

1997

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Repository Citation

Devins, Neal and Fitts, Michael A., "The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations" (1997). *Faculty Publications*. 440.
<https://scholarship.law.wm.edu/facpubs/440>

ESSAY

The Triumph of Timing: *Raines v. Byrd* and the Modern Supreme Court's Attempt to Control Constitutional Confrontations

NEAL DEVINS* AND MICHAEL A. FITTS**

"Observe due measure, for right timing is in all things the most important factor."¹

INTRODUCTION

Can Congress, through positive law, absolve itself of its responsibility to interpret the Constitution? That question was squarely presented in *Raines v. Byrd*,² a case in which the Supreme Court considered the constitutionality of congressional efforts to compel it to adjudicate the constitutionality of the 1996 Item Veto Act³ before the President ever had an opportunity to exercise his "item veto" power. More precisely, by authorizing lawmaker challenges to the Act's constitutionality and specifying that the Court was "duty [bound]" to "expedit[iously]" resolve such disputes,⁴ Congress effectively asked the Court to perform a lawmaking function—to determine whether proposed legislation was constitutional. Indeed, even if we assume that Congress reached a tentative but uncertain conclusion about the Act's constitutionality, Congress was at least petitioning the Court to serve as a modern-day "Council of Revision"—reviewing the constitutionality of legislation that had yet to affect anyone's rights and that would not affect anyone's rights until the Court rendered its decision. The Court turned back this legislative delegation, but only by indirection, ruling that members of Congress lacked standing to bring the suit. Noting both that the Item Veto Act has no bearing on the process of enacting an appropriation and that Congress can statutorily nullify presidential item veto authority,⁵ *Raines* concluded that lawmaker claims that the Act affected the meaning and effectiveness of their votes on appropriations bills were "wholly abstract and widely dispersed."⁶ As a result, unless and until the President item vetoed an appropriation, claims that this power affected either private interests or the lawmaking process were no more than guesswork.

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1. HESIOD c. 700 B.C.

2. 117 S. Ct. 2312 (1997).

3. 2 U.S.C.A. §§ 691-692 (West Supp. 1997). The Act grants the President the power to cancel (subject to congressional override) any dollar amount of discretionary budget authority, any item of new direct spending, and certain limited tax benefits.

4. *Id.* at § 692(c); see also *id.* at § 692(a)(1).

5. See *Raines*, 117 S. Ct. at 2320.

6. *Id.* at 2322.

In adopting this analysis, the Court did not formally invalidate the Act's congressional standing/expedited review provisions. Indeed, the Court seemed to overlook the fact that the Item Veto Act (crafted by Congress and embraced by the White House without condition) specifically provided for this type of lawsuit. Portraying the case as an attempt by renegade members of Congress to bring down a law they disliked but could not defeat,⁷ the Court claimed that it must steer clear of this dispute or risk disrupting "the peaceful coexistence" between countermajoritarian judicial review and democratic government.⁸

In light of this history, we believe *Raines* offers a unique opportunity to explore the process by which the modern Supreme Court seeks to control the timing of its confrontations with Congress and the executive branch. Since Alexander Bickel first wrote his classic work *The Least Dangerous Branch*,⁹ judges and commentators have recognized the benefits of the "passive virtues,"¹⁰ that is, the procedural and jurisdictional delays that provide a "time lag between legislation and adjudication, as well as shifting the line of vision."¹¹ This temporal distance, Bickel argued, "cushions the clash between the Court and any given legislative majority and strengthens the Court's hand in gaining acceptance for its principles."¹²

At first glance, *Raines* appears to serve as a classic exercise of the passive virtues. Newspaper coverage, for example, observed that a Supreme Court decision on the constitutionality of the Item Veto Act would be imminent and inevitable, and *Raines* was, therefore, just delaying a substantive decision on the Act.¹³ Furthermore, the lack of any real disagreement on the outcome—the vote was seven-to-two for dismissal—seemed to suggest that the Justices did not see this result as raising any major ideological issues.

We maintain, however, that the decision and its political history are more complex than the classic Bickelian analysis suggests, revealing a Court that delayed consideration of some issues, accelerated decisions on others, and

7. See *id.* at 2315, 2322.

8. *Id.* at 2322. By describing a spate of "analogous confrontations between one or both Houses of Congress and the Executive Branch," the Court made clear that judicial recognition of "claimed injury to official authority or power" would "improperly and unnecessarily" plunge the Court into bitter interbranch struggles. The fact that the White House as well as most members of Congress endorsed the item veto as an essential deficit reduction tool did not matter. See *id.* at 2320-21. Political expediency also played a large part in the enactment of item veto legislation. See Neal Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. (forthcoming 1997); Michael A. Fitts, *The Foibles of Formalism: Applying a Political "Transaction Cost" Approach to Separation of Powers*, 47 CASE W. RES. L. REV. (forthcoming 1997).

9. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

10. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

11. BICKEL, *supra* note 9, at 116; see, e.g., *Baker v. Carr*, 369 U.S. 186, 284 (1962) (Frankfurter, J., dissenting); Larry Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978).

12. BICKEL, *supra* note 9, at 116.

13. See, e.g., Helen Dewar, *President Keeps Line-Item Veto; Ruling Leaves Door Open to Future Constitutional Challenge*, WASH. POST, June 27, 1997, at A1; Linda Greenhouse, *Benchmarks of Justice*, N.Y. TIMES, July 1, 1997, at A1.

simply ignored still others. While the center of this complicated dance was the expedited review provision, which stood as a symbol of modern democratic opposition to the exercise of the passive virtues, there were in fact two separate and interrelated timing decisions made by each branch of government.

On one side was Congress's original determination to accelerate both its own vote on the Item Veto Act and the subsequent judicial review of that legislation. As a variety of lawmakers and commentators observed, Congress chose to pass the Act at a moment (April 1996) when it was unclear exactly which party would first enjoy the new power—that is, a Democratic or Republican president.¹⁴ While there are real benefits to making a decision behind a political “veil of ignorance,”¹⁵ there can also be costs—such as a lack of political debate and a less clear understanding of who are the winners and losers. In this case, the problem was exacerbated by Congress's second timing decision—to accelerate judicial review through inclusion of the expedited review provision—in effect, requiring judicial resolution before either the Court or members of Congress had the time or opportunity to adequately consider the Act's impact and constitutionality.

On the other side was the Court, which was faced with two complementary timing decisions: whether to review the provision requiring expedited review and whether to decide the substantive constitutionality of the item veto. In the first instance, the Court, faced with democratic opposition to its exercise of the passive virtues, avoided a direct confrontation with Congress over this fundamental issue by, paradoxically, accelerating a totally separate confrontation—in this instance, with the D.C. Circuit. By deciding the theoretical question of congressional standing, the Court was able to overrule a long line of D.C. Circuit cases recognizing the doctrine. At the same time, this approach allowed the Court to delay an immediate confrontation with the elected branches over the substance of the Item Veto Act as we, and the Bickelian analysis, would recommend.

