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NO PLACE TO STAND: THE SUPREME COURT'S REFUSAL TO ADDRESS THE MERITS OF CONGRESSIONAL MEMBERS' LINE-ITEM VETO CHALLENGE IN *RAINES v. BYRD**

*James I. Alexander***

INTRODUCTION

President William Jefferson Clinton signed the Line Item Veto Act of 1996¹ ("Line Item Veto Act" or "Act") on April 9, 1996, and the law entered into effect on January 1, 1997.² The law enables the President to sign a comprehensive bill, giving the bill full effect, and then grants him the power to cancel³ specific

* 117 S. Ct. 2312 (1997).

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¹ Pub. L. No. 104-130, 110 Stat. 1200 (codified at 2 U.S.C. §§ 691-692 (Supp. 1997)).

² See § 5, Pub. L. No. 104-130 (1997).

³ The word "cancel" is included in the final line-item veto law to describe the extent of the Executive's authority and is defined to mean rescind or "prevent . . . from having legal force or effect." See 2 U.S.C. § 691e(4) (Supp. 1997). An earlier version of what became the Act used the terms "veto" and "repeal." See H.R. 2, 104th Cong. § 2 (1995). Assistant Attorney General Dellinger warned members of the Senate that a law authorizing "the President to 'veto' targeted tax benefits after they become law, thus resulting in their 'repeal'" would inevitably raise constitutional questions. See H.R. CONF. REP. NO. 104-491, at 49 (1995). Mr. Dellinger continued to say that "the use of the terms 'veto' and 'repeal' is constitutionally problematic" given that the Presentment Clause states that a President may only perform his "veto" power before a piece of legislation is enacted into law. U.S. CONST. art. I, § 7, cl. 2. "[T]he word 'repeal' . . . suggests that the President is being given authorization to change existing law on his own [which] arguably would violate the plain textual provisions of the [Presentment Clause]" H.R. CONF. REP. NO. 104-491, at 49 (1995). This constitutes only a

spending provisions and tax benefit measures contained in the same legislation within five days, provided that the cancellation "reduce[s] the Federal budget deficit,"⁴ does "not impair any essential government functions"⁵ and does "not harm the national interest."⁶

minor language change that does not alter the intent of the law. See *City of New York v. Clinton*, 985 F. Supp. 168, 179 (D.D.C.) (holding Line Item Veto Act of 1996 unconstitutional stating "[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck") (quoting Richard Cardinal Cushing)), *cert. granted*, 118 S. Ct. 1123 (1998) (oral argument set for April 27, 1998).

⁴ See 2 U.S.C. § 691(a)(3)(A)(i).

⁵ See *id.* § 691(a)(3)(A)(ii).

⁶ See *id.* § 691(a)(3)(A)(iii). The overall purpose of the Act is to minimize cases like the Fiscal Year 1994 Agriculture Appropriations Bill, in which Congress added \$221,000 for blueberry research at the University of Maine and \$140,000 for a swine study at the University of Minnesota. See 141 CONG. REC. H1103 (daily ed. Feb. 2, 1995) (statement of Rep. Cunningham (R-Cal.)). However, some scholars point to evidence culled from the 43 states that currently allow for some form of line-item veto to show that the power has done little to curb government's extravagant spending habits. See Clay Chandler, *Line-Item Veto May Alter The Way Bills Are Crafted*, WASH. POST, Aug. 12, 1997, at A1 ("[a]fter an extensive review of the experience states had with the veto in the 1980's, . . . [t]he line-item veto itself does nothing to the level of spending." (quoting Syracuse University professor of economics Douglas Holtz-Eakin)). It continues to be common practice for the federal legislature to present the President with yearly omnibus appropriations bills containing a myriad of unrelated programs and initiatives, many of which have very little to do with the stated purpose of the legislation. These member items are commonly known as "pork." See James Q. Wilson, *Democracy Needs Pork To Survive*, WALL ST. J., Aug. 14, 1997, at A12 (defining "pork" as "getting consent to a complex bill by doing particular favors for political interests of members").

As enacted, the Act's authorization is scheduled to sunset on December 31, 2004. See § 5, Pub. L. No. 104-30 (1997). An interesting scenario is sure to arise, should the federal budget "mov[e] into the black," in the next two years as some White House officials suspect. See Alexis Simendinger, *The Art of the Line-Item Veto*, NAT'L J., Oct. 18, 1997, at 2088. The federal budget deficit hit a high of \$290 billion in 1992, but is now steadily decreasing. See Robert Pear, *U.S. Judge Rules Line Item Veto Act Unconstitutional*, N.Y. TIMES, Feb. 13, 1998, at A23. If there is no longer a federal deficit to remedy, the Act's line-item veto authority will no longer exist. Simendinger, *supra*, at 2088. This will present a problem for those such as Senators Daniel R. Coats (R-Ind.) and John McCain (R-Ariz.), who support the existence of pure Executive line-item veto

The passage of the Act marked the conclusion of a long history of discussion and debate among scholars and government officials.⁷

power to curb Congress' frivolous spending habits. Pear, *supra*, at A23.

⁷ This history of debate was summarized by Senator Daniel Patrick Moynihan:

The line-item veto is not a new idea. President Ulysses S. Grant first proposed it in 1873. In 1876, Representative Charles James Faulkner of West Virginia introduced an amendment to the Constitution to provide for a line-item veto. Some 150 line-item veto bills have been introduced in the interim, but Congress has never seen fit to adopt any of them.

141 CONG. REC. S4444 (daily ed. Mar. 23, 1995) (statement of Sen. Moynihan (D-N.Y.)). See also Ronald D. Rotunda, *Constitutional Law; The Constitutional Line-Item Veto Act*, TEXAS LAWYER, June 23, 1997, at 28 (stating that "[a]t the time of the Constitutional Convention, the term 'line-item veto' did not exist because it did not need to exist"). Professor Rotunda states that the federal government's lack of complexity at the time of the Constitutional Convention made the merging of unrelated bills and riders infrequent. *Id.* Congress began the practice of attaching appropriation riders to bills during President Grant's term. *Id.* Frustration with this legislative practice prompted the first line-item veto proposal. *Id.*

The modern movement to grant the President line-item veto authority began with President Reagan's 1984 State of the Union Address. He stated that "[the line-item veto] works in 43 states. Let's put it to work in Washington for all the people." Ronald Reagan, *Address Before a Joint Session of the Congress on the State of the Union*, reprinted in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN: 1984, at 87, 89 (1984). Thereafter, the movement became a hallmark of the Republican party's "anti-government mantra," John Jacobs, *The Line-item Veto: Incompetence Meets Hypocrisy*, SACRAMENTO BEE, Nov. 4, 1997, at B7, and a significant piece of the party's 1994 "Contract With America," Eric Pianin & Stephen Barr, *U.S. Workers' Shift In Pensions Vetoed; Union, New York City File Court Challenges*, WASH. POST, Oct. 17, 1997, at A1. The seven states that do not allow their governor to exercise some sort of line-item veto are Indiana, Maine, Nevada, New Hampshire, North Carolina, Rhode Island and Vermont. DeWayne Wickham, *Line-Item Advocates Nothing But Whiners*, USA TODAY, Jan. 22, 1998, at 13A. Of these states, North Carolina is the only one that does not allow for even an "all-or-nothing" executive veto. Robert Destro, *Whom Do You Trust? Judicial Independence, The Power of the Purse & The Line Item Veto*, 44 FED. LAW. 26, 28 (1997).

In addition to the line-item veto, many state constitutions further discourage the practice of adding unrelated riders to bills ("log-rolling") by requiring the

The line-item veto debate shifted quickly from the Houses of Congress to the federal courts.⁸ On January 2, 1997, the day after the Act became effective, four Senators⁹ and two members of the House of Representatives¹⁰ joined together to challenge the Act's constitutionality in the United States District Court for the District of Columbia.¹¹ The District Court held in favor of these Legislators, concluding first that, as members of Congress, they

legislature to limit bills to a single subject. *Id.* At the most extreme, Wisconsin requires that "no private or local bill which shall be passed by the legislature shall embrace more than one subject" *Id.* at 28-29 (referencing WIS. CONST. art. IV, § 18).

⁸ The first federal court challenge to the line-item veto occurred in *National Treasury Employees Union v. United States*, 101 F.3d 1423 (D.C. Cir. 1996). In that case, a labor union challenged the constitutionality of the line-item veto before it entered into law, but was denied standing to sue for lack of a concrete injury. *See id.* at 1432. The organization argued unsuccessfully that the presence of presidential line-item veto power would require their organization to lobby the executive branch, in addition to their normal legislative advocacy activities, creating new costs and burdens. *Id.* at 1430. The court based its holding of inadequate standing upon both *National Taxpayers' Union v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (holding that hindering the furtherance of an organization's objectives "is the type of abstract concern that does not impart standing"), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (differentiating a direct injury to an "organization's activities" from "a setback to the organization's abstract social interests").

⁹ The Senators were Robert C. Byrd (D-W. Va.), Mark O. Hatfield (R-Or.) (retired at adjournment of the 104th Congress), Carl Levin (D-Mich.) and Daniel Patrick Moynihan (D-N.Y.).

¹⁰ The members were David E. Skaggs (D-Colo.) and Henry A. Waxman (D-Cal.).

¹¹ *See* *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C.), *vacated*, *Raines v. Byrd*, 117 S. Ct. 2312 (1997). The language of the Act's judicial review clause provides that "[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution." 2 U.S.C. § 692(a)(1) (Supp. 1997). The Act further provides for direct and expedited appeal to the Supreme Court. 2 U.S.C. § 692(c). The Act states that "[i]t shall be the duty of . . . the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of [any suit challenging the Act's constitutionality]." *Id.*

possessed standing to sue¹² pursuant to Article III of the Constitution,¹³ and second, that the Line Item Veto Act conflicted with the Presentment Clause¹⁴ of the Constitution.¹⁵ The defendants,¹⁶ representing the Executive Branch, immediately appealed this decision to the Supreme Court.¹⁷ On expedited appeal, the Supreme Court held that the Legislators lacked standing to

¹² *Byrd*, 956 F. Supp. at 31. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The central focus of the standing doctrine rests on the appropriateness of the plaintiff who asserts a "personal" injury, rather than on the judicial cognizability of the issue itself. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

¹³ See U.S. CONST. art. III, § 2, cl. 1 (stating that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ; to all Cases affecting Ambassadors, other public Ministers and Consuls; . . . to Controversies to which the United States shall be a Party"); U.S. CONST. art. III, § 2, cl. 2 states:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

¹⁴ U.S. CONST. art. I, § 7, cl. 2. The Presentment Clause states:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Id.

¹⁵ See *Byrd*, 956 F. Supp. at 30-36.

¹⁶ The defendants were the parties charged with operationally carrying-out the line-item veto: Frederick D. Raines, Director of Office of Management and Budget, and Robert E. Rubin, Secretary of the Treasury. *Id.* at 27.

¹⁷ See 2 U.S.C. § 692(c) (Supp. 1997) (legislatively providing for expedited appeal directly to the Supreme Court).

challenge the Act at the time of their suit, and vacated the District Court's judgment with instructions to dismiss the complaint, thus failing to address the merits of the constitutional claim.¹⁸ As a result, and as expected, President Clinton exercised the line-item veto power for the first time on August 11, 1997 under a cloud of constitutional controversy.¹⁹ More than one year after the Act's challengers first initiated suit in the federal court system, the fundamental constitutional questions swirling around the Line Item Veto Act of 1996 remain unanswered.²⁰

This Note argues that the enactment of the Line Item Veto Act conferred significant law making powers upon the Executive Branch to the direct detriment of each member of Congress' constitutionally reserved legislative functions. The District Court for the District of Columbia, therefore, correctly held that this transfer of power resulted in a sufficient Article III injury to compel federal court jurisdiction over the *Byrd* complaint, and the Supreme Court wrongfully dismissed the action creating needless controversy. Part I of this Note reviews the Supreme Court's working framework for making standing determinations. Part II examines the stated purpose of the judicial review clause included in the Line Item Veto Act of 1996 and its impact on the justiciability of the Legislators' constitutional challenge. Part III posits that the District Court for the District of Columbia correctly followed past legislative standing cases to allow the Legislators to advance the merits of their constitutional claim in *Byrd*. Part IV analyzes the Supreme Court's

¹⁸ See *Raines v. Byrd*, 117 S. Ct. 2312, 2322-23 (1997).

¹⁹ See John F. Harris, *Clinton Wields New Authority, Vetoing 3 Items: President Strikes Down Tax and Spending Provisions*, WASH. POST, Aug. 12, 1997, at A1 (quoting New York State Governor George E. Pataki's reaction to President Clinton's cancellation of his state's Medicaid reimbursement formula, where he characterized the veto as a "body blow" to New York's health care system and promised that his administration would "fight in Congress and in the courts" to reverse the veto); *infra* note 39 (referencing statements by members of the House of Representatives urging swift judicial resolution of the constitutional questions raised by the Act).

