WHAT'S IT TO THE LEGISLATOR? LEGISLATOR STANDING IN STATE COURT

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INTRODUCTION

Legislator standing is a difficult concept to understand, let alone discuss at an academic level. Within the doctrine are muddied concerns of standing, political questions, separations of powers, and the very responsibilities of governmental institutions. This is why, as Professor Matthew Hall puts it, "[l]egislative standing doctrine is neglected and under-theorized."[1] Despite all of the varying and conflicting intersections that legislator standing confronts, it is possible to conceptualize arguments for legislator standing by comparing the doctrine across different court systems and discussing the ways in which courts are different and should therefore have different concerns.

Although federal justiciability requirements often serve as a base for state courts, such is not always the case. Some state courts have lower justiciability requirements, while others follow the requirements laid out by Article III of the United States Constitution.[2] And while many state governments have adopted a similar structure to the federal government, there are differences to take into account when analyzing legislator standing. A few of these variances are the amount of responsibility retained by state governments, a splintered executive, and state departures from the legislative delegation prohibition in *INS v. Chadha*.[3] Finally, state courts should analyze in more depth the different powers enjoyed

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[1] Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 1 (2016). Professor Matthew Hall is an Associate Professor of Law at the University of Georgia School of Law.

[2] *Compare* Keller v. French, 205 P.3d 299, 304-05 (Alaska 2009) ("The degree of injury need not be great: an 'identifiable trifle' is sufficient to establish standing 'to fight out a question of principle.'" (quoting Ruckle v. Anchorage Sch. Dist., 85 P.3d 1030, 1040-41 (Alaska 2004))), *with* Turner v. Shumlin, 163 A.3d 1173, 1177 (Vt. 2017) ("This [c]ourt has adopted the constitutional and prudential components of the standing doctrine enunciated by the United States Supreme Court." (quoting Schievella v. Dep't of Taxes, 765 A.2d 479, 481 (Vt. 2000) (internal quotation marks omitted)).

[3] 462 U.S. 919 (1983).

by state governments, thereby explaining their particular concerns for the separation of those powers in legislator standing cases and how legislator standing would hinder or support that separation. It is because of these differences that state courts should not necessarily follow the Supreme Court's lead on legislator standing from *Raines v. Byrd*.[4] Instead, the individual state courts should consider multiple characteristics and principles of their own court and governmental system in deciding the question of legislator standing for themselves.[5]

Understanding the landscape of legislator standing in the various state courts is a tall task. Part II explores the foundation of legislator standing precedent in federal courts and describes the extent to which it pervades state court decision-making on the subject. Part III puts forward three general arguments for legislator standing in both state and federal courts. Finally, Part IV examines the various governmental structures, governmental powers, and justiciability requirements that state courts should consider when deciding issues of legislator standing.

I. WHERE THE FEAR OF LEGISLATOR STANDING ORIGINATES: ARTICLE III AND FEDERAL LEGISLATOR STANDING

To best describe how and why states should consider the question of legislator standing for themselves in light of their individual and unique qualities, it is important to consider where state courts' cautiousness surrounding legislator standing has originated so that we might understand how states are indeed different. The Article III justiciability requirements of standing and political question doctrines pose hurdles for many hopeful legislator-plaintiffs, often causing legislators' claims to fail before reaching the merits in federal court.[6] While other doctrines of justiciability surely play a role in some cases involving legislators,

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[4] 521 U.S. 811 (1997).

[5] For an interesting discussion on development of state constitutional doctrines, see generally Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). A similar premise, as used in this Comment, has been advanced by Professor Nat Stern but surrounding the political question doctrine specifically. Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153 (2018) (describing state constitutional doctrine development in light of "pervasive" federal precedent).

[6] *E.g.*, *Raines*, 521 U.S. at 830.

this Comment will focus only on these two federal justiciability doctrines and will provide a brief overview of standing and political question doctrines and how they interact with legislator standing.

A. Standing

Federal standing doctrine has been decided to originate from Article III of the United States Constitution.[7] As Article III, Section 2 dictates, "the judicial Power shall extend" to "Cases" and "Controversies,"[8] and for a case or controversy to be present, there must be two or more parties with opposing interests.[9] As Justice Scalia puts it, "[t]here is no case or controversy, the reasoning has gone, when there are no adverse parties with personal interest in the matter."[10] "In more pedestrian terms, [standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"[11] In order to adequately answer this question, the responding party must show a legally cognizable injury-in-fact and allege that the defendant's acts or omissions caused that injury.[12]

This is regularly the doctrine under which defendants argue legislator-plaintiffs' claims are beyond judicial review.[13] However, standing doctrine has prevented many types of plaintiffs other than legislators from bringing an action, which might well be a just

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[7] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) ("The requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2 . . . .").

[8] U.S. CONST. art. III, § 2, cl. 1.

[9] Scalia, *supra* note 7.

[10] *Id.*

[11] *Id.* Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1670 (2007) ("Standing, the 'most important of these doctrines,' focuses on whether a plaintiff is the right person to bring a given issue before the court." (footnote omitted)).

[12] Typically, in order to establish standing in federal court, a plaintiff must have suffered an injury in-fact which is fairly traceable to and caused by the defendant's acts or omissions and could be redressed with a favorable court decision. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (first citing Allen v. Wright, 468 U.S. 737, 756 (1984); then citing Warth v. Seldin, 422 U.S. 490, 508 (1975); then citing Sierra Club v. Morton, 405 U.S. 727, 740-41, 740 n.16 (1972); then citing Whitmore v. Arkansas, 494 U.S. 149, 155 (1990); then citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976); and then citing *Id.* at 38, 43); Ernest A. Benck, Jr., Comment, *Standing for State and Federal Legislators*, 23 SANTA CLARA L. REV. 811, 819 (1983).

[13] Raines v. Byrd, 521 U.S. 811, 816 (1997).

position in federal court.[14] For one example, an initiative proponent, very much similar to a legislator, did not have standing to defend their own initiative in *Hollingsworth v. Perry*.[15]

Like the initiative proponents in *Hollingsworth*, many hopeful legislator-plaintiffs fall short in this analysis because the injury that they assert is not personal to them, or they assert some injury for which the judiciary is not able to provide a remedy.[16] Courts look to the fact that an injury suffered to a legislator is either associated with the office that the legislator holds, which makes it an injury that is not personal,[17] or they might have causation concerns, citing that the legislator should have sought relief through the legislative process.[18]

B. Political Question Doctrine

Another important concern of federal courts in dealing with legislator standing is the political question doctrine,[19] and it is often interwoven into courts' standing analysis when dealing with the issue of legislator standing.[20] At its most basic level, political

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[14] Hollingsworth v. Perry, 570 U.S. 693, 706 (2013) ("We have repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing."). For an interesting argument regarding standing as applied in *Hollingsworth*, see Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435 (2013).

[15] *Hollingsworth*, 570 U.S. at 707 ("No matter how deeply committed petitioners may be to upholding Proposition 8 or how 'zealous [their] advocacy,' that is not a 'particularized' interest sufficient to create a case or controversy under Article III." (citations omitted)).

[16] *Raines*, 521 U.S. at 821 ("[A]ppellees do not claim that they have been deprived of something to which they *personally* are entitled . . . ."). This reasoning also finds its way into state court opinions. State *ex rel.* Mathewson v. Bd. of Election Comm'rs, 841 S.W.2d 633, 635 (Mo. 1992) (en banc) ("Senator Mathewson, speaking only in his official capacity, presents no personal stake in the outcome of this case.").

[17] *Raines*, 521 U.S. at 821 ("The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it [might] arguably be said) as trustee for his constituents, not as a prerogative of personal power." (citation omitted)).

[18] *Raines*, 521 U.S. 811; Reeves v. Gunn, 307 So. 3d 436, 439 (Miss. 2020) (en banc).

[19] *See Raines*, 521 U.S. at 821; Coleman v. Miller, 307 U.S. 433 (1939).

[20] Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 47 (2015) ("In addition to operating as a kind of de facto political question barrier, the Court's treatment of congressional standing carries overtones of the political question doctrine itself."); *see also* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 255 (1981) ("[T]he reasons for restricting suits by legislators against the executive have little to do with the standing doctrine. Standing, although reflecting a desire for judicial restraint, does not address the separation-of-powers concerns inherent in any suit by a legislator against the executive branch." (footnote omitted)).

question doctrine stands for the proposition that federal courts may not decide issues regarding powers which have been reserved by another branch of government.[21] As Louis Henkin puts it, political questions are "issues to be resolved and decisions to be made by the political branches of government and not by the courts . . . ."[22] This doctrine has deep roots in American constitutional history as Alexander Hamilton recognized a political question doctrine that had its foundations in the Constitution.[23] Rachel Barkow writes that "[t]he Constitution carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion. Under this view of the doctrine, judicial abstinence is not merely prudential or expedient, but constitutionally required."[24]

In laying out the test by which one discerns whether a question is political and, therefore, outside the reach of judicial review, the United States Supreme Court has given six factors to be considered on a "case-by-case" basis in *Baker v. Carr*.[25] This case-by-case reasoning is likely most helpful when dealing with legislator standing, as legislator standing cases can be difficult to

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[21] Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597 (1976).

[22] *Id. See also* Stern, *supra* note 5, at 157.

[23] Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 247-48 (2002) (citing THE FEDERALIST NO. 78 (Alexander Hamilton)). Further, the doctrine is typically noted to have origins in *Marbury v. Madison*, which was decided in 1803. 5 U.S. (1 Cranch) 137 (1803); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 102 (1988).