14. In delaying passage until close to the end of the Clinton presidency and making the veto effective only after election of the next president, Congress achieved agreement based on its inability to determine who the institutional beneficiaries of the Act would be. *See, e.g.*, 142 CONG. REC. H2980 (daily ed. Mar. 28, 1996) (statement of Rep. Hoyer suggesting that the January 1 enactment date was chosen because Congress did not want to give the line-item veto to a Democratic president); 142 CONG. REC. H3027 (daily ed. Mar. 28, 1996) (statement of Rep. Clinger confessing that sponsors of the Line-Item Veto Act chose a January 1 enactment date because both parties expected their own nominee to win the 1996 presidential election); 142 CONG. REC. S2987 (daily ed. Mar. 27, 1996) (statement of Sen. Lautenberg accusing Republicans of delaying the Line-Item Veto Act to avoid giving the new power to their political rival, President Clinton); 142 CONG. REC. S2991 (daily ed. Mar. 27, 1996) (statement of Sen. Exon claiming that the January 1 enactment date is evidence of the partisanship behind the Line-Item Veto Act). The media has also championed the idea that Republican lawmakers delayed the enactment of the Line-Item Veto Act because they hoped that a Republican president would be elected in 1996. *See, e.g.*, Alison Mitchell, *With Ceremony, Clinton Signs Line-Item Veto Measure*, N.Y. TIMES, Apr. 10, 1996, at B7; Greg Pierce, *Rue the Day*, WASH. TIMES, Nov. 19, 1996, at A5; *Power to the President?* WASH. POST, Jan. 6, 1997, at A16; *The Line Item Veto Decision*, WASH. POST, Apr. 14, 1997, at A16.

15. *See* Michael A. Fitts, *Can Ignorance Be Bliss: Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 966-81 (1990) (discussing benefits of behind-the-veil decisionmaking in separation of powers context).

In our view, however, the Court's characterization of congressional standing as an invitation to interbranch armageddon is, at the very least, unnecessary. After all, the Court could have concluded that Congress is without power to authorize its members to serve as self-appointed "counsel adversary" and challenge a law that has yet to take effect. Both the Framers' rejection of direct judicial participation in the lawmaking process as well as the bedrock Article III prohibition against advisory opinions countenance against the Court's review of a law of indeterminate scope and sweep. Had *Raines* rested on these grounds, as we will argue in Part I of this essay, the decision would have focused attention on Congress's obligation to independently interpret the Constitution.

Part II explores why the Court may have thought it so important to reach out and decide the congressional standing issue. The Court, we speculate, finds little institutional gain in immersing itself in the resolution of highly charged intramural squabbles brought by disgruntled members of Congress.¹⁶ Unlike the D.C. Circuit, whose approval of congressional standing enhances its power inside the Washington beltway, the Supreme Court may be more interested in "maintain[ing] public esteem" by avoiding head-on conflicts with Congress and the White House.¹⁷ *Raines*, moreover, proved a good vehicle to dampen (if not bring down altogether) congressional standing. The Court and Congress both saw *Raines* as low-stakes litigation. In particular, once the President item vetoed a congressionally approved program, a justiciable private suit would almost certainly materialize.¹⁸

Finally, Part III discusses why, quite apart from our legal arguments on how the Court should have approached the advisory opinion and congressional standing issues, it was important as a prudential matter for the Court to delay the ultimate decision on the Item Veto Act. Recognizing that Congress and the Executive constantly intersect with each other, the Court, we suggest, should prefer to let the branches bargain over the operation of the item veto and other structural changes before reaching a decision about their constitutionality. This bargaining informs judicial intervention by what it reveals *factually* about the accommodations each branch makes to the structural innovation. It also offers *normative* feedback on the evolving views of the branches on the constitutional

16. Most of these disputes either implicate the internal workings of Congress or are a byproduct of Congress's unwillingness to assert its institutional interests against the executive on foreign policy matters. See, e.g., *Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997) (coalition of 27 Congressmen challenging House rule requiring that tax increases be approved by at least three-fifths of members voting); *Dellums v. Bush*, 752 F. Supp. 1141, 1150 (D. D.C. 1990) (coalition of 55 Congressmen challenging anticipated use of force in Persian Gulf without congressional approval).

17. *Raines*, 117 S. Ct. at 2322; see also John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306-307 (1993) (describing congressional and judicial avoidance of exercising rights of governance in the foreign affairs and war powers areas).

18. *Raines*, 117 S. Ct. at 2325 (Souter, J., concurring). On October 16, 1997, the City of New York filed suit challenging President Clinton's use of the line-item veto on Medicaid funds appropriated for New York. See *N.Y. Files Suit Against Line-Item Veto*, CHI. TRIB., Oct. 17, 1997, at A1.

value of the change in light of that experience. Structural arrangements that do not disrupt the balance of power, we presume, will tend to be accorded a greater presumption of constitutionality.¹⁹

Despite our difficulty with the reasoning and doctrinal approach adopted by the Court, in the Conclusion we outline our ultimate agreement with the result in *Raines*. It is not surprising that only two Justices, Stephen Breyer and John Paul Stevens, formally dissented from the Court's judgment to return the item veto dispute to elected government.²⁰ With that said, *Raines* is unlikely to be the last word on congressional standing. Notwithstanding its muscular rhetoric, the Court reserved for another day the question of whether congressional standing might be authorized in an otherwise nonjusticiable dispute.²¹ By failing to establish its own rule, *Raines* exemplifies the Rehnquist Court's increasing tendency to choose standards that allow for discretionary application instead of absolutist rules.²²

In the end, the approach outlined in this essay resembles the classic Bickelian strategy of judicial repose—except updated and modified for the modern separation of powers context. In our view, not only was delay more appropriate in *Raines* than in many of the cases Bickel discussed, but the challenges to delay by Congress more direct. By passing the expedited review provision, Congress expressed its opposition to exercising the passive virtues. Given the value of delay in separation of powers confrontations, the Court should have met this challenge more directly by dismissing the lawsuit on advisory opinion grounds.

I. CONGRESS'S DUTY TO INTERPRET THE CONSTITUTION

A. THE ITEM VETO ACT AND THE ARTICLE III PROHIBITION AGAINST ADVISORY OPINIONS

Imagine that Congress, uncertain about the constitutionality of a proposal to statutorily outlaw flag burning, asks the Supreme Court for an opinion about its constitutionality. The Court, of course, would decline such an invitation to render an advisory opinion. Perhaps, as it did when Secretary of State Thomas

19. Without any sense of whether or when the President might use the item veto, *Raines*, 117 S. Ct. at 2320 n.9 (citing conflicting evidence of possible operation of Item Veto Act), the Court concluded that "to litigate this dispute at this time and in this form is contrary to historical experience." *Id.* at 2322. For an argument that the Item Veto Act—irrespective of its impact on the balance of powers—will be struck down on nondelegation grounds, see Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 CASE W. RES. L. REV. (forthcoming 1997).

20. In reaching the case's merits, Justice Stevens found irrelevant those balance of powers concerns that may well have proved decisive to the majority. See *Raines*, 117 S. Ct. at 2325 (Stevens, J., dissenting) (concluding that the Item Veto Act is inconsistent with the text of the Constitution).