²⁰ President Clinton's Administration is currently appealing the recent D.C. District Court decision that found the Act unconstitutional to the Supreme Court. *City of New York v. Clinton*, 985 F. Supp. 168, 179 (D.D.C.), *cert. granted*, 118 S. Ct. 1123 (1998). This Note went to press prior to a disposition of this appeal.

Raines v. Byrd decision and criticizes the Court's rationale for denying the Legislators standing to challenge the Act, and needlessly engendering the constitutional cloud that continues to swirl around the line-item veto. Part V discusses the future of the Line Item Veto Act in the federal court system and speculates that despite its sound policy goals, the Act will soon be found unconstitutional by the Supreme Court. This Note concludes that the diminution of Congress' legislative powers as a result of the Line Item Veto Act should have qualified as a sufficient injury to warrant federal court jurisdiction over the Legislators' constitutional challenge.

I. TRADITIONAL STANDING REQUIREMENTS

In several decisions delivered during the past fifty years, the Supreme Court has constructed a framework for determining the justiciability of a federal court complaint.²¹ The most basic requirement demands that the complaint present a "case" or "controversy."²² In order to demonstrate that a case or controversy is worthy of federal court jurisdiction, a litigant must satisfy two levels of review: "constitutional limitations on the federal court jurisdiction and prudential limitations on its exercise."²³ Article III prescribes the constitutional framework for limitations on federal

²¹ Justiciability will be used here as a general term encompassing standing, ripeness, redressibility, adverse parties and mootness. See *Flast v. Cohen*, 392 U.S. 83, 94-99 (1968). Each quality is determinative in the Supreme Court's overall jurisdictional analysis. See WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW, CASES AND MATERIALS 84-123 (10th ed. 1997).

²² See U.S. CONST. art. III, § 2. See also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (holding that the federal government's transfer of public property to a religious organization in alleged violation of the Establishment Clause did not "injure" the plaintiff, making their claim non-justiciable).

²³ *Warth v. Seldin*, 422 U.S. 490, 498 (1975). See *infra* notes 51, 92 and accompanying text (describing the differences between Article III standing limitations under the Constitution, and judicially erected "prudential" standing restrictions designed to discourage the courts from infringing upon legislative or executive domain).

court jurisdiction.²⁴ The Supreme Court interprets this article to mean:

At an irreducible minimum . . . the party who invokes the court's authority . . . [must] show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . and that the "injury fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision"²⁵

To be worthy of federal court jurisdiction, the alleged injury must be "distinct and palpable,"²⁶ "and not 'abstract' 'conjectural' or 'hypothetical.'"²⁷ Despite this comprehensive description, "[t]he constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition"²⁸ Consequently, the Court leaves itself substantial leeway when it comes to making standing evaluations.²⁹

Commentators reporting on the Supreme Court's handling of Article III standing questions seem to fall into two ideological camps.³⁰ Some legal scholars, such as Alexander Bickel, favor a narrow injury standard,³¹ which often discourages the courts from reaching the merits of disputes.³² Others tend to favor more "activist" courts and broader justiciability characterizations which

²⁴ See U.S. CONST. art. III.

²⁵ See *Valley Forge*, 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)).

²⁶ See *Warth*, 422 U.S. at 501.

²⁷ *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). See also *O'Shea v. Littleton*, 414 U.S. 488, 494 (denying standing to plaintiffs who failed to advance an adequate Article III case or controversy), *vacated*, *Spomer v. Littleton*, 414 U.S. 514 (1974).

²⁸ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

²⁹ See *infra* notes 53, 61, 153-161 and accompanying text (describing some of the Court's more liberal applications of the standing doctrine).

³⁰ See Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1916 (1986).

³¹ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (positing that narrow and restrictive justiciability principles are critical to sound judicial review).

³² COHEN & VARAT, *supra* note 21, at 81.

are more likely to lead courts to address the merits of controversies.³³ With these divergent points of view in mind, the Supreme Court admits that it does not uniformly or mechanically apply constitutional standing requirements.³⁴ The Court's history of indecision on standing questions has proven to be a liability to lower court judges who lack a clear guide by which to base their standing decisions.³⁵ Congress' legislative judgments are also affected by this inconsistency. By including broadly phrased judicial review language in statutes such as the Line Item Veto Act, Congress has sought to make standing determinations more predictable.

II. STATUTORILY GRANTED STANDING RIGHTS

The Line Item Veto Act of 1996 contains a judicial review clause that prescribes the acceptable procedures for what Congress characterized as inevitable challenges to the Act's constitutionality.³⁶ During the mark-up of the bill that eventually became the Act, Representative Nathan Deal (R-Ga.) proposed the inclusion of this clause for the purpose of expediting judicial review. He stated, "[i]t should be obvious that until . . . constitutionality is clarified, [the Act] will be under a cloud."³⁷ The clause is included in the final signed law.³⁸ Thus, there can be no question that both Congress and the President intended all of the constitutional questions surrounding the Act to be answered rapidly by the courts to mitigate any controversy prior to the President's exercise of the veto power.³⁹ Pursuant to this clause, any member of Congress or

³³ COHEN & VARAT, *supra* note 21, at 81.

³⁴ See *Allen v. Wright*, 468 U.S. 737, 751 (1984); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 89 (1984).

³⁵ See Nichol, *supra* note 30, at 1916.

³⁶ See *supra* note 11 (outlining the Act's prescribed judicial review provisions).

³⁷ See 141 CONG. REC. H1138 (daily ed. Feb. 2, 1995) (statement of Rep. Deal).

³⁸ 2 U.S.C. § 692(a) (Supp. 1997).

³⁹ The intent of Congress is unqualified:

any citizen adversely impacted by the Act⁴⁰ can claim a legally enforceable and "concrete impairment of protected interests"⁴¹ in the federal court system.⁴²

As a supporter of the line-item veto, I believe that it is important that any questions regarding the constitutionality of the line-item be resolved as quickly as possible. As long as legal questions remain, . . . any spending cut through the line-item veto process would certainly be challenged. The effectiveness of the line-item veto will be severely handicapped until the legal questions are resolved. *It is in nobody's interest to leave the status of line-item veto authority in limbo for an extended period of time* Hopefully, the procedure established by my amendment will result in a final resolution regarding the constitutionality of line-item veto authority before the Fiscal Year 1996 appropriations bills are sent to the President [I]f my amendment for judicial review is *not* added to the bill, *it is unlikely that the courts would consider the issue until the President exercises the line-item authority.*

141 CONG. REC. H1139 (daily ed. Feb. 2, 1995) (statement of Rep. Deal) (emphasis added). The judicial review clause also received the support of members opposing the Act:

[I] rise in support of the Deal amendment. It is one that we should all be able to support whether we support the bill or oppose the line-item veto bill Proponents of [the bill] should want to have the constitutional question regarding this bill settled as soon as possible This amendment says that the courts can go ahead and hear a test case on this legislation constitutionally without having to wait for the President to use the line-item veto authority this bill gives him.

Id. (statement of Rep. Collins (D-Ill.)). President Clinton has also acknowledged and supported the purpose of the Act's judicial review clause. *See Remarks by President Clinton at Signing of Line Item Veto Legislation*, Federal News Service (April 9, 1996) (stating that "We anticipate that [the Act] will be challenged—we've worked hard to provide for a means for [the Act's constitutionality] to be resolved quickly").

⁴⁰ 2 U.S.C. § 692(a)(1) (establishing the Act's broad grant of standing to challenge its constitutionality).

⁴¹ *Id.* When accompanied "by a concrete impairment of protected interests," a claim may fall within the legitimate scope of judicial review. *See* Nichol, *supra* note 30, at 1916.

⁴² *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 191 (1992) (stating that "[w]hether an injury is cognizable should depend on what the legislature has said . . . or on the definitions of injury provided in the various relevant sources of

The effects of similar judicial review clauses included in the Federal Election Campaign Act⁴³ ("FEC Act") and in the Presidential Election Campaign Fund Act,⁴⁴ were debated in *Buckley v. Valeo*⁴⁵ in 1976. Section 437(h) of the FEC Act provides that three types of plaintiffs may "institute . . . actions . . . to construe the constitutionality of any provision of this act."⁴⁶ These eligible plaintiffs are the Federal Election Commission, the national committee of any political party, and most notably, "any individual eligible to vote in any election for the office of President."⁴⁷ During the Senate debate in consideration of the bill that became the FEC Act, Senator James Buckley, in similar fashion to Representative Deal during the Line Item Veto Act debate, proposed to include this judicial review provision allowing standing for constitutional challenges.⁴⁸ In *Buckley*, the Supreme Court showed little concern for whether Senator Buckley had standing as an "individual eligible to vote" in a presidential election.⁴⁹ The Court stated that the FEC Act "intended to provide judicial review to the extent permitted by Article III."⁵⁰ Although it would appear

positive law.").

⁴³ 2 U.S.C. §§ 431-442 (1982 & Supp. 1985); 18 U.S.C. §§ 591-607 (1982).

⁴⁴ 26 U.S.C. §§ 9001-9012 (1982 & Supp. 1986).

⁴⁵ 424 U.S. 1 (1976).

⁴⁶ 2 U.S.C. § 437(h) (1982 & Supp. 1985).

⁴⁷ *Id.*

⁴⁸ 120 CONG. REC. S10,557-63 (1974) (statement of Sen. Buckley) ("I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time."). See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 283-84 (1988) (discussing examples of statutorily created standing rights).

⁴⁹ See *id.* at 284.

⁵⁰ *Buckley v. Valeo*, 424 U.S. 1, 12 (1976). The Court stated:

At the outset we must determine whether the case before us presents a "case or controversy" within the meaning of Art. III of the Constitution. Congress may not, of course, require this court to render opinions in matters which are not "cases or controversies." We must therefore decide whether appellants have a "personal stake in the outcome of the controversy" necessary to meet the requirements of Art. III. It is clear that Congress, in enacting 2 U.S.C. § 437(h), intended to provide judicial review to the extent permitted by Art. III. In our view, the

from *Buckley* that Article III's standing limitations are satisfied where Congress extends a specific statutory grant, prevailing opinions are that such a grant will only satisfy the "prudential" component of standing analyses.⁵¹ As detailed in *Raines v. Byrd*,

complaint in this case demonstrates that at least some of the appellants have a sufficient "personal stake" in a determination of the constitutional validity of each of the challenged provisions to present a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. at 11-12. Although the Court stated that "at least some" of the plaintiffs had standing, they subsequently answered the certified question of whether "each" plaintiff has standing by stating: "[h]as *each* of the plaintiffs alleged sufficient injury to his constitutional rights enumerated in the following questions to create a constitutional 'case or controversy' within the judicial power under Article III? YES." *Id.* at 12 n.11 (emphasis added). See Fletcher, *supra* note 48, at 284 n.292 (opining that the *Buckley* Court showed little concern for Mr. Buckley's standing as a Senator). In a later case involving the same standing issues, the Court held that while plaintiffs did not qualify as one of the three defined classes of eligible plaintiffs, their group could have been included if Congress had so intended. *Bread Political Action Comm. v. Federal Election Comm'n.*, 455 U.S. 577, 584 (1982) (holding trade associations and political action committees ineligible to challenge the Federal Election Campaign Act, but stating that standing could be conferred upon parties granted authorization statutorily by Congress). See also Fletcher, *supra* note 48, at 284 ("Of course, had Congress intended [to grant plaintiffs the right to bring suit under section 437(h)] it could easily have achieved [this result] Instead, Congress gave no affirmative indication that it meant to include in its grant any parties beyond [those listed in section 437(h)].").

⁵¹ See Fletcher, *supra* note 48, at 285; *infra* note 92 (discussing the elimination of prudential standing concerns). The Court has stated that standing may be accepted or denied based upon "prudential" considerations, which are independent of traditional constitutional restrictions. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 500 (1975). However, where Congress explicitly grants standing to a class of plaintiffs by statute, the Court's "prudential" concerns are satisfied. Fletcher, *supra* note 48, at 252. See *Raines v. Byrd*, 117 S. Ct. 2312, 2318 n.3. (1997) (accepting statutory grant of standing to satisfy the prudential restriction, but still requiring plaintiffs to suffer a "distinct and palpable injury," pursuant to Article III's standing threshold); *Warth*, 422 U.S. at 501 (stating "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules [However] Article III's requirement remains"). "When the Court refuses to find prudential standing, it, in effect, refuses to infer

the Court remains very much concerned with rigidly applying Article III's standing limitations.⁵²

In the past, the government has been more amenable to a broad system of judicial review including legislatively created standing rights embedded in statutes.⁵³ This principle is evidenced by a

a cause of action from existing legal materials." Fletcher, *supra* note 48, at 252.

