

THE HOUSE STRIKES BACK: THE OBAMACARE SAGA AND AMERICAN DEMOCRACY IN THE ERA OF *HOUSE V. BURWELL*

ALEXANDRA M. FRANCO*

I. INTRODUCTION

In late September 2015, John Boehner announced his resignation as Speaker of the House of Representatives.¹ His decision came during a tumultuous time in American politics; the country is experiencing some of the worst partisan gridlock and political stalemate that it has ever experienced.² Right now, Congress is largely unable to pass legislation due to factions of the Republican Party trying to advance a conservative agenda,³ and President Obama's desire to advance his own policy.⁴ The fragmentation of the Republican Party has been so severe, that it even struggled to select a new Speaker of the House.⁵

The Patient Protection and Affordable Care Act (ACA)⁶ has taken center stage in this scenario. Despite the fact that Congress passed it and that President Obama signed it into law in 2010⁷ the law has been nothing short of contentious. It is one of the most contested pieces of legislation in modern times⁸ with some commentators going as far as calling it the “most

* Alexandra M. Franco, J.D. The author would like to thank Alexander Boni-Saenz, Sheldon Nahmod, Lori Andrews and Patrick Goold for their help and guidance during this process. The author would also like to thank her husband Georgi and her mother Luz for their love and support.

¹ Mike DeBonis and Paul Kane, *House Speaker John Boehner to Resign at End of October*, THE WASHINGTON POST (Sept. 25, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/09/25/boehner-resigns/>.

² Aaron Blake, *Gridlock in Congress? It's Probably Even Worse Than You Think*, THE WASHINGTON POST (May 29, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/gridlock-in-congress-its-probably-even-worse-than-you-think/>.

³ Justin Buchler, *How Divided Government and Party Polarization Brought Down John Boehner*, THE WASHINGTON POST (Sept. 27, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/09/27/how-divided-government-and-party-polarization-brought-down-john-boehner/>.

⁴ Jon Sopel, *President Obama Defies Lame-Duck Expectations After Big Wins*, BBC NEWS (June 25, 2015), <http://www.bbc.com/news/world-us-canada-33273689>.

⁵ Lisa Mascaro, *Kevin McCarthy's Surprise Withdrawal From House Race Deepens GOP Divide*, LOS ANGELES TIMES (Oct. 8, 2015), <http://www.latimes.com/nation/nationnow/la-na-kevin-mccarthy-pulls-out-of-house-speaker-race-20151008-story.html>.

⁶ Pub. L. No. 111-148 Stat. 119 (2010).

⁷ U.S. Department of Health and Human Services, *Key Features of the Affordable Care Act*, (Nov 18, 2015), <http://www.hhs.gov/healthcare/facts-and-features/key-features-of-aca/index.html>.

⁸ Derek Thompson, *The Most Controversial Laws of the Last 100 Years (the Stimulus and Obamacare Are 1 and 2)*, THE ATLANTIC (Sept. 23, 2013), <http://www.theatlantic.com/politics/archive/2013/09/the-most-controversial-laws-of-the-last-100-years-the-stimulus-and-obamacare-are-1-and-2/279899/>.

divisive legislation in modern history.”⁹ As of March 2014, the House of Representatives had voted fifty-four times in different efforts to undermine the functionality of the Act.¹⁰ In October 2013, Congress was unable to pass a funding bill on time to keep the federal government open due to demands attached to it targeting the ACA, resulting in the first federal government shutdown in almost twenty years.¹¹ The Supreme Court has reviewed the law in two occasions, subsequently deciding to uphold most of it in *National Federation of Independent Business v. Sebelius* in 2012,¹² and *King v. Burwell* in 2015.¹³

This “never-ending saga” as Justice Kagan called it,¹⁴ is far from over. In November of 2014, the House of Representatives filed another lawsuit challenging the ACA.¹⁵ The lawsuit’s primary argument is that the Executive is unconstitutionally expending public funds in the form of “cost-sharing reductions” without appropriations made by Congress to make payments to insurance companies as provided by the ACA, violating Article I, Section 9 of the Constitution.¹⁶

The House, citing *Marbury v. Madison*¹⁷ in its complaint, states that “[i]n challenging [the Executive’s] actions, this case addresses fundamental issues regarding the limits of Executive power under our constitutional form of government, and the continued viability of the separation of powers doctrine upon which ‘the whole American fabric has been erected’”¹⁸ (emphasis added). The United States District Court for the District of Columbia ruled on the issue of standing on October 9, 2015 and held that although there was no case precedent of whether “Congress has standing to bring suit against the President,”¹⁹ the House had been “injured in a concrete and particular way that is traceable to the Secretaries and remediable in court”²⁰ and thus had standing to sue.

⁹ *Id.*

¹⁰ Ed O’Keefe, *The House Has Voted 54 Times in Four Years on Obamacare. Here is the Full List*, The Washington Post, (March 21, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/>.

¹¹ Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, THE NEW YORK TIMES (Sept. 30, 2013), http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html?_r=0.

¹² Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). [In *NFIB*, the Supreme Court upheld the individual mandate requiring that most uninsured individuals obtain health insurance or pay a tax under Congress’ taxing power and also ruling that Congress could not coerce the states by conditioning all Medicaid funds on adoption of the Medicaid expansion provision of the Act].

¹³ *King v. Burwell*, 135 S. Ct. 475 (2015). [In *King*, the Supreme Court upheld the federal subsidies in states with federal government-run health care exchanges].

¹⁴ Oyez, *King v. Burwell; Oral Argument*, CHICAGO KENT COLLEGE OF LAW at 00:20:22 (March 4, 2014) <https://www.oyez.org/cases/2014/14-114>.

¹⁵ Complaint, United States House of Representatives v. Burwell, No. 1:14-cv-01967 (D.C. Cir. Nov. 21, 2014).

¹⁶ *Id.* at 3-7, 8; U.S. Const. art. I § 9, cl. 7. “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” *Id.*

¹⁷ *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

¹⁸ Memorandum and Opinion at 2, United States House of Representatives v. Burwell, No. 14-1967 (D.C. Cir. Sept. 9, 2015) [citing *Marbury v. Madison*, 5 U.S. 137, 176 (1803)].

¹⁹ *Id.*

²⁰ *Id.*

By doing so however, the D.C. District Court decided to take part in the worsening erosion of our system of government, further threatening the “continued viability of the separation of powers doctrine”²¹ that the House complains about. Although legal scholars²² and the courts²³ have recognized the validity of some court disputes between the branches of government, the current political climate calls for an exercise in judicial restraint. By readily allowing judicial review of extremely contentious political fights that could be characterized as “political questions”²⁴ in an era of almost unprecedented stalemate between the Legislative and Executive branches, the courts are becoming enablers to the dysfunctionality of government, the polarization of the political parties and the disruption of the status that the branches of government have as co-equals.²⁵

The arguments of whether the government can sue itself,²⁶ the death of the political question and the rise of the supreme Judiciary²⁷ have been extensively explored in legal literature. To borrow a term from the hard sciences, however, there is a need to account for the “entropic force”²⁸ that the courts can become in structural democracy an era of political uncertainty and stalemate. I argue that if courts continue to entertain challenges such as the one presented in *House v. Burwell*, and if the current political climate does not improve towards a more stable bipartisan status quo, American democracy will spiral towards a state of dysfunction out of which it may not recover.

At what point should the courts refuse to hear lawsuits between the other branches? My intention with this article is to undertake an interdisciplinary approach to find an answer to this question. In part one, I

21 *Id.* [citing *Marbury v. Madison*, 5 U.S. 137, 176 (1803)]. *See also*, *United States House of Representatives v. Burwell*, No. 14-1967, 2016 U.S. Dist. LEXIS 62646, at *56 (D.D.C. May 12, 2016). For purposes of the discussion of separation of powers, this article will focus exclusively on the issue of standing as it was analyzed by the United States District Court for the District of Columbia on its September 9, 2015 Memorandum and Opinion. On May 12, 2016, the court ruled in favor of the House of Representatives, granting it summary judgment and “enjoin[ing] any further reimbursements under Section 1402 until a valid appropriation is in place.” *Id.* The injunction was stayed however, pending a future appeal. *Id.*

22 Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 839 (1991).

