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# STANDING UP FOR LEGISLATORS: REEVALUATING LEGISLATOR STANDING IN THE WAKE OF *KERR V. HICKENLOOPER*

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**ABSTRACT**—Hornbook constitutional law establishes that Congress and state legislatures are bodies of limited, enumerated powers, and common sense suggests they should get their act together and exercise them more often. But should legislators be permitted to sue in order to exercise their powers when another branch of government infringes on them unconstitutionally, or the body they represent unconstitutionally limits them? This Note argues that, at least in certain circumstances, they should. Following on the heels of the Tenth Circuit's recent treatment of the issue in its *Kerr v. Hickenlooper* decisions, this Note proposes a redefinition of the legislator standing doctrine under which legislators can sue to remedy unconstitutional infringement of specific, enumerated powers. In doing so, this Note argues that prudential concerns that have historically barred legislators from suing should be disregarded, not only because the Supreme Court signaled as much in *Lexmark International, Inc. v. Static Control Components, Inc.*, but also because these concerns are normatively ill considered. Rather, tying legislators' injuries in fact to enumerated powers better aligns standing for legislators with standing for everyone else, while helping ensure courts are not stuck hearing suits they cannot and should not hear.

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## INTRODUCTION

Lawsuits by legislators in federal court present perplexing, if rarely discussed, questions of justiciability. "Legislator standing" refers to the conditions under which courts will entertain lawsuits by legislators, not in legislators' individual capacities, but in their official roles as representatives of the people. Legislators' claims typically allege a serious threat to democratic principles or the separation of powers.[1] Where legislators seek to challenge actions of the executive, however, courts are often wary of hearing their claims due to the political question doctrine[2] or other separation of powers concerns.[3] Indeed, courts often refuse to entertain legislators' claims on these grounds.[4] In this sense, the legislator standing doctrine seeks to balance two evils: constitutional infringement on

[1] As an example, in *Raines v. Byrd*, 521 U.S. 811 (1997), the Supreme Court's most prominent decision on legislator standing, the legislators' purported injury—dilution of their voting power, effectuated by President Clinton's use of the Line Item Veto Act—would arguably amount to an instance at which presidential power is at its "lowest ebb," and separation of powers concerns are most pronounced. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring in the judgment). For a discussion of *Raines*, see *infra* Part II.B.1.

[2] 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11.2, at 135 (3d ed. 2008) (observing that the Supreme Court's legislator standing jurisprudence reflects "standing informed—and indeed virtually controlled—by political-question concerns"); *see also* Adam L. Blank, Raines v. Byrd*: A Death Knell for the Congressional Suit?*, 49 MERCER L. REV. 609, 623 (1998) (discussing the Court's conflation of Article III standing requirements and other aspects of justiciability and concluding that "the Court has employed standing as a convenient method to dismiss politically-oriented cases it does not want to decide on the merits").

[3] David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 207 (2001) ("Standing and the separation of powers doctrine have long been wedded together; a robust standing doctrine makes it more difficult for litigants to use the federal courts and therefore precludes their seizure of political power.").

[4] *Cf. id.* (analyzing the Supreme Court's decision in *Raines v. Byrd* as resting largely on separation of powers concerns, specifically a desire "to protect courts from deciding the types of cases most likely to threaten their legitimacy").

the legislative role, on the one hand, and infringement on the judicial role by way of legislator lawsuits, on the other.

The core of the legislator standing doctrine—as addressed most recently in the Court's 2015 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[5]—consists of the Court's two prior decisions in *Coleman v. Miller*[6] and *Raines v. Byrd*.[7] These cases stand for three important propositions. First, as demonstrated in *Coleman* and acknowledged in *Raines*, legislators can have standing to sue as legislators for institutional, rather than personal, injuries, at least in some circumstances.[8] Second, while it remains unclear exactly what these circumstances are, *Raines* dramatically narrows the ambit of legislator standing to instances in which legislators can demonstrate that their votes have been nullified and the legislators have not suffered a mere "abstract dilution of institutional legislative power."[9] Finally, *Raines* envisions a number of additional factors as relevant to the legislator standing inquiry, including whether the alleged legislative injury is redressable by ordinary legislative means, whether an ordinary, private citizen might bring suit instead, and whether the suit has the support of the legislative body involved in the case.[10] These factors are intended to inform a court's understanding of whether the separation of powers or political question doctrine would counsel against reaching the merits of the legislators' suit.

Recently, in *Kerr v. Hickenlooper* (*Kerr I*), the Tenth Circuit initially affirmed,[11] and then denied,[12] standing to a group of legislators bringing suit in their official capacities. The legislators in *Kerr* challenged the constitutionality of Colorado's Taxpayer Bill of Rights (TABOR) under the Guarantee Clause and a number of other constitutional and statutory provisions.[13] The legislators asserted that they had been deprived of their ability to vote in favor of tax increases or tax policy changes, which TABOR requires to be approved by popular vote, in violation of the

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[5] 135 S. Ct. 2652 (2015).

[6] 307 U.S. 433 (1939).

[7] 521 U.S. 811 (1997).

[8] *Id.* at 823; *Coleman*, 307 U.S. at 437–38.

[9] *Raines*, 521 U.S. at 826; *see id.* at 823 ("[O]ur holding in *Coleman* stands []at most . . . 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." (citation omitted)).

[10] *See id.* at 829–30. As discussed *infra* notes 143–44, the relevant inquiry is whether legislators have the support of a majority of the legislative chamber concerned.

[11] 744 F.3d 1156 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem.).

[12] Kerr v. Hickenlooper (*Kerr II*), No. 12-1445, 2016 WL 3126203, at *1 (10th Cir. June 3, 2016).

[13] *Kerr I*, 744 F.3d at 1161.

Constitution's guarantee of a republican form of government.[14] A three-judge panel of the Tenth Circuit initially reasoned that "it would be a bizarre result if the nullification of a single vote supported legislative standing, but the nullification of a legislator's authority to cast a large number of votes did not."[15] Later, after the Supreme Court vacated and remanded Kerr after deciding *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[16] the Tenth Circuit changed its mind, holding the legislators could not sue on their purported institutional injury.[17]

*Kerr* highlights two specific problems in the doctrine of legislator standing. First, *Kerr* suggests that the vote nullification–abstract dilution of power paradigm in *Raines* fails to provide discernible guidance to lower courts. In particular, courts differ on whether deprivation of the right to vote—as opposed to nullification of a recorded vote—merits standing. This is borne out by comparing *Kerr* with decisions of the D.C. Circuit immediately following *Raines*, as well as other courts' skepticism of legislator standing following *Raines*. Second, *Kerr* demonstrates that the additional standing requirements the Court considered in *Raines* are difficult to interpret, of questionable relevance in certain situations in which legislators might bring suit in federal court, and fail to accurately inform courts' consideration of separation of powers, the political question doctrine, and Article III.

This Note proposes a reformulation of the legislator standing doctrine. It begins by critiquing vote nullification, which provides a deficient approximation of the legislative function. It then suggests that the additional considerations the Court has attached in evaluating legislator standing cases should be abandoned for two reasons. First, the Court has recently signaled in *Lexmark International, Inc. v. Static Control Components, Inc.*,[18] that prudential considerations should not influence the standing inquiry. Therefore, insofar as these considerations are prudential in nature, courts should not use them as a means of considering the standing of legislators. Second, even if these considerations are not prudential, they are ill conceived, and thus should not be valid considerations in the first place.

If these prudential considerations have no bearing, the inquiry should return to the bedrock requirement of Article III: an injury in fact. In turn,

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[14] *Id.* at 1162–63.

[15] *Id.* at 1170.

[16] 135 S. Ct. 2652 (2015).

[17] *Kerr II*, No. 12-1445, 2016 WL 3126203, at *1 (10th Cir. June 3, 2016).

[18] 134 S. Ct. 1377 (2014).

this Note argues that courts should distinguish between two different permutations of alleged vote nullification—deprivation of an opportunity to vote and improper execution of a successful vote—recognizing an injury in fact only in the former case, where legislators have been unlawfully deprived of an opportunity to vote pursuant to an enumerated power. In such cases, legislators assert a cognizable injury under Article III. While this will have the effect of increasing the numbers of injuries in fact recognized, the other requirements of Article III standing—traceability and redressability—as well as ripeness, mootness, and the political question doctrine, can assist in identifying those legislator suits that should be nonjusticiable.

Part I of this Note begins by surveying basic justiciability, including discussions of Article III standing, prudential standing, ripeness, mootness, and the political question doctrine. Part I then provides an overview of the law of legislator standing, beginning with *Coleman* and *Raines* and then collecting the decisions of circuit courts interpreting *Raines*. Part II synthesizes the modern approach to legislator standing based on these decisions. It highlights the lack of clarity *Raines* has provided for lower courts, and then identifies problems with the vote nullification–abstract dilution of the institutional legislative power paradigm and the additional factors considered relevant for the purposes of legislator standing. Finally, Part III proposes a reformulation of the legislator standing doctrine that eliminates these extra factors and refocuses the injury in fact inquiry on legislators' enumerated powers.

## I. FOUNDATIONS OF LEGISLATOR STANDING

This Part briefly overviews fundamental aspects of justiciability, beginning with a synopsis of Article III and prudential standing requirements, ripeness, mootness, and a short discussion of the political question doctrine and its relationship to standing. This overview emphasizes recent Supreme Court decisions that address standing, which may impact legislator standing more specifically in ways that have not yet been explored. Additionally, this overview aims to differentiate the standing inquiry from that under the political question doctrine, a distinction that courts' analyses of legislator standing often blur.

This Part then surveys legislator standing jurisprudence, including the Supreme Court's 2015 decision in *Arizona Independent Redistricting Commission*, the Tenth Circuit's decisions in *Kerr*, and other decisions of import for the legislator standing doctrine.