[24] Barkow, *supra* note 23 (footnote omitted).

[25] Baker v. Carr, 369 U.S. 186, 211 (1962).

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

Id. at 217.

categorize.[26] However, courts rarely preclude any actions expressly on the basis of being a nonjusticiable political question.[27] Instead, courts typically deny standing based upon a heightened scrutiny standing test, which is employed because of the political nature of the plaintiff and the action.[28] Thus, legislative standing doctrine has taken form.

C. Legislator Standing in Federal Court

Legislator standing doctrine is a strange and difficult subject to deal with, primarily because the only material common denominator is that one of the parties to the litigation is a legislator.[29] Oddly, it is virtually the only time in which courts scrutinize standing based upon the plaintiff's occupation;[30] however, courts proceed with great caution when analyzing legislator standing out of concern for judicial review and the separation of powers doctrines.[31]

Because this litigation has developed into a more frequent occurrence than it was a century ago, scholarship has naturally arisen around the basic justiciability point of standing beginning in

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[26] Hall, *supra* note 1, at 4.

[27] Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 536 (2004). This might offer one reason why courts are wary of simply dismissing legislator lawsuits based upon political question concerns instead of dismissing for lack of standing.

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> In the field of legislator standing, this common concern caused the Court in *Raines* to treat the standing and political question doctrines as overlapping rather than discrete. There, the Court imported notions drawn from political question jurisprudence when it described its standing inquiry as "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.

Stern, *supra* note 20, at 48-49; *see also* Turner v. Shumlin, 163 A.3d 1173 (Vt. 2017).

[29] *See* Hall, *supra* note 1, at 4 (arguing "that the confusion and inconsistency in legislative standing doctrine has one simple cause: the doctrine has been called on to address a multitude of distinct and unrelated types of claims that have little in common other than the presence of a legislative litigant.").

[30] *Id.* at 23 ("No other occupation gets its own standing doctrine.").

[31] Raines v. Byrd, 521 U.S. 811, 820 (1997); *see also* Stern, *supra* note 20, at 49 ("The Court's approach in *Raines* also illustrates how denial of standing can perform political question's function of diverting plaintiffs to the legislative arena.").

the 1970s and 1980s.[32] For the most part, courts strike a balancing act by stating that legislators have no special status that confers standing, requiring them to show the same standing as a private citizen; however, at the same time, courts write that a legislator's standing should be under close scrutiny out of separation of powers concerns.[33]

This contradiction has appeared in scholarship on federal legislator standing.[34] As Ernest A. Benck, Jr. writes, "For purposes of standing, legislators receive no special treatment. . . . Legislators do, however, have interests which are different from those of the ordinary citizen."[35] Judge Carl McGowan expands on the latter point.[36] However, some scholars argue that even the Federal Judiciary's fear of legislator standing is ill-advised,[37] and some further argue that the absence of congressional or legislator standing tilts the scales of power in favor of the executive.[38] But still, others argue that allowing legislative standing more broadly will permit a power imbalance in favor of the legislature, giving them too much discretionary power to sue.[39]

The Court is often hesitant to intrude into the business of the other two branches of government, yet legislative standing cases, typically by nature, put the Court in the middle of the legislative

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[32] McGowan, *supra* note 20, at 241 ("The last decade has seen the birth and the coming of age of a new kind of lawsuit: one brought by a member of Congress challenging an action of the executive branch as injurious to some interest he or she claims to have as a legislator.").

[33] *Id.* at 254-55.

[34] *Compare* Benck, *supra* note 12, at 811, *with* McGowan, *supra* note 20, at 254-55.

[35] Benck, *supra* note 12, at 821.

[36] *See* McGowan, *supra* note 20.

[37] *See* Stern, *supra* note 20, at 14-16; Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863 (1983).

[38] Stern, *supra* note 20, at 15 (citing Paul Hubschman Aloe, *Justiciability and the Limits of Presidential Foreign Policy Power*, 11 HOFSTRA L. REV. 517, 553 (1982)); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1648 (1977) (noting practical obstacles to overturning President's action); Jonathan Wagner, Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526, 538-39 (1982) ("In the long run, such prudential strategies will inevitably lead to an accretion of executive power and a weakening of the separation of powers that broad judicial abstention was originally meant to strengthen.").

[39] Stern, *supra* note 20, at 12-13 (citing Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014)).

and executive branches of government.[40] To demonstrate the questions and concerns that courts often face in these cases, the Third Circuit Court of Appeals asked, "Should legislators be allowed to use the judicial process to force the executive branch to comply with 'the law of the land?' . . . [P]hrased differently, should legislators be able to use the court to implement a victory that was won in the legislative hall and ignored in the executive mansion?"[41] Because of these concerns, federal courts rarely recognize legislators' standing to sue because of the issues presented by Article III justiciability requirements.[42] Professor Nat Stern describes the Court's reluctance to recognize legislator standing as a "reality that virtually all claims of congressional standing will likely be denied."[43] But federal courts have expressed this desire to refrain from critiquing the day-to-day exercise of executive duties since the early stages of American judicial history.[44] For example, the Court in *Marbury v. Madison* stated that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."[45] Despite being reluctant to hear these issues, there have been a few instances of legislators seeking to protect their rights in the courts of the United States.[46]

While Supreme Court decisions on legislator standing have been few and far between, appellate courts in various circuits and states have made decisions regarding legislative standing,[47] so it is

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[40] *See* McGowan, *supra* note 20, at 242 ("Serious separation-of-powers questions inevitably accompany any effort by members of the legislature to enlist the judiciary's aid in a dispute with the executive.").

[41] Dennis v. Luis, 741 F.2d 628, 632 (3d Cir. 1984).

[42] *See* Hall, *supra* note 1, at 4.

[43] Stern, *supra* note 20, at 58.

[44] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[45] *Id.* at 170.

[46] *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997); Coleman v. Miller, 307 U.S. 433 (1939); Dennis v. Luis, 741 F.2d 628 (3d Cir. 1984); Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981).

[47] *See, e.g.*, *Raines*, 521 U.S. 811; *Coleman*, 307 U.S. 433; *Dennis*, 741 F.2d 628; *Riegle*, 656 F.2d 873; *Ex parte* Riley, 11 So. 3d 801 (Ala. 2008); Morrow v. Bentley, 261 So. 3d 278 (Ala. 2017); Keller v. French, 205 P.3d 299 (Alaska 2009); Bennett v. Napolitano, 81 P.3d 311, 317 (Ariz. 2003); Biggs v. Cooper *ex rel.* Cnty. of Maricopa, 341 P.3d 457 (Ariz. 2014); Grossman v. Dean, 80 P.3d 952 (Colo. App. 2003); Nania v. Borges, 551 A.2d 781, 785 (Conn. 1988); Hanabusa v. Lingle, 198 P.3d 604 (Haw. 2008); Bedke v. Ellsworth, 480 P.3d 121, 132 (Idaho 2021); Commonwealth *ex rel.* Beshear v.

important to keep in mind the dates of major Supreme Court and Courts of Appeals decisions when looking at the influencing authority on state supreme court reasoning.[48] In 1939, the United States Supreme Court first dealt with the issue of legislator standing.[49] A divided United States Supreme Court vaguely recognized standing for twenty state senators in *Coleman v. Miller* who voted against ratification of the Child Labor Amendment.[50] Those twenty senators brought suit after ratification was defeated by a vote of 20-20, with the Lieutenant Governor casting the tie-breaking vote in favor of ratification.[51] Without the Lieutenant Governor's vote, the resolution would have failed based upon the legislator-plaintiffs' gridlocking number of votes.[52] Because the senators constituted a sufficient bloc of votes to defeat the resolution without the alleged unconstitutional action by the Lieutenant Governor,[53] they had standing to challenge the issue of whether the executive branch of a state's government may break the tie in a vote to ratify an amendment to the United States Constitution under Article V.[54] The Supreme Court stated,

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Commonwealth *ex rel.* Bevin, 498 S.W.3d 355, 367 (Ky. 2016); Dodak v. State Admin. Bd., 495 N.W.2d 539 (Mich. 1993); Rukavina v. Pawlenty, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004); Conant v. Robins, 603 N.W.2d 143, 149 (Minn. Ct. App. 1999); Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995); Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (en banc); State *ex rel.* Mathewson v. Bd. of Election Comm'rs, 841 S.W.2d 633 (Mo. 1992) (en banc); Silver v. Pataki, 755 N.E.2d 842 (N.Y. 2001); Ohio Gen. Assembly v. Brunner, 872 N.E.2d 912 (Ohio 2017); Hendrick v. Walters, 865 P.2d 1232 (Okla. 1993); Campbell v. White 856 P.2d 255, 266-67 (Okla. 1993) (Opala, J., dissenting); Markham v. Wolf, 136 A.3d 134 (Pa. 2016); Turner v. Shumlin, 163 A.3d 1173 (Vt. 2017); Panzer v. Doyle, 680 N.W.2d 666, 682-83 (Wis. 2004), *abrogated by* Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (Wis. 2006).

[48] For example, while the Oklahoma Supreme Court cites *Coleman v. Miller* as persuasive authority on legislator standing in 1993, it is worth keeping in mind that the United States Supreme Court did not decide *Raines v. Byrd* until 1997. *Hendrick*, 865 P.2d at 1238 n.27.

[49] *Coleman*, 307 U.S. 433.

[50] *Id.*

[51] *Id.* at 436.