23 *Consumers Union of United States, Inc. v. FTC*, 691 F.2d 575, 577 (D.C. Cir. 1982).

24 *Baker v. Carr*, 369 U.S. 186 (1961). The Court in *Carr* explained the difference between a political question which courts should not decide because it is “nonjusticiable” and a legitimate case or controversy under Article III, § 2 of the U.S. Constitution: “In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court’s inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not “arise under” the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art III, § 2), or is not a “case or controversy” within the meaning of that section; or the cause is not one described by any jurisdictional statute.” *Id.*

25 *Marshall Fields & Co. v. Clark*, 143 U.S. 649, 672 (1892) [the Court refers to the branches of government as “coequal and independent departments”].

26 *See*, Herz, *supra* note 22.

27 *See*, Rachel E. Barkow, *More Supreme Than Court?* 102 Colum. L. Rev. 237 (2002).

28 Nico Roos, *Entropic Forces in Brownian Motion*, <http://arxiv.org/ftp/arxiv/papers/1310/1310.4139.pdf>. (Last accessed Oct. 10, 2015).

will lay out the factual information necessary to understand the current gridlock and analyze it through existing political science theory. I will also present the legal background to the issue of standing in court disputes between the branches through examination of existing case precedent. In part two, I will state legal precedent supporting a moderate doctrine of standing for government institutions and the policy reasons why courts should be reluctant to grant standing to institutional plaintiffs like in *House v. Burwell*. In part three, I will address the possible criticisms to a moderate theory of institutional standing and the reasons why such criticisms are not compelling.

II. AS AMERICAN AS APPLE PIE AND CONGRESSIONAL GRIDLOCK: POLITICAL CLIMATE BACKGROUND AND LEGAL ISSUES PRESENTED BY *HOUSE V. BURWELL*

President Obama recently said the following when referring to the current political climate of partisan stalemate and gridlock: “If I sponsor a bill declaring apple pie American, it might fall victim to partisan politics.”²⁹ It is easy to feel like such statement or other similar statements made by members of the President’s rival party³⁰ are nothing more than an exaggeration of what is otherwise business-as-usual American politics. The political science literature in the subject of stalemate and gridlock is extensive,³¹ showing that at previous times in history the lack of governmental accomplishment generated enough interest in the scholarly community to warrant it academic analysis.

However, there is something different about the current times that calls into question whether the present government is so dysfunctional that it is testing the boundaries of the Constitution, separation of powers and the structure of American democracy. A 2014 study of the 112th Congress by political scientist Sarah Binder set out to analyze whether the 112th congress was as dysfunctional as it was made out to be by comparing it to other congresses in modern³²American history using a number of metric

²⁹ E. W., *Unprecedentedly Dysfunctional*, THE ECONOMIST (Sept. 22, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/09/political-gridlock>.

³⁰ Stephanie Condon, *Boehner: Obama is Acting Like a King*, CBS NEWS (November 20, 2014), <http://www.cbsnews.com/news/boehner-obama-is-acting-like-a-king/>. In a statement made in 2014, John Boehner said—regarding the subject of immigration reform—that “instead of working together to fix our broken immigration system, the president says he’s acting on his own. But that is just not how our democracy works.” *Id.*

³¹ See, George C. Edwards III, Andrew Barrett & Jeffrey Peake, *The Legislative Impact of Divided Government*, 41 AM. J. OF POL. SCI. 545 (1997); Sarah A. Binder, *The Dynamics of Legislative Gridlock*, 93 AMER. POL. SCI. REV. 519 (1999); Sarah A. Binder, *Going Nowhere: A Gridlocked Congress?*, 18 THE BROOKINGS REV. 16 (2000); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS; HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (Basic Books 2012).

³² Sarah Binder, *Polarized We Govern?*, CENTER FOR EFFECTIVE PUBLIC MANAGEMENT AT BROOKINGS 2, 5 (May 2014), http://www.brookings.edu/~media/research/files/papers/2014/05/27%20polarized%20we%20govern%20binder/brookingscepmpolarized_figreplacedtextrevertablerev.pdf. The author’s legislative analysis extends to the “postwar era” after 1947. *Id.*

variables.³³ She concluded that: “[The] direct claims about the 112th Congress are essentially true... [T]he 112th Congress can claim to be the ‘worst Congress ever.’”³⁴ She explained that during the 112th Congress “almost three-quarters of the most salient issues remained unresolved at the end of the Congress.”³⁵

Although the aforementioned analysis focuses on the 112th Congress, it sheds light on the ongoing legislative situation. In 2015, a majority Republican Congress facing its own internal challenges,³⁶ is simultaneously attempting to show the country it is determined to pursue its policy agenda despite not having a Republican president and not having enough members in Congress to assure a supermajority³⁷ needed to override a veto. In this scenario, a paralyzed majority in the legislative branch may be tempted to turn to the Judiciary as an outlet of its frustration.

And it has. Although there is disagreement regarding the characterization of those who wish to repeal the ACA,³⁸ the reality is that repealing the Act has become one of the primary policy objectives of the

33 *Id.* at 5. Binder explains her methodology: “[I offer] a measure that captures the degree of legislative deadlock by isolating the set of salient issues on the agenda and then determining the fate of those issues in each Congress. The result is a ratio of failed measures to all issues on the agenda in each Congress.” The author used the number of legislative initiatives discussed in the New York Times editorials to identify “salient issues.” *Id.* Also, the author noted the amount of news press coverage and “congressional documents” to identify legislative issues and whether Congress and the President had taken negative or positive actions on such issues. *Id.*

34 *Id.* at 9. The author states in her conclusion “First, the frequency of deadlock shows a secular increase over time. Second, the direct claims about the 112th Congress are essentially true. By this measure, the 112th Congress can claim to be the ‘worst Congress ever’ over the postwar period, although the title is shared with the last Congress of the Clinton administration in 1999-2000.” *Id.*

35 *Id.*

36 Lisa Mascaro, *Kevin McCarthy’s Surprise Withdrawal From House Race Deepens GOP Divide*, LOS ANGELES TIMES (Oct. 8, 2015), <http://www.latimes.com/nation/nationnow/la-na-kevin-mccarthy-pulls-out-of-house-speaker-race-20151008-story.html>.

37 Elizabeth Rybicki, *Veto Override Procedure in House and Senate*, Congressional Research Service at 1 (Feb. 25, 2015).

38 Although some argue that challenges to the ACA have been largely spearheaded by conservative actors who brought forth the first two lawsuits against the Act, it is my view that at this point the narrative against the Act has integrated into the mainstream Republican platform. This argument is supported by the analysis presented by Thomas Mann and Norman Ornstein, who argue that the Republican Party as a whole has become more conservative over the years (in their book *It’s Even Worse Than It Looks: How the American System Collided with the New Politics of Extremism* to which I refer constantly in this article). The former Speaker of the House—who was not part of the conservative wing of the party—brought forth the latest lawsuit on behalf of the entire House of Representatives. Also, repealing the Act has become an important point among most Republican presidential hopefuls in 2015 whether associated with the conservative wing of the party or not. See, Tom LoBianco, *2016 GOP Hopefuls Say Ballot Box Now Only Way to Get Rid of Obamacare*, CNN (June 15, 2015), <http://www.cnn.com/2015/06/25/politics/2016-candidates-obamacare-ruling/>. The National Federation of Independent Business—the entity that brought forth the lawsuit in *NFIB v. Sebellius*—is a lobbying organization generally engaged in contributing to the campaigns of conservative republican politicians such as Eric Cantor. *Id.* See, OpenSecrets.org, *National Fedn of Independent Business*, <https://www.opensecrets.org/orgs/summary.php?id=D000000160>. In the 2015 *King v. Burwell* case, individual plaintiffs claiming to have been affected by the law were represented by libertarian attorney Michael Carvin. *Id.* See, Sheryl Gay Stolberg, *A Lawyer Taking Aim at the Health Care Act Gets a Supreme Court Rematch*, THE NEW YORK TIMES (Mar. 4, 2015), <http://www.nytimes.com/2015/03/05/us/a-supreme-court-rematch-for-a-lawyer-targeting-the-health-care-act.html>.