21. *Id.* at 2322.

22. On this point, see generally Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). With regard to the 1996-1997 Term, see Cass R. Sunstein, *Supreme Caution: Once Again the High Court Takes Only Small Steps*, WASH. POST, July 6, 1997, at C1.

Jefferson sought an advisory opinion on certain policy questions confronting President Washington's administration, the Court would remind the Congress that the "three departments of government" are "checks upon each other" and express its confidence that Congress "will discern what is right" through its "usual prudence, decision, and firmness."²³

Imagine now that Congress, still uncertain about the constitutionality of its flag burning proposal, approves the measure with an effective date one year after its enactment. This legislation, moreover, contains a provision that compels the Supreme Court to render an opinion about the bill's constitutionality sometime before its effective date. Furthermore, to ensure that the Court has the benefit of an adversarial presentation before it, the legislation specifies that the Solicitor General, representing the United States, will defend the measure and that members of Congress, serving as "counsel adversary," will oppose the measure. Under this scheme, the Court would have before it a somewhat artificial suit so that it can either approve or veto Congress's action. For this reason, as was true in *Muskrat v. United States*,²⁴ the Court almost certainly would consider Congress's request a call for an advisory opinion. In reaching this conclusion, moreover, the Court might well refer to the Framers' rejection of a Council of Revision consisting of the "Executive and a convenient number of the National Judiciary . . . with authority to examine every act of the National Legislature before it shall operate."²⁵

These two hypotheticals, we think, are easy cases. The Constitution—as the Framers' rejection of the Council of Revision makes clear—demarks judicial power as separate and distinct from the lawmaking power.²⁶ As such, the prohibition against advisory opinions has been dubbed "the oldest and most consistent" limitation on federal judicial power.²⁷ Congress cannot create a cause of action simply to satisfy itself that its handiwork, after all, is constitutional. Rather, Article III demands a real dispute launched by a party who can claim that the law has adversely affected her.

Let us now shift from the hypothetical to the real. On March 21, 1995, Senators Paul Simon (D-Ill.), a long-time sponsor of item veto reform, and Carl Levin (D-Mich.), an item veto opponent, proposed an amendment "acceptable

23. Correspondence between Chief Justice Jay and Secretary of State Thomas Jefferson, in PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67 (4th ed. 1988).

24. 219 U.S. 346 (1911) (treating congressional efforts to facilitate litigation over the constitutionality of a recently enacted law as a request for an advisory opinion).

25. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1937).

26. James Madison, who pushed for the Council, saw it as a mechanism to limit "legislative excess" by permitting judges to "add their wisdom to the law." Jeff Roedel, *Stoking the Doctrinal Furnace: Judicial Review and the New York Council of Revision*, N.Y. HIST. 261, 275 (July 1988). The Philadelphia Convention rejected this merger of functions, preferring that each branch operate within its designated spheres of authority. See LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 47 (2d ed. 1995); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 40.

27. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 65 (5th ed. 1994); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 50 (1997) (describing advisory opinion ban as "core of Article III").

to both sides.”²⁸ Authorizing any member of Congress to challenge the Act’s constitutionality and requiring expedited Supreme Court review of such challenges, Senator Simon explained: “What we do not want is to live in limbo. . . . [Some constitutional experts have testified that it is constitutional; others have testified that it is unconstitutional.] I do not know who is right. The courts have to make that determination. But we ought to know as quickly as possible.”²⁹ Levin added that the proposal was not unusual, that its “language tracks the Gramm-Rudman judicial review language.”³⁰ Other than a suggestion by Act sponsor John McCain (R-Ariz.) that a severability clause be added to the statute,³¹ the Simon-Levin amendment prompted no discussion.

The Simon-Levin proposal, of course, set the stage for the Act’s inclusion of a congressional standing/expedited review provision. Moreover, the Simon-Levin proposal hardly differs from our second flag burning hypothetical. To start with, the expedited review provision was designed to facilitate a judicial determination of constitutionality before the Act took effect. While congressional plaintiffs in *Raines* filed suit one day after the Item Veto Act technically took effect, congressional sponsors understood that the President would not have an opportunity to make use of his item veto power until some time after the Supreme Court’s anticipated decision. As Representative Nathan Deal (D-Ga.), House sponsor of the expedited review provision, recognized: “Hopefully, the procedure established by my amendment will result in a final resolution regarding the constitutionality of line-item veto authority before the . . . appropriation bills are sent to the President.”³² Furthermore, although plaintiffs in *Raines* voted against the Item Veto Act, the expedited review provision was available to “any member of Congress” willing to launch a constitutional attack against the Act. In other words, recognizing that the Supreme Court would insist upon some type of an adversarial presentation, Congress established a mechanism whereby “any member” could perform a function that Item Veto Act supporters and opponents both embraced—securing expedited judicial review

28. 141 CONG. REC. S4244 (daily ed. Mar. 21, 1995) (statement of Sen. Simon).

29. *Id.* Senator Simon’s comments focused on an earlier version of the Act. With that said, there is no doubt that the Act’s congressional standing/expedited review provision was designed to resolve continuing uncertainty about the Act’s constitutionality. For example, at the 1995 Senate hearings, legal experts divided on the question of whether Congress could statutorily grant item veto power to the President. See *The Line Item Veto: A Constitutional Approach: Hearing Before the Subcomm. of the Senate Judiciary Comm.*, 104th Cong. (1995). More significantly, the final version of the Act mimicked a House proposal which included a congressional standing/expedited review provision for precisely the same reasons articulated by Senator Simon. See 141 CONG. REC. H1138 (daily ed. Feb. 2, 1995) (statement of Rep. Deal) (“Since we are proceeding in a statutory form for a line item veto and not a constitutional amendment, it should be obvious that until that constitutionality is clarified, it will be under a cloud.”).

30. 141 CONG. REC. S4245 (daily ed. Mar. 21, 1995) (statement of Sen. Levin).