### *A. Justiciability*

*1. Article III Standing.*—From Article III's limited grant of federal jurisdiction to cases or controversies,[19] the Supreme Court has derived three irreducible requirements that a plaintiff must demonstrate in order to establish standing to bring a lawsuit in federal court.[20] These requirements are (1) the plaintiff has suffered a cognizable "injury in fact" to a legally protected interest, (2) the plaintiff's injury is fairly traceable to the defendant's conduct, and (3) a favorable judgment will likely redress the plaintiff's injury.[21]

Legislator standing jurisprudence focuses most closely on the injury in fact requirement.[22] In the broader standing context, the Court has used various narrowing modifiers to describe the requisite nature of an alleged injury. First, an injury cognizable under Article III must be "particularized," meaning that a plaintiff must allege personal harm.[23] This serves in part to ensure that the party seeking to invoke the court's jurisdiction will adequately represent the interest the party seeks to protect.[24] Additionally, an injury must be "'real and immediate,' not 'conjectural' or 'hypothetical.'"[25] This prevents a court from issuing an advisory opinion, which it cannot do under Article III's case-or-

[19] U.S. CONST. art. III, § 2. The case-or-controversy requirement both prevents courts from issuing premature, "advisory" opinions that do not affect "live" rights and ensures adequate adverseness between the parties before a court, such that litigants aggressively represent their own interests and do not inadequately represent outside parties with similar (or more directly affected) interests. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 300, 302 (1979).

[20] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471–72 (1982).

[21] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[22] The issue in *Raines v. Byrd* centered on whether the congressional members' alleged injury—diminution of their voting power—was a sufficiently cognizable injury in fact. 521 U.S. 811, 820–21 (1997). Similarly, in *Kerr v. Hickenlooper*, the issue was not whether the Colorado state legislators' injury was fairly traceable to TABOR or redressable by judicial decision, but whether the legislators met the injury in fact requirement. 744 F.3d 1156, 1163–71 (10th Cir. 2014) (analyzing the legislators' injury in fact in great detail, and then concluding with only a very brief discussion of the traceability and redressability requirements), *vacated*, 135 S. Ct. 2927 (2015) (mem.).

[23] Warth v. Seldin, 422 U.S. 490, 508 (1975); *see also Lujan*, 504 U.S. at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

[24] *Valley Forge*, 454 U.S. at 472 ("[Standing] assures an actual factual setting in which the litigant asserts a claim of injury in fact, [such that] a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court."); *see also* Brilmayer, *supra* note 19, at 310 ("The case or controversy requirement guarantees that the individuals most affected by the challenged activity will have a role in the challenge.").

[25] City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

controversy limitation.[26] In this way, the injury in fact requirement also concerns proper respect for the separation of powers, because it limits the province of the federal courts to the role provided for in Article III.[27] To that end, the Court more recently reaffirmed that an injury cannot be too speculative and must at least be "certainly impending," if it has not already manifested.[28]

Legislators must also satisfy Article III's traceability and redressability requirements, although these considerations have not driven courts' legislator standing analyses.[29] These requirements nevertheless deserve brief discussion. Traceability is synonymous with causation and asks whether the party charged has indeed caused the alleged injury.[30] Redressability, on the other hand, seeks to determine whether a court is properly positioned to provide a remedy for an alleged wrong.[31] The traceability and redressability requirements also serve to help realize the adverseness and separation of powers concerns underlying the case-or-controversy requirement.[32]

*2. Prudential Standing.*—In addition to Article III's irreducible bedrock of standing, federal courts have historically applied additional limitations to the circumstances in which litigants can bring suit in federal court.[33] These "prudential standing" limitations include bars on hearing "generalized grievances,"[34] claims that fall outside the "zone of interests"

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[26] *Valley Forge*, 454 U.S. at 472 (explaining that requiring an injury in fact follows from the case-or-controversy requirement by "tend[ing] to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

[27] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself." (emphasis omitted)).

[28] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (emphasis omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

[29] *See supra* note 22; *see also* Raines v. Byrd, 521 U.S. 811, 830 n.11 (1997) (noting the legislators' injuries may also not have satisfied the traceability requirement).

[30] Allen v. Wright, 468 U.S. 737, 753 n.19 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387–88 (2014).

[31] *Id.* at 753 n.19.

[32] *Id.* at 759–61.

[33] *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004) (denying standing to a litigant based on prudential, as opposed to Article III, considerations), *abrogated by Lexmark Int'l*, 134 S. Ct. at 1387–88. For a discussion of prudential standing's impact on legislator standing, particularly in light of recent Supreme Court decisions, see *infra* Part II.

[34] A generalized grievance consists of an injury "shared in substantially equal measure by all or a large class of citizens." Warth v. Seldin, 422 U.S. 490, 499 (1975). Where a litigant raises only a

of a particular statute,[35] and suits raising another's rights or interests (or third-party standing).[36]

Importantly, because prudential standing requirements are not based in Article III, but are instead judicially imposed, prudential requirements are subject both to Congressional abrogation and judicial revision.[37] And on the latter basis, a recent Court decision raises serious questions about—if not heralding the end of—the prudential standing doctrine. In *Lexmark International, Inc. v. Static Control Components, Inc.*,[38] the Court unanimously declined to apply the zone of interests test as a matter of prudential standing.[39] Additionally, in a footnote, Justice Scalia raised doubt as to whether concerns traditionally labeled prudential standing should any longer be considered as such.[40] The decision in *Lexmark*, however, follows two recent decisions in which the Court discussed issues of prudential standing.[41] Read together, these cases fail to provide perfect

generalized grievance, the Court has suggested the political, rather than judicial, process provides a more appropriate remedy. *Id.* at 500.

[35] The zone of interests test asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Bennett v. Spear, 520 U.S. 154, 163 (1997) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

[36] *Allen*, 468 U.S. at 751.

[37] *Bennett*, 520 U.S. at 162 (first citing *Allen*, 468 U.S. at 751; and then citing *Warth*, 422 U.S. at 498, 501).

[38] 134 S. Ct. 1377 (2014).

[39] *Id.* at 1387 ("Whether a plaintiff comes within 'the "zone of interests"' is an issue that requires us to determine, *using traditional tools of statutory interpretation*, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. . . . '"[P]rudential standing" is a misnomer' as applied to the zone-of-interests analysis, which asks whether 'this particular class of persons ha[s] a right to sue under this substantive statute.'" (third alteration in original) (emphasis added) (first quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 (1998); and then quoting Ass'n of Battery Recyclers, Inc. v. EPA, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring))).

[40] *Id.* at 1387 n.3. Justice Scalia first remarked that complaints of generalized grievances do not raise genuine cases or controversies under Article III, and thus should be understood as constitutionally, and not prudentially, nonjusticiable. *Id.* Then, because the case "[did] not present any issue of third-party standing," Justice Scalia elected not to address "the doctrine's proper place in the standing firmament." *Id.*

[41] The first case is *Hollingsworth v. Perry*, in which the Court declined to recognize standing for a group of state constitutional amendment proponents who sought to intervene and defend the amendment, which had been declared unconstitutional. 133 S. Ct. 2652, 2659, 2660–61 (2013). The Court reasoned that, because the proponents' alleged injury was nothing more than a generalized grievance, it did not create a genuine case or controversy. *Id.* at 2662–63. Interestingly, the Court did not mention prudential standing in determining the alleged injury was a generalized grievance, which is consistent with Justice Scalia's treatment of generalized grievances in *Lexmark*. *See id.*; *see also supra* note 40. The second case is *United States v. Windsor*, decided the same day, in which the Court recognized standing for the United States, with a group of members of the House or Representatives intervening, in appealing a decision holding the Defense of Marriage Act (DOMA) unconstitutional. 133 S. Ct. 2675, 2688–89 (2013). Unlike its approach in *Hollingsworth* and *Lexmark*, the Court openly recognized the relevance of prudential concerns, particularly regarding the legislators' standing. *Id.* at 2686–88. The gist of these concerns stemmed from whether the legislators would provide sufficient

clarity on the future of prudential standing, but suggest at minimum a growing wariness among members of the Court in denying standing based on prudential grounds.[42]

*3. Ripeness and Mootness.*—Like the Article III requirements of traceability and redressability, courts have not engaged with the ripeness or mootness doctrines in considering legislators' standing. Still, ripeness and mootness are relevant to the reformulation of legislator standing discussed below, and brief definition is therefore necessary.

Ripeness asks whether issues parties present to a court are fit for judicial decision, and whether the parties would face hardship if the court were to withhold consideration until a later time.[43] If issues are not fit for decision and the parties would not face undue hardship, a case is not ripe, and therefore not justiciable. The purpose of ripeness is akin to Article III's case-or-controversy requirement: to prevent a court from engaging in debate over abstract disputes when judicial decision is not yet appropriate.[44] Mootness, on the other hand, weighs against a court's exercise of jurisdiction where "[t]he controversy between the parties has . . . clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'"[45] Like ripeness, therefore, mootness reflects the absence of a live case or controversy.[46]

*4. The Political Question Doctrine.*—The political question doctrine is arguably relevant in virtually every instance a legislator brings suit.[47] The doctrine presents different questions, however, from those typically raised in the standing inquiry, at least as far as Article III is concerned.[48] Thus,

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"adversarial presentation of the issues." *Id.* at 2687. The Court nevertheless found that the legislators' "sharp adversarial presentation" mollified these concerns. *Id.* at 2688.

[42] If the Court is indeed seeking to distance itself from the prudential standing doctrine, this move may have a significant impact on how federal courts should treat legislator standing, on which prudential concerns have traditionally had commanding influence. *See infra* Parts II–III.

[43] Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

[44] *Id.* at 148–49. For a discussion of the relationship between ripeness and Article III's case-or-controversy requirement that concludes ripeness is not required by, and is in fact inconsistent with, the case-or-controversy requirement, see Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987).

[45] DeFunis v. Odegaard, 416 U.S. 312, 317 (1974) (third alteration in original) (quoting Aetna Life Ins. v. Haworth, 300 U.S. 227, 240–241 (1937)).

[46] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 63 (7th ed. 2011); *see also* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 376 (1974) (observing that the mootness doctrine asks "whether an actual controversy continues to exist").

[47] *See supra* note 2 and accompanying text.

[48] This Note will focus on legislator standing while aiming to differentiate standing questions from those that arise under the political question doctrine. To that end, it is necessary here to briefly

courts typically consider the standing of legislators, and then proceed to consider whether the political question doctrine provides an independent rationale for finding a suit nonjusticiable.[49]

Like prudential standing, the political question doctrine is a judicial construct.[50] As one might expect, the doctrine excludes from judicial decision questions best left to the political process or political resolution. Whether a question is political depends on evaluation of a multifactor test the Court announced in the seminal case of *Baker v. Carr*:

> 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.[51]

At least one of these considerations must be present for the political question doctrine to apply.[52] Thus, for example, the Court has recognized the applicability of the doctrine to the issue of what constitutes trying impeachments under Article I, Section 3, Clause 6 of the U.S. Constitution[53]—largely under *Baker*'s textually demonstrable commitment and lack of a judicially discoverable and manageable standard for resolution prongs[54]—as well as the doctrine's bar on examining the actions of the military during Japanese internment in World War II[55]—there in an effort to show proper respect to coordinate branches of government.[56] Additionally, the Court has in some instances categorically barred suits

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summarize the political question doctrine in order to situate the doctrine in the context of a wider reformulation of legislator standing. *See infra* Parts II–III.

