive branch to defend or enforce acts of Congress are extraordinarily rare. But they do occur . . .”).

¹⁷¹ See *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013) (“The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG’s motion to enter the suit as of right, on the rationale that the United States already was represent-

172 sor,¹⁷² the Supreme Court examined the constitutionality of Section 3 of the Defense of Marriage Act (“DOMA”).¹⁷³ President Obama’s administration refused to defend the constitutionality of DOMA, but continued to enforce the statute as a means to create a judicial controversy so federal appeals courts might review the constitutionality of the statute.¹⁷⁴ It was uncertain whether an appeal was appropriate in the case after a district court held the statute was unconstitutional and the executive concurred with the trial court’s decision.¹⁷⁵ The Obama Administration argued that the leadership of the House of Representatives could file amicus briefs in support of DOMA, but also contended that the executive branch alone had exclusive authority to defend federal statutes even if Congress or a house of Congress might intervene in a case to file amicus briefs in cases where congressional leaders disagree with the executive.¹⁷⁶

ed by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party.”); *Windsor v. United States*, 797 F. Supp. 2d 320, 323 (S.D.N.Y. 2011) (stating that “the DOJ asks that BLAG’s involvement be limited to making substantive arguments in defense of Section 3 of DOMA while the DOJ continues to file all procedural notices”); Mank, *supra* note 3, at 6 (asserting that the Obama Administration enforced DOMA, despite the Administration’s view that the statute was unconstitutional); Meltzer, *supra* note 33, at 1210–11 (“The Department of Justice has taken the view that only the executive branch may represent the United States in litigation, or . . . that any intervention by Congress should be limited to presenting arguments in defense of a statute’s constitutionality.”).

172 133 S. Ct. 2675.

173 See Defense of Marriage Act, 1 U.S.C. § 7 (2012) (codifying sex-specific stipulations on marriage in the United States). *Windsor* challenged Section 3 of DOMA, which amended the federal definitions of “marriage” and “spouse” in Title 1, § 7 of the United States Code so that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” See *Windsor*, 133 S. Ct. at 2683, 2689–96 (assessing the validity of DOMA under the U.S. Constitution).

174 See *Windsor*, 133 S. Ct. at 2683–85 (detailing the Obama Administration’s refusal to defend the constitutionality of the act, while continuing to enforce it); see also Mank, *supra* note 3, at 6 (asserting that the Obama Administration still enforced DOMA, despite its view that it was unconstitutional); *infra* Part V.B.

175 See *Windsor*, 133 S. Ct. at 2684–85 (analyzing an amicus brief’s suggestion that once the executive branch had agreed with *Windsor*’s position, the two were no longer adverse parties and it was therefore improper for the Supreme Court to grant certiorari); Mank, *supra* note 3, at 6 (adding that before the *Windsor* opinion, it was unclear if an appeal from the district court opinion was proper); *infra* Part V.B.

176 See *Windsor*, 133 S. Ct. at 2684 (“The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG’s motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).”); see also *Windsor*, 797 F. Supp. 2d at 323–24 (stating that “the DOJ asks that BLAG’s involvement be limited to making substantive arguments in defense of Section 3 of DOMA while the DOJ continues to file all procedural notices”); Mank, *supra* note 3, at 6 (summarizing the executive branch’s argument that it alone has

In *Windsor*, the Court did not directly address whether Congress or a house of Congress has standing to defend a federal statute in the small number of cases where a president declines to enforce or defend a federal statute.¹⁷⁷ Justice Anthony Kennedy's majority opinion concluded that the executive branch had standing to appeal the trial court's decision holding that DOMA was unconstitutional because the executive continued to enforce the statute when it refused to pay a tax refund to the plaintiff.¹⁷⁸ Furthermore, *Windsor* recognized the appropriateness of the amicus brief filed by House of Representatives leadership supporting the constitutionality of DOMA because that brief provided a required adverse party for an appeal in a case where the executive agreed with the trial court that DOMA was unconstitutional.¹⁷⁹ Justice Scalia's dissenting opinion argued that Congress almost never has standing to defend or enforce a federal statute because Article II's Take Care Clause gives an almost exclusive role to the executive branch to defend federal laws, and contended that no party had standing to appeal in *Windsor* because President Obama's administration agreed with the district court's decision holding Section 3 to be unconstitutional.¹⁸⁰ Nevertheless, Justice Scalia's dissent-

the authority to defend federal statutes in the courts); Meltzer, *supra* note 3, at 1210–11 (“The Department of Justice has taken the view that only the executive branch may represent the United States in litigation, or . . . that any intervention by Congress should be limited to presenting arguments in defense of a statute’s constitutionality.”).

177 See *Windsor*, 133 S. Ct. at 2685–88 (reasoning that the House of Representatives had standing despite the executive branch’s refusal to defend the constitutionality of the federal statute at issue); Grove & Devins, *supra* note 31, at 622 (observing that *Windsor* did not reach the issue of whether the House had standing); see also Mank, *supra* note 3, at 5 (noting that one argument in support of the notion that a President has a duty to enforce all potentially unconstitutional statutes is because the law is not entirely clear as to whether Congress has standing and the authority to intervene in order to defend a statute); *infra* Part V.C.

178 *Windsor*, 133 S. Ct. at 2686–87 (asserting that the executive branch’s refusal to grant the sought-after relief provides for a degree of adverseness that is sufficient for purposes of establish a justiciable dispute under Article III); see also Mank, *supra* note 3, at 6–8, 42 (agreeing with the Supreme Court’s determination in *Windsor* that the executive branch had standing to appeal the lower court’s decision); see *infra* Part V.C.

179 *Windsor*, 133 S. Ct. at 2687–89 (finding that the congressional committee’s briefs in *Windsor* provided an adversarial presentation); see also Mank, *supra* note 3, at 7–8 (speculating that *Windsor* will pave the way for Congress, or one of its houses, to defend the constitutionality of a statute in the courts when the executive branch refuses to do so); see *infra* Part V.C.

180 *Windsor*, 133 S. Ct. at 2698–2705 (Scalia, J., dissenting) (arguing that the courts can only adjudicate cases where the parties are adversaries seeking opposite outcomes through litigation, and since that requirement was not applicable to the parties in *Windsor*, the case should have been dismissed); see *infra* Part V.D; see also Mank, *supra* note 3, at 7 n.18 (noting that “Justice Thomas joined Justice Scalia’s dissenting opinion in full”); *id.* (explaining that “Chief Justice Roberts joined only the standing portion, Part I, of Scalia’s dissent-

ing opinion acknowledged the standing of Congress to represent itself in separation-of-powers cases involving its core institutional powers.¹⁸¹ On the other hand, Justice Alito's dissenting opinion sought to recognize the standing of a house of Congress to defend a federal statute that the president refuses to defend.¹⁸²

B. *The Preliminary Stages of the Windsor Litigation*

Scholars disagree whether the president has a duty under Article II's Take Care Clause to enforce a statute the president believes is unconstitutional.¹⁸³ The Department of Justice ("DOJ") has acknowledged that the executive branch should routinely defend federal statutes and should refuse to do so only in "rare" cases involving laws that undermine executive authority or raise serious constitutional

ing opinion, but not his discussion of the merits, as the Chief Justice filed a separate dissenting opinion on the merits"); see also *Windsor*, 133 S. Ct. at 2696–97 (Roberts, C.J., dissenting) (noting his agreement with Justice Scalia on the point that the Supreme Court did not have jurisdiction to review the case).