Republican Party to this day.³⁹ Two legal challenges to the Act reached the Supreme Court, which ultimately upheld it almost in its entirety.⁴⁰ However, In *NFIB* and *King*, the Court did not hear a dispute directly between two branches of government. In an unprecedented move, on July of 2014 the House approved a measure allowing the Speaker to sue the Executive branch and subsequently filed a complaint in the United States District Court for the District of Columbia in November of the same year.⁴¹ The House argued that the Obama Administration expended funds that Congress had not appropriated in the form of the ACA's "Cost-Sharing Reductions,"⁴² in violation of Article I, Section 9 of the Constitution.⁴³ The Secretaries argued in their motion to dismiss that the House could not bring a cause of action to challenge the way in which the executive implements the Act due to lack of jurisdiction.⁴⁴ Despite lack of precedent, D.C. District Court rejected the claim that the issue was a "quintessentially political fight" and held that the political process would not provide a remedy to the House's claim.⁴⁵ Therefore, it held that the "House had standing to sue the Secretaries."⁴⁶ In doing so, it stated:

The House sues, as an institutional plaintiff, to preserve its power of the purse and to maintain constitutional equilibrium between the Executive and the Legislature. If its non-appropriation claims have merit, which the Secretaries deny, the House has been injured in a concrete and particular way that is traceable to the Secretaries and remediable in court.⁴⁷

This case is significant because by granting standing to the House, the D.C. court decided to immerse itself into a very delicate set of constitutional issues. When the Judiciary decides to adjudicate a claim between the two other branches, separation of powers questions arise.

³⁹ Kristina Peterson, *GOP Lawmakers Weigh Contentious Tactic to Dismantle Health Law*, THE WALL STREET JOURNAL (Jan. 30, 2015), <http://www.wsj.com/articles/gop-lawmakers-weigh-contentious-tactic-to-dismantle-health-law-1422638911>.

⁴⁰ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2015). [the Court invalidated conditioning all Medicaid program funds on states expanding the Medicaid program under the ACA]; King v. Burwell, 135 S. Ct. 2480 (2015) [the Court upheld the tax credits at issue based on the ambiguity of whether they were available at health insurance exchanges established by the federal government and not the states].

⁴¹ Alex Rogers, *House Grants Boehner Authority to Sue Obama*, TIME (July 30, 2014), <http://time.com/3061174/house-grants-boehner-authority-to-sue-obama/>.

⁴² Complaint at 8-14, United States House of Representatives v. Burwell, No. 1:14-cv-01967 (D.C. Cir. Nov. 21, 2014).

⁴³ *Id. See*, U.S. Const. art. I, § 7 cl. 2 "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* Complaint, at 15 United States House of Representatives v. Burwell, No. 1:14-cv-01967 (D.C. Cir. Nov. 21, 2014). The second argument, which is not central to our discussion, was that the Administration amended the ACA's Employer Mandate by "altering the date by which penalties will be assessed" for certain employers who fail to provide health insurance coverage to full time employees. *Id.*

⁴⁴ Defendant's Motion to Dismiss at 1-2, 12, United States House of Representatives v. Burwell, No. 1:14-cv-01967, 1-2, 12 (D.C. Cir. Jan 26, 2015).

⁴⁵ Memorandum and Opinion at 2, United States House of Representatives v. Burwell, No. 14-1967 (D.C. Cir. Sept. 9, 2015).

⁴⁶ *Id.*

⁴⁷ *Id.*

Separation of powers is the constitutional foundation for our system of government.⁴⁸ It separates the federal government into three branches in charge of separate functions: legislative, executive and judicial.⁴⁹ Separation of powers depends upon the idea that the branches work independently from one another, that they are to a great extent co-equal,⁵⁰ and that they do not interfere with each other's functions.⁵¹ Ever since the Supreme Court decided *Marbury v. Madison* in 1803, the job of the courts within the system of separation of powers has been understood as limited "to decide what the law is."⁵² However, the discussion about what this means is an ongoing and exceedingly complex part of American jurisprudence.

To invoke a court's power of judicial review, a plaintiff must show that the court can hear the case through its exercise of federal jurisdiction⁵³ set forth in Article III of the Constitution, by demonstrating that the issue is justiciable, that is, whether the case presents a "case or controversy."⁵⁴ There are several threshold questions to satisfy the "case and controversy" requirement.⁵⁵ One of them is that the plaintiff must have standing to bring forth a cause of action.⁵⁶ Standing requires that a plaintiff show (1) "injury in the form of invasion of a legally protected interest, [(2)] that is concrete and particularized and actual or imminent, [and that the injury is (3)] fairly traceable to the challenged action and redressable by a favorable ruling."⁵⁷ The Court has held that if a plaintiff cannot show that there are "specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention," the harm is not concrete or particularized enough to grant standing.⁵⁸ What this means is that if a person claims standing about a general harm that would affect this person as much as someone else in a hypothetical sense,⁵⁹ the injury would not be "concrete and particularized" to that person.

48 U.S. Const. art I §§ 8, 9., U.S. Const. art II., U.S. Const. art III.

49 *Id.*

50 *Marshall Fields & Co. v. Clark*, 143 U.S. 649, 672 (1892) [the Court refers to the branches of government as "coequal and independent departments"].

51 *Killbourn v. Thompson*, 103 U.S. 168, 190-191 (1880) [stating the general structure of separation of powers].

52 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

53 *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

54 U.S. Const. art. III, § 2 cl. 1.

55 *Poe v Ullman*, 367 U.S. 497, 504 (1961).

56 U.S. Const. art. III, § 2 cl. 1. "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." *Id.*

57 *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015)(internal quotations omitted)."

58 *Wrath v. Sheldon*, 422 U.S. 490, 507 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992).

59 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992). The Court stated in this opinion that "[it had] constantly held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id.*

The political question doctrine is another one of the threshold questions to satisfy the “case or controversy” requirement. The political question doctrine is a judicial device of self-restraint to control the limits of justiciability within the system of separation of powers.⁶⁰ Generally, asking whether a dispute constitutes a “political question” refers to the proper role of the Judiciary; whether it is proper for the judicial branch to issue a remedy or whether it the issue is better left to the “political” branches.⁶¹ Therefore, the application of the doctrine begins when a court exercises its own discretion on whether it is proper for it to adjudicate the issue before it or not.⁶² In *Baker v. Carr*⁶³ the Court laid out the different factors that determine whether a case presents a political question.⁶⁴ Among other factors, the Court was concerned about situations in which the Judiciary would be called to decide on an issue that is constitutionally delegated to one of the other branches, or to make a policy determination “clearly for nonjudicial discretion.”⁶⁵ *Carr* overruled a line of cases holding that apportionment of voting districts were political questions, in part because a court’s decision in that context would invariably favor one political party over the other.⁶⁶ Despite the fact that the issue of district apportionment needed to be resolved its “embroilment in politics, in the sense of party contest and party interests,” made the Court hesitate to step in.⁶⁷

Article III’s case or controversy requirement supports separation of powers by preventing the Judiciary from “being used to usurp the powers of the political branches.”⁶⁸ The Supreme Court has stated the importance of standing by recognizing that “[r]elaxation of standing requirements is

60 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

61 Jay M. Zitter, *Application of Political Question Doctrine by U.S. Supreme Court*, 75 A.L.R. Fed. 2d, 2 (1978-1991).

62 Barkow, *supra* note 27, at 244-246. The author explains that the political question doctrine as it applies to constitutional questions arising between government actors still falls within the Court’s power to determine what the law is, because the initial determination of whether a question constitutes a political question is the Court’s, which then decides whether it can legitimately exercise its power of judicial review or decline to decide the case. *Id.*

63 *Baker*, 369 U.S. 186.

64 *Id.* at 217. In this case the Court laid out the different assessments of justiciability by explaining that the threshold question will depend on the context of the particular controversy: “[The political question doctrine is] essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.*

65 *Id.*

66 *See*, *Colegrove v. Green*, 328 U.S. 549, 553, 555 (1946). “Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this court has traditionally held aloof.”