⁵² *Raines*, 117 S. Ct. at 2318 n.3 (stating that a statutory grant of standing does not satisfy constitutional standing limitations set forth in Article III). In addition to the "bedrock requirement" that a plaintiff present a "case" or "controversy" as stated in *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1986), the *Raines* Court characterized Article III's standing limitations as requiring a plaintiff to demonstrate a "personal stake" in the dispute, and to show that the injury is "particularized as to him." *Raines*, 117 S. Ct. at 2317. However, in an earlier opinion, the Warren Court took a less definite position on the meaning of Article III and its standing restrictions. See *Flast v. Cohen*, 392 U.S. 83, 97 (1968) ("The many subtle pressures which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.") (internal quotations and citations omitted).

⁵³ One author has noted:

Actually, the Court has little room, at least under existing constitutional law, to overturn any congressional grant of standing. Given the confused state of article III jurisprudence, if Congress chooses to implement federal policies through the employment of the judiciary in actual lawsuits the Supreme Court would be hard pressed to deny that such efforts are necessary and proper exercises of Congressional authority.

Nichol, *supra* note 34, at 84. See also *infra* notes 61, 153-161 and accompanying text (addressing the Court's proclivity for accepting standing pursuant to factors that appear to be more abstract than those raised in *Raines*).

In several cases, the Court has accepted some standing arguments where interests did not appear to be "distinct and palpable." For example, The Endangered Species Act ("ESA") provides that "any person" can file a challenge to enforce the statute. 16 U.S.C. § 1640(g) (1982). While an ordinary citizen's subjective concern over the possible extinction of an animal would seem to be intangible and generalized, the Court did not address the standing issue in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which involved a challenge to the ESA. Nichol, *supra* note 34, at 84 n.94. The Court has also allowed standing to be based upon rights and "benefits of living in an integrated community." See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76 (1982) (granting standing to residents under the Fair Housing Act of 1968, despite acknowledging that "neighborhood standing" may involve an indirect injury);

proposed provision of the Virginia Plan, championed by James Madison at the Constitutional Convention, which detailed the creation of a "Revisionary Council" composed of the President and several members of the Supreme Court.⁵⁴ This Council would act as a check upon legislative action by reviewing legislation approved by Congress.⁵⁵ If this Council rejected a measure, it could become law only after a legislative override.⁵⁶ Although the framers ultimately rejected the creation of the Council,⁵⁷ some scholars have concluded that the existence of this proposal shows "that the founders must have welcomed any traditional mechanism that could aid in keeping Congress within bounds."⁵⁸ Thus, there is some historical evidence of a broadly characterized system of judicial review.

Various Supreme Court decisions have suggested that Congress can create legally enforceable interests even where none existed before.⁵⁹ In some cases, the Court has held that congressional power to create standing rights was limited by the requirements of

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208 (1972) (granting standing to tenants of a housing complex to challenge the alleged racially discriminatory practices of their landlord that deprived them of "the social benefits of living in an integrated community . . . [and caused them to] suffer[r] . . . economic damage").

⁵⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (M. Farrand ed. 1911).

⁵⁵ Nichol, *supra* note 34, at 84.

⁵⁶ See Nichol, *supra* note 34, at 93.

⁵⁷ See Nichol, *supra* note 34, at 93.

⁵⁸ Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 834 (1969).

⁵⁹ *Id.* at 816. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 164 n.15 (1978) (accepting the general clause in the Endangered Species Act, granting standing to "any person" to enforce its provisions); *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (stating that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute") (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); Nichol, *supra* note 34, at 84 n.94 (reasoning that the Court has allowed interests which are not "distinct and palpable" to serve as acceptable bases for standing).

Article III.⁶⁰ However, in various other cases, the Court has shown a willingness to confer jurisdiction based solely upon abstract and shared statutorily created injuries.⁶¹ These intersecting ideas have been addressed aggressively by Justice Antonin Scalia.⁶² In his majority opinion in *Lujan v. Defenders of Wildlife*,⁶³ Justice Scalia concluded that "legislatively pronounced" "public rights" cannot supply a basis for federal court standing unless they correspond with the Court's narrow interpretations of concrete and tangible injuries.⁶⁴ Several scholars regard *Lujan* as

⁶⁰ See, e.g., *Warth*, 422 U.S. at 518 (denying petitioners standing to challenge adjacent town's zoning ordinance that excluded low and moderate income persons from living in the town); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (denying standing to birth-mother seeking child support from child's father because statute required parents to be married); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1147 (1993).

⁶¹ See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972) (allowing standing under the Civil Rights Act of 1968 based upon harm to plaintiffs' interest in interracial association); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982) (granting standing to plaintiff "testers," posing as prospective home-buyers, to challenge an apartment complex owner's alleged racially-discriminatory steering practices under the Fair Housing Act of 1968). In *Havens Realty*, the Court stated that "congressional intention cannot be overlooked in determining whether testers have standing to sue." *Id.* at 373. See also *infra* notes 153-161 and accompanying text (reviewing additional examples of the Court's willingness to accept broadly-based standing assertions).

⁶² See Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("[Standing law should] restric[t] courts to their traditional undemocratic role of protecting . . . minorities against impositions of the majority, and exclude 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."). Scalia reasoned that the "core" requirement of particularized harm should impose a strict limitation "upon the congressional power to confer standing." *Id.* at 883-84 (citing *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)). See Nichol, *supra* note 60, at 1147 (exploring Scalia's opposition to the "liberaliz[ation]" of modern standing law).

⁶³ 504 U.S. 555 (1992).

⁶⁴ *Id.* at 578. Scalia stated that there is "absolutely no basis for making the Article III injury turn on the source of the asserted right." *Id.* at 576. If the courts chose to ignore the concrete injury requirement because of the invitation of Congress, they would violate "the separate and distinct constitutional role of

marking a "transformation" in the law of standing from a more broad-minded characterization of Article III to a much narrower one.⁶⁵ Because of this strict adherence to an ambiguous "personal" injury requirement,⁶⁶ the Court vacated the District Court's decision in *Byrd v. Raines*.⁶⁷ As a result, the Court failed to expeditiously address the merits of the Line Item Veto Act's constitutional controversy, and effectively rendered the motivation behind the Act's judicial review clause null and void.

III. THE DISTRICT OF COLUMBIA CIRCUIT AND *BYRD V. RAINES*

In *Byrd v. Raines*,⁶⁸ the United States District Court for the District of Columbia held that the Legislators possessed a sufficient stake in their dispute to warrant federal court jurisdiction over their challenge to the Line Item Veto Act.⁶⁹ This decision followed a series of holdings by the D.C. Circuit which demonstrate a recognition of legislators' standing to challenge measures that weaken their ability to exercise identifiable constitutional law-making functions.⁷⁰

the Third Branch — one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than the political branches." *Id.*

⁶⁵ Professor Nichol argues that Justice Scalia has "ignored the scholarship of the history of Article III . . . [by] cavalierly stat[ing] that the injury requirement is an 'irreducible constitutional minimum,' a 'principle fundamental,' and a 'common understanding' undergirding the exercise of judicial power." Nichol, *supra* note 60, at 1152-53 (quoting *Lujan*, 504 U.S. at 576).

⁶⁶ See *infra* notes 134-139, 142-148 and accompanying text (arguing that the characteristics of an "official capacity" injury does not make the injury necessarily impersonal).

⁶⁷ 956 F. Supp. 25 (D.D.C.), *vacated*, *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

⁶⁸ *Id.*

⁶⁹ *Id.* at 31.

⁷⁰ *Id.* at 30. See *Kennedy v. Sampson*, 511 F.2d 430, 433 (D.C. Cir. 1974) (holding that depriving a congressional plaintiff of the constitutional process by which a bill becomes a law is a sufficiently specific injury to warrant federal court jurisdiction). The *Kennedy* Court granted standing to Senator Edward Kennedy and his colleagues to argue that a bill could become law without the President's signature 10 days after it was presented. *Id.* at 436. The court stated:

The Legislators asserted that the Line Item Veto Act dilutes voting powers conferred by Article I of the Constitution.⁷¹ Prior to January 1997, members of Congress could be assured that after voting upon an aggregated appropriations bill, the President would either sign and accept the comprehensive bill or veto it in whole.

It seems to this court axiomatic that, to the extent that Congress' role in the government is thus diminished, so too must be the individual roles of each of its members. Put another way, the influence of any one legislator upon the political process is in great measure dependent upon the stature of the governmental branch of which he is a member.

Id. Moore v. U.S. House of Representatives is another example of the D.C. Circuit's willingness to confer jurisdiction in legislator standing cases. 733 F.2d 946, 950-53 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). In *Moore*, the D.C. Circuit granted standing to challenge a violation of the constitutional requirement that revenue raising bills originate in the House, despite the concurrence of then Circuit Judge Scalia who argued strongly against the affirmative standing determination. The majority stated that:

[Where] the injury claimed . . . is to the members' rights to participate and vote on legislation in a manner defined by the Constitution . . . [the] [d]eprivation of a constitutionally mandated process of enacting law may inflict a more specific injury on a member of Congress than . . . a generalized complaint that a legislator's effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum.

Id. at 951. The court also asserted that "the mere fact that a case involves an unlawful deprivation of a legislator's powers by members of a coordinate branch of government does not automatically deprive the federal courts of power to adjudicate the claim." *Id.* at 953. *See also* Michel v. Anderson, 14 F.3d 623, 625 (D.C. Cir. 1994) (granting members of Congress standing to challenge House Rule allowing territorial delegates to vote because of its vote-diluting effect); Vander Jagt v. O'Neill, 699 F.2d 1166, 1168-71 (D.C. Cir.) (upholding standing to challenge House leadership committee's seating assignments), *cert. denied*, 464 U.S. 823 (1983).

In addition to the D.C. Circuit, other federal circuits have ruled in a similar fashion in legislator standing cases. *See* Risser v. Thompson, 930 F.2d 549, 550-52 (7th Cir.) (granting Wisconsin state legislators standing to challenge the constitutionality of the Governor's "partial veto" power), *cert. denied*, 502 U.S. 860 (1991).

⁷¹ *Byrd*, 956 F. Supp. at 31. *See* U.S. CONST. art. I, § 7, cl. 2, *supra* note 14 (setting forth the text of the Presentment Clause prescribing the procedures for presenting a bill for Executive approval or objection).

The only way such a bill could be changed would be as a result of new House and Senate votes.⁷² The Act's passage fundamentally altered these time-tested procedures.⁷³ As a result of the Act, members of Congress lack absolute certainty that the projects and initiatives they work hard to build consensus around will be ultimately implemented.⁷⁴ A Senator's vote for an "A-B-C" bill "might lead to the post hoc creation of an 'A-B' law, an 'A-C' law, or a 'B-C' law, depending on the President's use of his newly conferred authority."⁷⁵ The foundation of the Legislators' case rested upon their contention that their votes in Congress carry a wholly different meaning than prior to the Act's passage.⁷⁶

The District Court accepted the argument that since the enactment of the Line Item Veto Act, members of Congress were "injured" in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it.⁷⁷ The District Court rejected the argument which was later

⁷² See *Byrd*, 956 F. Supp. at 31.

⁷³ See Editorial, *Striking Down the Line Item Veto*, N.Y. TIMES, Feb. 14, 1998, at A12 (stating that "[t]he line item veto not only allows the President to edit the law, it allows him to undo the entire legislative process").

⁷⁴ See Kenneth Jost, *Line-Item Case May Hinge On Standing*, LEGAL TIMES, May 19, 1997, at 2 (stating that "the new law 'is a nullification of a senator's or representative's vote . . .'" (quoting Erwin Chemerinsky, a constitutional law professor at the University of Southern California Law Center)).

⁷⁵ Brief for Appellees at *25, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671) (quoting Appellee Sen. Byrd), available in 1997 WL 251423.

⁷⁶ Plaintiffs argued:

A Member, who in voting "yea" on a bill, is unconstitutionally forced to give the President the option of vetoing an item without which the Members vote would have been "nay" is suffering an injury well within the holdings of those [previous Supreme Court] cases even if it is not certain that the President will veto the item.

Id. at 26. Furthermore, as evidenced by the President's first use of the line-item veto, a victim of a specific veto may not be given advance warning that their item will be "canceled." See Harris, *supra* note 19, at A1 (stating that House Speaker Newt Gingrich felt "blindsided" by the President's use of the veto since the canceled items had survived "protracted bipartisan negotiations").