[49] In *Kerr*, for example, the Tenth Circuit first considered the legislators' standing and only then proceeded to consider the applicability of the political question doctrine. *See infra* note 117 and accompanying text.

[50] Luther v. Borden, 48 U.S. (7 How.) 1, 40–42 (1849). In *Luther*, the Court refused to issue an opinion on the merits in a dispute between competing governments in the State of Rhode Island. *Id.* The Court determined that "the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." *Id.* at 39.

[51] 369 U.S. 186, 217 (1962).

[52] *Id.*

[53] Nixon v. United States, 506 U.S. 224, 237–38 (1993).

[54] *Id.* at 229–38.

[55] Korematsu v. United States, 323 U.S. 214, 217–18 (1944).

[56] *Id.*

under certain constitutional provisions on the basis of the political question doctrine.[57]

The rationale for the political doctrine is a tortured question largely beyond the scope of this Note.[58] Suffice it to say for present purposes that whatever the proper rationale for the doctrine—whether it be doubts about the competence and capacity of courts to decide political questions,[59] or fear that the public will misunderstand judicial decisions touching on political issues,[60] or some other purpose—the doctrine is here to stay as a justiciability concern lurking behind any account of legislator standing.

### *B. Legislator Standing Jurisprudence*

*1.* Coleman *and* Raines.—The Supreme Court has shaped the doctrine of legislator standing through two primary cases. First, in *Coleman v. Miller*,[61] the Court appraised the standing of a majority of Kansas state legislators to challenge the state's ratification of an amendment to the U.S. Constitution. The legislators challenging ratification had voted against the amendment, but the overall vote resulted in a tie, which Kansas's lieutenant governor broke in favor of ratification.[62] The legislators asserted that this tie-breaking maneuver violated proper legislative process.[63] The Court concluded that the legislators should have standing as the suit implicated the "plain, direct and adequate interest in maintaining the effectiveness of their votes," also noting that the legislators' "votes against ratification have

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[57] One such categorical bar is of import to this Note. In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), and *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912), the Court refused to hear claims arising under the Constitution's Guarantee Clause, U.S. CONST. art. IV, § 4, on the basis of the political question doctrine. *Luther*, 48 U.S. at 42; *Pacific States*, 223 U.S. at 151. These cases are the basis of the traditional understanding that claims arising under the Guarantee Clause raise nonjusticiable political questions. Then, in *Baker v. Carr*, the Court affirmed the decisions in *Luther* and *Pacific States*, but did so on the basis that the cases raised issues pertaining to the aforementioned political question doctrine factors. 369 U.S. 186, 217–18, 222 & n.48, 228 (1962). It is not clear, therefore, whether *Baker* sustained the categorical political question doctrine bar on Guarantee Clause claims. Later, in *New York v. United States*, the Court stated in dicta that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. 144, 185 (1992). Based on *Baker* and *New York*, the Tenth Circuit decided that the Guarantee Clause claims raised in *Kerr v. Hickenlooper*, which this Note discusses in detail, did not present categorically nonjusticiable political questions. 744 F.3d 1156, 1175–76 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem.).

[58] For an overview and critique of competing rationales for the political question doctrine, and an argument that the political question doctrine should never influence a federal court's determination of whether a case is nonjusticiable, see Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1984).

[59] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (2d ed. 1986).

[60] *See id.*

[61] 307 U.S. 433 (1939).

[62] *Id.* at 435–36.

[63] *Id.* at 436.

been overridden and virtually held for naught although if [the legislators] are right in their contentions their votes would have been sufficient to defeat ratification."[64]

Following *Coleman*, the Court did not consider the issue of legislator standing for nearly sixty years, until its decision in *Raines v. Byrd*.[65] In *Raines*, six members of Congress challenged the constitutionality of the Line Item Veto Act,[66] arguing the President's ability to veto specific appropriations provisions from validly enacted laws diminished their constitutionally prescribed voting power.[67] Importantly, the Court narrowed *Coleman*'s precedential force to "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."[68] The Court further stated that "[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."[69] Because the Members of Congress "[had] not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated," the Court denied the Members of Congress standing.[70]

*2. Legislator Standing Post-*Raines.—Post-*Raines*, several lower federal courts have considered the standing of legislators bringing suit in their institutional capacities, although decisions on the subject have been relatively infrequent. Many decisions in the wake of *Raines* have come from the D.C. Circuit,[71] although select other circuits have issued opinions

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[64] *Id.* at 438.

[65] 521 U.S. 811 (1997).

[66] The Line Item Veto Act provided, in relevant part, that "the President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit," subject to certain specified conditions and procedural requirements. 2 U.S.C. § 691(a) (1996), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998). The Act further provided, pursuant to § 691b(a), that Congress could pass "disapproval bills" that would render any presidential cancellation "null and void." *Id.* § 691b(a).

[67] *Raines*, 521 U.S. at 816.

[68] *Id.* at 823.

[69] *Id.* at 826.

[70] *Id.* at 824.

[71] *See, e.g.*, Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); Alaska Legislative Council v. Babbitt, 181 F.3d 1333 (D.C. Cir. 1999); Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999). The high number of D.C. Circuit cases stems from the fact that many legislator lawsuits—including *Campbell* and *Chenoweth*—involve Congress. The issues relevant in these cases, notably separation of powers concerns, differ from those where state legislators bring suit. *See infra* note 172 and accompanying text.

discussing or applying *Raines*.[72] Most of these decisions were issued in the first five years following *Raines*. Following these early decisions, very few reported cases concern legislator standing.[73] The last three years, however, have produced at least three cases that raise important new questions about legislator standing.[74]

A majority of courts that have applied *Raines*, especially those applying *Raines* in the five years following its issue, have strictly applied *Raines*'s vote nullification standard and concluded that the legislator plaintiffs at issue lacked standing to bring their claims.[75] A leading example is *Campbell v. Clinton*, in which the D.C. Circuit affirmed the denial of standing to members of Congress who alleged President Clinton had violated the War Powers Resolution and the War Powers Clause of the Constitution by involving U.S. troops in a NATO campaign in Yugoslavia.[76] The members of Congress argued that, by failing to submit a report pursuant to the War Powers Resolution and giving Congress an opportunity to decide whether U.S. military involvement should continue, the President effectively nullified a prior vote in which Congress had chosen not to declare war.[77] The D.C. Circuit panel disagreed, reasoning that the members of Congress "enjoy[ed] ample legislative power" to remedy their alleged injury,[78] and therefore denied standing under *Raines*.[79]

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[72] *See, e.g.*, Baird v. Norton, 266 F.3d 408 (6th Cir. 2001); Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999).

[73] *See, e.g.*, Russell v. DeJongh, 491 F.3d 130 (3d Cir. 2007); Kucinich v. Obama, 821 F. Supp. 2d 110 (D.D.C. 2011).

[74] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013); *Kerr I*, 744 F.3d 1156 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem.).

[75] The D.C. Circuit has led the charge, starting with *Chenoweth*. In *Chenoweth*, members of the House of Representatives challenged a presidential executive order, alleging that the order impinged on "their constitutionally guaranteed responsibility of open debate and vote on [certain] issues and legislation." 181 F.3d at 113. After surveying circuit approaches to legislator standing pre-*Raines*, which more readily afforded standing to legislators, the court concluded that the members' alleged injury was nothing more than the abstract dilution of authority proscribed in *Raines*. *Id.* at 114–16. For treatment generally skeptical of legislator standing post-*Raines* in other circuits, see, for example, *Russell*, 491 F.3d at 135–38 (denying standing to a Senator of the Virgin Islands whose alleged injury amounted to nothing more than "seeing that the law is followed," and who had legislative remedies available); *Baird*, 266 F.3d at 413 (denying standing to Michigan state legislators on the basis that they could not show they had cast specific votes that had been nullified). *But see Miller*, 169 F.3d at 1122–23 (recognizing standing for a Nebraska state legislator to challenge a Nebraska state ballot measure that "threaten[ed] his political career and livelihood," thereby creating an "individualized, concrete injury" distinguishable from that lacking in *Raines*).

[76] 203 F.3d at 20, 24.

[77] *Id.* at 20. Congress voted not to declare war but did not take action to stop the President's initial decision to send troops to Yugoslavia, even funding the effort. *Id.*

[78] *Id.* at 23. These means were thought to consist of passing a resolution opposing the President's actions or defunding his efforts. *Id.*

Three noteworthy decisions of the past three years, however, have applied *Raines* and recognized the standing of legislators to bring suit. The first is *United States v. Windsor*, which concerned a challenge to the constitutionality of the Defense of Marriage Act (DOMA).[80] The case raised the issue of the standing of an entity called the Bipartisan Legal Advisory Group (BLAG), a group of members of the House of Representatives that sought to intervene on appeal to defend the constitutionality of DOMA.[81] While a majority of the Supreme Court elected not to address the BLAG's standing independent of the Executive (the named defendant in the suit),[82] Justices Alito and Scalia addressed the BLAG's standing in dissenting opinions.[83]

Justice Alito would have recognized the BLAG's standing,[84] but disagreed with the majority's holding that DOMA is unconstitutional.[85] Justice Alito reasoned that, under *Coleman* and *Raines*, lower courts' finding DOMA unconstitutional nullified the votes of members of the House of Representatives required to enact DOMA, thereby creating a cognizable injury in fact.[86] Justice Alito's dissent also framed the injury-in-fact inquiry somewhat more broadly, however, as requiring only a showing of a "limit[ation on] Congress' power to legislate."[87] Justice Scalia, on the other hand, disagreed that the BLAG's intervention created a justiciable case or controversy.[88] His dissent took particular issue with Justice Alito's "theory of jurisdiction," finding Justice Alito's conclusion and method contrary to *Raines*,[89] and reaffirming Justice Scalia's long-held position that

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[79] *Id.* at 23–24. The *Campbell* panel was not unanimous on the standing question. Rather, Judge Randolph wrote separately to challenge the panel's interpretation of *Raines*, arguing that "the majority's decision is tantamount to a decision abolishing legislative standing." *Id.* at 32 (Randolph, J., concurring in the judgment). Judge Randolph took particular issue with the panel's conflation of vote nullification and the ability to remedy an alleged legislative injury with a future vote, arguing the latter is not inconsistent with the former. *Id.* Ultimately, he would have denied standing, but only because the legislators failed to articulate in their pleadings precisely the injury for which they sought a remedy. *Id.* at 33.