67 *Id.*

68 *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) [citing *Summers v. Earth Island Institute*, 555 U.S. 488, 492-493 (2009); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006); *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-222 (1974)].

directly related to the expansion of judicial power.⁶⁹ The Court has also stated that the issue of standing needs to withstand a particularly demanding inquiry when the Judiciary sets out to decide whether an action by another branch of government is constitutional or not,⁷⁰ which is something that the court in *House* also acknowledged.⁷¹

Standing gets even more convoluted as it applies to lawsuits within the government when there is no private party bringing the cause of action. In the *House* case, the complaint states that the House of Representatives is “a component of the United States Government,”⁷² and is bringing a cause of action against another component of the U.S. Government, the Executive branch.⁷³ To sue the Secretaries, the House authorized the Speaker to sue on its behalf through a resolution.⁷⁴ The issue of one branch of government bringing a cause of action against another is particularly controversial in the legal scholarly community and in the courts.⁷⁵ However, the problem here as it relates to separation of powers is whether an institution like the House of Representatives can bring forth such a cause of action, and whether a court can or should adjudicate such dispute. Although the D.C. Court ruled that the House had standing, it is not clear whether existing precedent supports this ruling.⁷⁶ In *House*, the parties and the court

69 *Id.* [citing *United States v. Richardson*, 418 U.S. 166, 188 (1974)].

70 *Id.* [citing *Raines v. Byrd*, 521 U.S. 811, 8118 (1997)]. The Court states: “In keeping with the purpose of this doctrine, [o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force use to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” *Id.*

71 Memorandum and Opinion at 2, *United States House of Representatives v. Burwell*, No. 14-1967 (D.C. Cir. Sept. 9, 2015) [citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 n. 12 (2015)]. The D.C. Circuit court stated: “Although no precedent dictates the outcome, the case implicates the constitutionality of another Branch’s actions and thus merits an ‘especially rigorous’ standing analysis.” *Id.*

72 Complaint at 4, 5, *United States House of Representatives v. Burwell*, No. 1:14-cv-01967 (D.C. Cir. Nov. 21, 2014).

73 *Id.* at 5. Although by its own resolution the House can bring a cause of action from the President directly, in this case it filed the suit against the Secretary of the Department of Health and Human Services, the U.S. Department of Health and Human Services, and the Secretary of the Department of the Treasury and the United States Department of the Treasury. *Id.*

74 *Id.* The full citation to the resolution states: “[T]he Speaker is authorized to initiate or intervene in one or more civil actions on behalf of the House of Representatives in a Federal Court of competent Jurisdiction to seek any appropriate relief regarding the failure of the President, the head of any department or agency, or any other officer or employee of the executive branch, to act in a manner consistent with that officials duties under the Constitution and laws of the United States with respect to implementation of any provision of the Patient Protection and Affordable Care Act, title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010, including any amendment made by such provision, or any other related provision of law, including a failure to implement any such provision.” *Id.*

75 Herz, *supra* note 22 at 894 n. 1. It is clear that under U.S. law a person cannot sue him or herself. However, some legal commentators (such as Hertz) argue that although the federal government may be one and the same, the prohibition that bars a person from suing him or herself does not apply to parts of the government which would like to sue each other. *Id.* Nevertheless, courts have acknowledged the uncomfortable nature of a case in which the federal government is at both sides of the dispute. Hertz explains that The Supreme Court (in *United States v. Interstate Commerce Comm.*, 337 U.S. 426, 430 (1949)). observed that while a case in which the United States brought a cause of action against the Interstate Commerce Commission could be characterized as “*United States v. United States et al.*” it “involve[d] controversies of the type which are traditionally justiciable and that therefore, the federal government had proper standing to request judicial review. *Id.*”

76 Memorandum and Opinion at 2, *United States House of Representatives v. Burwell*, No. 14-1967 (D.C. Cir. Sept. 9, 2015).

attempted find an answer to institutional standing by relying on scant existing precedent. The most important cases in this area are *Coleman v. Miller*,⁷⁷ *Raines v. Byrd*,⁷⁸ and *Arizona State Legislature v. Arizona Independent Redistricting Commission*.⁷⁹

Coleman and *Raines* formulate the controlling precedent for standing when individual member(s) of Congress bring a cause of action claiming a harm stemming from their office in an institution. In *Coleman*, the Court granted standing to individual members of the Kansas legislature who had voted against the ratification of an amendment to the Kansas constitution.⁸⁰ When the amendment was put to a vote, the result was 20 votes in favor and 20 votes against.⁸¹ The Lieutenant Governor decided to cast a tie-breaking vote for the resolution and the amendment was ratified, nullifying the votes of the legislators who had voted against it.⁸² In *Raines* the Court denied standing to individual members of Congress who had voted against the Line Item Veto Act and lost.⁸³ The congressmen alleged in their complaint that the Act “unconstitutionally expanded the President’s power” and “violate[d] the requirements of bicameral passage.”⁸⁴ The Court held that the congressmen lacked standing because their claim was not about a personal loss of a private right, “which would make the injury more concrete.”⁸⁵ Also, this was not the case of vote nullification seen in *Coleman*;⁸⁶ these were individual members of congress suing about “the abstract dilution of institutional legislative power” which “necessarily damages all Members of Congress and both Houses of Congress equally” (emphasis in original).⁸⁷

In *Arizona*, the Supreme Court held that the Arizona Legislature as an institution had standing to sue the Arizona Independent Redistricting Commission (AIRC). Arizona adopted new redistricting maps pursuant to a proposition which amended the Arizona Constitution, reassigning its authority to determine voting districts to the AIRC.⁸⁸ Regarding the issue of standing, the Arizona legislature alleged that “the loss of redistricting power constituted a concrete injury.”⁸⁹ Because the newly granted redistricting authority vested on the AIRC would give the state no other

77 *Coleman v. Miller*, 307 U.S. 433 (1939).

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

79 *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, (2015).

80 *Coleman*, 307 U.S. 433

81 *Id.* at 436.

82 *Id.*

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

84 *Id.*

85 *Id.* at 820-827.

86 *Id.* at 824.

87 *Id.* at 820-827.

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

89 *Id.* at 2662 [citing *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Amazonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) and *Clapper v. Amnesty Intl’ USA*, 133 S. Ct. 1138 (2015)]. The Court set out the requirements for standing as a need for a party to show: “injury in the form of ‘invasion of a legally protected interest’ that is ‘concrete and particularized and ‘actual or imminent’” and that the injury is “‘fairly traceable to the challenged action’ and redressable by a favorable ruling.” *Id.*

choice than to implement the ARIC's plan, the Court held that the injury alleged by the Arizona legislature was neither "too 'conjectural' [nor] hypothetical" to fail the requirements of standing.⁹⁰ In *Arizona*, the Court observed the fact that it was not an individual or individual members of the Arizona legislature claiming the harm, but instead the Arizona legislature as an "institutional plaintiff, asserting an institutional injury... after authorizing votes in both of its chambers."⁹¹

These three cases create a gray zone for concreteness. *Coleman* finds concreteness when individual members of a legislature claim undue deprivation of their powers in their official capacity—in which a private citizen would not have a personal stake—and when the claim is limited in space, time and scope.⁹² However, the gray zone extends from *Raines* to *Arizona*; at what point does a harm to *an institution* should become concrete and particularized enough to satisfy the standing requirement?

III. THE *HOUSE* ERA: CALLING FOR AN EXERCISE IN JUDICIAL RESTRAINT BY RESTRICTING THE APPLICABILITY OF EXISTING PRECEDENT AND STAYING OUT OF CONTENTIOUS POLITICAL FIGHTS

To summarize, here is the factual and legal scenario of the house dispute: There is an empirically demonstrable period of excessive legislative stalemate and gridlock.⁹³ One of the most contested pieces of legislation in history,⁹⁴ which has already survived two Supreme Court challenges⁹⁵ almost intact, prompts yet another attack.⁹⁶ The Republican majority Legislature is largely unable to pass legislation at this time, and is especially unlikely to pass an appropriations bill funding the ACA's cost-sharing reductions⁹⁷ when one of its fundamental party platforms at the time is to repeal the ACA.⁹⁸ The House sees as a last resort the

⁹⁰ *Id.* at 2664.