⁷⁷ *Byrd*, 956 F. Supp. at 31. "The advent of the line-item veto has shaken the 200-year old power relationships in the federal government. While presidents have always paid close attention to their own priorities, the veto has given them

adopted by the Supreme Court,⁷⁸ that the Legislators' suit lacked ripeness as required by the "case or controversy" requirement prescribed by Article III.⁷⁹ Instead, the District Court astutely accepted the plaintiffs' assertion of ongoing harm and injury, resulting from a new and fundamentally altered relationship with the Executive Branch.⁸⁰ D.C. District Court Judge Jackson compared this ongoing harm with the ongoing harm found in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,⁸¹ where a review board comprised of members of Congress, possessed a yet-to-be exercised veto power over the Airport Authority's Board of Directors.⁸² In *Metropolitan*, the Supreme Court granted standing stating that "[t]he threat of the veto hangs over the Board of Directors like a sword over Damocles, creating a 'here-and-now subservience' to the Board of Review sufficient to raise constitutional questions."⁸³ Relying on this language, Judge Jackson also granted standing holding that the ripeness requirement was satisfied because of the

an unprecedented ability to micromanage the appropriations process." Guy Gugliotta & Eric Pianin, *Line-Item Veto Tips Traditional Balance of Power; Capitol Hill Plots Strategy to Counter the President's Pen*, WASH. POST, Oct. 24 1997, at A1. See Simendinger, *supra* note 6, at 2088 (quoting President Clinton as saying the line-item veto "will lead to different kind of negotiation in the budgeting process").

⁷⁸ *Byrd*, 956 F. Supp. at 30. See *Raines v. Byrd*, 117. S. Ct. 2312, 2322 (1997).

⁷⁹ See *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 81 (1978) (holding issue ripe for adjudication because "appellees will sustain immediate injury" from the use of power plants); *supra* notes 23, 49 and accompanying text (describing Article III's standing threshold).

⁸⁰ See *Byrd*, 956 F. Supp. at 32. One Senator commented that the Line Item Veto Act "will change the spending habits of Congress . . . [B]ecause the President has the line-item veto, it will change the way we put the bills together in the first place." 141 CONG. REC. S4140 (daily ed. March 17, 1995) (statement of Sen. Coats (R - Ind.)). See also *id.* at S4221 (daily ed. Mar. 21, 1995) ("The line-item veto power will fundamentally change the way we think and behave [as legislators].").

⁸¹ 501 U.S. 252 (1991).

⁸² *Id.* at 260.

⁸³ *Id.* at 265 n.13.

similar subservient relationship created by the Line Item Veto Act.⁸⁴

Given its geographic location, the D.C. Circuit possesses an inordinate amount of jurisprudence on public officials and their use of the federal court system to adjudicate constitutional matters.⁸⁵ By way of contrast, most Supreme Court jurisprudence on Article III standing issues is in response to privately initiated actions.⁸⁶ Despite the D.C. Circuit's wealth of case law on the subject, the Supreme Court has never endorsed the Circuit's legislator standing analyses, and has consistently denied certiorari to most of its cases where standing was questioned.⁸⁷ However, in the line-item veto scenario, the Supreme Court was compelled to grant certiorari to the defendants and to reconsider the District Court's decision on the standing issue because of the language contained in the Act's judicial review clause.

⁸⁴ *Byrd*, 956 F. Supp. at 32.

⁸⁵ See CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 3531.11 (2d ed. 1984).

⁸⁶ See *infra* note 142 (describing the Court's leading taxpayer standing decisions). Several D.C. Circuit standing cases addressing legislator standing have either been denied certiorari or resolved by the Supreme Court without addressing the standing question. See *supra* note 70 (detailing examples of acceptable legislator standing in D.C. Circuit cases); *Byrd*, 956 F. Supp. at 31 (stating that "the Supreme Court has never endorsed the [D.C.] Circuit's analysis of standing in such cases . . ."); Jost, *supra* note 74, at 3 (reviewing the D.C. Circuit's legislator standing decisions that have been denied certiorari by the Supreme Court). Recently, Justice Scalia issued a strong majority opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which some scholars have regarded as one of the most important standing cases since World War II because of its deliberate blow to citizen standing. Sunstein, *supra* note 42, at 164-65.

⁸⁷ A reason for differing justiciability standards among the D.C. Circuit and the Supreme Court is suggested by Professor Nichol. He argues that the Supreme Court has applied the injury standard inconsistently, leaving the lower courts deprived of guidance. See Nichol, *supra* note 30, at 1918 ("[T]rial judges have been left completely at sea in the examination of which sorts of interests, if abrogated, sustain jurisdiction.").

IV. THE SUPREME COURT AND *RAINES V. BYRD*

The Supreme Court imposes limitations on federal court standing which are both constitutional, pursuant to Article III of the Constitution,⁸⁸ and prudential, based upon the Court's preference to preserve a separation of powers among the three branches of government.⁸⁹ Generally, the Court is reluctant to usurp the powers of the other branches "unless obliged to do so in the proper performance of [their] judicial function, when the question is raised by a party whose interests entitle him to raise it."⁹⁰ As acknowledged by Chief Justice Rehnquist in the majority opinion of *Raines v. Byrd*,⁹¹ the Court's prudential concerns are satisfied where Congress expressly grants plaintiffs standing authorization.⁹²

⁸⁸ See U.S. CONST. art. III, § 2, cl. 1. The Constitution states:

The judicial Power [of the federal courts] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States . . .

Id.

⁸⁹ See *supra* note 51 and accompanying text (outlining the parameters of prudential standing). Prudential concerns are not prescribed by the Constitution, rather they are judicially erected limitations designed to discourage the courts from infringing upon legislative or executive domain. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

⁹⁰ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982) (citing *Blair v. United States*, 250 U.S. 273, 279 (1919)).

⁹¹ 117 S. Ct. 2312 (1997).

⁹² *Id.* at 2318 n.3 ("[C]ongress' decision to grant a particular plaintiff the right to challenge the act's constitutionality (as here, see § 692(a)(1) . . .) eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit."). See *Bennett v. Spear*, 117 S. Ct. 1154, 1162-63 (1997) (holding that the inclusion of a citizen suit provision in the Endangered Species Act, 16 U.S.C. § 1540(g) (1973), allowing "any person" to file a challenge, expands Article III's standing limitations to the "full[est] extent permitted"); *supra* note 51 (containing

The defendants did not contest prudential standing in their arguments,⁹³ and the brevity of this discussion benefitted their case. If the Court entered into a separation of powers discussion, it would have been compelled to weigh the plaintiffs' substantial separation of powers arguments, which go directly to the merits of their constitutional challenge to the Act.⁹⁴

The Court further imposes limitations on federal court jurisdiction when controversies implicate the "political question doctrine."⁹⁵ However, this limitation is similarly not grounded in

additional information on the Court's prudential standing concerns).

⁹³ See Oral Argument of Appellants at *12, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 276080 ("[W]e concede and concur that the prudential standing of objections have been set to one side by the act of Congress . . .").

⁹⁴ Plaintiffs based their claim of injury upon a profound diminishment of powers granted to the legislative branch by the Presentment Clause contained in Article I of the Constitution. Brief for Appellees at *19, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251423. They maintain that the Constitution textually grants "the power of the purse" to the legislature, and the advent of the line-item veto tilts this power relationship in the favor of the Executive, without amending the Constitution. *Id.* at *45. If the defendants engaged the Court in a separation of powers discussion on the justiciability of the case, it is likely that the Plaintiffs' contention of damage to the legislature's power relationship with the Executive would have been granted additional weight by the Court in its justiciability evaluation. Instead, the plaintiffs' claim of diminished legislative power was held to be insufficient grounds for Constitutional standing. *Raines*, 117 S. Ct. at 2322.

⁹⁵ "By extending the judicial power to all cases in law and equity, the Constitution had never been understood to confer on that department any political power whatever." ADDRESSES BY JOHN MARSHALL, U.S. HOUSE OF REPRESENTATIVES, 1794 (ON THE RESOLUTION OF THE HONORABLE EDWARD LIVINGSTON) 13 (1848). *But see* Charles Edward Umbanhowe, *Marshall on Judging*, 7 AM. J. LEGAL HIST. 210, 224 (1963) ("Marshall knew that the Court handled political issues; anyone who would deny this is foolish The Court can and must handle questions of public policy, political questions; but it cannot handle the question in the way of politics, but in the way of law."). It remains clear however, that the Court may refuse judicial review if "the constitution has committed the determination of the issue to another agency of government than the courts." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959). In *Raines v. Byrd*, the Court found that the Act's statutory grant of standing satisfied prudential separation of powers and political question limitations. 117 S. Ct. at 2318 n.3. See also Linda Sandstrom

constitutional construction, but is based solely upon judicial defenses to preserve the separation of powers.⁹⁶ Since both Congress and the President expressly endorsed the Line Item Veto Act and its judicial review clause,⁹⁷ the *Raines* Court became sufficiently convinced of each branch's comfort with using the judicial forum to mollify its traditional separation of powers concerns, and avoid the infusion of a "political question" analysis.⁹⁸ With each of these non-constitutional barriers to standing eliminated, the *Raines* Court's justiciability analysis was shortened to only an Article III determination of whether the averred injury was "personal, particularized, concrete and otherwise judicially cognizable."⁹⁹

The *Raines* Court found the Legislators' claim to be non-justiciable for two central reasons: 1) the Legislators lacked an adequate "personal stake" in their dispute to satisfy the Court's interpretation of the Article III injury standard;¹⁰⁰ and 2) the lack of such an injury prevented the Legislators from advancing a "ripe" claim for relief.¹⁰¹ With prudential concerns eliminated by the existence of the Act's explicit judicial review clause, it is unclear how the Court can fault the ripeness of the Legislators' claim. In *Bowsher v. Synar*,¹⁰² the Supreme Court addressed removal

Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 306 (1996) (arguing that the political question doctrine "should be abolished" because it "retains little or no functional purpose" given the existence of the Court's bedrock separation of powers concerns).

⁹⁶ See Alexander M. Bickel, *The Supreme Court, 1960 Term Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961); Simard, *supra* note 95, at 333 (discussing the Court's non-constitutionally erected jurisdictional limitations which promote separation of powers principles).

⁹⁷ See 2 U.S.C. §§ 691-692 (Supp. 1997) (the Line Item Veto Act); 2 U.S.C. § 692 (Supp. 1997) (the judicial review clause).

⁹⁸ See *Raines*, 117 S. Ct. at 2318.

⁹⁹ *Id.* "[C]ongress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 2318 n.3.

¹⁰⁰ *Id.* at 2322 ("In sum, appellees have alleged no injury to themselves as individuals . . . and their attempt to litigate this dispute at this time and in this form is contrary to historical experience.").

¹⁰¹ *Id.*

¹⁰² 478 U.S. 714, 727-28 (1986).

provisions contained in the statute defining the Office of the Comptroller General.¹⁰³ There, the Court held that removal provisions were "ripe" and worthy of full effect and consideration despite their lack of prior use.¹⁰⁴ By stating that the line-item veto's constitutionality could be questioned in the federal courts at another time,¹⁰⁵ the Raines Court points to a ripeness problem that did not setback the appellees in *Bowsher*.

A. A Ripe Claim for Relief

Plaintiffs claimed to be worthy of federal court standing because the Act infringes upon constitutionally reserved legislative functions and profoundly alters the nature of the legislature's time-tested relationship with the Executive Branch during appropriations negotiations.¹⁰⁶ The defendants contended that the President's intentions regarding the powers conferred by the Act were "entirely speculative" and thus insufficient to cause a justiciable Article III injury.¹⁰⁷ This, however is not at all true. President Clinton spoke openly about his intention to exercise the line-item veto power as soon as he possibly could.¹⁰⁸

¹⁰³ See 31 U.S.C. § 703 (1983).

¹⁰⁴ See *Bowsher*, 478 U.S. at 728 n.5. The Court found that these removal provisions could "hardly be thought to be undermined because of nonuse." *Id.*

¹⁰⁵ See *Raines*, 117 S. Ct. at 2322 (1997) (suggesting that the constitutionality of the Act could be challenged "by someone who suffers a judicially cognizable injury . . .").

¹⁰⁶ The mere existence of the Act forces "a Member who is not permitted to vote 'yea' or 'nay' . . . on a menu of items from which the President may choose, . . . [to] surrender an important power at the moment of voting, and . . . [to] transfer to the President a choice that the Member is constitutionally entitled to exercise himself." Brief for Appellees at *25-26, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251423.

¹⁰⁷ See *Byrd v. Raines*, 956 F. Supp. 25, 31 (D.D.C.), vacated, *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

¹⁰⁸ See, e.g., 141 CONG. REC. S8202-03 (daily ed. June 13, 1995) (containing letter from President Clinton to the Speaker of the House: "Dear Mr. Speaker: I am writing to urge that Congress quickly complete work on the line-item veto legislation so I can use it this year to curb wasteful tax and spending provisions"). In a press conference following the D.C. District Court's *Byrd v. Raines* decision, the White House confirmed that the President "fully intended to use"

Several Supreme Court decisions have found that Article III injury need not occur to qualify for standing as long as an injury is "certainly impending."¹⁰⁹ While the Court does place limits upon acceptable "imminent" or "certainly impending" injuries,¹¹⁰ these expressed restrictions fail to cover the immediacy of the harm

his line-item veto power imminently. See White House Press Release, at *1 (Apr. 11, 1997), available in 1997 WL 174185; Juliet Eilperin & Jim Vande Hei, *If Line-Item Veto Debuts This Week, Battle Over Clinton "Cancellations" Will Be Long*, ROLL CALL (Wash. D.C.), Aug. 11, 1997 at *1, available in LEXIS, Nexis Library, ALLNWS File (quoting Stan Collender, managing director of Burson-Marsteller's federal budget consulting group, as saying "[C]linton is showing his willingness to use it. It gives his threats during (appropriations debates) more credibility").