181 See *id.* at 2700 (Scalia, J., dissenting) ("[In *Chadha*] two parties to the litigation disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case. Because *Chadha* concerned the validity of a mode of congressional action . . . the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers."); Grove & Devins, *supra* note 31, at 623 (observing that none of the Justices in *Windsor* questioned the House or Senate's authority "to sometimes stand in for the executive and defend federal statutes"); Mank, *supra* note 3, at 7 (noting that in his dissent in *Windsor*, Justice Scalia did not dispute Congress's right to represent itself in separation-of-powers disputes involving its authority).

182 See *Windsor*, 133 S. Ct. at 2711–14 (Alito, J., dissenting) (arguing that Congress has standing to defend the constitutionality of statutes in the courts when the executive branch fails to do so); *infra* Part V.E; Mank, *supra* note 3, at 7 (contending that members of either house of Congress have standing to defend any statute that the executive branch fails to defend). But see Grove & Devins, *supra* note 31, at 574, 625–32 (arguing that the Take Care Clause gives the executive branch exclusive authority to defend federal laws and therefore bars congressional standing to intervene even when the President refuses to enforce a law, and also contending that bicameral principles in the Constitution bar one house of Congress from defending a challenged federal statute). Justice Thomas joined only Parts II and III of Justice Alito's dissenting opinion, on the merits, but not Part I on standing. See *Windsor*, 133 S. Ct. at 2681 (listing opinions).

183 Compare EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984* 72 (5th rev. ed. 1984) (arguing that the president has a duty to enforce statutes he believes unconstitutional), and Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382–84 (1986) (same, but acknowledging that "the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted"), with Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509–10, 512–13 (2012) (arguing that the President should not defend or enforce a statute he believes is unconstitutional). See generally Mank, *supra* note 3, at 4–5, 17–22 (discussing contrasting views on whether a President must defend all federal statutes).

problems.¹⁸⁴ Because it is unclear who has the authority to defend a federal statute if the executive refuses to do so, an attorney general might adopt a “middle position” of partially defending or enforcing a statute while raising or acknowledging doubts about the law’s constitutionality, as the Obama Administration tried to do in the DOMA case in *Windsor*.¹⁸⁵ In 2011, U.S. Attorney General Eric Holder informed U.S. House Speaker John Boehner that the DOJ would not defend the constitutionality of DOMA’s limitation of marriage to heterosexual couples, but implied that the DOJ would still enforce the law as a means to ensure that federal courts would have jurisdiction to decide the issue of the law’s constitutionality.¹⁸⁶ Because it was likely that the leadership of the House of Representatives would disagree with his view that Section 3 of DOMA was unconstitutional, Attorney General Holder’s letter concluded that “[o]ur attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases,” but also stated that the executive, through the DOJ, would “remain a part[y] to

184 The Attorney General’s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981); see also Meltzer, *supra* note 33, at 1198 (“Thus, one can say in general that refusals by the executive branch to defend or enforce acts of Congress are extraordinarily rare. But they do occur . . .”).

185 See Parker Rider-Longmaid, Comment, *Take Care that the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 306–07 (2012) (“Nondefense decisions better respect separation-of-powers principles than do nonenforcement decisions. . . . Nondefense thus splits the difference: the President defers to Congress by giving the statute effect through enforcement and by giving Congress an opportunity to defend the law, but he also gives voice, particularly in court, to his own concerns about the act’s constitutionality.”); Walter Dellinger, *The DOMA Decision*, NEW REPUBLIC (Mar. 1, 2011), <https://newrepublic.com/article/84353/gay-marriage-obama-gingrich-doma> (defending the Obama Administration’s decision to enforce but not to defend DOMA because “[h]ere, the president has decided to comply with the law and leave the final decision of its constitutionality to the courts, a course of action that respects the institutional roles of both Congress, which passed the law, and the judicial branch”); Mank, *supra* note 3, at 4–5, 31–34, 36–38 (explaining the so-called “middle position,” which provides that the executive branch might, in certain situations, choose to enforce a law whose constitutionality it doubted in order to create a justiciable controversy for the court’s review).

186 See generally Letter from Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [hereinafter Holder Letter] (suggesting that the executive branch deemed Section 3 of DOMA unconstitutional and why it would no longer defend its constitutionality in the courts, even though it would still continue to enforce the law); Mank, *supra* note 3, at 31–34, 36–38 (explaining that the executive branch continued to enforce Section 3 in order to preserve the injuries to pertinent parties, and in turn, preserve their standing in the courts).

the case and continue to represent the interests of the United States throughout the litigation.”¹⁸⁷

In *Windsor*, Edith Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse,” because DOMA denied federal recognition of and benefits to same-sex spouses.¹⁸⁸ She paid \$363,053 in estate taxes to the U.S. government, but filed a refund request with the Internal Revenue Service (“IRS”) to seek full reimbursement of those taxes.¹⁸⁹ The IRS denied her refund request because Windsor was not a “surviving spouse” under DOMA’s heterosexual definition of marriage because she was married to a woman, Thea Spyer.¹⁹⁰ She next filed a refund suit in the United States District Court for the Southern District of New York.¹⁹¹ Windsor argued that DOMA’s denial of federal tax benefits to same sex married couples violated her constitutional right to equal protection under the Fifth Amendment.¹⁹²

In *Windsor*, Attorney General Holder notified the district court and House Speaker Boehner that the DOJ would not defend the constitutionality of DOMA Section 3, but would continue to enforce the statute’s denial of federal benefits to same sex married couples while the federal courts decided its constitutionality.¹⁹³ The Bipartisan Legal Advisory Group (“BLAG”) of the House of Representatives, which includes the five majority and minority leaders of the House, voted along party lines, three Republicans to two Democrats, to intervene in the *Windsor* litigation to defend the constitutionality of Section 3 of DOMA.¹⁹⁴ The Department of Justice did not oppose limited inter-

187 Holder Letter, *supra* note 186 (demonstrating that the Obama Administration knew that Congress would join the litigation to defend the constitutionality of Section 3); Mank, *supra* note 3, at 32–33 (noting that Attorney General Holder’s letter served as notice for Congress to intervene in the pending lawsuits, including *Windsor*, if it felt so inclined).

188 *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (quoting 26 U.S.C. § 2056(a) (2012)—the federal statute that controls the passing of property to spouses—which did not apply to the plaintiff in *Windsor*); Mank, *supra* note 3, at 36 (adding that the statute did not apply to the plaintiff in *Windsor*, because DOMA inhibits federal benefits and recognition to same-sex couples).

189 *Windsor*, 133 S. Ct. at 2683.

190 *Id.*

191 *Id.*

192 *Id.*

193 *See id.* at 2683–84 (noting the Obama Administration’s policy, encapsulated in Attorney General Holder’s letter to the House of Representatives, of not defending, but nonetheless enforcing, Section 3); Mank, *supra* note 3, at 36 (referencing the same).