[80] 133 S. Ct. 2675, 2682 (2013).

[81] *Id.* at 2684. The House gave the BLAG license to speak for the institution in the case. H.R. 5, 113th Cong. § 4(a)(1)(B) (2013).

[82] *Windsor*, 133 S. Ct. at 2688. As previously discussed, *see supra* note 41, the majority relied in part on the "BLAG's sharp adversarial presentation of the issues" in the case in holding that prudential concerns should not bar the Court from hearing the appeal. *Windsor*, 133 S. Ct. at 2688.

[83] *Windsor*, 133 S. Ct. at 2711–14 (Alito, J., dissenting); *id.* at 2703–05 (Scalia, J., dissenting).

[84] *Id.* at 2712 (Alito, J., dissenting).

[85] *Id.* at 2720.

[86] *Id.* at 2713–14.

[87] *Id.* at 2712.

[88] *See id.* at 2700–01 (Scalia, J., dissenting).

[89] *See id.* at 2703–04.

the judiciary should have no part in resolving disputes between the President and Congress.[90]

The second recent case of import for the legislator standing doctrine is *Arizona State Legislature v. Arizona Independent Redistricting Commission*, in which the Court recognized the standing of the Arizona State Legislature to challenge the constitutionality of a voter-created independent redistricting commission.[91] Writing for a five-Justice majority,[92] Justice Ginsburg found that creation of the commission "strip[ped] the Legislature of its alleged prerogative to initiate redistricting," and thus was a cognizable injury for standing purposes.[93] Rejecting arguments that the Arizona legislature should have to attempt to adopt redistricting measures to attain standing, the Court found sufficient injury in the legislature's inability to adopt redistricting measures without violating the state constitution and the voter proposition creating the commission.[94] In doing so, the Court distinguished *Raines* on the basis that the Arizona legislature "commenced [the] action after authorizing votes in both of its chambers," demonstrating institutional endorsement.[95] To that end, the Court likened the Arizona legislature's injury to that in *Coleman*, holding that the commission's existence "'completely nullif[ied]' any vote by the [Arizona] Legislature, now or 'in the future,' purporting to adopt a redistricting plan."[96] Accordingly, despite ultimately deciding against the

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[90] *Id.* at 2704–05. *See generally* Scalia, *supra* note 27.

[91] 135 S. Ct. 2652, 2665–66 (2015).

[92] Of the four dissenting Justices, only Justices Scalia and Thomas discussed standing, each joining the other's opinion arguing that the Arizona legislature did not have standing. *Id.* at 2694–97 (Scalia, J., dissenting); *id.* at 2697–99 (Thomas, J., dissenting). Chief Justice Roberts's and Justice Alito's positions on the Arizona legislature's standing, therefore, are unclear. Justice Scalia advanced his familiar position that federal courts' jurisdiction under Article III "[does] not include suits between units of government regarding their legitimate powers." *Id.* at 2694–95 (Scalia, J., dissenting). Justice Thomas commented on the Court's "tradition of disdain for state ballot initiatives," noting its inconsistency with the Court's holding on the merits, but concluded by explaining he would decide the case by finding the Arizona legislature lacked standing. *Id.* at 2697, 2699 (Thomas, J., dissenting).

[93] *Id.* at 2663–66 (majority opinion).

[94] *Id.* at 2663–64. Thus, the Court seemingly rejected the requirement that the Arizona legislature take a "specific legislative act" to obtain standing.

[95] *Id.* at 2664. The Court further distinguished *Raines* on the basis that the Arizona legislature's claim "does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here." *Id.* at 2665 n.12. Responding to Justice Scalia's concern that the Framers would have been "*all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments," *id.* at 2697 (Scalia, J., dissenting), the majority noted that the party invoking jurisdiction was in fact a state government. *Id.* at 2666 n.14 (majority opinion).

[96] *Id.* at 2665 (quoting Raines v. Byrd, 521 U.S. 811, 823–24 (1997)). Justice Scalia took issue with the majority's reliance on *Raines*, remarking that "*Coleman* was a peculiar case that may well stand for nothing" and downplaying the decision's precedential force. *Id.* at 2696–97 (Scalia, J., dissenting).

Arizona legislature on the merits,[97] the Court nevertheless found the legislature had standing to bring the suit forward.

The final decisions of import for legislator standing are the Tenth Circuit's rulings in *Kerr v. Hickenlooper*,[98] which provide the most in-depth discussion of the legislator standing doctrine among recent cases. In *Kerr*, current and former Colorado state legislators challenged the constitutionality of Colorado's Taxpayer Bill of Rights (TABOR), a voter-enacted amendment to the state constitution.[99] They argued TABOR violates the Guarantee Clause of the U.S. Constitution[100] and raised additional challenges.[101] After a district court certified the legislators' standing to bring suit,[102] a Tenth Circuit panel affirmed,[103] with Judge Lucero writing for the panel. Following this initial decision, the Supreme Court vacated and remanded the case to the Tenth Circuit for reconsideration in light of the Court's decision in *Arizona Independent Redistricting Commission*.[104] On remand, the Tenth Circuit reversed its position, holding the legislators did not have standing.[105]

To demonstrate an injury in fact, the *Kerr* legislators asserted that TABOR precludes them from performing "legislative core functions of taxation and appropriation."[106] Endeavoring to situate the legislators' injury in the context of *Coleman* and *Raines*, Judge Lucero initially considered the legislators' injury neither a nullification of an actual, otherwise effective vote nor a mere abstract dilution of institutional legislative power.[107] Ultimately, he concluded that the legislators' injury was "closer" to that involved in *Coleman* and emphasized that TABOR rendered the legislators' votes on tax issues advisory in nature, referencing *Coleman*'s

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[97] *Id.* at 2677 (majority opinion).

[98] *Kerr I*, 744 F.3d 1156 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem.).

[99] COLO. CONST. art. X, § 20. TABOR is a complex provision, but for the purposes of this inquiry, it is sufficient to note that TABOR precludes the Colorado state legislature from voting to enact tax increases, or tax policy changes that result in a net increase in taxation above a certain threshold, without submitting the desired increase to a popular vote. *Id.* § 20, cl. 4(a).

[100] U.S. CONST. art. IV, § 4.

[101] *Kerr I*, 744 F.3d at 1161. The *Kerr* plaintiffs argued that TABOR directly contravenes the Colorado Enabling Act, ch. 139, § 4, 18 Stat. 474, 474 (1875), under which Colorado was admitted as a state in 1876, and that TABOR impermissibly amends the Colorado Constitution.

[102] Kerr v. Hickenlooper, 880 F. Supp. 2d 1112, 1118, 1139 (D. Colo. 2012).

[103] *Kerr I*, 744 F.3d at 1172.

[104] Kerr v. Hickenlooper, 135 S. Ct. 2927 (2015) (mem.).

[105] *Kerr II*, No. 12-1445, 2016 WL 3126203, at *1 (10th Cir. June 3, 2016).

[106] *Kerr I,* 744 F.3d at 1163; *see also* Response to Governor's Opening Brief at 41, *Kerr I*, 744 F.3d 1156 (10th Cir. 2014) (No. 12-1445), 2013 WL 1721392, at *41 ("What has been 'lost' in the instant case is not *a* vote, but any ability to carry out the fundamental responsibility of a legislature to raise revenue needed to meet the needs of the state.").

[107] *Kerr I*, 744 F.3d at 1165–66.

effectiveness standard.[108] Thus, Judge Lucero eschewed the notion that the legislators should have to identify a "specific legislative act"—in this case, a referred tax increase[109]—for which their votes had been nullified.[110] Rather, the nature of the legislators' injury was "disempowerment rather than the failure of any specific tax increase."[111] Judge Lucero further opined that "it would be a bizarre result if the nullification of a single vote supported legislative standing, but the nullification of a legislator's authority to cast a large number of votes did not."[112]

Judge Lucero relied upon two additional considerations in distinguishing the legislators' injury from that in *Raines*. First, he observed that because TABOR cannot be repealed by the Colorado legislature, the legislators were without recourse for their alleged injuries by way of the ordinary legislative process.[113] The *Kerr* legislators had not lost a vote for which they were seeking relief in the courts as in *Raines*; rather, the legislators "allege[d] that TABOR has stripped the legislature of its rightful power."[114] Second, he noted that the plaintiffs' identity as state, as opposed to federal, legislators mitigated the separation of powers concerns that animated the decision in *Raines*.[115] He added that while the Colorado General Assembly had not formally endorsed or authorized the legislators to bring suit, the General Assembly submitted an amicus curiae brief supporting the legislators' standing,[116] again distinguishing *Raines*, in which both houses of Congress opposed the legislators' suit.[117]

Following the panel's decision, the defendants moved for rehearing en banc, which the Tenth Circuit voted to deny.[118] Four judges dissented from the denial, one of whom, Judge Tymkovich, wrote a dissenting opinion disputing the panel's recognition of the legislators' standing. Judge Tymkovich hypothesized that authorizing standing in this circumstance would permit legislators to bring suit to vindicate legislative core functions

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[108] *Id.* at 1165–67.

[109] Under TABOR, the Colorado state legislature can "refer" tax increases for popular vote, but cannot enact them unilaterally. COLO. CONST. art. X, § 20, cl. 3(b).

[110] *Kerr I*, 744 F.3d at 1168.

[111] *Id.* at 1169.

[112] *Id.* at 1170.

[113] *Id.* at 1166.

[114] *Id.* at 1167.

[115] *Id.* at 1168.

[116] *Id.* at 1168 & n.7.

[117] Raines v. Byrd, 521 U.S. 811, 829 (1997). Finding that the legislator plaintiffs had standing to sue, Judge Lucero proceeded to explain why the political question doctrine should not bar their claims. *Kerr I*, 744 F.3d at 1172–81.