31. See *id.* at S4244 (statement of Sen. McCain).

32. 141 CONG. REC. H1139 (daily ed. Feb. 2, 1995) (remarks of Rep. Deal). In making these remarks, Representative Deal referred to the fiscal year 1996 appropriation bills. *Id.* Although the Item Veto Act took effect on January 1, 1997, Representative Deal’s plan nonetheless came to fruition. *Raines* was decided before Congress submitted its fiscal year 1998 appropriation bills to the President.

of the Act's constitutionality. Accordingly, while item veto proponents filed an amicus brief defending the Act's legality,³³ the appropriateness of the expedited review provision was never called into doubt by any congressional filing.³⁴

In this situation, there was good reason for the Court to steer clear of an item veto ruling on advisory opinion grounds.³⁵ "The stuff of [constitutional] contests," wrote then law professor Felix Frankfurter, "are facts, and judgment on facts."³⁶ The item veto is a classic example of this ripeness concern within the advisory opinion doctrine; only through experience can conclusions be drawn about the item veto's impact on the balance of power.³⁷ An expedited ruling on the item veto's constitutionality then would yield little more than "sterile conclusions unrelated to actualities."³⁸ More fundamentally, Congress's attempt to draw the Court into the item veto flap raises basic separation of powers problems, as we will explore in greater detail below.³⁹ The Court ought not to function as a Council of Revision on those constitutional questions that Congress cannot settle to its satisfaction. Although such decisions might make government more efficient in the short term, over time they would diminish the Court's ability to act as a distinctive countermajoritarian voice.⁴⁰

B. RAINES: A MISSED OPPORTUNITY FOR INTERBRANCH CONSTITUTIONAL DIALOGUE

The flip side of this judicial independence concern is Congress's utilization of advisory opinions to duck *its* responsibility to pass judgment on the constitutionality of its enactments. Expedited review provisions contained in several significant congressional enactments,⁴¹ including the Item Veto Act, reflect Congress's

33. Joint Brief of the United States Senate and the Bipartisan Legal Advisory Group of the United States House of Representatives as Amicus Curiae, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (No. 96-1671) available in 1997 WL 251409.

34. See *id.* at *2 n.2 ("Amici express no position on the standing issue raised by appellants.").

35. The Court, for example, could have concluded that the parties were not truly adverse, in that congressional plaintiffs were functioning as Congress's agents in a deal crafted by Act supporters and opponents and acquiesced to by the White House. The Court, moreover, could have concluded that it was indeterminate whether its decision would have some effect. See ERWIN CHEMERINSKY, *supra* note 27, at 53 (stating a case is a nonjusticiable request for an advisory opinion if there is not a "substantial likelihood" of some effect); accord *American Fed'n of Govt Employees v. United States*, 634 F. Supp. 336, 340 (D. D.C.) ("[No] plaintiff has successfully argued that he had standing because he was likely to be injured by legislation that had not yet been passed."), *aff'd*, 479 U.S. 801 (1986).

36. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

37. For further discussion, see *infra* Part III.

38. Frankfurter, *supra* note 36, at 1003.

39. See *infra* Part Ib.

40. For this very reason, the Court in *Muskrat* rested its decision on advisory opinion grounds. See Patrick C. McKeever & Billy Dwight Perry, Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785, 805-06 (1962).

41. Other enactments containing expedited constitutional review provisions include the Communications Decency Act, the Gramm-Rudman-Hollings Deficit Control Act, and the Federal Election Campaign Act. All three of these measures were invalidated on constitutional grounds. See *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997) (invalidating Communications Decency Act); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (invalidating Gramm-Rudman-Hollings Act); *Buckley v. Valeo*, 424 U.S. 143 (1976) (invalidating portions of Federal Election Campaign Act).

desire to delegate this responsibility to the Court.⁴² Unwilling to invest significant institutional resources into determining whether its most controversial laws are constitutional, Congress appears quite willing to hand off this constitutional responsibility to the Court.

While this phenomenon is hardly new and may well be inevitable,⁴³ Congress's dodging of its "duty to make its own informed judgment on the meaning and force of the Constitution"⁴⁴ is nonetheless disquieting. The congressional role in shaping constitutional values has both formal as well as prudential roots. Lawmakers do not, for example, swear their allegiance to the decisions of the Supreme Court when taking their oath, but rather to "support this Constitution."⁴⁵ Starting with the confirmation of judicial nominees, Congress also places its imprimatur on Court decisionmaking. In addition, Congress affects public acceptance of Court decisionmaking, sometimes by supporting and other times by opposing Court decisionmaking.⁴⁶ Because interest-group pressures affect courts and elected officials in different ways, a full-range consideration of the costs, benefits, and background principles underlying different policy outcomes is best accomplished by a government-wide decisionmaking process. Just as courts should eschew advisory opinions to better maintain the separation of powers, Congress likewise needs to perform the legislative function of passing judgment on the constitutionality of its enactments.⁴⁷ Without this engagement, the Court may well begin to consider the Constitution as its exclusive domain and, as such, may systematically discount the harm (to representative democracy) of striking down elected government actions. Put another way: Just as the Court informs Congress about the meaning of the Constitution, Congress too should educate the Court.⁴⁸

42. This point was raised during oral arguments in *Raines*. In questioning respondent's counsel, Alan Morrison, one of the Justices expressed "concern that if this Court is routinely invited to be the referee for legislative matters that the legislators themselves will not take the constitutional positions that they ought to" Transcript of Oral Argument at *40, *Raines v. Byrd*, No. 96-1671 1997 WL 276080 (U.S. May 27, 1997) [hereinafter Transcript].

43. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 137-38, 152, 157 (1893) (counselling against legislative reliance on Court interpretations of the Constitution).

44. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997). We note the irony of this cite, for the *Boerne* Court trashed Congress for advancing an interpretation of the First Amendment at odds with earlier Court decisions.

45. U.S. CONST. art. VI. For a general consideration of this question, see *Symposium: Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977, 985-86, 994-1001, 1011-13 (1987).

46. See generally LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (2d ed. 1996).

47. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586-87 (1975).

48. For competing perspectives on the necessity of court/elected government dialogues, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360 (1997) (arguing that Congress is "duty-bound" to follow Supreme Court interpretations of the Constitution); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, VA. L. REV. (forthcoming 1998) (arguing court/elected government dialogues are necessary to law's ability to settle disputes).

Unfortunately, the Court in *Raines* not only failed to address this issue, but instead exacerbated the problem by its characterization of the case. Rather than suggest that Congress ought to take seriously its duty to interpret the Constitution, the Court spoke of its "natural urge" to "settle . . . this important dispute" and promised Congress and the nation that it ultimately would deliver a definitive interpretation of the item veto's constitutionality.⁴⁹ In this respect, although bathed in the rhetoric of the passive virtues, *Raines* is a paean to judicial supremacy. The Court's "no standing" holding returns the item veto to elected government, but offers little incentive for Congress to invest more energy in assessing the constitutionality of its actions.

To be sure, those who believe that Congress is not "ideologically committed or institutionally suited to search for the meaning of constitutional values" may question the practicality of such an effort.⁵⁰ From this perspective, admonitions that Congress closely evaluate the constitutional meaning of its work seem hollow, even perhaps counterproductive. Under this view, equating the role of Congress with that of the Court might diminish the Court's own power to speak with true authority about our collective constitutional vision. Based on this and similar concerns, scholars have criticized civic republican proposals that the Court exercise heightened judicial review as a means of transforming legislative deliberations.⁵¹

Despite practical limitations to direct judicial oversight of legislative deliberations, a considered "remand to the legislature" in this context seems qualitatively different from proposals for heightened judicial review. The Court would not be formalistically commanding that Congress undertake its responsibilities in a public-spirited or civic republican manner, but rather structuring the judicial process so that Congress would be forced to face the consequences of its judgments, at least briefly, and have the opportunity to express views on its constitutionality without hiding behind immediate judicial resolution.⁵² In other

49. *Raines*, 117 S. Ct. at 2318; see also *id.* at 2325 (Souter, J., concurring) ("The virtue of waiting for a private suit is only confirmed by the certainty that another suit can come to us.").

50. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979); see also Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 610 (1983) (arguing that lawmakers have little incentive to seriously consider constitutional questions). For an opposing view, see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 746 (1985) (arguing Congress has institutional capacity to interpret the Constitution).

51. See Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1653-54 (1988); Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1691-92 (1988).

52. Another example of this phenomenon is the Court's rewriting of legislation through its self-declared power to make severable (unless Congress specifies otherwise) unconstitutional provisions of otherwise valid enactments. "Judicial willingness to stand in for Congress," as Michael Dorf points out, "not only blurs the lines of power between the branches, but also encourages congressional laziness in matters of constitutional principle." Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 293 (1994). Congress, unfortunately, appears to endorse this default rule. When Congress considered the Item Veto Act, for example, Gerald Solomon (R-NY) noted that "[n]o severability or nonseverability provisions were included in the bill, but it is the intention of the conferees [consistent with the current rule of thumb] that any judicial determinations regarding the

words, it would simply be establishing a structure—implicit in the prohibition against advisory opinions—for facilitating greater congressional accountability.

We think the Supreme Court missed an opportunity to discuss these principles in *Raines*. The decision should have focused on Congress as an institution, not weaknesses in the claims of individual members. In so doing, the Court could have admonished Congress to heed James Bradley Thayer's warning against the political function implicit in judicial review "dwarf[ing] the political capacity of the people" and "deaden[ing] its sense of moral responsibility."⁵³ These fundamental concerns, which underlie the advisory opinion prohibition, were squarely before the Court in *Raines*. Judicial authority seems particularly strong at such moments—requiring the political branches of government to assume responsibility for their own actions and engage in interbranch dialogue over constitutional meaning.

II. THE (SUPREME COURT'S) PROBLEM WITH CONGRESSIONAL STANDING

Although the failure of the Court to confront the advisory opinion issue may have been animated by its Bickelian fear of confronting the legislative branch directly, the Court also appears to have been motivated by its desire to confront the issue of congressional standing proactively.⁵⁴ At first blush, this might seem to be an odd timing decision, since Congress (with the President's blessing) embraced this lawsuit when it amended the Act to provide for expedited judicial review. The Court, however, misdescribed these facts in its opinion, suggesting instead that congressional plaintiffs "ha[d] not been authorized to represent" Congress's institutional interests (a "fact" that the Court "attache[d] some importance to").⁵⁵ This sleight of hand shifted the focus away from the advisory nature of the Court's decision and to the appropriateness of disappointed lawmakers invoking the Court's jurisdiction to settle a score with their colleagues. It also allowed the Court to bring *Raines* into the fold of recent standing decisions, which link standing to the separation of powers.⁵⁶

Why did the Court wish to reach out and address the legality of congressional standing? The answer, we suspect, is that the Supreme Court intended to send a message to the D.C. Circuit in a case with few practical consequences. Starting in 1974, the D.C. Circuit opened a window for lawmakers—suing in their official capacity—to defend their legislative prerogatives in court.⁵⁷ Although

constitutionality of the bill be applied severably to the legislation." 142 CONG. REC. H2973, H2974 (daily ed. Mar. 28, 1996) (remarks by Rep. Solomon).

53. JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES AND FELIX FRANKFURTER ON JOHN MARSHALL 107 (1967).

54. *Raines* leaves little doubt that, for the Supreme Court, congressional standing is an invitation to disaster, risking "public esteem" by "plung[ing]" the Court into bitter political battles. *Raines*, 117 S. Ct. at 2321-22.

55. *Id.* at 2314, 2322.

56. *Id.* at 2317 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984) (internal quotation marks omitted))).

57. See, e.g., Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241,

most of these disputes were thrown out on "equitable discretion" grounds, disappointed congressmen would regularly trot down to the U.S. Courthouse, make a speech, and file papers challenging, say, the President's authority to terminate a treaty or launch a military invasion.

The Supreme Court opposed this practice and *Raines* proved a wonderful opportunity to make this point. In critical respects, *Raines* is a purely hypothetical dispute. Lawmaker plaintiffs could not point to any concrete harm they suffered as a result of something the President or Congress did; rather, *Raines* was entirely prospective, focusing on harms lawmakers anticipated suffering in budget negotiations with their colleagues as well as through the President's anticipated exercise of his item veto power. Moreover, because there would be a "plaintiff who obviously would have standing" to challenge the President's use of the item veto,⁵⁸ *Raines* was deemed inconsequential. For example, *Raines*'s plaintiff Robert Byrd (D-W. Va.) discounted the no standing finding as "just a temporary setback."⁵⁹ Finally, by leaving for another day the question of whether lawmakers could challenge otherwise nonjusticiable conduct, *Raines* sounded a strong message on lawmaker standing in a nearly unanimous, nondivisive ruling.

In opposing the standing of lawmakers suing in their official capacities,⁶⁰ *Raines* sought to merge pragmatics and principle. The principle is the separation of powers, the notion that each branch is the master of its domain. Congress should speak the voice of Congress; the President (perhaps through his delegee, the Solicitor General) should speak the voice of the Executive. Court involvement in matters internal to the legislative or executive branches, as suggested by the advisory opinion prohibition, is inappropriate.⁶¹

Raines also makes clear that judicial recognition of lawmaker standing is pragmatically unwise. Lawmaker standing thrusts the courts into the midst of intrabranched and interbranch disputes before the underlying claims can be fairly assessed. Moreover, "by embroiling the federal courts in a power contest nearly

244-45 (1981); Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as a Counterweight?*, 54 U. PITT. L. REV. 63, 66, 78-79 (1992). In approving congressional standing, however, the D.C. Circuit has held that lawmakers must meet the same Article III requirements as other plaintiffs. See, e.g., *Moore v. U.S. House of Representatives*, 733 F.2d 946, 950-54 (D.C. Cir. 1984).

58. *Raines*, 117 S. Ct. at 2325 (Souter, J., concurring). Designated beneficiaries of an appropriation, for example, would certainly have standing to challenge the President's "item vetoing" of their benefits. At the same time, ripeness concerns may prevent the Supreme Court from resolving such a claim. See *infra* Part IIIc.

59. Robert Pear, *Court Allows Clinton the Line-Item Veto*, N.Y. TIMES, June 27, 1997, at A21. The Court's conclusion that lawmakers cannot launch judicial challenges in their official capacities did not prompt a single comment in either the House or Senate. As such, *Raines*'s most significant accomplishment went unnoticed.

60. Lawmakers sometimes sue in their private capacities. When Adam Clayton Powell challenged his exclusion from the House of Representatives, for example, his claimed loss of salary was a concrete private harm. See *Raines*, 117 S. Ct. at 2318 (discussing *Powell v. McCormack*, 395 U.S. 486 (1969)).