194 *Windsor*, 133 S. Ct. at 2684 (noting that BLAG decided to intervene in the lawsuit); Mank, *supra* note 3, at 36 (noting the same). *See* Brief on the Merits of the Bipartisan Legal Advisory Group of the House of Representatives, *U.S. v. Windsor*, U.S. Supreme Court, No.

vention by BLAG; however, the DOJ continued to represent the U.S. Government in the case.¹⁹⁵ The district court denied BLAG's motion to enter the suit as of right because the United States already was represented by the Department of Justice, but did grant BLAG's intervention as an interested party.¹⁹⁶

On the merits, the district court ruled against the United States because it held that Section 3 of DOMA is unconstitutional and ordered the Treasury to refund the estate tax paid by Windsor with interest.¹⁹⁷ Both the DOJ and BLAG filed notices of appeal even though the DOJ agreed with the district court's decision holding Section 3 to be unconstitutional.¹⁹⁸ The U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment that Section 3 was unconstitutional.¹⁹⁹ However, the United States refused to comply with the lower court's judgment, did not pay a refund to Windsor, and continued to enforce Section 3 of DOMA even though the executive branch agreed that the statute was unconstitutional in denying federal benefits to same-sex married couples.²⁰⁰ The Obama Administration likely continued to enforce Section 3 of DOMA despite its view that the provision is unconstitutional to maintain sufficient adverse-

12–307, at ii n.* (Jan. 22, 2013), available at <http://www.supremecourtpreview.org> (explaining the status of the Bipartisan Legal Advisory Group in the “Parties to the Proceeding” section of the brief); see also Meltzer, *supra* note 33, at 1212 (asserting that party politics influenced BLAG voting to interfere in the case); Mank, *supra* note 3, at 36–37 n.169 (clarifying that during the *Windsor* litigation, the three Republican leaders in the Bipartisan Legal Advisory Group—John A. Boehner, Speaker of the House; Eric Cantor, Majority Leader; and Kevin McCarthy, Majority Whip—supported the House's intervention to defend the constitutionality of Section 3 of DOMA, but the two Democratic leaders—Nancy Pelosi, Minority Leader, and Steny H. Hoyer, Democratic Whip—refused to support the majority position).

195 *Windsor*, 133 S. Ct. at 2684 (explaining that the district court barred BLAG from intervening as of right, but still granting it intervention as an interested party); Mank, *supra* note 3, at 37 (noting the same).

196 *Windsor*, 133 S. Ct. at 2684 (citing FED. R. CIV. P. 24(a)(2)) (explaining that the district court allowed BLAG to enter the case as an interested party, rather than allowing it intervene as of right in light of what it reasoned was the DOJ's already active role in representing the United States); Mank, *supra* note 3, at 37 (stating the same).

197 *Windsor*, 133 S. Ct. at 2684 (summarizing the district court's ruling in favor of Windsor: Section 3 of DOMA was unconstitutional and the Department of Treasury was ordered to refund the plaintiff); Mank, *supra* note 3, at 37 (explaining the same).

198 *Windsor*, 133 S. Ct. at 2684 (stating that on appeal, the Second Circuit confirmed the district court's judgment); Mank, *supra* note 3, at 37 (stating the same).

199 *Windsor*, 133 S. Ct. at 2684 (stating that on appeal, the Second Circuit confirmed the district court's judgment); Mank, *supra* note 3, at 37 (stating the same).

200 *Windsor*, 133 S. Ct. at 2684 (noting that the executive branch had failed to comply with the district court's ruling); Mank, *supra* note 3, at 31, 33, 38 (asserting that the executive branch failed to comply with the district court's ruling despite agreeing with the holdings in order to maintain adverseness on appeal).

ness between the parties so that there would be Article III standing to give the Supreme Court the opportunity to decide the constitutional question in *Windsor*; there probably would have been no standing for appellate review if the U.S. had paid the tax refund to Windsor.²⁰¹

The Supreme Court granted certiorari so it could review the constitutionality of Section 3 of DOMA.²⁰² The Court also raised two additional questions: (1) whether the United States' agreement with Windsor's legal position that Section 3 was unconstitutional precluded further appellate review and (2) whether BLAG had standing to appeal the decision.²⁰³ Because all of the parties agreed that the Court had jurisdiction to decide *Windsor*, the Court appointed Professor Vicki Jackson as amicus curiae to argue the contrary view that the Court lacked jurisdiction to consider the case.²⁰⁴

C. Justice Kennedy's Majority Opinion: The House Leadership's Intervention Favors Appellate Standing

In determining whether any party had standing to appeal the *Windsor* case to the Supreme Court, Justice Kennedy's majority opinion asked the question of "whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here."²⁰⁵ He reasoned that it was uncontested that Windsor had standing to sue in district court to seek to recover the estate taxes that Thea Spyer's estate had paid to the U.S. government since being forced to disburse an allegedly unconstitutional tax "causes a real and immediate economic injury to the individual taxpayer."²⁰⁶ The Court observed that the executive's agreement with Windsor that DOMA Section 3 is unconstitutional did not "deprive[] the [d]istrict [c]ourt of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed."²⁰⁷

201 *Windsor*, 133 S. Ct. at 2686 ("It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling."); Mank, *supra* note 3, at 38.

202 *Windsor*, 133 S. Ct. at 2684; Mank, *supra* note 3, at 38.

203 *Windsor*, 133 S. Ct. at 2684; Mank, *supra* note 3, at 38.

204 *Windsor*, 133 S. Ct. at 2684; Mank, *supra* note 3, at 38.

205 *Windsor*, 133 S. Ct. at 2684; Mank, *supra* note 3, at 38.

206 *Windsor*, 133 S. Ct. at 2684–85 (quoting *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2563 (2007)); Mank, *supra* note 3, at 38–39.

207 *Windsor*, 133 S. Ct. at 2685; Mank, *supra* note 3, at 39.

However, the *Windsor* decision acknowledged that there was disagreement about “the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.”²⁰⁸ Professor Jackson, acting as the Court’s designated amicus against jurisdiction, provided a reasonable argument that no party had appellate standing once the executive branch and Ms. Windsor agreed with the district court’s decision and, accordingly, that both the court of appeals and the Supreme Court lacked jurisdiction over the case.²⁰⁹ Justice Kennedy summarized her position as follows:

The *amicus* submits that once the President agreed with Windsor’s legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.²¹⁰

Disagreeing with Professor Jackson’s arguments, Justice Kennedy concluded that her view that there was no appellate standing because the President and Ms. Windsor both agreed with the district court’s decision “elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise.”²¹¹ The *Windsor* decision reasoned, “[i]n this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court” because the United States’ refusal to pay the tax refund ordered by the district court created an injury “sufficient” for Article III standing, even if the executive agreed with Windsor that DOMA Section 3 is unconstitutional.²¹² The Court conceded, “It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court’s ruling.”²¹³ Accordingly, by continuing to enforce DOMA Section 3, the DOJ established the economic injury essential for Article III standing before the Court even while arguing that the provision was unconstitutional.²¹⁴

208 *Windsor*, 133 S. Ct. at 2685; Mank, *supra* note 3, at 39.

209 *Windsor*, 133 S. Ct. at 2685; Mank, *supra* note 3, at 39.

210 *Windsor*, 133 S. Ct. at 2685; Mank, *supra* note 3, at 39.