[52] *Id.* at 433.

[53] *Id.*

[54] *Id.* at 446 (stating that Article V requires ratification of constitutional amendments by state legislatures).

> We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege.[55]

Coleman is often cited by courts and legislator-plaintiffs;[56] however, courts are quick to distinguish that the legislators in *Coleman* won their battle in the Legislature and were deprived of that victory.[57] Courts also point to the fact that in *Coleman*, the legislators who brought the suit constituted a sufficient number to bring about the desired result.[58]

In 1997, the Supreme Court heard the issue of *individual* legislator standing for the first time and did not recognize standing for the six individual federal legislators that sought to challenge the unconstitutionality of the Line Item Veto Act in *Raines v. Byrd*.[59] After passing in the Senate by a vote of 69-31 and the House of Representatives by a vote of 232-177,[60] the Court placed significant weight on the fact that the legislator-plaintiffs did not constitute a sufficient number of votes to cause a different outcome as in *Coleman*.[61] Indeed, the Court proceeded carefully in *Raines* due to separation of powers concerns.[62] In light of this caution, the Court

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[55] *Id.* at 438.

[56] *See, e.g.*, Biggs v. Cooper *ex rel.* Cnty. of Maricopa, 341 P.3d 457, 460-61 (Ariz. 2014); Bennett v. Napolitano, 81 P.3d 311, 317 (Ariz. 2003) (comparing facts to both *Raines* and *Coleman*); Reeves v. Gunn, 307 So. 3d 436, 452 (Miss. 2020) (en banc) (King, P.J., dissenting).

[57] *See, e.g.*, Silver v. Pataki, 755 N.E.2d 842, 848 (N.Y. 2001). For an example of this thought being applied in state court, see *Reeves*, 307 So. 3d at 452 n.15 (en banc) (King, P.J., dissenting).

[58] *Raines*, 521 U.S. at 822; *Biggs*, 341 P.3d at 460 (Ariz. 2014); *Silver*, 755 N.E.2d at 848.

[59] *Raines*, 521 U.S. at 820-21, 826.

[60] *Id.* at 814.

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> 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.

Id. at 823 (citation omitted).

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did not find that the injuries asserted by the legislators were personal to them.[63] "Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete."[64] The legislators, in a sense, lost a political battle in the halls of Congress and sought a different outcome in the courtroom,[65] whereas the legislators in *Coleman* voted sufficient enough to block passage of the resolution, winning the political battle in their legislature, but sought vindication of that victory in court.

Although the Supreme Court has heard only a scarcity of cases involving legislator standing, the United States Court of Appeals for the D.C. Circuit has heard a few cases of its own regarding legislator standing before the Supreme Court's decision in *Raines*.[66] While these cases have developed into varying approaches to

> We have always insisted on strict compliance with this jurisdictional standing requirement. . . . And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. As we said in *Allen*, 'the law of Art. III standing is built on a single basic idea—the idea of separation of powers.' In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency.

Id. at 819-20 (footnote omitted) (citations omitted).

[63] > [A]ppellees do not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*. . . . The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.

Id. at 821.

[64] *Id.*

[65] New York courts have used a similar phrase. Silver v. Pataki, 755 N.E.2d 842, 848 (N.Y. 2001) ("[S]eeking to obtain a result in a courtroom which he failed to gain in the halls of the Legislature.").

[66] Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209 (2001).

legislative standing,[67] most prominently, the D.C. Circuit has put forward the idea that legislators cannot assert their failure to persuade colleagues in the legislature as an injury.[68] They must first seek help from their colleagues in the form of legislative procedure, or enactment, repeal, or amendment of statute, before invoking the power of the courts.[69] In other words, "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action."[70] This idea has been critiqued by scholars as a form of self-help doctrine, [71] and some state courts have declined to employ the doctrine altogether.[72] Judge Carl McGowan points out the flaws in this line of reasoning.[73] Further, some state supreme court justices have advanced theories of their

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[67] For a detailed analysis of the various legislative standing approaches in the D.C. Circuit, see Stern, *supra* note 20, at 16-19. *See also* Arend & Lotrionte, *supra* note 66.

[68] Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 877 (D.C. Cir. 1981). This idea has been coined "equitable discretion." *See generally* David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205 (2001). But the District Court for the District of Columbia seemingly rejected the equitable discretion doctrine in *Campbell v. Clinton*. 52 F. Supp. 2d 34, 45 n.11 (D.C. Cir. 1999) ("The mere *availability* of a legislative alternative is not sufficient to defeat standing; if it were, a legislator would never have standing since Congress always has the option of impeaching and removing the President.").

[69] *Riegle*, 656 F.2d at 881.

[70] *Id.* Further, the D.C. Circuit has stated,

> [T]his court will not confer standing on a congressional plaintiff unless he is suffering an injury that his colleagues cannot redress. When congressional plaintiffs have sought to accomplish in this court what they were unable to persuade their colleagues to do, we have usually refused to confer standing because of our concern for non-interference in the legislative process.

Id. at 877.

[71] McGowan, *supra* note 20, at 254-55.

[72] Dodak v. State Admin. Bd., 495 N.W.2d 539, 546 n.25 (Mich. 1993) (flagged by Westlaw as disapproved of by Rohde v. Ann Arbor Pub. Schs., 737 N.W.2d 158, 175 n.9 (Mich. 2007) (Weaver, J., concurring in part and dissenting in part) (deciding an issue of taxpayer standing)).

[73] McGowan, *supra* note 20, at 254-55. In Mississippi, the Supreme Court seemed to previously be in step with this sentiment. Fordice v. Bryan, 651 So. 2d 998, 1003 (Miss. 1995) (holding that legislators asserted a colorable interest by showing that their votes had been "adversely affected by the Governor's vetoes."), *overruled by* Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (en banc) (to the extent that *Fordice* gave legislators categorical standing).

own.[74] But ideas similar to equitable discretion doctrine have taken hold in the reasoning of other state supreme court justices.[75]

The development of equitable discretion doctrine, or the avenue to trump legislator standing with a legislative alternative, directly calls into question whether wrongs may go without remedies because a plaintiff was unable to persuade a political body to provide redress. In no other situation do courts both hold a plaintiff to a higher burden to show standing based upon their occupation or require a plaintiff to first seek help from their co-workers before bringing suit.[76]

The scarcity of case law from courts, advancement of differing theories, and a mixture of complex separation of powers issues make legislator standing a headache for many legal minds, explaining why scholars have expressed how difficult it is to grapple with legislator standing doctrine.[77] As Matthew Hall describes, it is "difficult or impossible to discern a coherent doctrine of legislative standing" based upon inconsistencies among the courts.[78] However, the development of legal scholarship on the issue has historically proved unnecessary as the executive and legislative branches work out their disagreements in the political processes.[79] As Professor Hall writes, "[f]or decades, the confusion in the doctrine scarcely mattered because the political branches tended to work out their disagreements in the political process, litigating only rarely;"[80]

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[74] *Reeves*, 307 So. 3d at 452 n.15 (en banc) (King, P.J., dissenting).

[75] The Mississippi Supreme Court has advanced this argument, although it did not use the term equitable discretion, nor did it cite authority which uses the term. *Reeves*, 307 So. 3d at 439 (en banc) ("Where the Legislature itself declines to challenge a governor's veto, an adverse impact may be felt by the individual legislator who voted for the bill as a result of the Legislature's actions, not the Governor's actions."). This idea was also expanded on in Justice Maxwell's concurrence. *Id.* at 443 (Maxwell, J., concurring) ("[The Governor] pitches that any injury [the legislators] are now suffering was caused by their own chamber's failure to act. . . . I do agree there are some legs to these arguments.").

[76] McGowan, *supra* note 20, at 254-55; Hall, *supra* note 1, at 23.

[77] Hall, *supra* note 1, at 3.

[78] *Id.* To an extent, one problem in grappling with legislator standing in state court is that there are too many theories being advanced without many cases on the subject to fully flesh out any of them. *See* Raines v. Byrd, 521 U.S. 811 (1997); Coleman v. Miller, 307 U.S. 433 (1939); Riegle v. Fed. Open Mkt., 656 F.2d 873 (D.C. Cir. 1981); *Reeves*, 307 So. 3d 436 (en banc); Turner v. Shumlin, 163 A.3d 1173 (Vt. 2017).

[79] Hall, *supra* note 1, at 4.

[80] *Id.*

however, recently there has been more litigation between Congress and the President, making the doctrine's development an important concern in legal scholarship.[81]

II. GENERAL ARGUMENTS FOR LEGISLATOR STANDING

Despite federal courts' unwillingness to have a broad legislator standing doctrine, there are arguments in favor of one, and this section lays out three general arguments for legislator standing, whether it be state or federal court. First, any time there is a constitutional injury to a party, they at least have a decent argument for a remedy in court. While the Supreme Court has made it clear that there can be wrongs without remedies,[82] that does not necessarily mean that it is not a compelling argument to say: something injurious, at least in a constitutional sense, has occurred, so the court should provide a remedy. Second, there is an inconsistent standing requirement being applied to legislators. While state legislators must meet the same standing requirements as a normal litigant, courts hold legislators to a higher bar than ordinary litigants by scrutinizing their claims more due to separation of powers concerns that are not present for normal plaintiffs. This seems to mean that legislators are one step behind ordinary plaintiffs as far as standing is concerned. Third, and a sub-argument of the first, the nature of representative government supports legislators protecting themselves and their constituents' interests from injury.