[118] Kerr v. Hickenlooper, 759 F.3d 1186, 1186 (10th Cir. 2014).

potentially obstructed by other state constitutional amendments.[119] He also countered the legislators' notion of what constitutes an "effective" vote under *Coleman*, contending that "effectiveness" in this context could be achieved by the legislators voting to refer a tax measure to Colorado's electorate, even if the measure was not ultimately adopted.[120] Ultimately, Judge Tymkovich argued for a strict interpretation of *Raines*, under which "legislative standing is limited to claims of nullifications of specific, otherwise valid votes," concluding that the *Kerr* legislators had not suffered an injury of this type.[121]

On remand, Judge Lucero centered on what the panel construed to be the core holding in *Arizona Independent Redistricting Commission*: that "individual legislators," like those in *Kerr*, "lack standing because they assert only an institutional injury."[122] *Arizona Independent Redistricting Commission*, Judge Lucero concluded, "materially alter[ed] the jurisprudence on legislator standing."[123] It established a "threshold question" of whether individual legislators assert individual or institutional injury.[124] In the latter instance, Judge Lucero interpreted *Arizona Independent Redistricting Commission* to preclude standing. He proceeded, however, to acknowledge that this analytical approach was "difficult to square" with *Coleman* and *Raines*, the latter of which he described as "internally inconsistent."[125] He further conceded that "*Arizona* did not expressly hold that only an institutional plaintiff possesses standing to assert an institutional injury," inviting the Court to "clarify the matter on further review."[126] Still, notwithstanding its recognition that *Kerr* "parallels [*Arizona Independent Redistricting Commission*] in many respects,"[127] the panel denied the legislators' standing.

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[119] *See id.* at 1188–89 (Tymkovich, J., dissenting) (arguing, for example, that based on the panel decision, legislators could bring suit to strike down Colorado's constitutional amendment legalizing recreational marijuana, COLO. CONST. art. XVIII, § 16, on the basis that the provision deprives the legislature of its legislative core function of "codifying the criminal law").

[120] *Kerr*, 759 F.3d at 1190–91.

[121] *Id.* at 1191.

[122] *Kerr II*, No. 12-1445, 2016 WL 3126203, at *1 (10th Cir. June 3, 2016). Note that this focus departs from, and does not address, the issues presented by the dissenters from the prior denial of hearing en banc.

[123] *Id.*

[124] *Id.* at *4.

[125] *Id.* at *4.

[126] *Id.* at *5.

[127] *Id.* at *3.

## II. LEGISLATOR STANDING AT PRESENT: SYNTHESIS AND SHORTCOMINGS

This Part begins by synthesizing the current approach to legislator standing. The current approach consists first of determining whether legislators' injuries constitute nullified votes or abstract dilutions of institutional legislative power, and then considering a number of additional, prudential factors. Nullified votes, when buttressed by an absence of prudential factors that would otherwise counsel against justiciability, warrant standing.

This Part then critiques the current approach in two stages, first by discussing shortcomings of the vote nullification–abstract dilution of legislative power paradigm and exploring the paradigm's underinclusiveness. This Part then argues that additional factors in the legislator standing analysis are prudential in nature and have therefore been preempted by the Court's decision in *Lexmark*, or are in any event ill-founded considerations that should play no role in legislator standing analysis.

### *A. The Current Approach to Legislator Standing*

*1. Vote Nullification or Abstract Dilution of Institutional Legislative Power?*—As discussed in more detail in Part I, the dominant approach of courts that have considered the standing of legislators post-*Raines* has been to consider whether legislators' asserted injuries rise to "the level of vote nullification at issue in *Coleman* [or] the abstract dilution of institutional legislative power" alleged in *Raines*.[128] If an alleged injury amounts to no more than an abstract dilution of institutional legislative power, courts have refused to recognize legislators' standing.[129] Alternatively, where legislators can demonstrate their votes have been nullified, courts have permitted legislators' claims to proceed.[130]

What constitutes "nullification," however, is less than clear.[131] It appears settled that "an official's mere disobedience or flawed execution of

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[128] *Raines*, 521 U.S. at 826. The Court's recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* indicates that vote nullification remains the operative standard. 135 S. Ct. 2652, 2665 (2015) (describing the Arizona legislature's injury as nullification of any present or future vote). Thus, contrary to the Tenth Circuit's decision on remand in *Kerr*, *Arizona Independent Redistricting Commission* did not "materially alter" legislator standing jurisprudence by eliminating standing where individual legislators sue on institutional injuries. *Kerr II*, 2016 WL 3126203, at *6. If anything, the Court's decision implicitly *expanded* legislator standing by also recognizing that the Arizona legislature had lost an *opportunity* to vote. *See infra* note 135 and accompanying text.

[129] *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 23–24 (D.C. Cir. 2000).

[130] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2713–14 (2013) (Alito, J., dissenting).

[131] "It is, to be sure, not readily apparent what the Supreme Court meant by [nullified.]" *Campbell*, 203 F.3d at 22.

a law for which a legislator voted . . . is not an injury in fact for standing purposes."[132] It remains unsettled, however, whether deprivation of an opportunity to vote,[133] as opposed to cancellation of a recorded vote, constitutes nullification.[134] To that end, there is some suggestion that legislators might suffer certain cognizable injuries that cannot be construed as vote nullification, at least where there is loss of a voting opportunity or perceived voting right.[135]

*2. Additional Factors.*—Courts have then proceeded to consider at least four additional factors that inform the legislator standing inquiry, many of which originated in *Raines*. The first is a notion of the separation of powers that seems to hold that the province of the judiciary should not extend to deciding disputes between the Executive and Legislative branches.[136] The Court in *Raines* relied upon a historical practice of judicial abstention from disputes between the Executive and Legislature,[137] and subsequent decisions of federal courts denying standing for legislators have continued to rely upon separation of powers concerns.[138]

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[132] Russell v. DeJongh, 491 F.3d 130, 134 (3d Cir. 2007).

[133] Deprivation of an opportunity to vote consists of complete denial of a perceived voting right, such that a vote is never recorded. For example, in *Kerr v. Hickenlooper*, the legislator plaintiffs' injury was not cancellation of a recorded vote, but deprivation of an opportunity to vote on tax measures at all. *See supra* note 106 and accompanying text.

[134] *Compare Russell*, 491 F.3d at 135 ("[D]epriving a legislator of an opportunity to vote . . . is an injury in fact."), *with* Chenoweth v. Clinton, 181 F.3d 112, 115 (D.C. Cir. 1999) (holding deprivation of Congressmen's "right[] to participate and vote on legislation in a manner defined by the Constitution" did not satisfy Article III's injury in fact requirement (alteration in original) (quoting Moore v. U.S. House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984))).

[135] *Kerr I*, 744 F.3d 1156, 1170 (10th Cir. 2014) ("[W]e do not read *Raines* to require legislators seeking standing to plead facts" demonstrating nullification of a specific vote.), *vacated*, 135 S. Ct. 2927 (2015) (mem.); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2663, 2665 (2015) (characterizing the Arizona legislature's alleged injury as loss of "the opportunity to engage (or decline to engage) in redistricting," and then rejecting any requirement that the legislature have undertaken (or attempted to undertake) any specific legislative act).

[136] Raines v. Byrd, 521 U.S. 811, 819–20 (1997) ("[O]ur 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."); *see also id.* at 832–33 (Souter, J., concurring in the judgment) ("Because it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing, it behooves us to resolve the question under more general separation-of-powers principles underlying our standing requirements.").

[137] *Id.* at 826–29 (majority opinion) (concluding that "[i]t is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power," and considering various historical disputes between the Executive and Legislative branches not resolved by the judiciary as evidence that such suits are not justiciable).

[138] *See, e.g.*, *Russell*, 491 F.3d at 133 ("Concerns for separation of powers and the limited role of the judiciary . . . are particularly acute in legislator standing cases . . . ." (citation omitted)); *Chenoweth*, 181 F.3d at 116 (interpreting *Raines* to require the court to "merge [its] separation of powers and standing analyses"); *see also* United States v. Windsor, 133 S. Ct. 2675, 2704–05 (2013) (Scalia, J., dissenting) (arguing that "confrontation" between Congress and the President outside of a courtroom,

A second, oft-cited factor is whether ordinary legislative means remain available to legislators seeking judicial recourse.[139] This factor relates to the separation of powers concerns discussed in the previous paragraph in that, if legislative means remain available, it is not the proper place of the judiciary to involve itself.[140] The nature and type of legislative means sufficient to satisfy this factor are somewhat unclear. The decision in *Raines* seems to envision the hypothetical possibility of repealing, enacting, or defunding offending legislation as sufficient.[141] Decisions interpreting *Raines*, however, have offered varying interpretations of adequate legislative means.[142]

A corollary of the requirement of exhaustion of legislative means is a third factor: that legislator plaintiffs have the support of the institution in which they serve, reflecting the notion that the alleged injury stems from their membership in a legislative body.[143] The content of this factor, as opposed to the others discussed in this Section, appears settled: legislator

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rather than a lawsuit, is the proper means of resolving interbranch disputes); *cf. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665 n.12 ("There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here."); *Kerr I*, 744 F.3d at 1168 ("[B]ecause the present suit deals with the relationship between a state legislature and its citizenry, we are not presented with the separation-of-powers concerns that were present in *Raines*.").

[139] *Raines*, 521 U.S. at 829 ("We also note that our conclusion [denying standing] neither deprives Members of Congress of an adequate remedy (since they may repeal the [challenged] Act or exempt appropriations bills from its reach)."); *see also Russell*, 491 F.3d at 135–36 (refusing to recognize the standing of a legislator in part on the basis that effective remedies remained in the political process); *cf. Kerr I*, 744 F.3d at 1169 (distinguishing the "extent and type of disempowerment" of the legislator plaintiffs from instances in which legislative remedies remained available).

[140] *See Windsor*, 133 S. Ct. at 2704–05 (Scalia, J., dissenting) ("If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit . . . . But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so.").

[141] *Raines*, 521 U.S. at 829.

[142] *Compare* Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000) (finding the legislator plaintiffs retained "ample legislative power" to remedy their alleged wrongs, despite the legislators having failed in their attempts to pass a concurrent resolution against and oppose appropriations for challenged Executive action), *with Kerr I*, 744 F.3d at 1168 (finding the legislator plaintiffs lacked the "ability to correct [their] alleged injury through ordinary legislation," notwithstanding any particular assertion of a frustrated effort on the part of the legislators). *See also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2664 (holding that "[t]o establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State's fundamental instrument of government").