¹⁰⁹ *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (stating that "[a] threatened injury must be 'certainly impending' to constitute injury in fact"). See also *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 201-02 (1983) (holding that issue of whether waste disposal regulations were preempted by federal statute was ripe because "requir[ing] the industry to proceed without knowing whether the moratorium is valid would impose a palpable . . . hardship . . ."); *Larson v. Valente*, 456 U.S. 228, 241 (1982) (noting threatened imposition of a state registration and reporting requirement on religious organizations "surely amounts to a distinct and palpable injury"); *Buckley v. Valeo*, 424 U.S. 1, 117 (1976) (holding challenge to the Federal Election Campaigns Act was ripe anticipating "impending future rulings and determinations"); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 143-45 (1974) (holding that a time delay before disputed provisions of the Rail Act come into effect does not impact justiciability); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (stating that petitioner could challenge a statute that "deters the exercise of constitutional rights" without "expos[ing] himself to actual arrest or prosecution"); *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 506-08 (1972) (holding that the Michigan Water Pollution Act could be challenged based upon a threat of future enforcement); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (stating that petitioner drug companies' day-to-day business operations were sufficiently impacted by regulations to constitute a justiciable controversy); Nichol, *supra* note 30, at 1950 n.89 (referencing "decisions allowing preenforcement review of governmental action under a ripeness analysis, based upon the present burdens of pending acts").

¹¹⁰ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (stating that "[a]lthough 'imminence' is concededly a somewhat elastic topic, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes — that the injury is 'certainly impending'").

befalling the complaining legislators in *Raines*.¹¹¹ Even at the time these legislators filed their constitutional challenge in *Byrd*,¹¹² the President's intention to use his line-item veto authority quickly and decisively was unquestionable.¹¹³ Based upon its

¹¹¹ *Raines v. Byrd*, 117 S. Ct. 2312 (1997). On August 11, 1997, in his first use of his newly conferred line-item veto powers, President Clinton vetoed an appropriation item for the State of New York's Medicaid reimbursement formula. See Harris, *supra* note 19, at A1. As the senior Senator from the State of New York at the time of this veto, Sen. Daniel Patrick Moynihan experienced a bonafide "injury" as a result of the President's use of his pen. Harris, *supra* note 19, at A1. While the substance of this veto was indeterminable when Senator Moynihan and his colleagues raised their constitutional challenge, the circumstances at the time strongly evinced that such an impending harm could "proceed with a high degree of immediacy, [and thereby] . . . reduce the possibility of deciding a case in which no injury would . . . occur[r] at all." *Lujan*, 504 U.S. at 564 n.2. In *Lujan*, the Court explained that "[w]here there is no actual harm, . . . its imminence (*though not its precise extent*) must be established." *Id.* at 564 (emphasis supplied). The *Lujan* Court rejected plaintiffs' claim that their injury (being denied the opportunity to observe endangered animals) was "certainly impending" because of an "indefinite" probability that the injury would occur. See *id.* at 564 n.2. The *Lujan* Court also expressed that the availability of federal court jurisdiction pursuant to an impending injury is "stretched beyond the breaking point when . . . the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Id.* Plaintiffs' generalized intent to "some day" visit places where they may be denied the opportunity to observe endangered animals, "is not simply enough" to support an "actual or imminent" injury. *Id.* at 564. See also *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (opining that plaintiff, who had previously been choked by a police officer, failed to establish a "case or controversy" where no "real or immediate threat that he would again be . . . choke[d]" existed).

¹¹² The *Byrd* defendants filed their challenge to the Line Item Veto Act on January 2, 1997, the day after the Act entered into law. *Byrd*, 956 F. Supp. at 27.

¹¹³ See *supra* note 108 (referencing the President's eagerness to use the line-item veto power). Some predicted that "[l]itigation would shroud the statutory line-item veto in legal uncertainty for years and thus ensure that a President would refrain from vigorously using this authority until the litigation was resolved." J. Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498, 1500 (1995). These predictions, however, did not prove true. While the line-item veto remains under a constitutional "shroud," this condition has certainly not curbed the President's use of his line-item veto powers. See *infra* notes 172, 180-182 and accompanying text (discussing President Clinton's continued uses of the Act's powers despite the lack of a judicial resolution).

previous acceptance of “certainly impending” injuries, it is irrational for the Court to deny jurisdiction here in the presence of such imminent threats.¹¹⁴

The *Raines* Court recognized that the plaintiffs’ arguments required a two-tiered analysis including a determination of their federal court standing and an examination of the merits of their constitutional challenge.¹¹⁵ At the beginning of its standing analysis, the Court made special mention that the leadership bodies in both the House and the Senate, in their amici curiae brief, jointly favored a reversal of the D.C. District Court on the merits of the line-item veto’s constitutionality.¹¹⁶ The Court relied heavily on this congressional input in developing its opinion, but neglected to properly consider its complete message in light of the two-tiered analysis. Given the express language contained in the judicial review clause of the Act,¹¹⁷ the fact that a majority of both Houses of Congress supported the standing of individual members to challenge the constitutionality of the line-item veto cannot be questioned.

The *Raines* Court improperly relied on congressional opposition to the suit, which was based solely on the constitutional merits of the Act, for its determination that the plaintiffs lacked standing.

¹¹⁴ “Votes on appropriations bills containing multiple items are ‘certainly impending’ . . . since there is no doubt that the appellee Members [of Congress] will be called upon to vote on appropriations bills in the next several months [immediately following the official enactment of the Act].” Brief for Appellees at *25, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251423.

¹¹⁵ See *Raines*, 117 S. Ct. at 2317. The D.C. District Court also employed this two-tiered approach, but found the claim to be ripe and therefore proceeded directly to the merits of the Legislators’ argument. See *Byrd*, 956 F. Supp. at 32.

¹¹⁶ *Raines*, 117 S. Ct. at 2317 n.2 (“The House Bipartisan Legal Advisory Group (comprising the Speaker, the Majority Leader, the Minority Leader, and the two Whips) and the Senate filed a joint amici curiae urging that the District Court be reversed on the merits.”). See Amici Curiae Brief of House Bipartisan Legal Advisory Group et al. at *1, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251409.

¹¹⁷ See *supra* note 11 (providing language of the Act’s judicial review clause, 2 U.S.C. § 692(a)(1), enabling any Member of Congress to bring a suit challenging the Act’s constitutionality).

At the outset of their opinion, the *Raines* majority expressly recognized congressional silence on the standing question in the amici curiae brief.¹¹⁸ Yet at the conclusion of their opinion, the Court stated that they "attach some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."¹¹⁹ In addition, the defendants also conceded that "an injury to official authority may support standing for a government itself or its duly authorized agents."¹²⁰ By confusing a lack of support for the merits of a claim with a lack of support for standing, the Court unfortunately took an illogical leap that clouded the final results of their opinion.¹²¹

¹¹⁸ See *Raines*, 117 S. Ct. at 2317 n.2 ("Their [amici curiae] brief states that they express no position as to appellees' standing."). See Amici Curiae Brief of House Bipartisan Legal Advisory Group et al. at 2 n.2, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251409. The only record of Congress' opinion as to the Legislators' standing is contained in the plain language of the Line Item Veto Act of 1996, 2 U.S.C. § 692 (a)(1), which is the foundation upon which the Legislators base their claim. *Raines*, 117 S. Ct. at 2316. See also RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 9-10 (4th ed. Supp. 1997) (questioning the Court's statement that Congress did not support the filing of the *Byrd* plaintiffs' suit given the Act's unambiguous judicial review clause).

¹¹⁹ *Raines*, 117 S. Ct. at 2322. The justices neglect to mention that Congress only actively opposed the merits of the claim and they fail to state that both Houses actually support a member of Congress' standing to challenge the Act in federal court. See 2 U.S.C. § 692 (a)(1) (Supp. 1997).

¹²⁰ *Raines*, 117 S. Ct. at 2323 n.2 (Souter, J., concurring). See also Brief for Appellants at *20-21, 25-28, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251425.

¹²¹ While it is true that the Act was passed by a majority of both Houses of Congress and signed by the President, this only evinces that both branches believe that the line-item veto advances sound policy. It does not suggest that they each believed it to be constitutional. But see Oral Argument of Appellees at *51, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 276080 (providing assertion by the Court to the appellees that "[a] majority of the colleagues of the plaintiffs have decided that this law is constitutional . . ."). The Court assumes Congress' belief in the Act's constitutionality, despite the fact that the Act's judicial review clause was inserted to expeditiously address this very constitutional question which remains unanswered. See *supra* note 39 (reproducing statements by members of Congress explaining the purpose of the

B. "Personal" and "Official Capacity" Injuries - Are They Mutually Exclusive?

The specific questions of legislator standing presented by the *Byrd* and *Raines* cases constituted issues of first impression for both the D.C. District Court and the Supreme Court.¹²² While the District Court depended heavily upon its previous case law concerning legislator standing, the Supreme Court chose to ignore these lower court decisions. Instead, the Supreme Court relied on but one remotely analogous case that did not involve federal legislators.¹²³ In *Coleman v. Miller*,¹²⁴ the Supreme Court granted standing to Kansas legislators who "have a plain, direct and adequate interest in maintaining the effectiveness of their votes."¹²⁵ The Court accepted jurisdiction in *Coleman*, recognizing that the legislators had "adequate interest in the controversy by reason of their [official public] duty to enforce the state statutes," despite a lack of private damage.¹²⁶ The *Raines* majority distinguished *Coleman* because votes in the state legislature were

Act's judicial review clause).

¹²² See *Raines*, 117 S. Ct. at 2318 (stating that "[w]e have never had occasion to rule on the question of legislator standing presented here"); *Byrd v. Raines*, 956 F. Supp. 25, 33 (1997) (stating that "[t]his case is indisputably one of first impression"). Congress and the President remain divided over the question of whether federal legislators can challenge laws in court. Jost, *supra* note 74, at 2. See Kenneth Jost, *Lawmakers Lose Standing With Courts*, THE RECORDER (Wash., D.C.), June 27, 1997, at 3 (stating that "[T]he high court used the [*Raines*] case to issue its first direct ruling on the issue of legislative standing").

¹²³ *Raines*, 117 S. Ct. at 2318-21.

¹²⁴ 307 U.S. 433 (1939). In *Coleman*, members of the Kansas legislature were granted standing in their official capacity as legislators to challenge the use of a tie-breaking vote by the President of their State Senate, resulting in the state's allegedly improper ratification of a proposed Constitutional amendment (the "Child Labor Amendment") by a vote of 21-20. *Id.* at 435. The Court eventually ruled against the legislators on the merits of their complaint. *Id.* at 456.

¹²⁵ *Id.* at 438.

¹²⁶ *Id.* at 445.

allegedly “denied effectiveness” in a specific instance,¹²⁷ rather than in the ongoing and debilitating sense averred by the plaintiffs in *Raines*. It is unclear how the *Coleman* holding can be so easily dismissed when the *Raines* case presents a much stronger claim to fundamental, constitutionally-reserved rights.¹²⁸ At the most extreme, the *Coleman* Court incorrectly viewed Kansas as ratifying a proposed constitutional amendment which had already been rejected by twenty-six states and accepted by only five,¹²⁹ making it highly improbable that the proposal would be enacted into law.¹³⁰ However, members of Congress are subject to repeated vote nullification as result of the Line Item Veto Act. Thus, the “harms [in *Raines*] are more serious, more pervasive, and more immediate than the harm at issue in *Coleman*.”¹³¹

It is apparent that the Constitution does not draw a definitive line between the justiciability of claims raised by those suffering “personal” harm and those suffering “official” harm.¹³² With the

¹²⁷ See *Raines*, 117 S. Ct. at 2319-20.

¹²⁸ See *id.* at 2328 (Breyer, J., dissenting). In *Flast v. Cohen*, the Warren Court demonstrated a preference for granting standing based upon the suitability of the complaining plaintiffs, rather than on the justiciability of their claim. 392 U.S. 83, 99 (1968). Some scholars, however, continue to argue that standing should be based upon the nature of the constitutional question being raised. See Fletcher, *supra* note 48, at 290. The plaintiffs in *Raines* exhibited a substantial injury claim that satisfies the Court’s prudential and constitutional justiciability limitations. “[T]he plaintiffs . . . do not ask the Court ‘to pass upon’ an ‘abstract intellectual proble[m],’ but to determine ‘a concrete living contest between’ genuine ‘adversaries.’” *Raines*, 117 S. Ct. at 2327 (Breyer, J., dissenting) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)). “[S]ince many of the plaintiffs will likely vote in the majority for at least some appropriations bills that are then subject to presidential cancellation, I think . . . their votes are threatened with nullification too.” *Id.* at 2329 (Breyer, J., dissenting).