A. Remedies for Wrongs

One defect of the federal judicial review doctrines is that they allow some constitutional violations to go without remedies.[83] For example, the political question doctrine does not take into account whether a constitutional violation occurred, but whether or not the question is beyond judicial review.[84] Louis Henkin describes that,

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[81] *Id.* Professor William A. Fletcher also attributes much of modern standing doctrine development to "an increase in litigation to articulate and enforce public, primarily constitutional, values." William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988).

[82] *See generally* Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

[83] *Id.*; *see also infra* text accompanying note 84.

[84] Henkin, *supra* note 21, at 599.

under these circumstances, "the courts say to the petitioner in effect: 'Although you may indeed be aggrieved by an action of government, although the action may indeed do violence to the Constitution, it involves a political question which is not justiciable, not given to us to review.'"[85] It is not enough for a plaintiff to say, "If I do not have standing, then who might?" and the Court has been perfectly fine with leaving the resolution of some issues to the political process.[86] As the Supreme Court stated in *Schlesinger v. Reservists Committee to Stop the War*, "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[87] This holding clearly presupposes that some wrongs may be perpetuated for which no plaintiff exists.

To allow constitutional violations to go unremedied may well have justification in federal court where the separation of powers doctrine is more entrenched, or well-known; however, in state government, there is more governmental power allowing for more transgressions which threaten government institutions. For example, federal courts do not have to decide issues of constitutional violations regarding line-item vetoes because no such power exists;[88] however, some state courts have to decide such issues due to the fact that the governor is given that additional power.[89] If a governor were to abuse a power which is already in excess of the powers given in the federal model, the constitutional violation has doubled in size.

Some state courts have used reasoning contrary to that of the federal courts.[90] For example, in *Bedke v. Ellsworth*, the court found

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[85] *Id.*

[86] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

[87] *Id.* (citing United States v. Richardson, 418 U.S. 166, 179 (1974)).

[88] Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding that the Line Item Veto Act violated the Presentment Clause of the Constitution).

[89] *See, e.g.*, Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (en banc); Silver v. Pataki, 755 N.E.2d 842 (N.Y. 2001).

[90] *Compare* Bedke v. Ellsworth, 480 P.3d 121, 132 (Idaho 2021), *and* Panzer v. Doyle, 680 N.W.2d 666, 682-83 (Wis. 2004) (abrogated on other grounds)

that legislators did have standing to seek a declaratory judgment because "[i]f the Speaker and the Pro Tem have not been aggrieved, no one has."[91] With this recent state court case following a different line of reasoning than the federal courts, it may be an interesting and new trend in legislator standing cases, and arguably it is good public policy.

B. Inconsistent Application of Standing Doctrine

Standing doctrine has been firmly established in federal courts, but state courts are not bound by the same standard for standing.[92] While standing doctrines might differ from federal courts to state courts, one common idea seems to remain: legislators do not have a special status which confers standing.[93] Instead, a legislator must show they meet the same standing requirements as any ordinary litigant.[94] However, at the same time, courts argue

> If Senator Panzer, as Majority Leader of the Senate, and Representative Gard, as Speaker of the Assembly, acting in concert with the Joint Committee on Legislative Organization, lack standing to assert a claim that the Governor acted to deprive the legislature of the ability to exercise its core function in a specific subject area, then no one in the legislature could make such a claim, and no one outside the legislature would have an equivalent stake in the issue.,

with Schlesinger, 418 U.S. at 227.

[91] *Bedke*, 480 P.3d at 132. Other state courts have cited *Schlesinger* and followed the federal courts' reasoning. Nania v. Borges, 551 A.2d 781, 785 (Conn. 1988) ("'[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing,' is an admittedly unsatisfactory answer." (quoting *Schlesinger*, 418 U.S. at 227)).

[92] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836; Grossman v. Dean, 80 P.3d 952, 959 (Colo. App. 2003) ("Although federal decisions may be considered for guidance, we are ultimately governed here by state principles of standing, rather than the federal principles created by Article III of the United States Constitution . . . ."); Fordice v. Bryan, 651 So. 2d 998, 1003 (Miss. 1995) ("Under article III, § 2 of the United States Constitution, the federal courts limit review to actual 'cases and controversies.' Such restrictive language is not found in the Mississippi Constitution. 'Therefore, we have been more permissive in granting standing to parties who seek review of governmental actions.'" (quoting Van Slyke v. Bd. of Trs. of State Insts. of Higher Learning, 613 So. 2d 872, 875 (Miss. 1993)).

[93] *Compare* Raines v. Byrd, 521 U.S. 811 (1997), *with* Morrow v. Bentley, 261 So. 3d 278, 287 (Ala. 2017) (quoting Markham v. Wolf, 136 A.3d 134, 140 (Pa. 2016)), *and Reeves*, 307 So. 3d at 439 (en banc) (holding that it was error to confer standing to legislators simply because they are legislators).

[94] "Legislators have no special right to standing simply by virtue of their status: like other plaintiffs, legislators must establish a distinct, concrete injury in fact." ACLU of

that legislators' claims for standing should be scrutinized more heavily due to the separation of powers concerns inherent in such an action.[95] This reasoning is wholly inconsistent.[96]

If courts are going to hold legislators to the same standard as ordinary individual plaintiffs, they would not proceed to more heavily scrutinize plaintiff-legislators' standing. Indeed, legislators are not "cloaked" with a "special category of standing" which gives a categorical recognition of standing.[97] But it seems that legislators are more disadvantaged when it comes to conferring standing. One might even say they are "cloaked with a 'special category of standing'" which is less than other plaintiffs.[98]

This inconsistency is further displayed when courts reason legislators should have sought remedial measures with their colleagues in the legislature rather than with the court.[99] As Judge Carl McGowan writes,

> There can be no peaceful coexistence between, on the one hand, the notion that legislators are treated like any other plaintiff for standing purposes, and, on the other, the idea that courts should rigorously scrutinize whether the congressional plaintiff's true quarrel is with his colleagues, rather than the executive. There is no general requirement that a private litigant employ self-help before seeking judicial relief. Nor should there be, because an ordinary plaintiff, having suffered injury in fact within the contemplation of the law he invokes, is entitled to his day in court. If the plaintiff passes the standing test and presents a justiciable dispute, it is assumed that the political branches have decided to commit such disputes to the judiciary and, barring extraordinary circumstances, that is a judgment which courts are bound to respect.[100]

Tenn. v. Darnell, 195 S.W.3d 612, 625 (Tenn. 2006). *See also Morrow*, 261 So. 3d 278; *Reeves*, 307 So. 3d 436 (en banc); *Silver*, 755 N.E.2d 842.

[95] *Morrow*, 261 So. 3d at 287; Dodak v. State Admin. Bd., 495 N.W.2d 539, 543 (Mich. 1993); Turner v. Shumlin, 163 A.3d 1173, 1178 (Vt. 2017).

[96] McGowan, *supra* note 20, at 254-55.

[97] *Morrow*, 261 So. 3d at 287 (quoting *Markham*, 136 A.3d at 140).

[98] *Contra id.*

[99] McGowan, *supra* note 20, at 254-55.

[100] *Id.* (footnote omitted).

While Judge McGowan makes a good point, federal courts and some state courts have seemed to go in the opposite direction.[101] Courts seemingly attack the causation element of the traditional notion of standing doctrine; however, in virtually no other case is a plaintiff required to seek redress with their colleagues before making an initial claim in the court system.[102]

Justice King, of the Mississippi Supreme Court, advances an additional theory in opposition to the idea that a legislature should first take up the issue on its own before attempting to bring suit, specifically in the context of an allegedly unconstitutional veto.[103] He argues that an unconstitutional veto is something that in the legislative context carries no significance, and therefore, it would be absurd to require a legislature to vote to override something that does not exist.[104]

> Such an injury does not vanish when the Legislature fails to attempt to override an unconstitutional veto. If the vetoes were unconstitutional as alleged by the legislators, then the vetoes were void and a nullity. . . . Thus, the vetoes, if unconstitutional, are a legal nothing, and the Legislature is not required to act on a legal nothing to maintain standing.[105]

Arguing that the legislature need not take any action to preserve the injury to them, Justice King in effect argues that once an unconstitutional act takes place, another branch of government is not responsible for preserving their own injury so that they might have standing to seek redressability in the courts.[106]

C. Representative Nature of Republican Government

Being a legislator carries with it a great amount of responsibility. Legislators are tasked with codifying the will of the people and ensuring that their constituents are heard and

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[101] *See* Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (en banc).

[102] McGowan, *supra* note 20, at 254-55.

[103] *Reeves*, 307 So. 3d at 452 n.15 (Miss. 2020) (en banc) (King, P.J., dissenting) (citations omitted).

[104] *Id.*

[105] *Id.*

[106] *Id.*

represented in a republican form of government.[107] As such, legislators have important interests in maintaining their ability to carry out their duties and responsibilities, not only for themselves and their office, but for the citizens of their district and state.[108] It has been suggested, however, that legislators' interests in legislation vanish at the time their vote is cast.[109] For example, the Supreme Court of Pennsylvania discussed legislators' claims in *Markham v. Wolf*, where they seemed to leave no room for legislators to challenge an infringement on legislative power by the governor once the legislation in question has been passed by the legislature.[110] But the Court of Appeals of New York rejected that proposition.[111]

> We reject the notion that plaintiff's functional responsibilities as a legislator are at an end once a bill is voted upon and leaves the Assembly. Such a narrow view could render a legislator's vote meaningless and unnecessarily dilute one's legislative responsibilities. A legislator surely would have the capacity to sue if prevented from casting a meaningful vote on legislation at the outset.[112]

Legislators have a responsibility to their constituents and to their state to do the job of a legislator.[113] As the New York Court of Appeals recognized, the common injuries legislators typically allege stem from the "functional responsibility to consider and vote on legislation."[114]

III. VARIABLES STATE COURTS SHOULD CONSIDER

Any argument in favor of legislator standing can best be made by asking the court to weigh various factors. In federal courts, the factors of Article III justiciability and separation of powers doctrine

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[107] *See* Silver v. Pataki, 755 N.E.2d 842, 846 (N.Y. 2001) (discussing the "functional responsibilities" of legislators).