[143] *See Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting) (citing *Raines* for the proposition that "lack of institutional endorsement [is] a sign of [a] standing problem" for legislators bringing suit in their institutional capacities); *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2664 (commenting favorably that the Arizona legislature "commenced this action after authorizing votes in both of its chambers"); *Kerr II*, No. 12-1445, 2016 WL 3126203, at *4–6 (10th Cir. June 3, 2016).

plaintiffs must have, at minimum, the support of the majority of the chamber in which they serve as a legislator.[144]

Finally, courts have considered whether a private citizen, as opposed to a legislator, could bring suit to remedy the alleged wrong. The Court in *Raines* explicitly relied on this possibility,[145] and shortly after the decision was issued, a private citizen successfully brought suit.[146] The purpose behind this factor appears to be twofold: first, to help guard against entertaining suits asserting generalized grievances,[147] and second, to ensure the judiciary's proper respect for the separation of powers.[148]

### *B. Critique of the Current Approach to Legislator Standing*

*1. Problems with the Vote Nullification–Abstract Dilution of Institutional Legislative Power Paradigm.*—Federal courts have struggled in applying the Court's vote nullification–abstract dilution of institutional legislative power paradigm.[149] The Court has taken note of this struggle,[150] and its decisions suggest the present Court might prefer a different standard.[151] This dissatisfaction reflects two particular problems

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[144] For example, in *Windsor*, the House of Representatives authorized the BLAG to defend the constitutionality of DOMA. *See supra* note 81 and accompanying text; *see also Kerr II*, 2016 WL 3126203, at *5 (discussing lack of institutional endorsement in the Colorado General Assembly as militating against standing); *cf. Raines*, 521 U.S. at 829 ("We attach some importance to the fact that [the legislator plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.").

[145] *Raines*, 521 U.S. at 829 ("We also note that our conclusion [does not] . . . foreclose[] the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).").

[146] *See* Clinton v. City of New York, 524 U.S. 417 (1998).

[147] *See* Russell v. DeJongh, 491 F.3d 130, 135 (3d Cir. 2007) ("[A] legislator's interest in seeing that the law is followed is no different from a private citizen's general interest in proper government.").

[148] *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment) (reasoning that entertaining a suit by a private citizen, as opposed to hearing an "interbranch controversy about calibrating the legislative and executive powers, as well as an intrabranch dispute between segments of Congress . . . would expose the Judicial Branch to a lesser risk").

[149] *See supra* notes 131–35 and accompanying text.

[150] In the *Windsor* decision, Justice Scalia incisively captured the frustrating nature of the vote nullification standard in a footnote: "A principled and predictable system of jurisprudence cannot rest upon a shifting concept of injury, designed to support standing when we would like it." 133 S. Ct. 2675, 2704 n.3 (2013) (Scalia, J., dissenting).

[151] Based on his opinion in *Windsor*, *see* discussion *supra* notes 84–87 and accompanying text, Justice Alito seems to envision broader standing for legislators. That he did not join dissents discussing standing in *Arizona Independent Redistricting Commission*, *see supra* note 92, lends some support to that understanding. Chief Justice Roberts, despite objecting to standing in *Windsor*, did not specifically dissent on standing in *Arizona Independent Redistricting Commission*, while the opposite is true of Justice Thomas (who did not dissent on standing in *Windsor*, but dissented in *Arizona Independent Redistricting Commission*). Justice Scalia, of course, adamantly opposed standing for legislators, but was no supporter of the vote nullification standard either. *See supra* note 150. And as for the rest of the present Court, the majority's decision in *Arizona Independent Redistricting Commission* affirmed the continuing vitality of vote nullification, but envisioned the concept somewhat more broadly. 135 S. Ct.

that have arisen from grounding the legislator standing doctrine in vote nullification. First, the Court's use of vote nullification in *Raines* was meant to cabin *Coleman*'s potentially expansive vote-effectiveness language in the particular circumstance of *Raines*.[152] Courts have then tried to apply vote nullification in other contexts, however, for which the standard is ill suited. Second, vote nullification helps understand some aspects of the legislative function, but does not account for every injury a legislator might have. Thus, vote nullification will not capture some injuries that should be cognizable under Article III.

As discussed in Part I, the decision in *Raines* arose to respond to language in *Coleman* that might have given rise to legislators, specifically members of Congress, making expansive use of judicial fora in resolving disputes with the Executive.[153] It is not surprising that this possibility influenced the Court to recognize only very isolated circumstances in which legislators might have standing to sue for failed execution or implementation of the law.[154] *Raines* might have come out differently, however, if the named defendant and the manifestation of injury, or both, changed. The Court might have treated the legislators' standing very differently if the case involved not interbranch conflict, but members of Congress suing a different entity.[155] Additionally, the Court might have

2652, 2664–65 (2015) (characterizing the Arizona legislature's injury as both a lost opportunity to vote and vote nullification). This seems to follow logically from Justices Breyer's and Ginsburg's statements in prior cases. In his dissent in *Raines*, Justice Breyer envisioned broader standing for legislators bringing suit in their institutional capacities based on foundational adverseness, rather than vote nullification. 521 U.S. at 839 (Breyer, J., dissenting) ("I concede that there would be no case or controversy here were the dispute before us not truly adversary, or were it not concrete and focused. But the interests that the parties assert are genuine and opposing, and the parties are therefore truly adverse."). Justice Ginsburg joined a concurrence in *Raines* that agreed that standing should be denied largely on separation of powers grounds, rather than holding that the legislators did not demonstrate a sufficient injury in fact. *See id.* at 832–33 (Souter, J., concurring in the judgment). This point was also central to the majority opinion she authored in *Arizona Independent Redistricting Commission*. 135 S. Ct. at 2665 n.12.

[152] *See Raines*, 521 U.S. at 825–26 (appraising the legislator plaintiff's desired definition of *Coleman*'s concept of an "effective" vote as a "drastic extension" the Court was "unwilling to take").

[153] Note, *Standing in the Way of Separation of Powers: The Consequences of* Raines v. Byrd, 112 HARV. L. REV. 1741, 1750 (1999) ("A close examination of the *Raines* opinion reveals that the majority was making a[n] . . . argument against 'a system of judicial refereeship' in denying congressional standing. . . . [The] Court made various statements hinting that political disputes within the legislature should be resolved through the legislative process—not through litigation."); *see also* Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 281 (2001) (commenting on the propensity for legislators to bring suit in court, particularly that "legislators will be inclined to use the courts as a political venue to challenge the President or other Executive Branch officials").

[154] *See* Note, *supra* note 153, at 1752–53 (identifying "concerns about the dangers of judicial self-aggrandizement from interfering with the political process by umpiring intrabranch and interbranch disputes" as motivating *Raines*'s vote nullification standard).

[155] *See Raines*, 521 U.S. at 828–29 (describing the "restricted role for Article III courts" as "not some amorphous general supervision of the operations of government" (quoting United States v.

been more willing to entertain a suit alleging abridgement of some other enumerated power, as opposed to dilution of an already exercised power.[156] Predictably, therefore, lower federal courts have struggled to apply *Raines* when legislators have named non-Executive defendants and sought relief for different types of injuries.[157]

To that end, if *Raines* is understood to equate the only possible cognizable injury to legislators in their institutional capacities with vote nullification, *Raines* misunderstands the nature of the legislative function.[158] As just one example of this misunderstanding, legislators can suffer reputational or electoral injuries when they lose an opportunity to vote—even where a vote would fail to produce official action—because voters respond to individual votes at the ballot box, even where votes result in no official action.[159] Legislators frequently introduce and vote for "statement" legislation as a way of appealing to their base electorate, even where the legislation has no chance of passing.[160] Additionally, focusing narrowly on voting ignores the value of open debate and the free exchange of ideas that precede and inform voting in our democratic process.[161] It is not difficult to imagine hypothetical situations in which the majority party of a legislative chamber imposes discriminatory obstacles on members of a minority

Richardson, 418 U.S. 166, 192 (1974))); *see also* Note, *supra* note 153, at 1751 (explaining the *Raines* decision as evincing hesitation on the part of the Court to "serve as an umpire of political disputes *between the other two branches*" (emphasis added)). Additionally, as the Court stated in *Arizona Independent Redistricting Commission*, suits concerning the proper role of state government do not present the same concerns. *Supra* note 95 and accompanying text.

[156] *See Raines*, 521 U.S. at 829–30 (summarizing the context of the legislators' suit and observing that "[w]hether the case would be different if any of these circumstances were different we need not now decide"); *see also* Arend & Lotrionte, *supra* note 153, at 260 (emphasizing the "narrowness" of the holding in *Raines*, and discussing instances in which legislators might have standing).

[157] *See, e.g.*, *supra* notes 131–35 and accompanying text.

[158] *See* Note, *supra* note 153, at 1757 (describing "the implication that nullification of a vote would be judicially cognizable but nullification of a right to vote would not be" a "deep[] problem").

[159] *Cf.* R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 375 (1986) ("[Legislators] may vote in favor of legislation about which they have substantial doubts because it would be difficult to explain a contrary vote to their constituents."). To the extent one might view such injuries as "just part of politics," Article III provides no indication why a politically significant injury creates any less of a case or controversy than an injury in another context.

[160] For artistic commentary on a well-known contemporary example, see Mike Smith, *Attempts to Repeal Obamacare Continue*, HUFFINGTON POST (Feb. 10, 2015, 8:46 AM), http://www.huffingtonpost.com/mikesmith/attempts-to-repeal-obamace_b_6648616.html [http://perma.cc/957Y-WW5R].

[161] *See* U.S CONST. art. I, § 6, cl. 1 ("[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

party's efforts to introduce, debate, or vote on legislation.[162] Such actions should be understood to injure these legislators in their institutional capacities—"zero[ing] in on any individual member"[163]—despite not involving nullification of a recorded vote.

Given this context, the Court's decision in *Raines* cannot—or at least should not—be read to address every instance in which legislators might seek standing to bring suit in federal court in their institutional capacities.[164] An improved framework for evaluating legislator standing, therefore, would abandon the requirement that federal courts shoehorn variant legislative injuries into one of two categories—vote nullification or not—that are incapable of encompassing the likely scope of those injuries.

*2. Problems with Additional Factors in the Legislator Standing Analysis.*—As outlined in Part II.A.2, in addition to considering if legislators' posited injuries amount to vote nullification, courts have evaluated a number of additional factors that might influence whether to recognize standing. Despite a significant lack of clarity in how exactly these factors should influence the legislator standing analysis, the factors are most akin to prudential considerations that might counsel for or against recognizing standing, whether a cognizable injury in fact exists or not.[165] To that end, following the Court's recent decision in *Lexmark*, these factors should be abandoned unless they can be recategorized as finding their basis in Article III, which they cannot. Even if the factors are not wholly prudential, and therefore unaffected by *Lexmark*, they are nevertheless ill-founded considerations.