211 *Windsor*, 133 S. Ct. at 2685; Mank, *supra* note 3, at 39.

212 *Windsor*, 133 S. Ct. at 2686; Mank, *supra* note 3, at 40.

213 *Windsor*, 133 S. Ct. at 2686; Mank, *supra* note 3, at 40.

214 Mank, *supra* note 3, at 40.

Justice Scalia's dissenting opinion conceded²¹⁵ that the strongest case supporting Justice Kennedy's majority opinion is the Court's 1983 decision in *Immigration & Naturalization Service v. Chadha*.²¹⁶ The *Windsor* decision appropriately cited *Chadha* for the proposition that "even where 'the Government largely agree[s] with the opposing party on the merits of the controversy,' there is sufficient adverseness and an 'adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.'"²¹⁷ *Windsor* reasoned that the Obama Administration's refusal to refund Windsor's taxes created sufficient adverseness in light of *Chadha*'s similar approach.²¹⁸

Justice Scalia's dissenting opinion questioned whether *Chadha* actually held that the government had standing before the Supreme Court or only concluded that the government agency had standing before the court of appeals.²¹⁹ He concluded that the government did not have standing before the Supreme Court because it agreed with Ninth Circuit's decision holding the statute unconstitutional; however, Justice Scalia acknowledged that Congress had standing before the Supreme Court in *Chadha* because its views were adverse to the court of appeals' decision.²²⁰ Conversely, the *Windsor* decision reasoned that the Supreme Court in *Chadha* had properly concluded that the executive branch had standing before both the court of appeals and Supreme Court because the U.S. Government would have obeyed either court's decision to deport Chadha, even though the executive argued that a deportation order was unconstitutional.²²¹ Similarly, the *Windsor* decision determined that the executive branch was sufficiently adverse to Ms. Windsor to have standing because it refused to pay her the tax refund ordered by the district court.²²²

Despite conceding that a prevailing party "generally" is not aggrieved and may not appeal, the *Windsor* decision reasoned that the requirement of adverse parties was a flexible prudential principle and

215 *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting) (citation omitted) ("The closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*").

216 *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); Mank, *supra* note 3, at 40; *supra* Part IV.

217 *Windsor*, 133 S. Ct. at 2686–87 (2013) (quoting *Chadha*, 462 U.S. at 940 n.12); Mank, *supra* note 3, at 42.

218 *Windsor*, 133 S. Ct. at 2686–87; Mank, *supra* note 3, at 42.

219 *Windsor*, 133 S. Ct. at 2700–01 (Scalia, J., dissenting); Mank, *supra* note 3, at 42.

220 *Windsor*, 133 S. Ct. at 2700–01 (Scalia, J., dissenting); Mank, *supra* note 3, at 42.

221 *Windsor*, 133 S. Ct. at 2686–87 (majority opinion); Mank, *supra* note 3, at 42.

222 *Windsor*, 133 S. Ct. at 2686; Mank, *supra* note 3, at 42.

not a mandatory Article III rule in all cases.²²³ The Court acknowledged that the government's method of enforcing a law that it argued was unconstitutional raised prudential concerns about the need for a genuine adversary to vigorously argue that the statute is constitutional.²²⁴ The *Windsor* decision, nevertheless, determined the participation of congressional leaders or a house of Congress as amici curiae meet the requirement for a valid adversary to argue in favor of a statute's constitutionality despite the executive branch's failure to defend the law.²²⁵ Similarly, in *Chadha*, the Supreme Court had concluded that any prudential concern for an adversary arguing in favor of the statute's constitutionality was satisfied when the court of appeals had "invit[ed] and accept[ed] briefs from both Houses of Congress."²²⁶ The *Windsor* decision concluded that "BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."²²⁷ By acknowledging the role of the BLAG brief in meeting standing principles relating to adversarial parties and stating that congressional briefs played an analogous role in *Chadha*, the *Windsor* decision left open the possibility that in future cases federal courts might grant standing to Congress or a house of Congress that defend a statute that the executive refuses to defend, although the Court avoided the contentious issue of whether Congress or a house of Congress would have had standing to appeal if the executive branch had refused to enforce DOMA entirely.²²⁸

The *Windsor* decision did not formally decide whether Congress or a house of Congress would have had standing to sue on its own because the Court determined that the government had both prudential and Article III standing for appellate review in light of its adverse position of refusing to pay a refund to Windsor.²²⁹ The Court stated, "[f]or these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authori-

223 *Windsor*, 133 S. Ct. at 2687 (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)) (citing *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011)); Mank, *supra* note 3, at 42.

224 *Windsor*, 133 S. Ct. at 2687; Mank, *supra* note 3, at 42–43.

225 *Windsor*, 133 S. Ct. at 2687; Mank, *supra* note 3, at 43.

226 *Windsor*, 133 S. Ct. at 2687 (quoting *Chadha*, 462 U.S. at 940); Mank, *supra* note 3, at 43.

227 *Windsor*, 133 S. Ct. at 2688; Mank, *supra* note 3, at 43.

228 *Windsor*, 133 S. Ct. at 2687–88; Mank, *supra* note 3, at 43.

229 *Windsor*, 133 S. Ct. at 2688; Mank, *supra* note 3, at 44.

ty.²³⁰ The *Windsor* decision conceded that the executive's refusal to defend DOMA raised serious concerns about whether there would be adverse parties required for appellate review and that the government's refusal to defend federal statutes would cause significant issues if non-defense of statutes became a routine practice.²³¹ However, the *Windsor* decision reasoned:

But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.²³²

D. Justice Scalia's Dissenting Opinion in Windsor: Congress Only Has Standing to Defend Its Core Constitutional Powers

In his dissenting opinion in *Windsor*, Justice Scalia argued that Congress only has Article III standing to sue in federal courts when it is defending its core constitutional powers, as in the *Chadha* decision.²³³ Furthermore, he contended Congress does not have standing to defend federal statutes, even when the executive refuses to defend a statute, as in *Windsor*.²³⁴ Accordingly, Justice Scalia would allow Congress or a house of Congress to have standing in only limited circumstances because he believed that Article II usually gives the President exclusive authority under the Take Care Clause to defend or enforce federal laws, unless a law infringes upon essential congressional authority.²³⁵

Although conceding that Ms. Windsor had standing to sue in federal district court for a tax refund, Justice Scalia in his dissenting opinion argued that no party in the *Windsor* case had standing to appeal the district court's judgment because both Ms. Windsor and the U.S. government agreed with the court's determination that DOMA Section 3 is unconstitutional.²³⁶ Because Article III standing mandates that a party demonstrate that it has an injury requiring redress, he argued that friendly, non-adversarial parties may not collude to

230 *Windsor*, 133 S. Ct. at 2688; Mank, *supra* note 3, at 44.

231 *Windsor*, 133 S. Ct. at 2688–89; Mank, *supra* note 3, at 44.

232 *Windsor*, 133 S. Ct. at 2689; Mank, *supra* note 3, at 44–45.

233 *Windsor*, 133 S. Ct. at 2700–01, 2703–05 (Scalia, J., dissenting); Mank, *supra* note 3, at 45–46.

234 *Windsor*, 133 S. Ct. at 2700, 2703–05 (Scalia, J., dissenting); Mank, *supra* note 3, at 45–51.