[108] *Id.*

[109] *See* Markham v. Wolf, 136 A.3d 134, 145 (Pa. 2016).

[110] *See id.* (discussing fear that the legislators will sue anytime an action conflicts with legislative intent).

[111] *Silver*, 755 N.E.2d at 846.

[112] *Id.*

[113] *Id.*

[114] *Id.*

keep the scales fairly close, and to the federal courts of the past half-century, the scales have tilted against recognition of standing for most legislators.[115] However, coupled with the general arguments for legislator standing, there are differences between state and federal governments that tilt the same scales in favor of recognizing legislator standing in certain state courts depending on the nature and magnitude of the differences.

It is helpful to think of each difference individually and to picture a spectrum. On one end, a state court might have enough differences to be most favorable to legislator-plaintiffs, and on the other, the court might be most similar to the Federal Judiciary and, therefore, more apt to follow federal precedent and be more hostile to legislator-plaintiffs. After looking at all variables, the court would be left with a balancing test to determine the degree or magnitude of any differences and which, if any, variables are more important than the others, and thus, they may be able to determine whether it would be more appropriate for them to depart from or adhere to federal precedent on legislator standing.

These variables are presented in no particular order of importance; however, the progression begins with the broadest discrepancies between state and federal government and proceeds to narrower points of difference.

A. Governmental Structure

There are major differences when it comes to governmental structure not only between federal and state governments, but between different state governments. Some of these structural differences are important to consider in an analysis of legislator standing, and state courts should consider their specific and unique structural differences in deciding legislator standing issues.

1. Responsibility of State Government

One of the major differences between state and federal governments is the amount of responsibility for which each is

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[115] *E.g.*, Raines v. Byrd, 521 U.S. 811, 820-21 (1997); *see* Stern, *supra* note 20, at 199-200.

accountable.[116] The federal government is responsible for only that which is proscribed by the United States Constitution, which leaves much of the day-to-day responsibilities to state governments.[117] Most notable is the state's general policing power;[118] however, state governments are responsible for regulating education, implementation of welfare, and administering justice in regards to a volume of state laws which most often impact the citizenry.[119]

The differential in amount of responsibility might seem, at first glance, to be inconsequential when analyzing legislator standing; however, the argument can be made that where there is a greater threat to a larger portion of governmental responsibility, courts should be more generous in allowing standing so as to keep a plentiful check on potential bad actors in state government. Legislators might be the best plaintiff to do so as they are some of the most invested citizens in the government functioning and exercising power as it is permitted.[120]

Because of this concern, which is not present on the same scale in federal court, state courts should take into account the greater responsibility their government carries when analyzing legislator standing and deciding whether to follow federal precedent. Almost certainly, the scales tilt in favor of an independent state decision when taking into account this difference.

2. Governmental Procedures

Individual states have varying procedural differences from the federal governmental model. The more differences a state may have

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[116] *See* Linde, *supra* note 5, at 173 (describing the complexity of the law that state courts must apply in contrast to the law applied by federal courts).

[117] Antonin Scalia, Associate Justice of the Supreme Court of the United States, Keynote Address at the New Carroll Gartin Justice Building Dedication Ceremony (May 20, 2011).

[118] Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 747-48 (2007) ("American federalism cannot be fully understood without reference to the police power . . . 'police power' was the name Americans chose in order to designate the whole range of legislative power not delegated to the federal government and thus retained by the states.").

[119] Scalia, *supra* note 118.

[120] This notion comports with the very purpose of standing—to have litigants who actually care about the litigation. House Speaker v. Governor, 506 N.W.2d 190, 198 (Mich. 1993) ("The concept of standing represents a party's interest in the outcome of litigation that ensures sincere and vigorous advocacy.").

might justify a more liberal legislator standing doctrine than that of the federal legislator standing doctrine. One of the main procedural differences of the federal government and state governments are the length of legislative sessions.[121]

The Federal Congress sits year-round in Washington, D.C., which allows them to keep a watchful eye on the executive, thus maintaining the effectiveness of their checks and balances. Moreover, a federal legislator's colleagues are in Congress to aid in addressing unconstitutional actions as a body virtually year-round; however, state legislators have no such luxury because in many states, the legislature will only sit in session for a few months.[122] This shorter amount of time spent in session limits the legislators' and legislature's ability to effectively maintain their power to monitor executive actions. So, unless a special session is called through whatever means a state might possess, the executive is left to do what it wills during the break in sessions.[123]

This difference matters often as legislators sue over actions taken by the governor soon after the legislature adjourns *sine die*.[124] In some of these cases, as well as others, semblances of equitable discretion doctrine are on display.[125] Courts have looked at legislator plaintiffs, and instead of asking only "What's it to you?" as Justice Scalia framed the pedestrian standing inquiry, they ask "What's it to you, and why haven't you asked your colleagues to protect your interests?"[126] However, when the legislature is adjourned *sine die* and, therefore, unable to vote as a single body, there is not much that a legislator's colleague might do to help them.

Consider the following hypothetical scenario. The legislature passes an appropriations bill near the end of the legislative session with a narrow margin, and before receiving the governor's signature, it adjourns *sine die*. The governor, after adjournment,

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[121] *See Legislative Session Length*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 1, 2021), https://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx [https://perma.cc/8W2B-9GY4].

[122] *Id.*

[123] *See, e.g.*, OKLA. CONST. art. VI, § 7.

[124] *See Ex parte* Riley, 11 So. 3d 801, 805 (Ala. 2008). The hypothetical below is a similar situation to the facts in *Riley*.

[125] Reeves v. Gunn, 307 So. 3d 436, 439 (Miss. 2020) (en banc).

[126] Scalia, *supra* note 7, at 882.

employs an allegedly unconstitutional line-item veto of the bill. But the legislature is not there to take up a vote to override the veto, absent the governor calling them into special session, and the governor is unlikely to do so as it does not help his interest in the legislative process.

In the above hypothetical, there is no chance for an aggrieved legislator to seek help from his colleagues and, thus, a constitutional wrong would go without challenge in states, which would deprive a legislator of standing. Courts should consider these procedural aspects when deciding whether a legislator can bring an action to challenge action by the executive as unconstitutional.

3. Splintered Executive

Another large difference between the federal and state governmental structure is the makeup of the executive branch. The federal executive power is given to a single, unitary executive, the President of the United States;[127] however, state governments have created a splintered executive, meaning that instead of the executive power being vested in one office, states elect multiple statewide and independent executive officials.[128]

The executive branch is typically the branch tasked with enforcing the law and, therefore, bringing suit to enjoin those who act contrary to the law or constitution.[129] Most often, the executive official tasked with bringing an action on behalf of the state is the attorney general or its equivalent.[130] Some states allow the governor to bring suit when the attorney general refuses.[131] But what becomes of a bad actor that is the executive branch?

When a bad actor is a part of the executive, even when the executive is splintered, the executive has no incentive to enforce the law or enjoin themselves from governmental overreach. As a

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[127] U.S. CONST. art. II, § 1, cl. 1.

[128] *See generally* Jordan E. Pratt, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 MISS. L.J. 881, 886 (2017); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 231-35 (2014).

[129] *See* Recent Cases, *The Governor's Right to Sue*, 19 HARV. L. REV. 524, 524 (1905-1906). For a history of the executive duty to defend both at the state and federal level, see generally Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513 (2015). *See also* Pratt, *supra* note 128, at 884.

[130] *See, e.g.*, *The Governor's Right to Sue*, *supra* note 129, at 524-25.

[131] *Id.*

solution, courts should look to legislators for an enforcement mechanism. After all, they are the body most invested in producing the law and, therefore, arguably most invested in seeing that the law is enforced.

B. Governmental Powers

One of the greatest concerns about government in American history is the separation of powers doctrine, which ensures that no single branch becomes too powerful.[132] State governments are vested with a more broad and wide-reaching power than the federal government, and because of that, separation of powers concerns should be greater in the states than in the federal government.[133] Arguably, where the governor has more power than the President to effect the legislative process through a line-item veto, by bringing suit against legislators or by deciding not to give full force to laws passed by the legislature, constitutional concerns of separation of powers are multiplied. Therefore, where government is vested with broader power, arguments for legislator standing to prevent unconstitutional usurpations of more power are bolstered. This provides the most protection to the separation of powers doctrine in the states and provides legislators with no more power to challenge unconstitutional conduct than possessed by the executive branch.

1. Line-Item Veto

Another common procedural difference between the federal government and state governments, which weighs in favor of a more liberal legislator standing doctrine, is the line-item veto power

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[132] Madison noted this great concern of the American people in The Federalist No. 47, stating, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 307-08 (James Madison) (Modern Library ed., 2000).