As discussed in Part I.A.2, prudential standing has historically consisted of a set of judicially created norms that supplement the standing requirements of Article III. The Court's treatment of additional factors in the legislator standing analysis as supplementary to an initial consideration of whether the legislators' alleged injuries amount to vote nullification

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[162] As unlikely as these circumstances may seem, the *Raines* majority itself was aware of such situations and seemed to imply that allegations of "discriminatory" actions might constitute an injury in fact. *See* Raines v. Byrd, 521 U.S. 811, 824 n.7 (1997).

[163] *Kerr II*, No. 12-1445, 2016 WL 3126203, at *4 (10th Cir. June 3, 2016) (citing Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652, 2664 (2015)). The Tenth Circuit on remand in *Kerr* seemed to recognize this point, but summarily rebuffed the legislators' claims based on an insufficiently nuanced reading of *Arizona Independent Redistricting Commission*. *Supra* note 128 and accompanying text.

[164] *See* Arend & Lotrionte, *supra* note 153, at 255 ("[R]ather than develop a detailed doctrine of legislator standing . . . the Court [in *Raines*] decided the case on exceptionally narrow grounds and left many questions unanswered.").

[165] These factors are best considered prudential because they are judicially created and are not, as discussed in this Section, consistent with traditional Article III standing analysis.

suggests, therefore, that the additional factors are prudential in nature.[166] For the most part, lower federal courts interpreting *Raines* have treated these additional factors in a prudential manner.[167] Thus, the Court's recent *Lexmark* decision seems to counsel that these factors, unless they can be reclassified as finding their basis in Article III, should be abandoned.[168] Because these factors are inconsistent with a traditional, Article III standing analysis, and are in any case ill founded, they should not influence the legislator standing doctrine.

As for the first factor—whether separation of powers concerns counsel against recognizing legislators' standing—it is unclear why an additional separation of powers inquiry should follow satisfaction of Article III standing requirements, which are of themselves meant to ensure proper cabining of the judicial role.[169] If additional concerns about the capacity of the judiciary to resolve a particular dispute remain, these would seem best resolved by recourse to mootness or the political question doctrine,[170] if at all.[171] And, as an ancillary matter, the separation of powers concerns that

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[166] *See Raines*, 521 U.S. at 829–30 (finding that, in addition to the legislator plaintiffs failing to allege their votes had been nullified, the legislators did not have the approval of the House, they retained adequate legislative remedies, and a private citizen could bring suit instead).

[167] *See, e.g.*, *Kerr I*, 744 F.3d 1156, 1167–69 (10th Cir. 2014) (observing, only after addressing *Raines*'s vote nullification standard, that the legislator plaintiffs' claims did not raise compromising separation of powers concerns, legislative remedies were unavailable, and the plaintiffs' legislative chamber had intervened in their favor), *vacated*, 135 S. Ct. 2927 (2015) (mem.).

[168] *See supra* note 40 and accompanying text.

[169] *See supra* note 27 and accompanying text; Weiner, *supra* note 3, at 230 ("Though separation of powers proponents typically counsel against premature transfer of disputes from the political branches to the judiciary, the ban on advisory opinions and the ripeness doctrine already account for these concerns."). Additionally, as commentators have noted, the great irony in denying standing to legislators on separation of powers grounds is that legislators often bring suit to *vindicate* the separation of powers. Note, *supra* note 153, at 1758 ("Although *Raines v. Byrd* is best understood as a decision seeking to preserve separation of powers by restricting congressional standing, the Court failed to acknowledge that such special restrictions might result in inadequate enforcement of the principle of separation of powers.").

[170] *See* Blank, *supra* note 2, at 623 ("[T]he Court has employed standing as a convenient method to dismiss politically-oriented cases it does not want to decide on the merits. This result is analytically curious because the Court has more appropriate means by which it could dismiss the suit . . . ."). Blank suggests courts might utilize the ripeness doctrine, *id.*, but the political question doctrine seems an equally apt choice.

[171] *See, e.g.*, Redish, *supra* note 58, at 1059–60 ("[W]e must abandon the political question doctrine, in all of its manifestations. The doctrine inherently implies that one or both of the political branches may continue conduct that could conceivably be found unconstitutional, without any examination or supervision by the judicial branch. The moral cost of such a result, both to society in general and to the Supreme Court in particular, far outweighs whatever benefits are thought to derive from the judicial abdication of the review function.").

might militate against denying standing to resolve an interbranch conflict may not apply when legislators bring suit in a different context.[172]

The second factor asks whether ordinary legislative means remain available to legislators seeking judicial recourse. This concern seems directly at odds with traditional standing considerations where private citizens are involved and there is no such "exhaustion" requirement.[173] Additionally, in the legislator standing context, exhaustion of legislative remedies will often be impossible, as legislator plaintiffs that are members of a minority party do not have any reasonable chance of persuading enough of their colleagues to take legislative action.[174] Article III does not incorporate the will of the political majority as defining injury in fact, but entrusts the judiciary with performing a countermajoritarian function.[175]

To that end, the third factor, gaining support of a majority of the legislative chamber concerned, will not be feasible for most if not all legislator plaintiffs of a minority party.[176] From an Article III perspective, there is no reason why this support is necessary. Individual members of associational bodies do not have to receive permission from the institution, or support from a majority of its members, in order to bring a cognizable suit under Article III.[177] In fact, the Court's associational standing jurisprudence functions in the opposite manner: institutions have standing only insofar as individual members are injured.[178]

Finally, it should make no difference whether, under the fourth factor, a private citizen might bring suit. Article III is agnostic as to whether there is a different, hypothetical plaintiff who might bring a "better" lawsuit, as

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[172] *See, e.g.*, *Kerr I*, 744 F.3d at 1168 (distinguishing *Raines* on the basis that the legislator plaintiffs' claims raised questions about "the relationship between a state legislature and its citizenry," as opposed to Congress and the President).

[173] *See* Blank, *supra* note 2, at 618 (observing that private citizens are not required to exhaust non-judicial remedies in order to demonstrate an Article III injury in fact).

[174] *See* Alaska Legislative Council v. Babbitt, 181 F.3d 1333, 1338 (D.C. Cir. 1999) (observing that "there [was] not the slightest suggestion" that the seventeen legislator plaintiffs "had the votes" to take legislative action); *see also* Note, *supra* note 153, at 1754 ("[T]he Court's requirement that the plaintiffs either have authorization of either House or form a voting bloc sufficient to enact or defeat a measure implies that those who would have access to the courts do not need it, whereas those who need access would not have it.").

[175] *See* Scalia, *supra* note 27, at 894. An implication of this point is that, if a majority of a legislative body injures the minority, the judiciary should not abdicate its role by deferring to the majority on whether minority members are injured.

[176] *See Babbitt*, 181 F.3d at 1338.

[177] *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977) (requiring, for the purposes of associational standing, that an association show "the interests it seeks to protect are germane to the organization's purpose," but imposing no requirement of majority support by the organization).

[178] *Id.* at 342–43 (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975)).

long as the party before the Court can show the requisite injury in fact.[179] Even if the Court was concerned about the standing of hypothetical plaintiffs relative to one another, legislators will in some cases possess a superior litigation position where institutional injuries—injuries to their legislative capacities—are involved.[180] Additionally, as the Court has recognized, waiting for a private citizen to bring suit might permit constitutional violations to continue unabated.[181] And finally, if a private citizen were to bring suit, Article III's bar on generalized grievances might apply.[182]

For the foregoing reasons, prudential considerations that have significantly influenced the standing analysis should no longer dictate courts' analyses of legislator standing. Removing consideration of these factors laudably redirects the inquiry to Article III—specifically, what constitutes an adequate legislative injury—and other justiciability concerns.

## III. REFORMULATION OF THE LEGISLATOR STANDING DOCTRINE

This final Part proposes a reformulation of the legislator standing doctrine. It starts from the following premises, as discussed in Part II: first, limiting legislators' cognizable injuries in fact to nullifications of recorded votes misreads *Raines* and misunderstands the legislative function; and second, prudential considerations that have traditionally informed the courts' consideration of legislator standing should so inform no longer. This Part then proceeds to consider alternatives for defining a legislative injury in fact under Article III. It concludes that it should suffice for Article III purposes that a legislator can identify the abridgement of a constitutionally or statutorily enumerated legislative power. This should include certain instances of depriving legislators of an opportunity to vote.

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[179] This injury need be concrete in order to be adequate, but need not be superior to another's interest. *See supra* notes 23–28 and accompanying text; *see generally* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014) (recognizing a pattern of the Supreme Court performing "a relative assessment of superiority" in cases involving nontraditional plaintiffs, despite standing doctrine's traditional concern solely with the adequacy of injury).

[180] Re, *supra* note 179, at 1234–35 (arguing that where "nontraditional plaintiffs," as in legislators, bring suit, federal courts should recognize standing under Article III in instances where legislators have a "superior interest," or "greatest stake," in the suit, and discussing injuries manifested by legislative procedure as an example).

[181] *See* Weiner, *supra* note 3, at 231–32 (using *Raines* as an example of an instance in which a judicially prescribed waiting period for a citizen plaintiff to bring suit can require the Executive and Legislative Branches to presume the constitutionality of an act that is in fact unconstitutional, resulting in a greater volume of unconstitutional action than if the Court had recognized the standing of legislators and reached the merits in their suit).

[182] If an alleged injury to the institutional capacity of a legislature has no substantive impact on individual citizens, any one citizen represented by the legislature would have an interest undifferentiated from his or her fellow citizens. *See supra* note 34 and accompanying text.

Recognizing that this definitional change will expand the number of instances in which legislators have suffered a cognizable injury in fact, this Part concludes by discussing how other aspects of justiciability, including ripeness and the political question doctrine, can cabin legislators' potentially litigious desires and assuage the separation of powers concerns that have long undergirded the legislator standing doctrine.

In a world without precedent, federal courts could use a number of definitional standards to determine what constitutes a cognizable legislative injury. Vote nullification, which this Note has explored in detail, is one of the narrowest possibilities.[183] Denying legislator standing completely is probably the only narrower option, but has not been and should not be the doctrinal approach moving forward.[184]

On the other hand, there are a number of options broader than nullification. One, as the plaintiffs in *Kerr* presented, is to grant standing to legislators whenever they assert an injury to a "legislative core function."[185] This option has some intuitive appeal, as the Supreme Court has resorted to the definition of "legislative" in the context of other doctrines.[186] At least in the case of *Kerr*, however, the definition of injury assumes what it seeks to prove, in that the suit seeks to vindicate alleged rights of republican governance.[187] Additionally, permitting legislators to sue any time they feel as if some action violated a core legislative function would likely lead to an

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[183] *See* Blank, *supra* note 2, at 624 (commenting that after *Raines*, "[i]n all likelihood, the courthouse door has finally slammed shut" to legislators suing in their institutional capacities).