235 *Windsor*, 133 S. Ct. at 2700–01, 2703–05 (Scalia, J., dissenting); Mank, *supra* note 3, at 45–47.

236 *Windsor*, 133 S. Ct. at 2699–2700 (Scalia, J., dissenting); Mank, *supra* note 3, at 45.

obtain an advisory opinion from a federal court.²³⁷ He argued that the Court had never before recognized a suit where a petitioner effectively sought an affirmance of the judgment against it.²³⁸ Justice Scalia's dissenting opinion conceded that "[t]he closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*," but he argued that the two cases were distinguishable because in *Chadha* the House and Senate intervened in the case to defend their core constitutional powers.²³⁹

Justice Scalia's dissenting opinion argued that the executive usually has exclusive authority under Article II's Take Care Clause to defend, or not to defend, federal statutes, even in cases when a President refuses to enforce or defend a federal statute.²⁴⁰ However, he admitted an exception, as in the *Chadha* decision, where Congress is protecting its institutional authority.²⁴¹ Justice Scalia explained that the *Chadha* litigation involved the institutional powers of Congress and, accordingly, Congress had standing to sue in that case, but not in a case like *Windsor* where it sought to defend a statute unrelated to its core institutional powers, such as DOMA.²⁴²

Conversely, Justice Alito's dissenting opinion argued that Justice Scalia's and the United States' argument that the precedent for congressional standing in *Chadha* should be construed to apply only to rare cases when Congress is defending its institutional or procedural authority raises difficult line drawing issues since Congress also has a strong institutional interest in defending federal statutes because lawmaking is a core legislative function.²⁴³ Because reading *Chadha* to permit Congress or a house of Congress standing to defend federal statutes that involve Congress's institutional authority could be expanded to encompass standing in other situations, such as the *Wind-*

237 *Windsor*, 133 S. Ct. at 2699 (Scalia, J., dissenting); Mank, *supra* note 3, at 45; *see also* Hall, *supra* note 30, at 1550–51 (“[A]s a textual matter, the Cases or Controversies Clause seems plainly to require interested parties on both sides of the case. A one-sided ‘case’ or ‘controversy’ is an oxymoron.”).

238 *Windsor*, 133 S. Ct. at 2699–700 & n.1 (Scalia, J., dissenting); Mank, *supra* note 3, at 45.

239 *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting); Mank, *supra* note 3, at 45.

240 *Windsor*, 133 S. Ct. at 2700–2705 (Scalia, J., dissenting); Mank, *supra* note 3, at 45–46.

241 *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting); *id.* at 2700 n.2 (“[In *Chadha*] the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers.”); Mank, *supra* note 3, at 46; *see also* Hall, *supra* note 30, at 1549 (“*Chadha*, in short, held only that Congress has a sufficient institutional stake to support a case or controversy where it seeks to defend a power granted to it by a statute. *Chadha* does not hold that Congress may intervene to defend any challenged federal statute . . .”).

242 *Windsor*, 133 S. Ct. at 2700, 2700 n.2 (Scalia, J., dissenting); Mank, *supra* note 3, at 46.

243 *Windsor*, 133 S. Ct. at 2713–14 (Alito, J., dissenting); Mank, *supra* note 3, at 45–46.

sor case where the executive declined to defend the constitutionality of a statute, some scholars contend that a president's prerogative to defend federal statutes pursuant to Article II's Take Care Clause is completely exclusive and that the *Chadha* decision was incorrectly decided to the extent it allowed congressional standing to defend any statute, even ones related to core congressional powers.²⁴⁴ Justice Scalia, however, took a middle position between Justice Alito and academics favoring exclusive executive defense of federal statutes by distinguishing *Chadha* as the rare case where Congress has standing to defend its institutional prerogatives, but arguing that congressional standing was inappropriate in *Windsor* where President Obama's refusal to defend DOMA Section 3 had no impact on core congressional authority.²⁴⁵

Furthermore, Justice Scalia contended that neither Ms. Windsor nor the U.S. government had standing to appeal from the district court's decision in *Windsor* because both she and the executive agreed with the trial court's judgment.²⁴⁶ Conversely, the majority in the *Windsor* decision reasoned that the Supreme Court in *Chadha* had stated that the INS had standing before both the court of appeals and the Supreme Court despite the government's position agreeing with Mr. Chadha that the deportation statute at issue was unconstitutional because the executive branch would have obeyed either court's decision to deport Chadha, and, accordingly, the U.S. government was sufficiently adverse to Chadha to meet Article III standing requirements before the Supreme Court.²⁴⁷ Analogously, the *Windsor* decision concluded that the U.S. government was sufficiently adverse to Ms. Windsor's interests to have Article III standing to appeal to both the court of appeals and the Supreme Court because the executive

244 Grove & Devins, *supra* note 31, at 573–75, 623–30 (arguing Take Care Clause gives a President exclusive authority to defend federal laws, excludes congressional standing to intervene even when if a president refuses to enforce law and that *Chadha* decision was incorrect to recognize congressional standing to defend federal statutes even in limited cases); Mank, *supra* note 3, at 46. *But see* Gorod, *supra* note 31, at 1219–20 (“Defending [a] law . . . does not focus on the operation of the law and generally will not affect its operation at all. . . . [T]he Executive simply provides the court with its understanding of what the Constitution requires. . . .”); Greene, *supra* note 33, at 592 (contending that, if Congress sues for a declaratory judgment on the constitutionality of a law, Congress is not “controlling the execution of law”).

245 *Windsor*, 133 S. Ct. at 2700, 2700 n.2 (Scalia, J., dissenting); Mank, *supra* note 3, at 46–47; *see also* Grove & Devins, *supra* note 31, at 623 (“[N]o Justice in *Windsor* challenged the power of the House or the Senate to sometimes stand in for the executive and defend federal statutes.”).

246 *Windsor*, 133 S. Ct. at 2701 (Scalia, J., dissenting); Mank, *supra* note 3, at 47–48.

247 *Windsor*, 133 S. Ct. at 2686; Mank, *supra* note 3, at 48.

refused to pay her the estate tax refund mandated by the district court's decision.²⁴⁸ The disagreement between Justice Scalia and the majority over whether the executive was sufficiently adverse to Ms. Windsor's interests to have Article III standing to appeal to the court of appeals and the Supreme Court is relevant to the question congressional standing because the argument for legislative standing is arguably greater when a president refuses to defend a federal statute or the executive lacks standing to defend a statute, as Justice Alito argued in his dissenting opinion in *Windsor*.²⁴⁹

Justice Scalia's dissenting opinion clearly rebuked the majority opinion's approach that "the requirement of adverseness" between the parties in a case is only a "prudential" principle of standing that is waivable by the federal courts in appropriate cases.²⁵⁰ He argued that the Court had previously treated adverseness between the parties as an essential Article III standing mandate.²⁵¹ He reasoned that the availability of amicus curiae willing to skillfully argue the other side of a question did not meet the Article III requirement that there must be adverse parties to establish a justiciable "case" or "controversy" in federal court.²⁵²

Under Justice Scalia's approach to executive and legislative standing, Congress or a house of Congress would not have standing to sue whenever a President refuses to defend a statute, but only if Congress sues to protect its core institutional powers, as in *Chadha*.²⁵³ According to Justice Scalia, Congress must normally use its legislative authorities, including limiting appropriations or refusing to confirm presidential appointees instead of suing the executive in federal court, to protest a President's refusal to defend or enforce a law unrelated to core congressional institutional authority.²⁵⁴ In many cases, however, it may be impractical for Congress or a house of Congress to act against such executive recalcitrance, especially if the Senate and the House cannot agree on concerted action.²⁵⁵

248 *Windsor*, 133 S. Ct. at 2686; Mank, *supra* note 3, at 48.