[133] The Federalist Papers said there had to be overlap whereas state constitutions explicitly separate the branches' powers. *Compare* THE FEDERALIST NO. 47 (James Madison) (discussing a certain amount of blending such that the branches may keep proper checks on the others), *with* Bennett v. Napolitano, 81 P.3d 311, 316 (Ariz. 2003) (discussing the implicit separation of powers in the federal government in comparison to the explicit separation in Arizona's Constitution).

that some states bestow upon the governor.[134] This power is prohibited at the federal level, as it has been held unconstitutional.[135]

But in the states, when a legislature passes a bill and it is sent to the governor for their signature, the legislature and the individual legislators who voted for the bill are, at least for a short while, out of the picture. If the governor chooses to veto the bill, or any part of it, there is often a requirement of a two-thirds majority in both houses to nullify the veto.[136] While this procedural system resembles that of the federal model, a wrinkle is thrown in with the line-item or partial veto.

When a governor vetoes only part of a bill, the legislature does not know beforehand what part of the bill will be vetoed. The bill, the whole bill, passed the legislature, which may not have passed without the partially vetoed provision;[137] however, some courts have not shown any care for this difference between state and federal governments.[138]

In addition, relying upon the two-thirds requirement for rectification of an allegedly unconstitutional line-item veto calls for the same sort of self-help doctrine that McGowan describes.[139] Nowhere else in the law are plaintiffs first required to obtain the assistance or backing of someone similarly situated in order to remedy a constitutional violation against their rights and interests.[140]

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[134] For example, Mississippi and New York have similar line-item veto powers given to the governor for appropriations bills. *See* Silver v. Pataki, 755 N.E.2d 842 (N.Y. 2001); Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (en banc).

[135] Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding that the Line Item Veto Act violated the Presentment Clause of the Constitution).

[136] *See, e.g.*, N.Y. CONST. art. 4, § 7.

[137] Similar discussion occurred in the United State Supreme Court surrounding the Line Item Veto Act which was held unconstitutional. *Clinton*, 524 U.S. at 448 ("If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature.").

[138] *See Reeves*, 307 So. 3d 436 (en banc).

[139] McGowan, *supra* note 20, at 254-55. *See Reeves*, 307 So. 3d at 439 (en banc).

[140] McGowan, *supra* note 20, at 254 ("There is no general requirement that a private litigant employ self-help before seeking judicial relief. Nor should there be, because an ordinary plaintiff, having suffered injury in fact within the contemplation of the law he invokes, is entitled to his day in court." (footnote omitted)); *see also* Hall, *supra* note 1, at 23 ("No other occupation gets its own standing doctrine. We do not speak of

2. Legislative Standing to Defend

Similarly, some courts recognize legislative standing to defend their legislation or legislative power from constitutional challenges,[141] which is a departure from the federal doctrine laid out in *INS v. Chadha*.[142] In *INS v. Chadha*, the Supreme Court laid out the prohibition of Congress delegating executive powers to themselves and, thus, when the executive refuses to enforce the law, the legislature may not enforce the law or defend the law against constitutional challenges except for rare circumstances.[143] Typically, this duty to defend the law rests with the executive branch, whether that be the governor or the attorney general.[144]

Similarly to the comparison made between legislator and executive standing, it would also seem that in states which allow legislative standing to defend, legislators would have a much stronger argument for their standing to be recognized by the court. Where legislatures have the power to defend their work, i.e. the law passed by them, it would seem that legislators should be allowed to sue in order to defend their interests in their individual vote on such laws.

'educational standing' when public school teachers or law professors sue."). Indeed, "[m]aking sense of legislative standing begins with the recognition that some so-called legislative standing cases are not legislative standing cases at all. Rather, they are ordinary standing cases that happen to involve a legislator." *Id.* at 24.

[141] League of Women Voters v. Sec'y of State, 957 N.W.2d 731, 740 (Mich. 2020); *see also* N.D. Legis. Assembly v. Burgum, 916 N.W.2d 83, 91 (N.D. 2018) ("The Legislative Assembly has standing to bring otherwise justiciable claims seeking to defend against executive branch encroachment into the legislative sphere through improper use of a partial veto." (citing Colo. Gen. Assembly v. Lamm, 704 P.2d 1371, 1378-79 (Colo. 1985))).

[142] INS v. Chadha, 462 U.S. 919, 962-63 (1983); Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 573-74 (2014). But some states follow a similar road. *Cf.* Robinson Twp. v. Commonwealth of Pennsylvania, 84 A.3d 1054, 1055 (Pa. 2014).

[143] Grove & Devins, *supra* note 142. A similar proposition is found in some state separation of powers doctrines. *See, e.g.*, Michael J. Bentley, Osborne v. Neblett *and the Separation of Powers: Does the Legislative Power to Make Law Include the Power to Declare that Rights Under the Law Cannot Be Waived?*, 30 MISS. C. L. REV. 461, 462-63 (2012) (describing the "core powers" doctrine in Mississippi which says that "legislative power . . . is the authority to make laws, but not to enforce them." (alteration in original) (quoting Alexander v. State *ex rel.* Allain, 441 So. 2d 1329, 1338 (Miss. 1983))).

[144] Zoeller, *supra* note 129, at 524 ("Like the federal attorney general, state attorneys general owe a duty to defend state statutes against constitutional challenges.").

3. Legislators as Defendants

In discussing legislator standing to sue the governor for allegedly unconstitutional actions, it is helpful to pose the question, can the governor sue legislators or the legislature when they encroach upon or usurp executive powers? In Colorado courts, for example, the answer is yes.[145]

In *Romer v. Colorado*, the Governor of Colorado sued the General Assembly, as well as the Speaker of the House and President of the Senate, seeking a declaratory judgment after the legislature ignored the governor's veto of headnotes and footnotes in an appropriation bill "that sought to restrict or explain the use of the relevant appropriation."[146] By ignoring the veto of the headnotes and footnotes without overriding the veto, the governor alleged that the executive power had been usurped, and the Colorado Supreme Court found that the governor did have standing to pursue the action.[147] The Montana Supreme Court has also been friendly to governor-plaintiffs seeking to bring an action against legislative plaintiffs.[148] In *State ex rel. Judge v. Legislative Finance Committee and Its Members*, Montana's governor was allowed to bring an action alleging that the legislature unconstitutionally delegated itself gubernatorial power.[149]

In other states, the governor has significantly less power. For example, while Mississippi entrusts their governor to faithfully execute the law, the Mississippi Supreme Court has said that only the Attorney General may bring an action on behalf of the executive.[150] And when the Attorney General refuses to bring such a suit, the governor may not, himself, bring that suit.[151] Alaska has constitutionally preserved a protection of the legislature from

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[145] Romer v. Colo. Gen. Assembly, 810 P.2d 215, 220 (Colo. 1991) ("The governor has alleged a wrong that constitutes an injury in fact to the governor's legally protected interest in his constitutional power to veto provisions of an appropriations bill. Therefore, the governor has standing to bring this action.").

[146] *Id.* at 217.

[147] *Id.* at 218-20.

[148] State *ex rel* Judge v. Legis. Fin. Comm., 543 P.2d 1317, 1321 (Mont. 1975).

[149] *Id.* at 1319.

[150] *The Governor's Right to Sue*, *supra* note 129, at 524-25 (citing Henry v. State, 39 So. 856, 865 (Miss. 1906)).

[151] *Id.*

gubernatorial lawsuits.[152] Article III, Section 16 of the Alaska Constitution gives the governor broad power to execute the law and sue on behalf of the state; however, it includes that "[t]his authority shall not be construed to authorize any action or proceeding against the legislature."[153] This is a proposed lens through which to justify legislator standing in state courts. In states that allow the executive standing to sue the legislature as a whole or individual legislators in their capacity as legislators, one could make the argument that if one branch of government may bring an action in court to enforce some separation of powers dispute against another branch, the inverse would be allowed as well. However, it does seem that some state courts are more deferential to the veto power of the governor over standing of legislators to challenge that veto power's abuse than others.[154]

C. State Justiciability Requirements

Perhaps the most important difference for state courts to consider in a legislator standing analysis is their own justiciability requirements. The Federal Judiciary must follow the language of Article III and hear only "cases" or "controversies";[155] however, many state constitutions bear no such language.[156] In fact, state courts have been more liberal in the amount and type of issues they will decide.[157] Relevant to legislator standing, it seems, are the individual states' doctrines of standing, political question, and advisory opinions. If state courts are generally more liberal in their application of these doctrines to plaintiffs, one would reason that

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[152] Legis. Council v. Knowles, 988 P.2d 604, 607 (Alaska 1999).

[153] *Id.* (quoting ALASKA CONST. art. III, § 16).

[154] *Compare* Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (en banc), *and* Romer v. Colo. Gen. Assembly, 810 P.2d 215 (Colo. 1991), *with* Silver v. Pataki, 755 N.E.2d 842 (N.Y. 2001).

[155] U.S. CONST. art. III, § 2, cl. 1.

[156] See, for example, Bennett v. Napolitano, 81 P.3d 311, 316 (Ariz. 2003) ("Article VI of the Arizona Constitution, the judicial article, does not contain the specific case or controversy requirement of the U.S. Constitution."). *See also Reeves*, 307 So. 3d at 444 (en banc) (Maxwell, J., concurring) ("Unlike the United States Constitution, Mississippi's Constitution does not limit judicial review to cases or controversies.").