⁹¹ *Id.* The Court here distinguished the case at hand from *Raines v. Byrd*, 521 U.S. 811, 817 (1997) in which it held that individual members of Congress who did not have their respective houses' approval to bring forth a cause of action in their behalf and thus "the suitors could not repair to the Judiciary to complain." *Id.*

⁹² *Raines v. Byrd*, 521 U.S. 811, 832 (1997)(conurrence by Souter). "[T]he alleged, continuing deprivation of federal legislative power is not as specific or limited as the nullification of the decisive votes of a group of legislators in connection with a specific item of legislative consideration in *Coleman*, being instead shared by all the members of the official class who could suffer that injury, the Members of Congress." *Id.*

⁹³ *Binder*, *supra* note 32.

⁹⁴ *Thompson*, *supra* note 8.

⁹⁵ *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); *King v. Burwell*, 135 S. Ct. 475 (2015).

⁹⁶ Complaint, United States House of Representatives v. Burwell, No. 1:14-cv-01967 (D.C. Cir. Nov. 21, 2014).

⁹⁷ *Id.* at 3-4. I am focusing on this issue because it is House's central argument.

⁹⁸ David A. Fahrenthold & Jenna Johnson, "Republican's Obamacare 'repeal and replace' Dilemma Joins Presidential Contest," WASH. POST (Aug. 18, 2015), https://www.washingtonpost.com/politics/health-law-repeal-and-replace-joins-republican-presidential-contest/2015/08/18/b620ee94-45ce-11e5-846d-02792f854297_story.html. The author explains how since 2010 the Republican Party's focus has been to repeal the Act and how it is one of the party's major policy platforms for the upcoming general elections. *Id.*

controversial legal premise that (1) as long as it has vested one of his members (the Speaker in this case) with the authority to sue on its behalf, it has standing to bring a cause of action against the Executive, and (2) that the injury it claims is concrete, and redressable by the courts.⁹⁹ The D.C. Circuit then decides that the House has standing to sue the Executive despite the lack of precedent establishing such a claim and the separation of powers issues that such holding involves.¹⁰⁰

The foregoing is a recipe which can significantly alter our system of government. In addition to a myriad problems which will stem out of the policy and the legal implications of expanding the *Coleman*, *Raines* and *Arizona* precedents, the balance of separation of powers will inevitably tilt towards the Judiciary if the courts become an easily available forum through which the Legislature and the Executive attempt to solve their most fundamental disagreements. Justice Scalia once said that “no government official is ‘tempted’ to place restraints upon his own freedom of action.”¹⁰¹ The Legislature at the moment has no immediate incentive to show restraint and will appeal to court action to arbitrate its quarrels with the Executive. In this section, I present the legal and policy arguments supporting the idea that courts should decline to decide cases such as *House* by holding that quasi-institutional plaintiffs do not have standing to sue.

A. SOLUTION: REJECTION OF QUASI-INSTITUTIONAL ACTOR STANDING AND A MODERATE INSTITUTIONAL STANDING DOCTRINE

The crux of the standing issue is whether an institutional plaintiff can show that the injury it asserts is concrete to it as an institution. *Arizona* and *Raines*, when considered in conjunction, stand for the idea that a harm specific to the institution (such as the loss redistricting power at issue in *Arizona*) may be abstract and remote when individual members of Congress claim it just by virtue of their office, as it is not a power granted *to the office* but instead to the institution itself (for example, the loss of legislative power that the *individual* legislators in *Raines* claimed).¹⁰² However, when the entire affected body claims the institutional harm, it is easier to find the harm to be concrete like in *Arizona*.¹⁰³

⁹⁹ Complaint, United States House of Representatives v. Burwell, No. 1:14-cv-01967 (D.C. Cir. Nov. 21, 2014).

¹⁰⁰ Memorandum and Opinion at 2, United States House of Representatives v. Burwell, No. 14-1967 (D.C. Cir. Sept. 9, 2015) [citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 n.12 (2015)].

¹⁰¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 981 (1992). “The Court’s statement is that it is ‘tempting’ to acknowledge the authoritative nature of tradition in order to ‘curb the discretion of federal judges,’ is of course rhetoric rather than reality; no government official is ‘tempted’ to place restraints upon his own freedom of action, which is why Lord Acton did not say ‘Power tends to purify.’ The Court’s temptation is in the quite opposite and more natural direction – towards systematically eliminating checks upon its own power; and it succumbs.” *Id.*

¹⁰² *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

¹⁰³ *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S.Ct. 2652, 2663 (2015).

The D.C. District Court in *House* gave disproportional weight to the authorization of the individual member of Congress by the institution to sue on its behalf.¹⁰⁴ The issue of individual authorization of an official to sue on behalf of an institutional actor is not dispositive to the question of standing.¹⁰⁵ The Court in *Raines* only addressed this question at the end of the opinion when it said that it “[attached] *some* importance to the fact that appellees [had] not been authorized to represent their respective Houses of Congress in this action.”¹⁰⁶ This issue also was not the dispositive to the outcome in *Arizona*.¹⁰⁷ All this means is that the ability to bring forth an institutional loss of power claim¹⁰⁸ extends to a legislator if he or she has been authorized to represent the aggrieved institution.¹⁰⁹

Here is where the distinction should be drawn for cases such as *House*. The issue that an institutional harm can be less concrete when an individual within the institution claims it¹¹⁰ can evidence itself when individual segments *within* an institution claim the harm as well. Although the D.C. District Court held that the case at hand was more like *Arizona* because “the injury [there] is sufficiently concrete and particularized as to the *whole* House”¹¹¹ (emphasis in original), the power to make appropriations is not the House’s power alone. Despite the common understanding that the House has the “power of the purse,”¹¹² both chambers of Congress are equally vested with the power to make appropriations.¹¹³ The House stated this principle correctly when it said:

Congress thus has a necessary role—indeed, *the defining role*—in our system over any expenditure of public funds by virtue of the fact that *it first must pass identical appropriations bills in the House of Representatives*

¹⁰⁴ Memorandum and Opinion at 11, 22, United States House of Representatives v. Burwell, No. 14-1967 (D.C. Cir. Sept. 9, 2015) [citing *Marbury v. Madison*, 5 U.S. 137, 176 (1803)].

¹⁰⁵ *Raines*, 521 U.S. at 829.

¹⁰⁶ *Id.*

¹⁰⁷ *Arizona*, 135 S. Ct. at 2663. The Court drew this distinction between *Raines* and *Arizona* when it stated that in the former “both houses actively opposed [the congressmen’s] suit” whereas in the latter “[the Arizona legislature] commenced [the] action after authorizing votes in both of its chambers.” *Id.*

¹⁰⁸ *Id.* For example, in this case the harm claimed was the Arizona legislature’s loss of the power to draw the voting districts, which is not a power affixed to individual members of the Arizona legislature (such as the power to vote at issue in *Coleman*). In this case the power to determine the districts was conferred upon the Arizona legislature by the Arizona Constitution. The issue of individual authorization becomes relevant because an individual member of the Arizona legislature could not have claimed the loss of a power that attaches to the institution, unless it is authorized to bring suit on its behalf. *Id.*

¹⁰⁹ *Id.* The Court said: “our conclusion that the Arizona legislature has standing fits [our holding in *Coleman*] 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.’” *Id.* at 2665. Regarding the issue of authorization, the Court acknowledged the comment at the end of *Raines* and observed: “The Arizona legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers.” *Id.*

¹¹⁰ *Raines*, 521 U.S. at 821.

¹¹¹ Memorandum and Opinion at 19, United States House of Representatives v. Burwell, No. 14-1967 (D.C. Cir. Sept. 9, 2015).

¹¹² U.S. HOUSE OF REPRESENTATIVES, *Power of the Purse*, HISTORY, ART & ARCHIVES, <http://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/>.

¹¹³ U.S. Const. Art. I § 9, cl. 7.

and the Senate—and such bills then must become law—before any public funds may be expended . . . (second emphasis added).¹¹⁴

Hence, for the House of Representatives to have standing to sue, *Raines* and *Arizona* would have to stand for the proposition that an institutional injury, which affects both chambers of the legislative branch equally, becomes “concrete and particularized”¹¹⁵ enough *when only one of the chambers* claims to have been affected by it. Although the D.C. District Court relies upon a D.C. Court of Appeals case to stand for the idea that the House alone can be an institutional plaintiff,¹¹⁶ that case still does not address the issue of whether an alleged loss of Congressional power to make appropriations is sufficiently concrete and particularized to the House as part of the larger institution of the Legislature.