249 *Windsor*, 133 S. Ct. at 2711–14 (Alito, J., dissenting); *infra* Part V.E; Mank, *supra* note 3, at 7, 52–56.

250 *Windsor*, 133 S. Ct. at 2701 (Scalia, J., dissenting); Mank, *supra* note 3, at 49.

251 *Windsor*, 133 S. Ct. at 2701–02 (Scalia, J., dissenting); Mank, *supra* note 3, at 49.

252 *Windsor*, 133 S. Ct. at 2701–02 (Scalia, J., dissenting); Mank, *supra* note 3, at 49.

253 *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting); Mank, *supra* note 3, at 45–46.

254 *Windsor*, 133 S. Ct. at 2704–05 (Scalia, J., dissenting); Mank, *supra* note 3, at 51.

255 Greene, *supra* note 33, at 591 (discussing practical problems facing Congress in protesting a president's refusal to enforce or defend a statute); Mank, *supra* note 3, at 51–52, 51 n.261 (noting the same).

E. Justice Alito's Argument for Congressional Standing by a House Of Congress Where a President Refuses to Defend a Federal Statute

Justice Alito agreed with Justice Scalia that the executive was not an appropriate adverse party before the Supreme Court in *Windsor* because the United States concurred with Ms. Windsor that the District Court's judgment striking down DOMA Section 3 was valid.²⁵⁶ Then, Justice Alito addressed the "much more difficult question" of whether the leadership of the House of Representatives, BLAG, had standing to appeal that decision.²⁵⁷ Disagreeing with both the majority and Justice Scalia, Justice Alito determined that BLAG had "Article III standing in its own right, quite apart from its status as an intervenor."²⁵⁸

Justice Alito argued that BLAG had Article III standing to appeal the district court's decision in *Windsor* because it was the authorized representative of the House of Representatives, which was entitled to standing in that case since it suffered an injury in fact when the executive refused to enforce DOMA Section 3 and that injury was redressable by a decision in favor of the statute's constitutionality.²⁵⁹ He supported his view that BLAG had standing by citing *Chadha's* holding that both houses of Congress were "proper parties" to defend the constitutionality of the one-house veto statute in that case.²⁶⁰ Justice Alito inferred that the *Chadha* decision's recognition of congressional standing was based on an unspoken reasoning that Congress suffers an injury sufficient for standing purposes in every case where a federal statute passed by Congress is struck down by a lower court as unconstitutional and the executive refuses to appeal that decision.²⁶¹ The United States sought to distinguish *Chadha* from the situation in *Windsor* by treating the former decision as "involv[ing] an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action."²⁶² Justice Scalia offered similar arguments for distinguishing the two cases when he claimed that congressional standing

256 *Windsor*, 133 S. Ct. at 2711–12 (Alito, J., dissenting); Mank, *supra* note 3, at 52.

257 *Windsor*, 133 S. Ct. at 2712 (Alito, J., dissenting); Mank, *supra* note 3, at 52.

258 *Windsor*, 133 S. Ct. at 2712 n.1 (Alito, J., dissenting); Mank, *supra* note 3, at 52.

259 *Windsor*, 133 S. Ct. at 2712–14, 2712 n.2 (Alito, J., dissenting); Mank, *supra* note 3, at 52.

260 *Windsor*, 133 S. Ct. at 2712–13 (Alito, J., dissenting) (quoting and discussing *Chadha*); Mank, *supra* note 3, at 52.

261 *Windsor*, 133 S. Ct. at 2712–13 (Alito, J., dissenting); Mank, *supra* note 3, at 52.

262 *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting) (quoting Brief for the United States on the Jurisdictional Questions at 36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307)); Mank, *supra* note 3, at 52–53.

in *Chadha* applied only to cases in which the executive refuses to defend a statute that implicates a core institutional legislative authority.²⁶³

Disagreeing with both the U.S. government and Justice Scalia on congressional standing, Justice Alito provided a novel approach that Congress has standing in every case in which the U.S. government declines to defend the constitutionality of a federal statute because enacting such statutes is Congress's "central function."²⁶⁴ Rejecting both the U.S. government's and Justice Scalia's interpretation of *Chadha* as a case involving the power of the legislative branch, Justice Alito argued:

But that is a distinction without a difference: just as the Court of Appeals decision that the *Chadha* Court affirmed impaired Congress' power by striking down the one-house veto, so the Second Circuit's decision here impairs Congress' legislative power by striking down an Act of Congress. The United States has not explained why the fact that the impairment at issue in *Chadha* was "special" or "procedural" has any relevance to whether Congress suffered an injury. Indeed, because legislating is Congress' central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on.²⁶⁵

Justice Alito relied upon the *Coleman* decision, which held that a group of state senators who arguably cast the decisive votes to defeat a proposed amendment to the federal constitution had standing to contest the amendment's validity, to support his theory that Congress or a house of Congress has standing to defend any statute that the executive refuses to defend.²⁶⁶ He argued that the House of Representatives was a "necessary party" for DOMA's passage, and, therefore had standing in *Windsor*.²⁶⁷ He explained,

By striking down § 3 of DOMA as unconstitutional, the Second Circuit effectively "held for naught" an Act of Congress. Just as the state-senator-petitioners in *Coleman* were necessary parties to the amendment's ratification, the House of Representatives was a necessary party to DOMA's passage; indeed, the House's vote would have been sufficient to prevent

²⁶³ *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting) (footnote omitted) ("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. The Executive choosing not to defend that power, we permitted the House and Senate to intervene. Nothing like that is present here."); Mank, *supra* note 3, at 53.

²⁶⁴ *Windsor*, 133 S. Ct. at 2712–13 (Alito, J., dissenting); Mank, *supra* note 3, at 53.

²⁶⁵ *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting); Mank, *supra* note 3, at 53.

²⁶⁶ *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting); Mank, *supra* note 3, at 53.

²⁶⁷ *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting); Mank, *supra* note 3, at 53.