[157] *See Reeves*, 307 So. 3d at 444 (Maxwell, J., concurring) (en banc) ("[W]e have been more permissive in granting standing to parties who seek review of governmental actions." (quoting Van Slyke v. Bd. of Trs. of State Insts. of Higher Learning, 613 So. 2d 872, 875 (Miss. 1993))).

such a state court would also liberally apply these doctrines to legislators.[158]

1. Standing

As part of the analysis of standing in any court is the recognition of some type of injury. Typically, legislators assert three types of injuries:[159] "diluted vote,"[160] "usurpation of legislative power,"[161] and "diminished effectiveness in carrying out legislative duties absent a judicial declaration."[162] By and large, legislators do not constitute a special class upon which standing is conferred by

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[158] This is an important logical point. These doctrines exist because of the concern for the separation of powers. *See* Arend & Lotrionte, *supra* note 66, at 217 ("[T]he Court observed in *Allen v. Wright* that '[t]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" (quoting Allen v. Wright, 468 U.S. 737, 752 (1984))). So, where these doctrines are applied liberally, states are, at least in a sense, applying the separation of powers doctrine liberally.

[159] Benck, *supra* note 12, at 821; Campbell v. White 856 P.2d 255, 266 (Okla. 1993) (Opala, J., dissenting). Other scholars and courts have set out different categories of injury asserted by legislator-plaintiffs.

> In the many congressional standing cases decided by the lower federal courts, the congressional plaintiffs have advanced three basic legal theories in support of their standing to sue: (1) standing based upon an injury derivatively suffered by a congressman due to an injury inflicted upon the Congress, (2) standing based upon the congressman's status as a representative of his or her constituents, and (3) standing based upon an injury suffered directly by the congressman.

Cf. R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 13 (1986); Silver v. Pataki, 755 N.E.2d 842, 847 (N.Y. 2001) ("Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power. Only circumstances presented by the latter two categories confer legislator standing.").

[160] *Campbell*, 856 P.2d at 266 (Opala, J., dissenting); State *ex rel.* Ohio Gen. Assembly v. Brunner, 872 N.E.2d 912, 918 (Ohio 2017) (granting standing for legislators to prevent their votes from being nullified). Also of note, the Supreme Court of Virginia has held that private citizen voters had standing to challenge the constitutionality of an executive order hindering their right to vote. Howell v. McAuliffe, 788 S.E.2d 706, 715 (Va. 2016).

[161] *Campbell*, 856 P.2d at 266 (Opala, J., dissenting); Panzer v. Doyle, 680 N.W.2d 666, 686 (Wis. 2004) (abrogated on other grounds); Rukavina v. Pawlenty, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004); Commonwealth of Kentucky *ex rel.* Beshear v. Commonwealth of Kentucky *ex rel.* Bevin, 498 S.W.3d 355, 367 (Ky. 2016).

[162] *Campbell*, 856 P.2d at 266-67; *see also* Conant v. Robins, 603 N.W.2d 143, 149 (Minn. Ct. App. 1999).

virtue of their occupation.[163] However, that holding leads to the question, "What must legislators show for standing upon the above injuries to be recognized?" The answer has been quite hazy as courts say that legislators must meet the same standing requirements as any other plaintiff;[164] however, some of those courts add into the legislator standing equation a requirement of extra caution or scrutiny of legislator's claim of standing due to separation of powers concerns.[165]

Under this reasoning, it seems that private individuals may have a broader doorway to the courtroom than legislators. For example, in South Carolina, the supreme court found a justiciable controversy where a private party challenged the governor's line-item veto of an appropriations bill as unconstitutional.[166] But in Mississippi, legislators themselves may not challenge such an action as unconstitutional without showing a seemingly more substantial injury than plaintiffs of the citizenry.[167]

Further, many states have a more relaxed standard for allowing a plaintiff standing to bring suit.[168] For example, in Mississippi courts, a plaintiff need only assert an "adverse impact" in the litigation,[169] which serves as a much lower bar than the

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[163] *E.g.,* Morrow v. Bentley, 261 So. 3d 278, 287 (Ala. 2017).

[164] *Id.*

[165] Turner v. Shumlin, 163 A.3d 1173, 1177-78 (Vt. 2017).

[166] S.C. Coin Operators Ass'n v. Beasley, 464 S.E.2d 103 (S.C. 1995).

[167] *See* Reeves v. Gunn, 307 So. 3d 436, 439 (Miss. 2020) (en banc).

[168] Wis. Legis. v. Palm, 942 N.W.2d 900, 907 (Wis. 2020) ("Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional prerequisite." (quoting Schill v. Wis. Rapids Sch. Dist., 786 N.W.2d 177, 188 (Wis. 2010))); State *ex rel.* Clark v. Johnson, 904 P.2d 11, 18 (N.M. 1995) ("We simply elect to confer standing on the basis of the importance of the public issues involved." (quoting State *ex rel.* Sego v. Kirkpatrick, 524 P.2d 975, 979 (1974))); *Reeves*, 307 So. 3d at 444 (en banc) (Maxwell, J., concurring) ("[W]e have been more permissive in granting standing to parties who seek review of governmental actions." (quoting Van Slyke v. Bd. of Trs. of State Insts. of Higher Learning, 613 So. 2d 872, 875 (Miss. 1993))).

[169] Butler v. Watson, 338 So. 3d 599, 606 (Miss. 2021). This language is what has survived the standard for standing articulated in *Harrison County v. City of Gulfport*. Harrison County v. City of Gulfport, 557 So. 2d 780, 782 (Miss. 1990). There has been a recent string of cases which has muddied standing doctrine in Mississippi. *Compare Reeves*, 307 So. 3d at 438-39 (en banc) (applying standing requirements of "colorable interest" and "adverse impact" as discussed in *Harrison County*), *and Harrison County*, 557 So. 2d at 782, *with Butler*, 338 So. 3d at 605 (writing that the majority in *Reeves v. Gunn* overruled the "colorable interest" standard despite a dissent in that case arguing

federal standard of a concrete and particularized injury, which is fairly traceable to the defendant's acts or omissions.[170] In states that lower this bar for recognition of standing, it would seem that the bar might be lower for conferring standing upon legislators, but that is not always the case.[171]

2. Political Question

Political question doctrine is not a justiciability concern only at the federal level. State courts have political question concerns as well, especially when deciding issues of legislator standing. Although states are not bound by federal political question doctrine, they mostly adopt the federal doctrine in their courts.[172] Professor Nat Stern discusses both state courts' reluctance to establish wholly independent political question doctrines from the federal doctrine and their willingness to depart from it. However, "[e]ven some state high courts that have squarely staked out an independent doctrine of political questions have simultaneously drawn heavily from Supreme Court jurisprudence."[173] In describing the relationship between the federal and state doctrines, Professor Stern describes the federal doctrine as "pervasive" in that it inhibits states from creating their own, independent political question doctrine.[174]

However, some states have declared that simply because a question is political in nature does not mean the courts should shy away from deciding issues of great importance.[175] To the extent that

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that the court should overrule the "colorable interest" standard instead of applying it there).

[170] *Compare* note 169, *with* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

[171] *Compare Harrison County*, 557 So. 2d at 782, *with Reeves*, 307 So. 3d 436 (en banc).

[172] Stern, *supra* note 5, at 180.

[173] *Id.* at 184.

[174] *Id.* at 180.

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state courts take a more relaxed view of the political question doctrine, there is a stronger argument to be made in favor of allowing legislators their day in court.

3. Advisory Opinions

One of the clearest differences between federal and state judicial review restrictions is the advisory opinion. While the prohibition of advisory opinions in federal court is a bedrock principle, some state supreme courts have explicit power to issue them.[176] The Table below shows the landscape of state legislator standing as it relates to state court stances on the advisory opinion power. This Table is included, despite an absence in any other sections, because it would seem a best exercise of common logic to compare state court stances on advisory opinions to their stances on legislator standing doctrine, as the two share much in common.

> And with regard to the claim that today's case involves a political question in which the judiciary should not become enmeshed, it is much too late to reclaim our virginity. That great constitutional and legal questions may become topics of political and even partisan controversy should never be employed by this Court as an excuse to duck its responsibility to adjudicate the legal and constitutional rights of the parties. Suffice it to say that this Court has for years entertained and decided on the merits controversies wherein parties claimed that members of one department of government were exercising powers in another in violation of the constitutional mandate for separation of powers.

Dye v. State *ex rel.* Hale, 507 So. 2d 332, 339 (Miss. 1987); *see also* Stern, *supra* note 5, at 185.

[176] Hershkoff, *supra* note 92, at 1845 ("State constitutions in Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota authorize the judiciary to give advice when the legislature or governor so requests. In Alabama, Delaware, and Oklahoma, the advisory function is statutorily assigned . . . ."). However, federal courts do not permit advisory opinions. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Some states follow suit on the federal ban on advisory opinions. *See* State *ex rel.* Mathewson v. Bd. of Election Comm'rs, 841 S.W.2d 633, 635 (Mo. 1992) (en banc) ("This Court has steadfastly refused to expand its jurisdiction to include the issuance of advisory opinions.").

Table 1[177]

	Article III Advisory Opinion Prohibition	Statutory Advisory Opinion Power	Advisory Opinion Power Upon Request
Undecided on Legislator Standing[178]	Ark.; Cal.; Ga.; Ill.; Ind.; Iowa; Kan.; Md.; Mont.; Neb.; Nev.; N.M.;[179] N.C.; N.D.; Or.; S.C.; Utah; Va.;[180] Wash.;[181] W.V.	Del.	N.H.; Me.; R.I.; S.D.; Mass.
More Scrutinized Standing Requirements for Legislators	Vt.;[182] Pa.;[183] Ariz.;[184] Conn.;[185] Minn.;[186] Tex.[187]	Ala.[188]	Mich.;[189] Fla.[190]

[177] It is of note that there are no states that categorically confer standing upon or withhold standing from legislators. Further, the cases cited in the footnotes of this Table are merely an illustration and not meant to be an exhaustive list.