It is worrisome that, as some legal commentators point out, the courts are moving away from rejecting cases that present a potential political question.¹¹⁷ Also, legal scholars¹¹⁸ and some courts¹¹⁹ do not seem to be concerned with granting standing to institutional plaintiffs, especially in circumstances in which it might appear to be the most efficient manner to deal with the issue in controversy.¹²⁰ However, when there is a question of standing like in *House* that can demean the Judiciary’s image of political neutrality before the eyes of the people¹²¹ and threaten the balance of the co-equal branches of government,¹²² the solution is an institutional standing doctrine which allows for some institutional plaintiffs to seek redress in limited scenarios and a return to full applicability of the political question doctrine.

As a threshold question, *Coleman*, *Raines*, and *Arizona* require a court to establish the concreteness of an institutional harm when evaluating the

¹¹⁴ Complaint at 2, U.S. House of Representatives v. Burwell, No. 1:14-cv- 01967 (D.C. Cir. Nov. 21, 2014).

¹¹⁵ Memorandum Opinion at 65, U.S. House of Representatives v. Burwell, No. 14-1967 (D.C. Cir. Sept. 9, 2015).

¹¹⁶ *Id.* at 67-68 [citing United States v. Am. Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976)].

¹¹⁷ Barkow, *supra* note 27 at 242-43.

¹¹⁸ Herz *supra* note 22.

¹¹⁹ See, Comm. on Oversight and Gov. Reform v. Holder, 979 F. Supp 2d (D.D.C. 2013); United States v. Am. Tel. & Tel. Co., 551 F.2d 384 (1976).

¹²⁰ Herz *supra* note 22. The author’s extensive discussion of the commonality of disputes inside a branch itself, such as the Executive branch, suggests that this might be the most efficient way to deal with relatively low-profile institutional disputes. *Id.*

¹²¹ Barkow, *supra* note 25 at 242-43. The author explains the way in which the Court has even moved towards not even applying the political question doctrine analysis in cases like *Bush v. Gore*, which has become a popular symbol for an almighty judiciary. *Id.* See, Adam Cohen, *Has Bush v. Gore Become the Case That Must not be Named?*, N.Y. TIMES (Aug. 15, 2006) http://www.nytimes.com/2006/08/15/opinion/15tues4.html?_r=0.

¹²² Robert J. Pushaw, *Justiciability and Separation of Powers: a Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 436-38 (1996). The author explains within the context of early Supreme Court decisions dealing with separation of powers issues that the Court “reaffirmed the Federalist axiom that the Constitution created three functionally coextensive branches.” In these early cases the Court imposed three main realms through which it would ensure that it did not overstep its constitutionally-granted power to say what the law is. The Court would not “render decisions that were subject to legislative or executive review. . . [it] would not issue public advisory opinions [and] it would decline to exercise judicial power *if necessary* to avoid unduly encroaching upon the constitutional spheres of Congress or the President” (emphasis added). *Id.*

standing of an actor claiming the institutional harm.¹²³ The concreteness of the harm as applied to an institutional plaintiff is related to the representativeness of the plaintiff to the institution to which the harm is particularized. Therefore, if the claim is a loss of institutional power, in order for it to be sufficiently concrete, the plaintiff must show that it is representative of the entire affected class.¹²⁴

In the context of the issue in *House*, it would mean that the harm—which is the lack of appropriations for the cost-sharing reductions—would not be concrete enough to the House as a piece of the true institutional plaintiff: the Legislative branch. In this case, the only institutional plaintiff(s) that could claim the harm of the loss of power at issue in *House* would be both the House and Congress as the unified Legislative, because the House alone is unable to pass an appropriations bill without the other chamber. In the *House* lawsuit, the House of Representatives is a quasi-institutional plaintiff; an institutional actor which is affected by the alleged harm (in this case, by its “power of the purse,”¹²⁵) but for which the harm is not concrete and particularized enough to satisfy the requirement of standing.

However, the aforementioned standing doctrine should not stand alone. The reviewing court should apply the political question doctrine¹²⁶ to ensure that the issue is not better left to the other branches to resolve on their own. The application of this doctrine is vital because the question of justiciability in litigation between the branches may (and perhaps should) have a different outcome in a time not dominated by dysfunction and gridlock when an institutional plaintiff has a genuine need of redress. As the Court said in *Baker v. Carr*:

[d]eciding whether a matter has in any measure been committed by the Constitution to another branch, or whether the action of that branch exceeds whatever authority has been committed is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as the ultimate interpreter of the Constitution.¹²⁷

If a reviewing court decides that a plaintiff satisfies the standing requirement set forth above and that the lawsuit is not preempted by the political question doctrine, it could decide to hear the case without compromising its image of political neutrality.¹²⁸ The standing doctrine

¹²³ It would also be consistent with *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976). However, because this case and the other cases mentioned on page 21 of the D.C. District opinion in *House* are not Supreme Court cases, I will not attempt to reconcile these decisions with my proposed test. *See*, Memorandum and Opinion, *United States House of Representatives v. Burwell*, No. 14-1967 (D.C. Cir. Sept. 9, 2015).

¹²⁴ *Raines v. Byrd*, 521 U.S. 811, 833 (1997).

¹²⁵ *See*, *United States House of Representatives*, *supra* note 112.

¹²⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹²⁷ *Id.* at 211.

¹²⁸ To clarify, even when an institutional plaintiff satisfies the proposed standing test, the case would inevitably still present separation of powers issues. Also, the courts could try to further develop the political question doctrine to inquire whether the primary motivation behind a lawsuit is political rather than a genuine issue of executive overreach. In fact, the Court has expressed a direct correlation

proposed in this section in conjunction with the political question doctrine are the most balanced solution; this solution would provide redress for institutional plaintiffs with genuine issues while also giving the courts a fully workable test to decline to hear cases which may have severe consequences to our system of government.

B. POLICY: THAT WE CAN DOES NOT MEAN THAT WE SHOULD,
SEPARATION OF POWERS AND CLOSING THE FLOODGATES

The courts should nonetheless limit granting standing to institutional plaintiffs only in extraordinary circumstances and fully apply the political question doctrine in cases like *House* to protect the system of separation of powers. Separation of powers serves primarily to maintain the status of the branches as co-equals and to foster cooperation,¹²⁹ which is imperative to the proper functioning of our system of government. If the courts decide to grant standing in cases like *House*, they risk sliding down the slippery slope of eroding separation of powers and our system of government. Such a decision would incentivize gridlock and open the floodgates to more *House*-like lawsuits because government actors would have a new avenue to voice their frustration instead of negotiating. It would also tarnish the image of the court, as the court would appear to pick sides in a high-profile fight between two branches— especially when they are dominated by different political parties that are diametrically opposed on the issue at hand. Judicial review of issues such as the one in *House* should be the “last resort,”¹³⁰ not the main outlet for legislative or executive dissatisfaction.

Perhaps one of the best explanations of the need for judicial restraint in political disputes comes from Justice Souter’s concurrence in *Raines*:

[This] is in substance an interbranch controversy about calibrating the legislative and executive powers, as well as an intrabranched dispute between segments of Congress itself. Intervention in such a controversy would risk damaging the public confidence that is vital to the functioning of the judicial branch... by embroiling the federal courts in a power contest nearly at the *height of its political tension*.¹³¹(emphasis added).

It might be difficult to find an issue that is currently more at the “height of its political tension” than the ACA. As discussed in the previous sections, the ACA can be described as one of the most contentious pieces of legislation in history.¹³² The Supreme Court has heard two challenges¹³³ to it, and as of November 2015, it has agreed to hear yet one more challenge

between the political question and issues that stem directly from contentious political fights separate from the branches of government. See, *Colegrove v. Green*, 328 U.S. 549, 554-56 (1946). However, I am unable to further discuss how such elaboration of the political question doctrine would work, as it is beyond of the scope of this paper.

¹²⁹ Pushaw, *supra* note 122 at 403-04.

¹³⁰ *Raines v. Byrd*, 521 U.S. 811, 833 (1997).

¹³¹ *Id.* at 833-34.

¹³² Thompson, *supra* note 8.