61. For reasons outlined in the first part of this essay, a dismissal of the lawsuit on advisory opinion grounds would have best served separation of powers values. See *supra* text accompanying notes 44-53.

at the height of its political tension," lawmaker standing "expose[s] the Judicial Branch to [significant] risk."⁶² Embracing these values, *Raines* seems a classic expression of "the passive virtues," "an unelected, unrepresentative judiciary in our kind of government"⁶³ invoking Article III to shield itself from the harsh, unforgiving world of politics.

Raines's certainty that the costs of lawmaker standing outweighs its benefits begs the question of why the D.C. Circuit, for more than two decades, reached precisely the opposite result. An explanation emerges, however, if the separation of powers is seen as "a system of bargains" between the branches.⁶⁴ Unlike the Supreme Court, whose institutional prestige is often tied to individual rights cases, much of the D.C. Circuit's institutional prestige is attached to structural cases. Correspondingly, the D.C. Circuit, as Judge Patricia Wald put it, sees itself "especially well-equipped to play" a leadership role on separation of powers and administrative law issues: "We are located just down the avenue from Congress and just up the street from the White House. Several D.C. Circuit judges have been members of Congress, and most of us have held policymaking executive positions."⁶⁵ By participating in interbranch battles as well as intramural squabbles between agencies with independent litigation authority and the Justice Department,⁶⁶ the D.C. Circuit has good reason to see itself as a player and the government as disunitary. For this reason, the D.C. Circuit has much to gain—in terms of power and prestige—by adjudicating lawmaker challenges to congressional and executive action.

In contrast, the Supreme Court has good reason to steer clear of these cases. Concerns of interbranch harmony matter more to a Court whose influence and reputation do not hinge on the resolution of separation of powers and administrative law disputes. For example, to maximize its power to speak the last word on individual rights disputes, the Court may find it advantageous to trade off to the elected branches the power to sort out foreign affairs, war powers, and other structural matters.⁶⁷ Beyond the Court's particularized interest in individual

62. *Raines*, 117 S. Ct. at 2324 (Souter, J., concurring).

63. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (Bork, J., concurring) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (internal quotation marks omitted). *Allen's* invocation of Judge Robert Bork's *Vander Jagt* opinion is noteworthy, for Judge Bork used *Vander Jagt* as a vehicle to express his disapproval of the D.C. Circuit's sometimes acceptance of congressional standing.

64. McGinnis, *supra* note 17, at 304; see also Fitts, *supra* note 8, at 1666.

65. Patricia M. Wald, *Symposium: The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 513 (1988).

66. See Neal E. Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. 1035, 1048-50 (1994) (describing incentives for D.C. Circuit to encourage intragovernmental litigation).

67. See McGinnis, *supra* note 17, at 306. Under this view, the Court is far more likely to defend its institutional turf on individual rights matters. There is much support for this proposition. In its 1992 reaffirmation of abortion rights—*Planned Parenthood v. Casey*—the Court claimed the authority to resolve the abortion dispute, invoking "the Nation's commitment to the rule of law" and declaring that "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." 505 U.S. 833, 867, 869 (1992). More recently, in *City of Boerne v. Flores*, the Court castigated Congress for not

rights, the Supreme Court is far more likely than lower courts to take social and political forces into account. Acknowledging that it can neither appropriate funds nor command the military, the Court recognizes that its power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary."⁶⁸ As psychologists Tom Tyler and Gregory Mitchell observed, the Court seems to believe that "public acceptance of the Court's role as interpreter of the Constitution—that is, the public belief in the Court's institutional legitimacy—enhances public acceptance of controversial Court decisions."⁶⁹ Throwing itself into the middle of disputes between disappointed lawmakers and either the Congress or the White House opens the Court up to political retaliation and, as such, is a gambit the Court is disinclined to take.⁷⁰ The Court in *Raines* was well aware of these high stakes, acknowledging the "risk[s]" to its "public esteem" by "improperly and unnecessarily" participating in political battles over the separation of powers.⁷¹

The Court, as Alexander Bickel put it, "exists in a Lincolnian tension of principle and expediency."⁷² *Raines* exemplifies this tension, leaving open the possibility of lawmaker standing being recognized in an otherwise nonjusticiable controversy while invoking the "passive virtue" of steering clear of quintessentially political disputes. *Raines*'s balancing act, moreover, reveals the Court's power to frame the issues before it. For the most part, the Court accomplishes this task through its certiorari power. In *Raines*, however, the Court had no choice but to hear the case. The lower court's invalidation of the Item Veto Act (and its accompanying approval of standing) as well as Congress's expedited review provision compelled the Court to act and to act quickly. The Court's desire to address lawmaker standing, of course, made this a rather easy pill to swallow.⁷³

giving due respect to "judicial interpretations of the [First Amendment] already issued." 117 S. Ct. 2157, 2172 (1997).

68. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion).

69. Tom R. Tyler & Gregory Mitchell, *Legitimacy and Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 715 (1994).

70. For similar reasons, the Court prefers that the Solicitor General unify the views of federal departments and agencies. In *FEC v. NRA Political Victory Fund*, for example, the Court—on its own motion—refused to allow the FEC, an independent agency, to file a certiorari petition without first receiving Solicitor General approval. 513 U.S. 88, 99 (1994).

71. *Raines*, 117 S. Ct. at 2324, 2321-22.

72. BICKEL, *supra* note 9, at 50.

73. This description suggests that *Raines*'s no standing finding is rooted in pragmatics, not principle. We think that description is fair. First, standing doctrine is notoriously malleable. For example, while *Raines* trivializes the harm lawmakers suffer when they negotiate a budget deal in the shadow of an allegedly unconstitutional law, the Court has validated such claims of process harms in other settings. See Bruce K. Miller & Neal E. Devins, *Constitutional Rights Without Remedies: Judicial Review of Underinclusive Legislation*, 70 JUDICATURE 151 (1986) (contrasting cases in which the Court approves process-based harms with cases in which it rejects process harms); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1424, 1455-61 (1995) (same); Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 47-51 (same). Second, to facilitate its invocation of separation of powers values, the Court miscasts the dispute in *Raines*. Third, it is hard to square the Court's strong words on

III. RIPENESS, THE ITEM VETO, AND SEPARATION OF POWERS

In light of this history, the most revealing aspect of the decision in *Raines* may be what it says about the Court's desire and ability to time the judicial resolution of the various constitutional issues presented in the case. On the one hand, the Court decided to accelerate its confrontation with the D.C. Circuit; on the other hand the Court decided to delay—or perhaps avoid—potential confrontations with the Congress and executive branch on the constitutionality of the accelerated review provision and the item veto itself. Pointing to the prudential advantages of delay, concurring Justices David Souter and Ruth Bader Ginsburg specifically noted their agreement with the majority decision only because they were confident the constitutional challenge to the Item Veto Act would return to the Court.⁷⁴ While the *Raines* majority did not technically rely on ripeness analysis, the underlying principles behind the doctrine—to avoid premature entanglements “in abstract disagreements with other organs of government”—clearly underlay their reasoning.⁷⁵