¹²⁹ See *Coleman*, 307 U.S. at 436.

¹³⁰ See *Raines*, 117 S. Ct. at 2328 (Breyer, J., dissenting).

¹³¹ *Id.* “[The Line Item Veto Act] is a nullification of a senator or representative’s vote.” See Jost, *supra* note 74, at 2 (quoting Erwin Chemerinsky, a Professor of Constitutional Law, University of Southern California Law Center).

¹³² *Raines*, 117 S. Ct. at 2328 (Breyer, J., dissenting) (stating that since the *Raines* majority suggests that legislators might have standing to contest rules that

exception of its recent *Raines* decision, the Supreme Court has never denied standing to a legislator advancing a constitutional claim for lack of a personal injury.¹³³ The *Raines* majority opinion follows from an underlying belief that legislators acting in their official capacities can never suffer a "personal" injury sufficient to confer Article III jurisdiction.¹³⁴ In *Coleman*, the

"‘denied’ them their vote . . . in a discriminatory manner," *id.* at 2320, it is possible that "any constitutional rule distinguishing ‘official’ from ‘personal’ injury is not absolute"). The strong views against this assertion are only contained in concurring and dissenting opinions to D.C. Circuit cases. *See Moore v. U.S. House of Representatives*, 733 F.2d. 946, 958 (D.C. Cir. 1984) (Scalia, J., concurring) (stating that traditional constitutional "principle[s] [are] reduced to meaninglessness, and the system of checks and balances replaced by a system of judicial refereeship, if the officers of the political branches are deemed to have a personal, ‘private’ interest in the powers that have been conferred upon them . . ."), *cert. denied*, 469 U.S. 1106 (1985); *Barnes v. Kline*, 759 F.2d. 21, 42 (D.C. Cir. 1985) (Bork, J., dissenting) (stating that individual members of Congress seeking judicial review over the validity of the presidential "pocket veto" did not sue because of "any personal injury done to them but solely to have the courts define and protect their governmental powers"), *vacated as moot sub nom.*, *Burke v. Barnes*, 479 U.S. 361 (1987).

¹³³ *See Raines*, 117 S. Ct. at 2318. However, the Supreme Court points out in *Raines* that federal jurisdiction may be conferred where a member of Congress asserts an individual injury. *Id. See, e.g., Meese v. Keene*, 481 U.S. 465, 476 (1987) (granting standing to state representative alleging damage to his professional reputation); *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (allowing Congressman Adam Clayton Powell to challenge his exclusion from the House of Representatives and his subsequent loss of salary).

¹³⁴ *Raines*, 117 S. Ct. at 2318. Prior to his appointment to the Supreme Court, former D.C. Circuit Court Judge and Professor of Law, Antonin Scalia advanced this narrow interpretation of Article III standing doctrine. *See generally* Scalia, *supra* note 62, at 882-84. Scalia has asserted that strict standing requirements encourage separation of powers by excluding several issues from judicial review. Scalia, *supra* note 62, at 892-97. He asserted that statutory grants of standing based upon generalized rights are unconstitutional. *See* Scalia, *supra* note 62, at 894-97. These ideas restrict the will of Congress and the President to create standing. *See* Nichol, *supra* note 30, at 1940 n.143. At one time, Scalia intimated that the prohibition against legislator standing might not be absolute, but this would seem to be in an extreme case. *Moore*, 733 F.2d at 959 (Scalia, J., concurring) (stating that "unless those powers have been denied in such fashion as to produce a governmental result that harms some entity or individual who brings the matter before us, we have no constitutional power to interfere").

Supreme Court recognized that the state legislators lacked a "personal" injury, yet jurisdiction over their complaint was conferred.¹³⁵ In *Raines*, however, the Court viewed as deficient the "official" quality of the members' injury, which "runs . . . with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power."¹³⁶

While the Supreme Court distinguished *Coleman* on the grounds that the state legislators' votes were in jeopardy of complete nullification,¹³⁷ the *Raines* Legislators complained of a similar situation. Justice Breyer, in his dissenting opinion, stated: "since many of the present plaintiffs will likely vote in the majority for at least some appropriations bills that are the subject of presidential cancellation, I think that—on their view of the law—their votes are threatened with nullification too."¹³⁸ The *Raines* Court advanced its position that the members of Congress sued only in their official capacities by stating that if a plaintiff retired from the legislature, their claim would be lost and instead be possessed by their successor.¹³⁹ This argument fails to distinguish *Coleman*, leaving each as a case of "official" injury with opposing results on the standing question.

Although Chief Justice Rehnquist authored the *Raines* opinion, Justice Scalia's influences are evident.

¹³⁵ See *Coleman v. Miller*, 307 U.S. 433, 445-46 (1939). In *Coleman*, Justice Frankfurter stated: "In no sense are they matters of 'private damage.' They pertain to legislators not as individuals but as political representatives executing the legislative process." *Id.* at 470 (Frankfurter, J., dissenting).

¹³⁶ *Raines*, 117 S. Ct. at 2318 (referencing THE FEDERALIST NO. 62 at 378 (James Madison) (C. Rossiter ed. 1961)). See also The Harvard Law Review Association 1997, *The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 217, 222 n.47 (1997) (stating that prior to *Raines*, the Court did not use the personal injury requirement to differentiate personal and official capacity injuries).

¹³⁷ *Raines*, 117 S. Ct. at 2319.

¹³⁸ *Id.* at 2329 (Breyer, J., dissenting).

¹³⁹ *Id.* at 2318. The plaintiff in *Raines*, Senator Mark O. Hatfield, actually did retire from the Senate prior to the Court's decision. *Id.* at 2315 n.1. The Court asserted that a retiring plaintiff legislator would relinquish this sort of claim to their successor, but curiously failed to apply this logic to retired plaintiff Hatfield. *Id.* Thus, the Court damages its argument that a member of Congress cannot suffer a personal injury.

By holding that the *Raines* plaintiffs lacked a “judicially cognizable injury” pursuant to the Act’s existence, the Court suggested that such a requisite injury could not be effected until after the President exercised his powers conferred by the Act.¹⁴⁰ Instead of considering the reasons for the establishment of the “personal” injury standard and testing them against the Legislators’ claim of power dilution, the *Raines* Court found the averred injury to be “wholly abstract and widely dispersed,” and therefore unworthy of federal court jurisdiction.¹⁴¹

Several of the Supreme Court’s denials of jurisdiction to complaints lacking “personal” injuries involve “tax paying” plaintiffs challenging government actions.¹⁴² Standing is usually

¹⁴⁰ The Court states, “We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act).” *See id.* at 2322. *But see* Oral Argument of Appellees at *5-6, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671), *available in* 1997 WL 276080 (suggesting that exempting appropriations bills from the Act’s reach would be extremely arduous). During the oral argument, the Court asked:

[S]uppose Congress decides later on that maybe some type of appropriations shouldn’t be subject to this [a hypothetical bill containing items A, B, and C] line item veto, so they include [a] passage in a subsequent bill saying that the Line Item Veto Act won’t apply to a certain type of appropriation. That, of course, has to go to the President for signature, and he then can veto that and that then would require enough votes to override that veto.

Id. Acting Solicitor General Dellinger, representing the defendants, replied: “Yes.” *Id.*

¹⁴¹ *Raines*, 117 S. Ct. at 2322.

¹⁴² The Court has steadily denied taxpayer standing to challenge federal expenditures. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-90 (1982) (denying taxpayers’ standing in challenge to the constitutionality of a grant of federal land to a religious college pursuant to the establishment clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227-28 (1974) (holding that taxpayers lacked standing to challenge the membership of members of Congress in the military reserve, which they asserted violated art. I, § 6, cl. 2 of the Constitution, restricting members of Congress from holding “any office under the United States”); *United States v. Richardson*, 418 U.S. 166, 170-71 (1974) (denying taxpayer standing to challenge the statute appropriating funds for the

refused because of "Joe citizen's" inability to manifest injuries distinct from those suffered by the general public.¹⁴³ It would seem then that the primary purpose for the personal injury standard is to prevent the federal courts from adjudicating harms that do not belong to the plaintiff. Yet, it is unclear why a legislator, or small group of legislators, acting in their official capacities are characterized as "Joe citizen," rather than as distinctive challengers of government action.¹⁴⁴ The existence of the line-item veto may not injure members of Congress "personally," however, its mere presence and aura profoundly affects their official duties and powers concretely and particularly.¹⁴⁵

Central Intelligence Agency because it allegedly violated art. I, § 9, cl. 7 of the Constitution which requires "a regular statement and account of the receipts and expenditures of all public money").

¹⁴³ *Allen v. Wright*, 468 U.S. 737, 756 (1984) ("[R]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interest of concerned bystanders.'") (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). "Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a personal constitutional right . . . a principled consistency would dictate recognition of respondents' standing to challenge the execution of every capital sentence on the basis of a personal right . . ." *Allen*, 468 U.S. at 756 n.21 (citing *Valley Forge*, 454 U.S. at 489-90).

¹⁴⁴ It has been argued that "increasingly pervasive government bureaucracies develop interests that elude or resist democratic control and distort the legislative process." Susan Bandes, *The Idea of A Case*, 42 STAN. L. REV. 227, 303 (1990) (citing Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hoffeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1040, 1044 (1968) (arguing that the personal stake requirement is unrelated to the Court's duty to do justice); Owen M. Fiss, *The Supreme Court, 1978 Term — Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 8 (1979)). This type of development calls into question the wisdom of judicial avoidance where concrete constitutional issues like the line-item veto are expressly designated for Supreme Court review. See *Raines*, 117 S. Ct. at 2324 (Souter, J., concurring) (stating that "as a factual matter [the members of Congress] have a more direct and tangible interest in the preservation of that power than the general citizenry has"); *Hendrick v. Walters*, 865 P.2d 1232, 1236-38 (Okla. 1993) (holding that a legislator had personal interest in suit to determine whether Governor lawfully assumed office after substantial interaction between the Governor and the legislature).

¹⁴⁵ The *Raines* majority stresses that to achieve standing, the plaintiff must, among other requirements, suffer "a legally protected interest which is . . .

The *Raines* injury is not “impersonal” in the same sense as taxpayers’ widely held grievances.¹⁴⁶ The harms averred in *Raines* belong distinctly, concretely and particularly to the Legislators. Justices Rehnquist and Scalia and their colleagues in the *Raines* majority should have acknowledged this distinction. Instead, the claims were grouped with *Lujan v. Defenders of Wildlife*¹⁴⁷ and various other failed impersonal and generalized injuries, ignoring their profound effect on the operating structure of legislative government.¹⁴⁸

concrete and particularized.” *Raines*, 117 S. Ct. at 2317 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “[The existence of the line-item veto] gives [the President] a lot more power to control individual lawmakers. If [the President is] smart, he can use [the Act] to extract concessions along the way in (appropriations bills).” Eilperin & Vande Hei, *supra* note 108, at *2 (quoting unnamed “GOP leadership aide”).

¹⁴⁶ In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court dismissed a taxpayer suit challenging the appropriateness of certain federal expenditures for lack of Article III jurisdiction by stating that:

The party who invokes the power [of federal court jurisdiction] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488. The Supreme Court has upheld this principal in several subsequent opinions. *See, e.g.*, *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (holding that taxpaying plaintiff who had generalized grievance that federal government failed to disclose Central Intelligence Agency expenditures pursuant to the Constitution, art. I, § 9, cl. 7, lacked standing because the impact on him was “common to all members of the public”); *Ex parte Levitt*, 302 U.S. 633 (1937) (dismissing suit regarding Justice Black’s appointment to the Supreme Court, because private complaining interest was “common to all members of the public”).

¹⁴⁷ 504 U.S. 555 (1992); *supra* notes 22, 142 and accompanying text (referencing some of the Supreme Court’s decisions denying standing to parties failing to raise sufficient injuries).

¹⁴⁸ A violation or infringement of the democratic process might trigger a special need for judicial intervention. Simard, *supra* note 95, at 326 n.133. *See Moore v. U.S. House of Representatives*, 733 F.2d 946, 952 (D.C. Cir. 1984) (“[A]ppellants here claim deprivation of a particular opportunity to vote in a manner prescribed by the Constitution. Both the alleged injury and the legal interest are specific and concrete.”), *cert. denied*, 469 U.S. 1106 (1985).