DOMA's repeal if the Court had not chosen to execute that repeal judicially.²⁶⁸

Disagreeing with both the United States and the Court-appointed amicus, Professor Jackson, Justice Alito argued that the *Raines* decision had not rejected congressional standing in all circumstances.²⁶⁹ He contended that "*Raines* dealt with individual Members of Congress and specifically pointed to the individual Members' lack of institutional endorsement as a sign of their standing problem" and therefore, only barred standing in suits brought by individual legislators.²⁷⁰ Justice Alito distinguished *Windsor* as different from the individual suits in *Raines* because BLAG represented the House of Representatives as an institution.²⁷¹

Additionally, he reasoned that BLAG and the House in the *Windsor* litigation were more similar to the key legislators whose votes controlled the outcome in *Coleman* than the individual legislators in *Raines*, who had not played an important role in enacting the challenged legislation.²⁷² He reasoned that,

[T]he Members in *Raines*—unlike the state senators in *Coleman*—were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action. Indeed, it is telling that *Raines* characterized *Coleman* as standing "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S., at 823, 117 S.Ct. 2312. Here, by contrast, passage by the House was needed for DOMA to become law. U.S. Const., Art. I, § 7 (bicameralism and presentment requirements for legislation).²⁷³

Disagreeing with both the U.S. government and Justice Scalia on congressional standing, Justice Alito concluded that Congress or a house of Congress has the institutional authority to defend federal statutes when a President declines to do so:

I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view, as I have explained, that argument is contrary to the Court's holding in *Chadha*, and it is certainly contrary to the *Chadha* Court's endorsement of the principle that "Congress is the proper party to defend the validity of a statute" when the Executive refuses to do so on constitutional grounds. 462 U.S., at 940, 103 S. Ct. 2764; see also 2 U.S.C. § 288h(7) (Senate Legal Counsel shall defend the constitutionality of Acts of Congress when

268 *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting); Mank, *supra* note 3, at 53–54.

269 *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting); Mank, *supra* note 3, at 54.

270 *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting); Mank, *supra* note 3, at 54.

271 *Windsor*, 133 S. Ct. at 2712 n.2, 2013; Mank, *supra* note 3, at 54.

272 *Windsor*, 133 S. Ct. at 2714; Mank, *supra* note 3, at 54.

273 *Windsor*, 133 S. Ct. at 2714; Mank, *supra* note 3, at 54.

placed in issue). Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.²⁷⁴

F. Criticisms of Congressional Standing and Especially Justice Alito's Broad Approach to Congressional Standing

Justice Scalia criticized Justice Alito's theory of congressional standing and responded that a President has almost exclusive sole authority under the Take Care Clause of Article II of the Constitution to defend or enforce every federal statute, except in cases like *Chadha* where Congress is suing to protect its core institutional authority.²⁷⁵ Justice Scalia argued that Justice Alito's approach to congressional standing did almost as much damage to the separation of powers as the majority's overly lenient approach to standing by "similarly elevat[ing] the Court to the 'primary' determiner of constitutional questions involving the separation of powers, and, to boot, increas[ing] the power of the most dangerous branch" by establishing a new system "in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws."²⁷⁶ Justice Scalia maintained that Justice Alito's view of congressional standing would undermine the traditional standing model based on private lawsuits by only those actually injured by a law to instead establish a new paradigm "in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking."²⁷⁷

Justice Scalia's interpretation that Justice Alito's theory of congressional standing would enable Congress to sue in federal court

274 *Windsor*, 133 S. Ct. at 2714 (Alito, J., dissenting) (footnote omitted); Mank, *supra* note 3, at 55.

275 *Windsor*, 133 S. Ct. at 2702–05 (Scalia, J., dissenting) (arguing a president has broad discretion whether to enforce federal laws pursuant to the Take Care Clause in the Constitution and that Congress does not have standing without an injury to challenge executive non-enforcement); Mank, *supra* note 3, at 56; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–78 (1992) (concluding that Article II and Article III of the Constitution limit Congress's authority to authorize citizen suits by any person lacking a concrete injury); Grove & Devins, *supra* note 31, at 572–73, 625–30 (arguing that the Take Care Clause gives the executive exclusive authority to defend federal laws thus excluding congressional standing to intervene even when a President refuses to enforce a law).

276 *Windsor*, 133 S. Ct. at 2703 (Scalia, J., dissenting); Mank, *supra* note 3, at 56.

277 *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting); Mank, *supra* note 3, at 56–57.

whenever a president “implements a law in a manner that is not to Congress’s liking” is a questionable and likely unfair analysis of Justice Alito’s dissenting opinion, because the *Windsor* decision involved the much narrower question of a President who refused to defend a federal statute, and Justice Alito never directly stated such a broad approach to standing.²⁷⁸ Justice Scalia made a more reasonable criticism when he opined that Justice Alito’s theory of congressional standing could allow plaintiffs to make believable arguments that federal courts may consider political disputes historically rejected as unsuitable for adjudication.²⁷⁹ Justice Scalia asserted that the “reasoning” of *Raines* foreclosed suits by Congress about how a President executes federal statutes even though Justice Alito was correct that that decision “did not formally decide this issue” because the decision treated several types of disputes between a president and Congress regarding such matters as the appointment power, removal power, legislative veto and pocket veto as non-justiciable by federal courts.²⁸⁰ Rejecting Justice Alito’s broad view of congressional standing, Justice Scalia contended that a President and Congress should use traditional political methods such as the denial of appropriations or executive appointments when Congress seeks to punish a President who refuses to defend a statute that Congress believes is constitutional.²⁸¹ However, some theoretical political remedies such as Congress’s impeachment authority,²⁸² which requires a two-thirds vote by the Senate, are impractical, and, therefore, a lawsuit may be the only effective way for Congress to challenge some executive decisions.²⁸³

Some academics have reasoned that the bicameral structure of Congress mandates that both houses agree to act to challenge presidential decisions, and, therefore, does not allow one house to take

278 Compare *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting), with *id.* at 2711–14 (Alito, J., dissenting); Mank, *supra* note 3, at 57.

279 *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting); Mank, *supra* note 3, at 57.

280 *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting); Mank, *supra* note 3, at 57.

281 *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting) at 2704–05; Mank, *supra* note 3, at 57.

282 U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other Crimes and Misdemeanors.”).

283 See Greene, *supra* note 33, at 591 (contending that the impeachment process is impractical in addressing many executive actions); Mank, *supra* note 3, at 51–52 (same); Nash, *supra* note 3, at 362–63, 388 (arguing the availability of impeachment would doom legislators’ standing); Pickett, *supra* note 31, at 473–74 (asserting impeachment would be too broad a step for executive nonenforcement). *Bul see* Grove & Devins, *supra* note 31, at 624 (“In separating legislation from implementation, moreover, the Constitution makes clear that Congress may not control those implementing federal law—outside the appointment, statutory, and removal mechanisms specified in the Constitution.”).

independent judicial action; their position implicitly contradicts Justice Alito's view that BLAG had standing in the *Windsor* decision on behalf of the House of Representatives to appeal the district court's decision that DOMA Section 3 is unconstitutional.²⁸⁴ Conversely, there is a plausible argument that the Constitution's proscription for bicameral legislative decisions in Article I, Section 1—compelling all legislative authority to be consigned to a Congress including a Senate and a House of Representatives—and Section 7—necessitating all bills be passed by both the House and Senate before being presented to the President—do not squarely bar congressional standing by one house of Congress.²⁸⁵ Furthermore, some constitutional provisions do not require bicameralism such as the Senate's appointment of federal officers and judges.²⁸⁶ Additionally, Justice Alito in his *Windsor* dissenting opinion suggested that neither *Coleman* nor *Raines* imposed bicameral action requirements on all congressional litigation.²⁸⁷

Professor Grove has claimed that Congress lacks Article III standing to defend federal statutes in federal court because Article I of the Constitution does not affirmatively grant Congress the authority to enforce or defend federal statutes in Article III courts.²⁸⁸ Conversely, she implicitly concedes that her argument is inconsistent with *Chadha*, and, as a result, she contends that decision was incorrectly decided to the degree it authorized the House and the Senate to intervene in the case to defend the constitutionality of the challenged statute.²⁸⁹ Although Justice Scalia believes that Congress does not

284 Compare Grove & Devins, *supra* note 31, at 573–75, 603–22 (arguing that bicameral principles in the Constitution bar one house of Congress from defending challenged federal statutes), with *Windsor*, 133 S. Ct. at 2712–14 (Alito, J., dissenting) (arguing BLAG had standing in the *Windsor* decision on behalf of the House of Representatives to appeal the district court's decision that DOMA Section 3 is unconstitutional); see Mank, *supra* note 3, at 54–55.