A. THE VALUE OF DELAY IN THE SEPARATION OF POWERS CONTEXT

Why was delay so important in the case of the item veto? Of course, many of the traditional arguments for delay, as expressed in the ripeness doctrine and described above, could be advanced in *Raines*. The procedural device that was being challenged—the item veto—had not yet been exercised; the exact nature and circumstances of its likely effect in the first test case thus remained subject to debate. There was also the possibility—however slight—that any constitutional confrontation with the legislative and executive branches would be avoided should the item veto never be exercised, as the Solicitor General seemed at one point to speculate at oral argument.⁷⁶ Moreover, even if the “confrontation” might not be avoided, the issues might be framed differently in a subsequent suit brought by a private party. As Justice Souter observed in his concurring opinion, “just as the presence of a party beyond the Government places the Judiciary at some remove from the political forces, the need to await injury to such a plaintiff allows the courts some greater separation in the time between the political resolution and the judicial review.”⁷⁷ In other words, the passage of time and the presence of a private injured litigant might afford the

lawmaker standing with two aspects of its holding. To begin with, the dilemma lawmaker standing poses for the Court is no different in otherwise nonjusticiable cases than in otherwise justiciable cases. The difference, instead, is the Court's “natural urge to proceed directly to the merits of [an] important dispute.” *Raines*, 117 S. Ct. at 2317. While the Court may ultimately conclude that lawmakers lack standing in otherwise nonjusticiable cases, *Raines*'s exemption of that category of dispute from its holding makes little doctrinal sense. Furthermore, it is hard to square *Raines* with *Coleman v. Miller*, 307 U.S. 433 (1939), a case that allowed state lawmakers to challenge the alleged nullification of their votes. See *Raines*, 117 S. Ct. at 2328 (Breyer, J., dissenting); *Coleman*, 307 U.S. at 436.

74. See *Raines*, 117 S. Ct. at 2325 (Souter, J., concurring).

75. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 163 (1987).

76. See Transcript, *supra* note 42, at *18.

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

Court a better understanding of how the item veto would actually work and protect its political independence to reach the best result.

In our view, however, these classic arguments do not justify the ultimate decision to delay in this case. The fact that Congress wished to accelerate constitutional review and make the item veto effective for only the next two administrations suggests it had doubts about the Act.⁷⁸ Indeed, many legislators, even those who supported the Act, seemed quite willing for the Court to intervene, or at least did not appear to be preparing for a pitched battle. When one compares the item veto case to 1996-97 Term decisions invalidating congressional initiatives, all of which were more politically charged, a confrontation with Congress over the item veto does not seem so daunting.⁷⁹ To the contrary, some might even claim delay *undermined* the Court's political position; deciding the item veto in this relatively abstract context, before the winners and losers of operation were clear, could have had certain political advantages.⁸⁰

Moreover, on the opposite side of the ledger, the Court's refusal to reach the merits arguably had present effects on legislators and the public, as Justice Stevens pointed out in his dissent.⁸¹ While almost every law or regulation influences current thinking and behavior before it is implemented, the item veto's proactive impact seems qualitatively different. In contrast to most cases in which complainants seek to initiate early review, the underlying *purpose* of the item veto—cited by proponents and foes alike—was to sway legislative deliberations and decisions *prior to its exercise*, in other words, to change the plaintiffs' current behavior, as they alleged in their complaint.⁸² After the item veto was passed, President Clinton even speculated that he might not need to

78. The Act sunsets the veto in 2005. See 2 U.S.C.A. § 691.

79. In his end-of-term wrap-up, David Savage, who covers the Supreme Court for the *Los Angeles Times*, put it this way: "Boldly striking down newly enacted laws, the justices showed little regard for the power and prerogatives of the lawmakers who meet on the opposite side of First Street, N.E." David G. Savage, *Supreme Court Grants States a Power Surge*, L.A. TIMES, June 19, 1997, at A1. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (holding that Congress could not criminalize pornography on the internet); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding that Congress could not grant more protection to religious freedom than what is required in the Constitution); *Printz v. United States*, 117 S. Ct. 2365 (1997) (holding that Congress could not require state or local officials to enforce federal gun-control regulation).

80. The same can be said of the congressional standing issue, that is, the abstractness of *Raines* reduced the political costs of a Court holding on lawmaker standing.

81. See *Raines*, 117 S. Ct. at 2327 (Stevens, J., dissenting).

82. As several congressional proponents of the Item Veto Act have suggested, the use of the item veto may be limited because the mere existence of that power vested in the President could discourage Congress from adding pork to appropriation bills in the first place. See, e.g., 142 CONG. REC. S2987, S2988 (daily ed. Mar. 27, 1996) (statement of Sen. Craig) ("Knowing that any individual provision may have to return to Congress one more time to stand on its own merits will promote more responsible legislation in the first place. In short, embarrassing items will not be sneaked into these bills in the first place."); *id.* at S2981 (statement of Sen. Biden) (arguing that the Line-Item Veto Act will "shift the incentives now in our system to attach special-interest spending to our appropriations bills."); *id.* at S2957 (statement of Sen. Stevens) (asserting that the line-item veto will be instrumental in creating a more disciplined Congress).

use the device since its purpose was to impose fiscal discipline upon Congress.⁸³ Whatever the doctrinal pigeonhole, there were important prudential and political reasons supporting early review in this case.

To justify delay in *Raines*, therefore, one needs to take account of the special values of ripeness in modern separation of powers confrontations. The normal ripeness doctrine, as described above, was developed for a paradigmatic challenge to a statute or administrative regulation that is yet to be implemented. Thus, the applicable standard has been, under the classic test set forth in *Abbott Laboratories v. Gardner*,⁸⁴ whether the harm to the plaintiffs resulting from delay is offset by the need for the Court to resolve the dispute through the prism of an actual case following implementation. The assumption is that, by allowing a specific case with real parties to be presented to the court, delay may avoid the controversy or make the issues in the dispute more refined. Time may also reduce the tenor of political argument in the other branches, which are no longer involved in the debate over its passage.

But separation of powers confrontations can differ in important respects from the traditional challenge to a congressional statute. Delay not only allows the Court to consider the constitutionality of the item veto in a suit involving its exercise, but only after the legislative and executive branches have had to respond over time to the exercise of the veto in a series of other situations as well. This repeat player aspect to separation of powers disputes distinguishes them from many traditional constitutional challenges; the branches are forced over time to react to and make accommodations with each other—and perhaps articulate new constitutional positions—in the shadow of the implementation of the law.

Of course, the implementation of virtually any statute produces *some* response by political institutions. Yet in many constitutional controversies, the new decision rule adopted by Congress, such as a ban on firearms, is less likely to be bargained around by national political institutions with independent political and constitutional positions. In the separation of powers context, the frequent interplay between the branches can make the ultimate impact of a new rule quite unpredictable, as the political accommodations between the branches can redefine or even undo the substantive impact.⁸⁵ The decision striking down the legislative veto in *INS v. Chadha*⁸⁶ is perhaps the best example; the ultimate effect of the new rule turned out to be quite different than originally predicted,

83. For a discussion of how Clinton has in fact used the veto, see *infra* notes 93 and 102 and accompanying text.

84. 387 U.S. 136, 147 (1967).