¹³³ *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); *King v. Burwell*, 135 S. Ct. 475 (2015).

to it separate from *House v. Burwell*.¹³⁴ The appropriations issue in *House* arose as a result of the government shutdown of 2013, when conservative members of the legislature refused to make concessions about defunding the ACA.¹³⁵ To reopen the government, Congress and the President settled on resolutions that funded the government but did not include any appropriations for the cost-sharing reductions.¹³⁶ Congressional efforts to repeal or undermine the ACA in some way have not stopped to this day.¹³⁷

However, in an era of excessive gridlock resulting from extreme factions overtaking the two-party system,¹³⁸ courts should turn down lawsuits like *House* because accepting them incentivizes the breakdown of American democracy. Based on empirical analyses of the political branches of government and their actions through American history, some political scientists argue that anomalies in the functioning of government, such as gridlock, are not permanent and that the system is self-correcting in the long term.¹³⁹ Others believe the dysfunction the country is experiencing may be difficult to overcome.¹⁴⁰ Whether history proves this period of gridlock to be one or the other, it is undoubtedly true that the Supreme Court has an everlasting effect on our system of government that traces back to *Marbury*.

One can only speculate the effect that the Court would have on the constitutional set-up of government and the political climate of gridlock and stalemate if it were to extend standing to quasi-institutional plaintiffs in a heavily charged political fight that cuts across party lines like the one in *House*. However, the reality is that the Court has already influenced the extremism evidenced in the legislature (which has led to the stalemate and gridlock seen today),¹⁴¹ even in instances where it has exercised what is clearly legitimate judicial review power.¹⁴²

¹³⁴ Emma Green, *The Little Sisters of the Poor Are Headed to the Supreme Court*, THE ATLANTIC (Nov. 6, 2015), <http://www.theatlantic.com/politics/archive/2015/11/the-little-sisters-of-the-poor-are-headed-to-the-supreme-court/414729/>.

¹³⁵ Holly Yan, *Government Shutdown: Get up to Speed in 20 Questions*, CNN (Oct 1, 2015), <http://www.cnn.com/2013/09/30/politics/government-shutdown-up-to-speed/>.

¹³⁶ Memorandum and Opinion at 10, *United States House of Representatives v. Burwell*, No. 14-1967 (D.C. Cir. Sept. 9, 2015).

¹³⁷ Noam N. Levey, *House Republicans Vote To Repeal Obamacare, Again*, L.A. TIMES (Oct 23, 2015), <http://www.latimes.com/nation/la-na-obamacare-repeal-house-20151023-story.html>.

¹³⁸ THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS; HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (Basic Books 2012). The authors argue that the current stalemate and gridlock stems primarily from the entire Republican party becoming more polarized as a whole.

¹³⁹ DAVID R. MAYHEW, *PARTISAN BALANCE; WHY POLITICAL PARTIES DON'T KILL THE U.S. CONSTITUTIONAL SYSTEM* 190 (2011).

¹⁴⁰ MANN & ORNSTEIN, *supra* note 138 at 111. The authors state (referring to David. R. Mayhew's theory in *Partisan Balance*): "We hope Mayhew is right and that this difficult patch will prove to be routine, short term and self-correcting, or at least easily correctible. But we doubt it. These perilous times and the political responses to them are qualitatively different from what we have seen before."

¹⁴¹ *Id.* at 47.

¹⁴² *Id.* The authors mention *Roe v. Wade* as a moment in which the Republican Party gained one of its most conservative allies, the Pro-life movement. *Id.*

Political scientists Thomas Mann and Norman Ornstein have identified specific periods in American history when the parties have become more polarized.¹⁴³ Such periods coincide with Supreme Court decisions that have directly influenced the polarization of the Republican Party, specifically.¹⁴⁴ *Roe v. Wade* brought forth the Pro-life movement, one of the most conservative allies of the Republican Party today.¹⁴⁵ Mann and Ornstein also recognize the controversial win of George W. Bush in the 2000 presidential election as further aiding to the polarization of the Republican Party.¹⁴⁶ The second term of the Bush presidency was itself the result of an even more controversial set of cases, including the now infamous *Bush v. Gore*¹⁴⁷ in which the application of the political question doctrine took a back seat.¹⁴⁸ Another period in time which the political parties experienced further polarization¹⁴⁹ was the fight over voting districts that continued after *Baker v. Carr* (case which opened the courthouse gates to arguments over voting districts).¹⁵⁰

The beginning of this paper recounted John Boehner's resignation as Speaker of the House of Representatives. The connection of that story to the present analysis is the most important reason why the courts should stay outside of contentious, politically-charged issues. Mann and Ornstein explain the beginning of the end of Boehner's speakership through the history of polarization pervasive in the Republican Party today.¹⁵¹ The conservative factions that have taken over the Party are the ones who pressured Boehner to resign,¹⁵² after years of forcing him to refuse to negotiate with the Executive.¹⁵³ The government shutdown at the core of the appropriations issue in *House* was spearheaded by this same group, to try to repeal the ACA.¹⁵⁴ The vote for the resolution authorizing Boehner to file a lawsuit on behalf of the House was divided along party lines.¹⁵⁵ In addition to being a fight between the political branches, this issue is a bitter fight between the political parties that, according to Mann and Ornstein, is sending our government down the path to transformation into a parliamentary system.¹⁵⁶

143 *Id.* at 47-51; *Roe v. Wade*, 410 U.S. 113 (1973); *Bush v. Gore*, 531 U.S. 98 (2000); *Baker v. Carr*, 369 U.S. 186 (1962).

144 MANN & ORNSTEIN, *supra* note 138 at 47-51.

145 *Id.*; *Roe v. Wade*, 410 U.S. 113 (1973).

146 MANN & ORNSTEIN, *supra* note 138 at 50-51.

147 *Bush v. Gore*, 531 U.S. 98 (2000).

148 Barkow, *supra* note 27, 242-43. The author states that the Court in *Bush v. Palm Beach Cty. Canvassing Bd.* and the concurrence in *Bush v. Gore* overlooked the political question doctrine and did not explain why it did not apply to those cases. *Id.*

149 MANN & ORNSTEIN, *supra* note 138 at 48. The authors mention that party polarization hastened during the voting district fights that occurred mostly in the 1980s. *Id.*

150 *Baker v. Carr*, 369 U.S. 186 (1962).

151 *See generally*, MANN & ORNSTEIN, *supra* note 138.

152 Eric Bradner, *John Boehner Trashes Conservative Groups Who Force Agenda*, CNN (Sept. 27, 2015), <http://www.cnn.com/2015/09/27/politics/john-boehner-ted-cruz-conservative-groups/>.

153 MANN & ORNSTEIN, *supra* note 138 at 1-30.

154 Bradner, *supra* note 152.

155 Timothy Stoltzfus Jost, *Perspective: The House and the ACA – A Lawsuit Over Cost-Sharing Reductions*, THE NEW ENGLAND JOURNAL OF MEDICINE 1, 6 (Massachusetts Medical Society 2015).

156 MANN & ORNSTEIN, *supra* note 138 at 42.

After announcing his resignation, Boehner stated: “The Bible says beware of false prophets. And there are people out there, you know, spreading noise about how much can get done. I mean this whole notion that we’re going to shut down the government to get rid of Obamacare in 2013 – this plan never had a chance.”¹⁵⁷ This statement may be evidence that the government shutdown of 2013 was primarily used as political leverage for the midterm elections,¹⁵⁸ rather than as an effective tool to try to repeal the ACA.¹⁵⁹ Therefore, it is not hard to imagine what a court opinion arbitrating a fight of this kind between two politically-opposed branches entrenched in a bitter fight ahead of the 2016 presidential elections would do, especially considering all of the delicate constitutional questions that the *House* case presents. As Mann and Ornstein state: “The political system has become grievously hobbled at a time when the country faces unusually serious challenges and grave threats;”¹⁶⁰ adjudication of a lawsuit like *House* could only exacerbate those threats.