C. Drawing the Wrong Analogies

To reach its conclusion, the *Raines* Court employed questionable reasoning in various stages of its opinion. A primary example is where the Court devoted nearly two pages of its opinion to analogizing the *Raines* scenario with President Andrew Johnson's near impeachment as a result of violating the Tenure of Office Act.¹⁴⁹ The Court posited that if they granted standing to the Legislators, President Johnson would also have been deserving of jurisdiction to challenge the "diminution of his official [Presidential] power" caused by the existence of the Tenure of Office Act.¹⁵⁰ President Johnson's claims are summarily characterized as being non-justiciable even though the matter never came before a court.¹⁵¹ The Court was compelled to rely on such speculation to advance their holding in *Raines* because of their lack of jurisprudence on legislator standing and their unwillingness to adopt the reasoning of the D.C. Circuit.¹⁵²

¹⁴⁹ *Raines*, 117 S. Ct. at 2321-22. The Tenure of Office Act of 1867 provided that a President could not remove a Cabinet Member that required confirmation of the Senate without consent of the Senate. ch. 154, Stat. 30 (repealed 1887).

¹⁵⁰ *Raines*, 117 S. Ct. at 2321.

¹⁵¹ Justice Stevens stated:

[T]he fact that others did not choose to bring suit does not necessarily mean the Constitution would have precluded them from doing so . . . [and furthermore] because Congress did not authorize declaratory judgment actions until the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, the fact that President Johnson did not bring such an action in 1868 is not entirely surprising.

Id. at 2326 n.3 (Stevens, J., dissenting). *See id.* at 2329 (Breyer, J. dissenting) (stating that "[I] do not believe that the majority's historical examples primarily involving the Executive Branch and involving lawsuits that were not brought . . . are legally determinative"); Jonathan L. Entin, *Panel I: War Powers and Foreign Affairs: The Dog That Rarely Barks*, 47 CASE W. RES. L. REV. 1305, 1309 (1997) (stating that "the Court's conclusion that the absence of [past similar interbranch] litigation implies recognition that interbranch differences do not implicate legally cognizable harms does not follow").

¹⁵² *See supra* note 70 (outlining the D.C. Circuit's principal legislator standing cases).

In formulating its opinion, the *Raines* majority managed to sidestep several applicable Supreme Court decisions. For example, in *Gladstone v. Village of Bellwood*,¹⁵³ the Supreme Court held that residents of Bellwood, Illinois were acceptable litigants in a suit alleging that a realty company engaged in "steering" prospective home buyers to areas based upon their race.¹⁵⁴ Although the plaintiff residents never intended to purchase a home, the Court granted their standing claim because the realty company's actions caused a diminution in the value of the residents' homes.¹⁵⁵ The residents also successfully argued that the company's practices generally "deprived [them] of the social and professional benefits of living in an integrated society."¹⁵⁶ Furthermore, the residents sued as the "Village of Bellwood," which is a municipal corporation.¹⁵⁷ The Court did not address the question of whether the "Village of Bellwood" could be viewed as a "private person" entitled to sue, stating that the petitioners did not properly raise the issue in their brief.¹⁵⁸ By ignoring the residents' "public" status, the Court avoided addressing whether the village actually supported the merits of the suit.¹⁵⁹ If residents who did not intend to pur-

¹⁵³ 441 U.S. 91 (1979).

¹⁵⁴ *Id.* at 115.

¹⁵⁵ *Id.* (stating that "the economic value of one's own home has declined as a result of the conduct of another certainly is sufficient under Article III to allow standing to contest the legality of that conduct"). See *Northeast Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664 (1993) (allowing contractors to challenge the City's allegedly discriminatory bidding policy without showing that they would receive contracts in the absence of the policy).

¹⁵⁶ *Gladstone*, 442 U.S. at 95.

¹⁵⁷ *Id.* at 109.

¹⁵⁸ *Id.* The Court reasoned that standing is "'as [broad] as is permitted by Article III of the Constitution.'" *Id.* (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 n.21 (1972)).

¹⁵⁹ See *supra* notes 116-121 and accompanying text (discussing Congress' level of support for the *Raines* plaintiffs' claims). While the *Raines* Court stressed that the members of Congress did not expressly represent the opinions of the congressional body, the *Gladstone* Court did not address whether the Bellwood community ever voted or exhibited support for the challenge to the realty company's practices, even though each resident's property was allegedly devalued. *Gladstone*, 441 U.S. at 115.

chase a home were granted standing to sue based upon allegations of declining property values, why should members of Congress, who fully intended to vote on appropriations legislation, be banned from the same court where they allege a substantial diminution of their constitutionally granted powers to vote and legislate?¹⁶⁰ Thus, the Court construed the injury raised by the plaintiffs in *Raines* as insubstantial, while the Bellwood residents were offered enormous leeway to advance their standing claim.¹⁶¹

In its *Lujan* opinion,¹⁶² the Court attempted to address expanding categories of acceptable Article III injuries, but their inquiry failed to result in the implementation of definitive limitations. “[B]roadening [statutory] categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”¹⁶³ This statement, delivered by Justice Scalia

¹⁶⁰ While Congress may delegate some of its rulemaking functions to the other branches of government, the delegation must be appropriate. *Mistretta v. United States*, 488 U.S. 361, 388 (1989). The legislature may not delegate its basic lawmaking authority. See, e.g., *Loving v. United States*, 116 S. Ct. 1737, 1744 (1996) (“[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.”). The plaintiffs in *Raines* complained of an injury to their “lawmaking functions” pursuant to the existence of the Act, but were denied standing despite averring a more defined claim than those advanced in *Gladstone*, 441 U.S. at 112, *Trafficante*, 441 U.S. at 208, or *City of Jacksonville*, 508 U.S. at 664. See also *Hampton v. United States*, 276 U.S. 394, 407 (1928). In *Hampton*, the Court stated:

“The true distinction therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made.”

Id. (quoting *Cincinnati, Wilmington & Zanesville R.R. Co. v. Commissioners of Clinton*, 1 Ohio St. 77, 88-89 (1852)).

¹⁶¹ *Gladstone*, 441 U.S. at 112 (“Although an injury to one’s ‘society’ arguably would be an exceptionally generalized harm or, more important for Art[icle] III purposes, one that could not conceivably be the result of these petitioners conduct, we are obliged to construe the complaint favorably to respondents [Bellwood residents] . . .”).

¹⁶² 504 U.S. 555 (1992).

¹⁶³ *Id.* at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

on behalf of the *Lujan* majority, seems to suggest a willingness by the Court to broadly construe the characteristics of a permissible Article III injury. However, in cases such as *Gladstone*¹⁶⁴ and *Trafficante*,¹⁶⁵ the Court employed this expressed philosophy in reverse: they first accept the injury claims of otherwise common taxpayers because they aver racially charged concerns, and then "broaden" the categories of Article III injury to meet these parameters. This comparison suggests that the Court does not follow a purely formalistic approach in its justiciability determinations.¹⁶⁶ Rather, there are definite indications of natural law influences¹⁶⁷ in both *Gladstone Realtors* and *Trafficante*. So why is it that the *Raines* plaintiffs are not granted such deference?¹⁶⁸

¹⁶⁴ 441 U.S. at 112 (allowing village residents who did not intend to purchase a home to challenge the professional practices of a realty company that allegedly steered potential new home-buyers to areas based upon race).

¹⁶⁵ 409 U.S. at 208 (granting tenants of housing complex standing to challenge the allegedly racially discriminatory new tenant selection practices of their landlord).

¹⁶⁶ See Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 136 (1996) (outlining the characteristics of some of the Court's formalist opinions). Kelso and Kelso explain that in the Supreme Court's original formalist era, 1872-1937, standing was strictly characterized within the traditional and customary meaning of "cases and controversies." *Id.* at 110. The most significant standing case during this era was *Frothingham v. Mellon*, 262 U.S. 447 (1923). "It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention . . ." *Id.* at 487-88. The modern formalist approach began in 1974 with the Burger Court and is now most strongly advanced by Justice Scalia. See Kelso & Kelso, *supra*, at 122-23. In *Lujan*, Justice Scalia concluded that the plaintiffs did not show an adequately imminent or actual injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992). "This conclusion is consistent with the formalist preference for a clearly proven, classic kind of injury as a matter satisfying injury-in-fact analysis." Kelso & Kelso, *supra*, at 123.

¹⁶⁷ Modern natural law standing decisions are characterized by a recognition of Article III's injury requirements and an appreciation for federal court standing where an alleged injury is not entirely direct or apparent. See Kelso & Kelso, *supra* note 166, at 128.

¹⁶⁸ See Sunstein, *supra* note 42, at 163, 166 (arguing that the injury in fact requirement lacks historical support). Sunstein supplies an extensive LEXIS study to back-up this claim: In the long history of the Supreme Court, standing has

The strong opinions of Justice Scalia, first expressed in his Suffolk University Law Review article,¹⁶⁹ and later advanced in his D.C. Circuit concurrence in *Moore v. U.S. House of Representatives*,¹⁷⁰ now appear to have silenced the discretionary tone set forth in some of the Supreme Court's earlier standing decisions.¹⁷¹

V. THE FUTURE OF THE LINE-ITEM VETO IN THE COURTS AFTER *RAINES*

The Supreme Court's failure to address the merits of the line-item veto's constitutional controversy has fostered a sea of confusion in both Washington D.C. and across the nation.¹⁷² It is

been discussed in terms of Article III on 117 occasions [through November, 1992]. Sunstein, *supra* note 42, at 169. Of those 117, 55, or almost half took place after 1985. Sunstein, *supra* note 42, at 169. Of the 117, 71 of the discussions took place after 1980, and of the 117, 109 occurred since 1965. Sunstein, *supra* note 42, at 169. He argues for the use of a more flexible test where a state law, federal law or the Constitution can confer a "cause of action" on a plaintiff. Sunstein, *supra* note 42, at 166.

¹⁶⁹ Scalia, *supra* note 62, at 881.

¹⁷⁰ 733 F.2d 946 (D.C. Cir. 1984).

¹⁷¹ See generally David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (concluding that it is necessary for the Court to exercise discretion in jurisdictional matters to avoid undue conflicts with the other branches of the federal government). The Court's decision on standing in *Raines* is affecting the strategies of other potential litigants. The Southeastern Legal Foundation was forced to reevaluate its legal strategy for challenging statistical sampling methods in the 2000 Census. See Juliet Eilperin, *Unlikely Fallout Begins From Line-Item Ruling, High Court's Recent Decision on Veto Affects Members of Congress' Standing to Sue in Other Cases*, ROLL CALL (Wash., D.C.), July 21, 1997 at *1, available in LEXIS, Nexis Library, ALLNWS File. The group planned to enlist Representative Bob Carr in their suit but decided to rethink their plan after the *Raines* decision. *Id.* The ruling is also likely to strengthen a D.C. Circuit Court of Appeals decision upholding a House rule requiring "a three-fifths super-majority" for tax increases. *Id.* As in *Raines*, these members of Congress averred vote dilution as their basis for federal court standing. *Id.*

¹⁷² See Gugliotta & Pianin, *supra* note 77, at A1 ("[The President's use of the line item veto has] 'touched off an uproar among congressional leaders We're dealing with a raw abuse of political power by a president who doesn't have to run again . . .'" (quoting Senate Appropriations Committee Chairman,

apparent that the *Raines* Court anticipated the initiation of other suits challenging the line-item veto's constitutionality after the President exercised his newly granted authority.¹⁷³ This assertion was aggressively advanced in Justice Souter's concurring opinion,¹⁷⁴ where he stated: "[T]he certainty of a plaintiff who obviously would have standing to bring a suit to court after the politics had at least subsided from a full boil is a good reason to resolve doubts about standing against the plaintiff invoking an official interest."¹⁷⁵ However, Justice Souter made the questionable assumption that the tense political atmosphere existing at the time of the Act's passage would subside when the President invoked his first veto. This reasoning has proven false.¹⁷⁶ By neglecting to address the merits of the line-item veto controversy, the Supreme Court fostered an environment where the tenseness has now "boiled over."¹⁷⁷

Using his line-item veto power, President Clinton has "canceled" eighty-two items from appropriations bills since August 11,

Ted Stevens (R-Alaska)); The Harvard Law Review Association 1997, *supra* note 136, at 218 ("[T]he law of legislative standing after *Raines* is a doctrine fraught with analytical inconsistency and uncertain boundaries.").

¹⁷³ See *Raines v. Byrd*, 117 S. Ct. 2312, 2322 (1997). See also Jost, *supra* note 122, at 3 (stating that the defendants' lawyer in *Raines*, Acting Solicitor General Walter Dellinger, said that "a [new] suit could be maintained by someone who stood to benefit from a program . . . [cancelled] by the president"); *infra* note 164 (referencing constitutional challenges to the Line Item Veto Act of 1997 brought after *Raines*).

¹⁷⁴ *Raines*, 117 S. Ct. at 2324-25 (Souter, J., concurring).

¹⁷⁵ *Id.* at 2325 (Souter, J., concurring).