[184] Denying legislator standing entirely is not without its advocates. Chief among them are Justice Scalia and former Judge Robert Bork. Their positions reflect concern that the Framers never envisioned the judiciary resolving disputes between the Executive and Legislative Branches. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting) ("[T]he 'enormous power that the judiciary would acquire' from the ability to adjudicate such suits 'would have made a mockery of [Hamilton's] quotation of Montesquieu to the effect that "of the three powers above mentioned . . . the JUDICIARY is next to nothing."'" (alterations in original) (quoting Barnes v. Kline, 759 F.2d 21, 58 (D.C. Cir. 1985) (Bork, J., dissenting))). This position fails to account for legislator suits that do not name the Executive as defendant and do not concern mere dissatisfaction with execution of the laws. It also fails to consider negative ramifications for the separation of powers that might result from denying standing in such suits.

[185] *Supra* note 106 and accompanying text.

[186] Formalist approaches to the separation of powers depend upon the definition of "legislative" to properly demarcate the proper ambit of the Branch's powers. *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 474 (1991) (advocating for "pragmatic formalism" in understanding the separation of powers, which requires "a pragmatically-based definitional analysis of the concepts of 'executive,' 'legislative,' and 'judicial' power"); *see also* INS v. Chadha, 462 U.S. 919, 952 (1983) (defining acts "legislative in purpose" as those that have "the purpose and effect of altering the legal rights, duties, and relations of persons").

[187] The *Kerr* plaintiffs argued that TABOR violates the Guarantee Clause by depriving the state of a republican form of government, *supra* notes 100–01 and accompanying text, and thus whether republicanism is at the core of the legislative function is entirely what their suit asked the courts to determine.

unwanted volume of legislative lawsuits that would, by their very nature, require courts to embroil themselves in the types of undesirable matters the *Raines* Court aimed to avoid through the vote nullification standard.[188]

An improved, narrower standard would instead require legislators to identify an enumerated institutional power that has been unlawfully curtailed. This standard adopts as its foundational premise that legislatures are bodies with limited, "checklist" powers.[189] Because legislatures are given these powers, they should not be unlawfully deprived of exercising their delegated legislative role.[190] And where such deprivations occur, legislators, like any other injured plaintiff, should have the option of vindicating the affected power. If a legislator can identify an enumerated institutional power that has been unlawfully curtailed, then the legislator satisfies Article III's injury-in-fact requirement.

*Arizona State Legislature v. Arizona Independent Redistricting Commission*, discussed in Part I.B.2, provides an example of how the proposed standard might be applied. The Arizona State Legislature asserted that the state's voter-created independent redistricting commission violated the Elections Clause, which states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,"[191] because the commission abridged the legislature's constitutionally endowed redistricting power.[192] Under the proposed standard, this allegation should warrant standing, because it identifies a constitutionally enumerated responsibility that the Arizona electorate has removed, arguably unconstitutionally, from the legislature.[193]

Importantly, this standard would preserve the core of *Raines* while not extending *Raines*'s vote nullification standard to legislator injuries for which the standard is ill suited. In instances in which legislators seek to remedy what they perceive as failed execution of enacted law, *Raines* should continue to apply, as there is no enumerated right a legislature

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[188] *See supra* notes 153–57 and accompanying text.

[189] *See* Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 13 (1987) ("Article I, section 8's language forms a checklist that invests Congress with specific powers rather than a more general, open-ended authority . . . . This checklist structure necessarily implies a limitation on congressional authority.").

[190] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) ("It must have been the intention of those who gave [Congress] these powers, to insure, so far as human prudence could insure, their beneficial execution.").

[191] U.S. CONST. art. I, § 4, cl. 1.

[192] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658–59 (2015).

[193] Of course, this does not mean that the Elections Clause provides the relief the Arizona legislature seeks, but only that the legislature has standing to bring suit. *See id.* at 2677 (ruling against the legislators, notwithstanding having recognized their standing to sue).

possesses in seeing the law executed.[194] On the other hand, if legislators can identify an enumerated right, it should not matter if they cannot also identify a nullified vote.[195] This would not overrule *Raines*, but merely recognize that *Raines* does not limit cognizable injuries exclusively to vote nullification.

Despite providing significant clarity and simplicity to the legislator standing doctrine, the proposed standard may nevertheless present a few different challenges. First, it may be difficult in some instances to differentiate between deprivation of an opportunity to vote, on the one hand, and dissatisfaction with execution of an enacted law, on the other.[196] Legislators will likely be tempted to describe every perceived injury in terms of a deprived voting opportunity, whether such deprivation exists or not. To that end, the proposed standard will increase, at a more general level, the number of instances in which legislators have standing to sue, which will thrust courts more frequently into resolving disputes that have traditionally caused uneasiness.[197] To the extent this uneasiness is well founded, it will only increase under the proposed standard. Finally, outside of deprivation of an opportunity to vote and other outright elimination of legislative functions, courts may struggle to discern what constitutes "abridgement" of a legislative right.[198] The problems that have plagued the courts in defining "adequacy" and "concreteness" for private plaintiffs under Article III may also plague future considerations of legislator standing.[199]

Other justiciability considerations, while perhaps insufficient to respond to these problems entirely, should help courts weed out claims by

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[194] For a recent article elaborating this point, see generally Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1312 (2014) (arguing that Congress cannot represent the United States in court in place of the Executive, as Article I grants Congress no power to enforce or defend federal laws).

[195] For a discussion of the vote nullification standard's underinclusiveness, see *supra* notes 158–62 and accompanying text.

[196] For example, the legislator plaintiffs in *Campbell v. Clinton*, *see* discussion *supra* notes 76–79 and accompanying text, argued that they had been deprived of an opportunity to vote on whether military action should continue in Kosovo. Because the legislature had considered and ratified actions President Clinton had taken, however, the legislators' injury was arguably nothing more than dissatisfaction with executive action, or an attempt to remedy a lost vote.

[197] For an analysis of this uneasiness in the Court's decision in *Raines*, see *supra* notes 153–57 and accompanying text.

[198] Dissenting from the denial of the petition for rehearing en banc in *Kerr*, Judge Tymkovich pointed out that while the legislature cannot directly enact tax measures under TABOR, it can still vote and refer measures to the voters. Kerr v. Hickenlooper, 759 F.3d 1186, 1190 (10th Cir. 2014) (Tymkovich, J., dissenting). Accordingly, the Colorado legislature's core functions of legislation and appropriation were arguably not "abridged."

[199] *See supra* notes 23–28 and accompanying text.

legislator plaintiffs that should not reach the merits.[200] First, by leaning more heavily on Article III's traceability and redressability requirements, courts can ensure that failed execution claims masquerading as deprivations of opportunities to vote are declared nonjusticiable. This is because, as the Court itself recognized in *Raines*, certain legislative injuries will not be traceable to Executive action,[201] nor will judicial remedy provide a solution.[202] Additionally, courts might rely on the ripeness doctrine to fence out some unwanted suits. If some plausible legislative action remains available to legislator plaintiffs, a court might prudently await the results of that action.[203] Finally, the political question doctrine should continue to render many suits by legislators nonjusticiable. While the doctrine should not bar legislator suits outright,[204] there are many suits to which the doctrine will apply. *Kerr* is a prime example, as the Court has long held the Guarantee Clause involves nonjusticiable political questions.[205]

## CONCLUSION

This Note has proposed a larger role for so-called legislator lawsuits, arguing for more open access to courts when legislators sue in their institutional capacities. This position reflects the notion that legislators are not so different from private plaintiffs such that Article III should not apply

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[200] *See supra* note 170 and accompanying text. While it might seem pointless to resist using standing doctrine—or more specifically, the injury-in-fact requirement—to do what other justiciability considerations accomplish anyway, the resulting clarity is desirable at least in part because it clarifies what Article III requires, and what it does not. This is one teaching of the Court's effort in *Lexmark* to recategorize certain prudential standing requirements as constitutionally based. *See supra* note 40.

[201] Raines v. Byrd, 521 U.S. 811, 830 n.11 (1997) (remarking that the legislators' injuries may also not have been traceable to the President's action). In these instances, even if legislators can somehow show that they have suffered an injury in fact, that injury will not be fairly traceable to Executive action, but rather to the fact that their legislative colleagues voted and passed a measure. While legislators' minority-party status should not deprive them of justiciability at the injury stage, *see supra* notes 174–78 and accompanying text, it may nonetheless affect whether their claims satisfy Article III's traceability requirement.

[202] Redressability might require courts to discard legislators' suits in two important ways. First, it may simply be impossible to formulate a remedy to address an alleged constitutional violation in executing a particular law where significant policymaking is required. Second, even if a court were to provide a remedy, it seems possible that some constitutional or legislative or executive action could negate the judicial remedy provided by changing the law or adopting a different policy.

[203] Courts should not hold minority-party plaintiffs to impossible standards, *see supra* notes 174–78, but if legitimate recourse remains for legislator plaintiffs to pursue, the ripeness doctrine might counsel abstention until that recourse is no longer available.

[204] To hold otherwise would flatly contravene *Coleman* and finds no support in *Raines*.

[205] *See supra* note 57; *see* Kerr v. Hickenlooper, 759 F.3d 1186, 1196 (10th Cir. 2014) (Gorsuch, J., dissenting) (advocating for dismissal after taking note of a "long[] history of failed efforts to develop standards for litigating Guarantee Clause cases involving individual citizen initiatives"). It bears repeating that the *Kerr* plaintiffs raised other statutory causes of action that do not have the same history. *See supra* note 101 and accompanying text.

to them. Rather, legislators are injured in a manner that should warrant standing when legislators seek to do the jobs they were elected to do.

Skepticism about the role of the judiciary in deciding suits brought by legislators in their official capacities is not misplaced. The Supreme Court's decision in *Raines* correctly reflected the notion that suits between the Executive and Congress will typically be better left to resolution by direct confrontation, rather than through the courts.

It does not follow from *Raines*, however, that legislators should only have standing to sue whenever they can demonstrate a nullified vote. Rather, legislators should have standing to sue in their official capacities to vindicate exercise of their enumerated powers. In particular, if We the People expect our legislators to promote the general welfare of our states and country, prudential concerns of the judiciary should not bar them from seeking relief in order to do so, especially if our unconstitutional initiatives stand in their way.