III. WHAT TO DO WHEN THE STRUGGLE IS REAL: COUNTERARGUMENTS TO JUDICIAL RESTRAINT

One of the arguments against this moderate theory of institutional standing is that it will not work to further separation of powers. It may be argued that by denying standing to a quasi-institutional plaintiff with a genuine issue in need of redress it could further incentivize the Executive to overreach beyond its boundaries. However, extending one branch’s power beyond its constitutional limits—in this case the Judicial—to curtail another’s is not the solution. Instead, courts should provide the legislature with clear guidelines for when they will consider reviewing an issue of alleged executive overreach. By utilizing this method, the courts would at the very least require both chambers of the Legislature vote to be able to bring a cause of action.¹⁶¹ This is a relatively small burden for the Legislature, with the benefit of providing a clearer message that the issue for which the Legislature seeks judicial review involves genuine overreach by the Executive and is not simply a charged political fight.

Furthermore, a quasi-institutional actor like the House is not entirely without redress if it cannot bring forth a cause of action on its own. The

157 Bradner, *supra* note 152.

158 See, Christina Marcos, *House Votes to Sue Obama*, THE HILL (July 30, 2014), <http://thehill.com/homenews/house/213859-house-votes-to-sue-obama>. See also, Pema Levy, *Hose Republicans Vote to Sue Obama*, NEWSWEEK (July 30, 2014), <http://www.newsweek.com/republicans-obama-lawsuit-democrats-john-boehner-obama-impeachment-obamacare-262246>.

159 Bradner, *supra* note 152.

160 MANN & ORNSTEIN, *supra* note 138 at 101.

161 It may be argued that it would be better to require that such a vote in both chambers be a supermajority vote. However, I believe it is inappropriate for the courts to make such a call. A specific vote requirement would have to be established by the Legislature itself and signed into law by the President. However, as we have seen through this article, the chances of this happening in the foreseeable future are slim.

Constitution grants the House the power to impeach.¹⁶² If the alleged harm caused by the Executive is as egregious as it is claimed to be, the Legislature can always seek impeachment.¹⁶³ Furthermore, legal scholars suggest that the House has a high level of discretion to bring forth the articles of impeachment.¹⁶⁴

If impeachment is not feasible, another possible solution is found in Justice Souter's concurrence in *Raines*¹⁶⁵ and evidenced by the previous two Affordable Care Act cases.¹⁶⁶ A private party affected by the issue at the core of the dispute can bring forth the challenge. Such a private party would spare a court from having to adjudicate a fight directly between the political branches; "it would expose the Judicial Branch to a lesser risk. Deciding a suit to vindicate an interest outside the government raises no specter of judicial readiness to enlist on one side of a political tug-of-war."¹⁶⁷

However, it may be that the executive violation does not rise to the level of "high crimes and misdemeanors" warranting impeachment¹⁶⁸ and that the private plaintiff solution would not fix the problem. For example, in the *House* case, the Republican actors behind the lawsuit quickly dismissed impeachment as a possibility.¹⁶⁹ Also, in that case it is unlikely that a private plaintiff would arise because the insurance companies have nothing to complain about as long as they keep receiving payment for the cost-sharing reductions. Once again, in both of these scenarios, a quasi-institutional plaintiff like the House under the model presented above could become a true institutional plaintiff by getting Congress to vote so that it

162 See also, U.S. Const. art. I, § 2, cl. 6. "The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment." *Id.* See also, U.S. Const. Art. I § 3 Congress has "the power to try all impeachments." *Id.*

163 Legal scholars have written extensively about the purpose of impeachment as a constitutional power, claiming that the framers gave this power to congress because it is the most apt branch to filter and apply a public feeling of executive inadequacy. See, Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 42 (1999). However, whether the standard of "high crimes and misdemeanors" set out in the constitution would be sufficient to accommodate the issue at stake in *House* would be a significant point of dispute and beyond the scope of this article. Nevertheless, it is worth mentioning that the House of Representatives is the body that brings forth the articles of impeachment—the documents stating the offense warranting the charge against the President or official—and therefore has a wide discretion to the charges it can bring, whether they result in impeachment or not. *Id.*

164 Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999).

165 *Raines v. Byrd*, 521 U.S. 811, 833, 835 (1997) (Souter, J., concurring). Justice Souter mentioned that the availability of an alternative plaintiff could alter assessment of the standing question: "[T]he certainty of a plaintiff who obviously would have standing to bring a suit to court after the politics had at least subsided from a full boil is a good reason to resolve doubts about standing against the plaintiff invoking an official interest." *Id.*

166 *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); *King v. Burwell*, 135 S. Ct. 475 (2015).

167 *Raines*, 521 U.S. at 833-34.

168 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 high crimes and misdemeanors." *Id.*

169 Zeke J. Miller, *Paul Ryan: Sue Obama, But Don't Impeach Him*, TIME (July 20, 2015), <http://time.com/3058670/paul-ryan-obama-impeach-sue/>.

can join in the lawsuit.¹⁷⁰ At that point, the injury claimed would be concrete and particularized enough to the institution so that a court could legitimately grant standing.¹⁷¹ The last hurdle a plaintiff would have to overcome in this scenario is the political question doctrine. If a court decides that the issue is not primarily motivated by a political fight, “embroiled in politics, in the sense of party contest[s],”¹⁷² a court could exercise its discretion to hear the case.

Although it may sound harsh,¹⁷³ the Court certainly is not required to review every constitutional question presented to it, especially in the realm of the political question doctrine.¹⁷⁴ As Chief Justice Rehnquist explained in *Raines*, sometimes there is an imbalance in the power of the branches that is deeply tied to a political fight, and just because the imbalance exists it does not mean the Court should get involved.¹⁷⁵ Sometimes the political branches take actions that undermine their own powers. For example, Congress has arguably delegated a fair amount of its constitutionally-granted war-making power¹⁷⁶ to the Executive through the Authorization for Use of Military Force.¹⁷⁷ Congress, as an institution, is responsible for carrying the burdens that it has placed upon itself as an institution through its ability to pass laws, such as the ACA.

IV. CONCLUSION

Legal scholars largely agree that just because a constitutional question is before the Court, this does not mean that the Court has to review the question.¹⁷⁸ This issue becomes even more relevant in times dominated by political gridlock and instability. That an issue such as the one in *House*

¹⁷⁰ In this scenario it would mean, for example, waiting until the repeated repeal efforts have ceased.

¹⁷¹ See *supra* note 161.

¹⁷² *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

¹⁷³ It may sound harsh because in the *House* case it is highly unlikely that any private plaintiff can arise to bring forth the case. Additionally, the consequences to the ACA marketplaces if the insurance companies stop receiving payments for the cost-sharing reductions would be severe. See, Stolfus Jost, *supra* note 155 at 3.

¹⁷⁴ Barkow, *supra* note 62.

¹⁷⁵ *Raines v. Byrd*, 521 U.S. 811, 826-27 (1997). Chief Justice Rehnquist explained that in addition to lack of precedent history did not support institutional lawsuits between the branches. *Id.* He mentioned that in “several episodes in our history” in which there was a fight between Congress and the Executive, neither of them ever sought judicial redress. *Id.* He specifically talked about the Tenure of Office Act, which was passed over a presidential veto in 1867 and became “a thorn in the side of succeeding Presidents” until its repeal in 1887. *Id.* He also mentioned other examples, such as the issue at stake in *INS v. Chadha*, 462 U.S. 919 (1983), and the Federal Election Campaign Act at issue in *Buckley v. Valeo*, 424 U.S. 1, 46 (1976). *Id.* He concluded that “[t]here would be nothing irrational about a system which granted standing in these cases.” *Id.* at 828.

¹⁷⁶ U.S. Const. art. I § 8, cl. 11.

¹⁷⁷ Pub. L. 107-40 §2(a). Through the AUMF, Congress granted the President authorization “to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” *Id.* This significantly expanded the Executive’s control over war-like actions. See also, NPR, “60 Words” Radiolab Podcast. Available at <http://www.radiolab.org/story/60-words/>. See also, *Raines supra* note 175.

¹⁷⁸ Barkow, *supra* note 62.

may in some cases be legitimate and in need of redress does not mean that the courts have an excuse to undermine justiciability and separation of powers. If they do, they risk becoming the superior arbiters of the lawmaking process in direct violation of their role as the interpreters of the law.¹⁷⁹ Courts also risk their image as an institution based on political neutrality. Most importantly, they risk furthering the erosion of our system of government perhaps past the point of no return. In the end, it will be up to the Judiciary to determine the constitutionality of its own actions, hopefully without jeopardizing the 239 year-old experiment of American democracy.

179 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).