285 U.S. CONST. art. I, § 1 (prescribing bicameralism and presentment requirements for legislation); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 945–46 (1983) (discussing bicameral provisions in Article I of the Constitution); Mank, *supra* note 3, at 55.

286 U.S. CONST. art. II, § 2, cl. 2; Nash, *supra* note 3, at 366.

287 See *Windsor*, 133 S. Ct. at 2713–14 (Alito, J., dissenting) (discussing *Coleman* and *Raines*); Mank, *supra* note 3, at 55.

288 Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1315–16, 1353–65 (2014); Mank, *supra* note 3, at 56.

289 Grove, *supra* note 288, at 1360–61; (“The Supreme Court overlooked these structural concerns [arguing against congressional enforcement or defense of federal laws] entirely in *Chadha*, when it permitted the House and Senate counsel to intervene in defense of the statute authorizing the legislative veto. . . . But the Court did not authorize intervention by any component of Congress until *Chadha*. Given the lack of historical support for the Court's assertion, and the fact that the Court did not even hold that the House or the Senate had standing to appeal, this one-sentence declaration in *Chadha* provides scant

have standing to challenge the almost exclusive executive authority under Article II to defend or enforce most statutes without legislative intervention, he acknowledges that the *Chadha* decision was correct in allowing Congress to defend its core institutional powers.²⁹⁰

CONCLUSION

While there are many unanswered questions about when Congress or a house of Congress has standing to sue a President, Judge Collyer's decision in *U.S. House of Representatives v. Burwell* was on solid ground in allowing a house of Congress to challenge President Obama's alleged misuse of the appropriations process, because that process is a core institutional power of Congress and of the House of Representatives in particular, where appropriation bills are supposed to originate.²⁹¹ The *Raines* decision appropriately limited suits and standing by individual legislators because of the potential for endless lawsuits that could clog the federal courts.²⁹² By contrast, the *Coleman* decision allowed a suit that addressed whether the Kansas executive had nullified a law so as to defeat the will of the legislature.²⁹³ Furthermore, Judge Collyer appropriately relied upon the Supreme Court's *Arizona State Legislature* decision and a series of cases in the D.C. Circuit for the principle that a state legislature, Congress, or a house of Congress may defend its institutional authority against executive interference or other potentially unconstitutional institutions.²⁹⁴

There are difficult line drawing questions between when Congress is challenging how a President implements or enforces a law, and when executive action intrudes on core institutional legislative authority.²⁹⁵ But the *Chadha* decision clearly implied that Congress has standing to sue when the executive branch allegedly intrudes on core

support for congressional standing to represent the federal government in court."); Mank, *supra* note 3, at 56.

290 *Windsor*, 133 S. Ct. 2675, 2700–05 (Scalia, J., dissenting) (arguing that the executive in most circumstances has exclusive authority to defend federal statutes under Article II thus excluding congressional standing to intervene even when a President refuses to enforce a law, but acknowledging an exception in *Chadha* where Congress is defending its core institutional authority under the Constitution); Mank, *supra* note 3, at 53–56.

291 *See supra* Part III; U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

292 *See supra* Part II.A.2.

293 *See supra* Part II.A.1.

294 *See supra* Parts II.A.4, II.B and III.

295 *See supra* Parts II.A.4 and Part III.

legislative authority.²⁹⁶ Granting standing to Congress or a house of Congress does not guarantee that the legislature will prevail on the merits of its suit. In the end, federal courts may conclude that President Obama's appropriations under Section 1402 do not violate the Appropriations Clause.²⁹⁷ This Article advocates standing in this suit, but does not offer an opinion on the ultimate merits of the case.

Judge Collyer did not discuss either *Chadha* or *Windsor*.²⁹⁸ *Chadha* at least indirectly addressed and supported the issue of congressional institutional suits, which were not at issue in the *Coleman* or the *Arizona State Legislature* decisions because they involved state legislators.²⁹⁹ The *Windsor* majority decision did not directly address congressional standing.³⁰⁰ However, Justice Scalia's dissenting opinion in *Windsor* acknowledged that Congress has standing to challenge a statute that threatens its core institutional authority as in the *Chadha* decision.³⁰¹ Even if the Court is not willing to endorse Justice Alito's broad approach to congressional standing in his dissenting opinion in *Windsor*,³⁰² Judge Collyer's opinion arguably goes no further than Justice Scalia or *Chadha* in supporting congressional standing to challenge executive actions or statutes that threaten Congress's core institutional authority.³⁰³ Additionally, the *Windsor* majority decision arguably implicitly supported action by a house of Congress in taking into account the BLAG amicus brief as a significant factor in recognizing standing in that case, although the Court deliberately avoided the contentious question of congressional standing.³⁰⁴ Accordingly, *U.S. House of Representatives v. Burwell* appropriately found congressional standing to challenge President Obama's alleged misuse of the appropriations process because a core institutional power of Congress was at stake.³⁰⁵

296 See *supra* Part IV.

297 See *supra* Part III.

298 See *supra* Part III.

299 See *supra* Part II.A.1.

300 See *supra* Part V.C.

301 See *supra* Part V.D.

302 See *supra* Part V.E.

303 See *supra* Parts III, IV and V.D.

304 See *supra* Part V.C.

305 See *supra* Parts III. See generally Adler, *supra* note 152 (arguing law surrounding congressional standing is unclear, but that Judge Collyer's recognition of standing is plausible in light of the danger of executive overreach into core legislative authority); Pickett, *supra* note 31, at 468–75 (arguing Congress should have institutional standing when a president refuses to enforce a federal statute because a president has violated the Take Care Clause in the Constitution and political remedies are ineffective). But see Bagley, *supra* note 150, at 1–2 (arguing Judge Collyer's recognition of standing in *U.S. House of Representatives v. Burwell* was wrong because the case involved a question of statutory interpretation

through the implementation of a statute and that her approach would undermine standing limits by allowing Congress to “dress[] up a statutory claim in constitutional garb”); Cheslock, *supra* note 131, at 163–74 (arguing the political question doctrine and lack of standing bar *Burwell* suit); Dellinger, *supra* note 150, at 2–3 (arguing judicial recognition of standing in *U.S. House of Representatives v. Burwell* would lead to a vast and unwarranted expansion of standing when the executive and legislature disagree about the interpretation of a statute). *See generally* Stern, *supra* note 25, at 3–4, 42–56 (arguing that separation of powers and political question doctrine concerns make it unlikely Supreme Court will recognize congressional standing, but acknowledging the law is not absolutely clear on issue of congressional standing).