[178] Included under the heading "Undecided on Legislator Standing" are states in which my searches for cases did not yield results on Westlaw or Lexis.

[179] State *ex rel.* Clark v. Johnson, 904 P.2d 11, 18 (N.M. 1995) (finding no need to address legislator standing due to "the importance of the public issues involved" (citing State *ex rel.* Sego v. Kirkpatrick, 524 P.2d 975, 979 (1974))).

[180] Howell v. McAuliffe, 788 S.E.2d 706, 732 n.1 (Va. 2016) (Powell, J., dissenting).

[181] Huff v. Wyman, 361 P.3d 727 (Wash. 2015) (declining to address legislator standing); *see also* Lee v. State, 374 P.3d 157 (Wash. 2016) (declining to address legislator standing).

[182] Turner v. Shumlin, 163 A.3d 1173, 1178 (Vt. 2017).

[183] Markham v. Wolf, 136 A.3d 134 (Pa. 2016).

[184] Biggs v. Cooper *ex rel.* County of Maricopa, 341 P.3d 457 (Ariz. 2014).

[185] Nania v. Borges, 551 A.2d 781, 785 (Conn. Super. Ct. 1988) (following federal precedent in absence of state case law on the subject).

[186] Rukavina v. Pawlenty, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004) (citing Raines v. Byrd, 521 U.S. 811, 820 (1997) (describing the standing requirement differently for legislators than for other plaintiffs)).

[187] *In re* Hotze, 627 S.W.3d 642, 648 (Tex. 2020) ("In general, individual legislators lack standing to sue to vindicate the Legislature's institutional prerogatives against executive-branch encroachment." (citing *Raines*, 521 U.S. at 830)).

[188] Morrow v. Bentley, 261 So. 3d 278 (Ala. 2017) (quoting *Markham*, 136 A.3d at 140; Turner v. Shumlin, 163 A.3d 1173, 1178 (Vt. 2017)).

[189] *See* Dodak v. State Admin. Bd., 495 N.W.2d 539 (Mich. 1993).

[190] Martinez v. Martinez, 545 So. 2d 1338, 1339 (Fla. 1989) (holding that a member of the legislature who had been called into special session by the governor and was challenging the constitutionality of such special session did have standing). This seems consistent with the notion that a legislator is held in the same regard as an ordinary

Standing Applied Similarly Between Legislators and Other Plaintiffs	Miss.;[191] N.Y.;[192] Alaska;[193] Haw.;[194] Idaho;[195] Ky.;[196] La.;[197] Mo.;[198] N.J.;[199] Ohio;[200] Tenn.;[201] Wis.;[202] Wyo.[203]	Okla.[204]	Colo.[205]

The above Table helps to articulate the idea that states should conduct their own analysis of legislator standing despite the pervasive federal precedent on the subject. Present on the Table are a few oddities, a few expected realities, and a lot of uncertainty.

Common logic might dictate where another branch of government may already ask the court to answer a question in the form of an advisory opinion, legislator standing to seek declaratory

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plaintiff; however, I was unable to find a Florida case directly on point with legislator standing in the sense that other states have dealt with the question.

[191] Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (en banc) (applying the same adverse impact or colorable interest standard to legislators as they do to ordinary plaintiffs).

[192] Silver v. Pataki, 755 N.E.2d 842 (N.Y. 2001).

[193] Keller v. French, 205 P.3d 299, 302 (Alaska 2009) (writing that standing is important because of the prohibition on advisory opinions and applying the ordinary standing inquiry to legislators).

[194] *See* Hanabusa v. Lingle, 198 P.3d 604 (Haw. 2008).

[195] Bedke v. Ellsworth, 480 P.3d 121 (Idaho 2021).

[196] Commonwealth of Kentucky *ex rel.* Beshear v. Commonwealth of Kentucky *ex rel.* Bevin, 498 S.W.3d 355, 367 (Ky. 2016).

[197] Murrill v. Edwards, 613 So. 2d 185, 189 (La. Ct. App. 1992) (finding that legislators lack a personal interest different from the public-at-large in challenging the Governor's withholding names for appointments as unconstitutional); McPherson v. Foster, 889 So. 2d 282, 293 (La. App. 1st Cir. 2004) (finding that a legislator has an interest in the opportunity to consider legislation changing the way that the state issues leases).

[198] State *ex rel.* Mathewson v. Bd. of Election Comm'rs, 841 S.W.2d 633, 635 (Mo. 1992) (en banc).

[199] *In re* Christie's Appointment of Perez, 95 A.3d 780, 786-87 (N.J. Super. Ct. App. Div. 2014).

[200] State *ex rel.* Ohio Gen. Assembly v. Brunner, 872 N.E.2d 912, 917-19 (Ohio 2007) (finding that individual legislators had standing and not addressing the standing of the Assembly as a whole).

[201] ACLU of Tenn. v. Darnell, 195 S.W.3d 612, 625 (Tenn. 2006).

[202] Panzer v. Doyle, 680 N.W.2d 666, 682-83 (Wis. 2004) (abrogated on other grounds) (followed in Wis. Legis. v. Palm, 942 N.W.2d 900, 908 (Wis. 2020)).

[203] Cathcart v. Meyer, 88 P.3d 1050, 1057-58 (Wyo. 2004) (relaxing the standing requirement for legislators challenging term-limit law).

[204] Hendrick v. Walters, 865 P.2d 1232, 1236 (Okla. 1993).

[205] Grossman v. Dean, 80 P.3d 952 (Colo. App. 2003).

relief would not seem far-fetched. However, as seen in Alabama,[206] the fact that a state court has the power to issue advisory opinions does not necessarily mean that legislators will have their standing recognized to bring an action against the executive.

These courts should re-think legislator standing in light of there being no ban on advisory opinions in their state. With a judiciary vested with such power, even if only in some scenarios, it would seem, both pragmatically and in the interest of rectifying constitutional wrongs, a good policy choice for the court. Thus, in states where advisory opinions are permitted, courts should be more willing to recognize legislator standing to bring an action against the executive.

One expected reality is that in five of eight states where advisory opinions are available at the legislature's or governor's request, there has not been a decision on the question of legislator standing; however, interestingly, Colorado, Michigan, and Florida will issue advisory opinions upon request, but those courts still conduct standing analysis of legislators. It is strange that the legislature may usually ask the state's highest court to answer a question of constitutional significance without a requirement similar to the federal "case" or "controversy" requirement, yet the court does require a legislator-plaintiff to show that they do indeed have standing to pursue an action. Another oddity is that all three states that allow advisory opinions in certain situations pursuant to statute are across the board on their legislator standing doctrines. While I have done significant research on the states' methods of issuing advisory opinions, their unique procedures may have an impact on the courts' rulings on legislator standing.

The most important trend to be pointed out on this table is the divide between states who have a similar prohibition on advisory opinions as Article III. While some seemingly follow *Raines v. Byrd* and apply a heightened scrutiny standing test,[207] other jurisdictions seemingly apply the same generic standing inquiry that each state court ordinarily employs for all plaintiffs. The qualifier, "seemingly," is an important distinction. While state courts write that they hold legislator plaintiffs to the same standard

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[206] *Compare* Hershkoff, *supra* note 92, *with* Morrow v. Bentley, 261 So. 3d 278, 294 (Ala. 2017).

[207] Turner v. Shumlin, 163 A.3d 1173, 1178 (Vt. 2017).

as an ordinary plaintiff in the standing inquiry, such may not actually be the case. For instance, the Mississippi Supreme Court said just that, yet seemed to scrutinize the legislators' standing in *Reeves v. Gunn* at a higher standard than the norm.[208]

Finally, a host of state courts have yet to decide the issue of legislator standing, and that is the heart of this Comment. When those state courts are confronted with the issue of whether they should recognize a legislator's claim of standing, they ought not simply follow the United States Supreme Court's legislator standing doctrine. Instead, they should look to the variance in their state governmental system from that of the federal government and determine to what extent those differences dictate the result of their standing inquiry.

CONCLUSION

Legislator standing is an amorphous concept, and adding to the conversation concepts of federalism and the differences between the doctrines of fifty state courts does not make the task of discussing it any easier. Ambitious as it may be, this Comment provides the first attempt to describe some method by which state courts may address the doctrine of legislator standing through a lens without federal court precedent monopolizing and pervading state court analysis.

Because of fundamental differences in state and federal government, it is important that states perform independent analyses on legislator standing issues when they arise, not simply proceed with extra caution because federal courts do. Instead, state courts should consider arguments in favor of legislator standing in conjunction with differences in governmental structure, governmental powers, and judicial review doctrines. While some state courts fall into the same decision-making model as the federal courts, there are a good many states that could reach different conclusions based upon their unique characteristics, and those courts should not be dissuaded from recognizing legislator standing to rectify constitutional wrongs simply because the federal

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[208] Reeves v. Gunn, 307 So. 3d 436, 438-39 (Miss. 2020) (en banc) (applying the same adverse impact or colorable interest standard to legislators as they do to ordinary plaintiffs).

doctrines have become so pervasive in state courts. This may be just the avenue for legislators to make their way into the courtroom.