¹⁷⁶ But see Neal Devins & Michael Fitts, Editorial, *Don't Rush the Court*, N.Y. TIMES, Feb. 16, 1998, at A15 (arguing subsequent to the D.C. District Court's *City of New York v. Clinton* decision, 958 F. Supp. 168 (1998), the Supreme Court should refrain from addressing the constitutionality of the line-item veto until the Court is able "to sort out the impact of the new law," and gain "a firm understanding of how the statute works before passing judgment").

¹⁷⁷ "It is becoming increasingly clear that this so-called 'tool' [the line-item veto] is really not for the purpose of cutting spending, but is rather a blunt instrument intended primarily to intimidate members of Congress, so that the White House can have its way." See Press Release, Sen. Byrd Statement on NTEU Line Item Veto Act Court Decision, Jan. 7, 1998, (on file with *Journal of Law and Policy*).

1997, which will reportedly trim \$1.9 billion from the federal deficit over the next five years.¹⁷⁸ However, these savings are all based upon the dubious assumption that the Act will ultimately be found constitutional by the Supreme Court. If the Act is overturned, there will be at least eighty-two constituencies seeking to recover damages.¹⁷⁹

After much speculation as to which of these constituencies would overcome fears of Executive retribution and challenge the Act,¹⁸⁰ three new suits challenging the constitutionality of the line-item veto were filed in response to the President's first uses of his newly found authority.¹⁸¹ At the same time, efforts got underway

¹⁷⁸ See *Line-Item Veto Scorecard: \$1.9 Billion over 5 Years*, WASH. POST, Dec. 4, 1997, at A21. While this may appear to be enormous savings, the federal government will spend \$9 trillion over the same five year span. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ The three groups affected by President Clinton's vetoes [of August 11, 1997] – farmers, insurance and financial companies, and the State of New York – all have broad agendas before the federal government, and don't take lightly the risk of antagonizing the President and becoming a constitutional guinea pig . . . [For an initial period] the three groups have concentrated their efforts on legislative, rather than judicial, fixes.

T. R. Goldman, *Waiting For a Line-Item Veto Suit*, THE RECORDER (Wash., D.C.), Sept. 23, 1997, at 1.

¹⁸¹ The first suit was filed by the National Treasury Employees Union ("NTEU"). See Naftali Bendavid, *Line-Item Veto Foes Preparing For Battle; Courts Likely to Get Last Word — And Soon*, CHI. TRIB., Oct. 18, 1997, at 1. This group also filed the first line-item veto suit before the Act's enactment only to be denied standing. See *supra* note 8 (referencing National Treasury Employees Union v. United States, 101 F.3d 1423 (D.C. Cir. 1996)). In this second suit, they were assured to appear before a different D.C. District Court judge as Judge Charles Richey, who presided over their first suit, passed away. Goldman, *supra* note 180, at 1. The NTEU also successfully challenged the constitutionality of the 1986 Gramm-Rudman Budget Balancing Act. Juliet Eilperin, *As Line-Item Goes to Court, Members Revisit Veto Law*, Roll Call (Wash., D.C.), Oct. 20, 1997, at *1, available in LEXIS, Nexis Library, ALLNWS File. Their suit alleged injury as a result of being victimized by the cancellation of funding that would allow federal employees to change their pension plans. Stephen Barr, *Judge Clears Way for Pension 'Open Season'*, WASH. POST, Jan. 7, 1998, at A17.

On Jan. 6, 1998, United States District Judge Thomas Hogan approved a negotiated settlement between the President Clinton's Administration and the NTEU,

which included a full rescission of this particular veto. *Id.* Under this settlement, Judge Hogan agreed that the President "overstepped his authority . . . when he used his new line-item veto power" in this instance. Ruth Larson, *Judge Rules Clinton Abused Veto Power; Rejects Line-Item Use on Pension Plans*, WASH. TIMES, Jan. 7, 1998, at A1. As in each of the suits challenging the Act's constitutionality, the NTEU asserted that the line-item veto embodied an unconstitutional shift of legislative power to the Executive branch. *Id.* Judge Hogan dismissed this charge as moot given the settlement. *Id.*

The second suit was filed on October 16, 1997, by New York City Mayor Rudolph W. Giuliani and several municipal organizations, including the National Health and Human Services Employees Union, District Council 37, and the Greater New York Hospital Association. *City of New York v. Clinton*, 985 F. Supp. 168, 171 (D.D.C.), *cert. granted*, 118 S. Ct. 1123 (1998). They too challenged the Act's constitutionality and claimed injury as a result of President Clinton's use of the line-item veto authority on August 11, 1997 to "cancel" from the balanced budget agreement an item that allowed New York to operate under a special formula to qualify for higher Medicaid payments from the federal government. *Line-Item Veto to Face New Court Challenge*, WHITE HOUSE BULLETIN, Oct. 16, 1997, at *1, available in LEXIS, Nexis Library, ALLNWS File; Eric Pianin & Stephen Barr, *U.S. Workers' Shift In Pensions Vetoed; Union, New York City File Court Challenges*, WASH. POST, Oct. 17, 1997, at A1. While New York Senator Daniel Patrick Moynihan did not join as a party to the suit, he did file an amicus curiae brief supporting the City's claims along with his fellow *Raines* plaintiffs Senator Byrd and Representative Levin. *See City of New York*, 985 F. Supp. at 169 n.1. This suit claimed that if the veto was allowed to stand, New York State would lose \$2.6 billion in vital Medicaid reimbursements. *Id.* at 172. On February 12, 1998, D.C. District Court Judge Thomas Hogan held that: 1) the City plaintiffs had standing to sue by virtue of the President's use of the line-item veto power to their direct detriment, *id.* at 175; and 2) the Line Item Veto Act of 1996 is unconstitutional. *See id.* at 169 (stating that "the Line Item Veto Act violates the procedural requirements ordained in Article I of the United States Constitution and impermissibly upsets the balance of powers so carefully prescribed by its Framers"). However, this ruling does not prevent the President from continuing to use the line-item power. *See Pear*, *supra* note 6, at A23 (quoting White House spokesman Barry Toiv who stated that President Clinton "remains ready to use it under appropriate circumstances").

The third suit was filed by the Snake River Potato Growers cooperative of Blackfoot, Idaho, on October 21, 1997. Jim Vande Hei & Juliet Eilperin, *Morning Business*, ROLL CALL (Wash., D.C.), Oct. 27, 1997, at *1, available in LEXIS, Nexis Library, ALLNWS File. The cooperative asserted an injury as a result of the President's August 11, 1997 cancellation of a tax provision allowing companies to defer capital-gains taxes when selling processing plants to farm cooperatives. *Id.* Absent the veto, farming cooperatives would continue to buy processing plants for less total cost. *Id.* This matter became combined with the *City of New York* case by

in both Houses of Congress to repeal the Act.¹⁸² In addition, using the powers granted under the Act,¹⁸³ Congress overruled a Presidential cancellation of funding for military construction projects.¹⁸⁴ Now that it appears the Supreme Court will finally move beyond justiciability considerations to address the merits of constitutional challenges to the Act, it is extremely likely that the Court will follow its formalist tendencies¹⁸⁵ and hold that the Act encroaches upon the Constitution's Presentment Clause.¹⁸⁶ While

the D.C. District Court, *City of New York*, 985 F. Supp. at 172, and is now being jointly appealed before the Supreme Court by the Clinton Administration. See Pear, *supra* note 6, at A1.

¹⁸² Senators Byrd and Moynihan introduced a bill in the Senate to repeal the Act on October 24, 1997. See S1319, 105th Cong. (1997). See Stephen Singer, *Byrd Wants Law Repealed, Line Item Veto Again Targeted by Senators*, CHARLESTON DAILY MAIL, Oct. 25, 1997, at 1A ("In offering this legislation, I'm attempting to restore the kind of government with checks and balances the people have enjoyed for over 200 years." (quoting Senator Byrd)). In the House, Representative David Skaggs introduced a similar bill on October 9, 1997. See H.R. 2649 105th, Cong. (1997). However, both bills face uphill battles. See *Senators Mount Effort to Repeal Line-Item Veto*, WASH. TIMES, Oct. 25, 1997, at A3. While President Clinton continues to face a great deal of criticism regarding his use of the line-item veto, ironically a great deal of the clamoring comes from supporters of the veto power who disapprove of the way the President has chosen to apply the power. See Senator John McCain, *Line-Item Furor*, WASH. POST, Nov. 7, 1997, at A25 ("The administration's process for determining which items to veto seems arbitrary at best. It has no established, consistent and objective criteria against which all programs are evaluated, nor are these criteria clearly stated in advance of the action."); Press Release of Senator John McCain, *Letter to President Clinton on Use of Line-Item Veto*, Nov. 1, 1997, (on file with *Journal of Law and Policy*).

¹⁸³ See 2 U.S.C. §§ 691b(a), 691d (Supp. 1997). The Act contains procedures for both Houses of Congress to consider "disapproval bills," in response to individual line-item vetoes, which may be enacted into law through the normal procedures in art. I, § 7 of the U.S. Constitution. *Id.* If such a bill passes, it nullifies the President's cancellation. 2 U.S.C. § 691b(a).

¹⁸⁴ See Press Release of Rep. Jim Hanson, *House & Senate Vote To Override Presidential Line-Item Veto*, Nov. 8, 1997 (on file with *Journal of Law and Policy*).

¹⁸⁵ See *supra* note 168 (outlining the Supreme Court's recent formalist leanings).

¹⁸⁶ U.S. CONST. art. I, § 7, cl. 2. See generally Michael J. Gerhardt, *The Bottom Line on the Line-Item Veto Act of 1996*, 6 CORNELL J.L. & PUB. POL'Y

there are strong policy reasons for establishing a line-item veto,¹⁸⁷ the Constitution should not be stretched so far from its moorings both out of respect for the separation of powers¹⁸⁸ and deference to the plain language of the Presentment Clause.

233 (1997). Professor Gerhardt argues that:

the Act violates Article I by allowing the President to sign or veto a measure in a form never actually approved by both houses of Congress; involves an illegitimate attempt by the Congress to redefine statutorily the constitutional term Bill; contravenes both Supreme Court authority severely restricting congressional discretion to delegate a core legislative function and long-standing congressional understanding of the prerequisites for a legitimate bill; and radically alters the fundamental balance of power between Congress and the President on budgetary matters.

Id. at 233. These comments were included in a comprehensive statement delivered by Senator Moynihan on the Senate floor during the final debate on the line-item veto. 141 CONG. REC. S4409, 4444-46 (daily ed. Mar. 23, 1995).

¹⁸⁷ See *supra* note 6 (describing the government's efforts to curb its use of "pork").

¹⁸⁸ Gerhardt, *supra* note 186, at 238 ("The framers deliberately chose to place the power of the purse outside of the Executive because they feared the consequences of centralizing the powers of the purse and the sword."). See also THE FEDERALIST NO. 58, at 300 (James Madison) (M. Beloff ed. 1987) ("This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."). It is likely that the only way the line-item veto will clear the Supreme Court's review is through an amendment to the Constitution. See Gerhardt, *supra* note 186, at 246 (concluding that while a line-item veto constitutional amendment might be the most sound option for creating this new form of executive power, this idea has yet to gather needed congressional or popular support). This method was suggested in previous debates by Congress. See, e.g., H.R.J. Res. 6, 104th Cong. (1995); H.R.J. Res. 4, 103rd Cong. (1993). It is interesting that so many mention that President Reagan began the modern movement toward adopting line-item veto powers for the Executive, see *supra* note 7, yet he did not ask Congress to unilaterally cede its legislative powers. See Ronald Reagan, *Message to the Congress Transmitting the Fiscal Year 1985 Budget*, reprinted in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN: 1984, at 130, 133 (1984) ("We need a *constitutional amendment* granting the President power to veto individual items in appropriations bills.") (emphasis added).

CONCLUSION

In *Raines*, members of Congress asserted injury to their legislative authority to make appropriations decisions as a result of the Act's enactment. This is an entirely different injury than those advanced in the new round of suits, which follow from alleged harm caused by specific uses of the line-item veto. While there is a general consensus that the Supreme Court will now get beyond standing to finally address the constitutionality of the line-item veto in these cases, the injuries averred by the *Raines* plaintiffs, which were denied credibility by the Court, should not be dismissed or overlooked. The fundamental issue remains: whether a member of Congress can ever suffer a judicially cognizable injury sufficient to warrant federal court jurisdiction.¹⁸⁹ Despite Justice Scalia's view, a legislator should be able to raise a judicial challenge to a law such as the Line Item Veto Act, where Congress grants a fundamental congressional function to another branch of government. While the diminution of a legislator's political power is not an injury in the classic sense, it is an injury nonetheless which is deserving of Article III jurisdiction.

¹⁸⁹ See *Buckley v. Valeo*, 424 U.S. 1, 12 n.11 (1976) (demonstrating that in the past, the Supreme Court has granted standing to a member of Congress to challenge the constitutionality of a law without questioning the quality of the legislator's injury).