85. Bickel recognized that delaying litigation had the advantage of allowing the "full political and historical context, the relationship between the Court and the representative institutions of government," to be made clearer. BICKEL, *supra* note 9, at 124. Our point is that, in the modern separation of powers context, it also illuminates the relationship of "the representative institutions of government" to each other. *Id.*

86. 462 U.S. 919, 959 (1983).

as the branches made extensive accommodations to work around the decision.⁸⁷ The approach of the legislative and executive branches to controversies over foreign affairs and executive privilege has similarly redefined the meaning of the constitutional decision rules over time.⁸⁸

This phenomenon provides the best explanation for the Court's quite extraordinary discussion in *Raines* of the failure by various legislative and executive figures over the years to bring suits challenging laws before they had been implemented.⁸⁹ This is fascinating constitutional history, but unusual precedent for a decision of the Court. Rather than resolve the issue of congressional standing through an exploration of traditional constitutional principles, the Court placed its greatest reliance on the failure of the various members of the branches in assorted cases over the years to challenge the other branch proactively through suit.

On a purely *formal* level, as Justice Stevens pointed out in dissent, the failure of members of the branches to bring suit says little about how the Court would or should have resolved such a suit. If one's theory of constitutional methodology is limited to the original intent of the Framers, judicial precedent, and constitutional text, then the practices of the branches are of marginal relevance.⁹⁰ But for those who view the decision as necessarily informed by constitutional practice—as the debate over the item veto and the Court majority's discussion of the history of congressional standing suggest—the value of current constitutional custom is readily apparent.⁹¹

B. THE VALUE OF DELAY IN *RAINES*

How would the experience with the item veto, like experience with legislator lawsuits, be illuminating? First, it might offer some preliminary evidence about the item veto's impact on the overall balance of powers. One important question is whether the item veto will drive the existing equilibrium of checks and balances out of equipoise, as the extraordinary formal responsibility vested in

87. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 275 (1993); Fitts, *supra* note 8 (analyzing this issue from a "political transaction cost," or Coasian perspective).

88. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); Neal E. Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 110 (1996) (indicating that Congress and the executive branch have been unwilling to trade political solutions to interbranch conflict for judicial resolution); McGinnis, *supra* note 17, at 305-08, 325-25; Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. (forthcoming 1997); Peter M. Shane, *Legal Disagreements and Negotiation in a Government of Law: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 465-66 (1987) (stating that each branch has an independent view of executive privilege entitled to primacy in its own "jurisdiction," but co-equal status with others in different contexts).

89. See *Raines*, 117 S. Ct. at 2320-21.

90. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency*, 72 CORNELL L. REV. 488, 493 (1987).

91. On the role of custom in separation of powers decisionmaking, see Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 115-16 (1984).

the President by the item veto might suggest. Proponents and defenders take different sides, dividing on whether Congress will be able to respond through other devices to check any presidential overreaching.⁹² For its part, the Clinton administration signalled before the decision that the President might not make aggressive use of the item veto.⁹³ The Court in *Raines* recognized this possibility. Noting in a footnote that the President might find it politically costly to utilize the item veto,⁹⁴ the Court made clear that it was too soon to draw conclusions about the item veto's significance.

Apart from these systemic interbranch concerns, there is a separate substantive policy issue of whether the item veto will work to improve the quality of specific legislation. Will it be used by the President to threaten individual members of Congress simply to pursue executive pet projects, as opponents claimed?⁹⁵ Or will it serve to check the perverse micromotives of individual members, as its supporters hope?⁹⁶ In other words, will it transform the substantive quality of legislation in a significant way, and if so, in what direction?

In several recent separation of powers confrontations, the Court has had the advantage of such history. The legislative veto, for example, enjoyed wide usage before it was struck down in *Chadha*, as had the special prosecutor

92. See Devins, *supra* note 8; see also William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

93. At oral argument, the Solicitor General speculated that the President might not exercise the veto, as did Clinton at a news conference immediately following its passage. The President, of course, has made use of the item veto since *Raines*. Whether these invocations should be construed as either de minimis or significant, however, seems more a function of one's baseline than anything else. See, e.g., John M. Broder, *Clinton Cuts a Bit of Fat Off the Pork*, NEW ORLEANS TIMES, Oct. 18, 1997, at A14 (President "has deferred to Congress on the overwhelming majority of projects that members added to budget bills"); Robert Reno, *Clinton Vetoes and Annoys*, GREENSBORO NEWS & RECORD, Oct. 22, 1997, at A15 ("[A]s a practical weapon in the real political world, [the item veto] is less lethal than a poleax if more annoying than a peashooter."); see also *infra* notes 99, 102.

94. See *Raines*, 117 S. Ct. at 2320 n.9.

95. During congressional debate, many congressmen expressed concern that a president could force an undesirable congressional response by merely threatening to use the item veto. See, e.g., 142 CONG. REC. S2941 (daily ed. Mar. 27, 1996) (statement of Sen. Byrd) ("This new power of rescissions will be used by a President to threaten and coerce and intimidate members of the legislative branch to give the President what he wants or he will cut the projects and programs that our constituents need and want."); *id.* at S2969 (daily ed. Mar. 27, 1996) (statement of Sen. Bumpers) (confessing that, as governor, he threatened the use of the item veto to "get legislators in line" and that the president would use the power to coerce lawmakers to vote a particular way); *id.* at H3010 (daily ed. Mar. 28, 1996) (statement of Rep. Roukema) (same); *id.* at H3002 (daily ed. at Mar. 28, 1996) (statement of Rep. Slaughter) (same).

Similarly, congressmen opposed to the Item Veto Act have argued that a president could use it to compel members of Congress to vote for his own pet projects. See, e.g., *id.* at H2976 (daily ed. Mar. 28, 1996) (statement of Rep. Beilenson) ("[The President] will use this new line item veto authority as a threat to secure appropriations he wants funded."); *id.* at S2965-66 (daily ed. Mar. 27, 1996) (statement of Sen. Levin) ("[A] president could push his agenda in congress by threatening to use the line-item veto. . . . Such threats could be used to . . . increase federal funding for projects favored by the President."); *id.* at H2978 (daily ed. Mar. 28, 1996) (statement of Rep. Skaggs) (demonstrating how President Reagan could have used the line-item veto to secure funding for the Contras); *id.* at S2969 (daily ed. Mar. 27, 1996) (statement of Sen. Bumpers) (demonstrating how President Bush could have used the item veto to ensure passage of the Utah Wilderness Bill).

96. See Devins, *supra* note 8.

provision upheld in *Morrison v. Olson*.⁹⁷ Indeed, even with the extensive background before the Court at the time of these decisions, we have learned a great deal about these devices from subsequent practice, which was not available to the Court at the time of decision.⁹⁸ Because the item veto will be implemented in the context of a series of interconnections between the branches, the institutions of government undoubtedly will condition its exercise in innumerable ways.

In addition to the information it offers about the actual operation of the item veto, delay is valuable because of its political impact—it increases the likelihood that Congress will be forced into expressing more developed views on the operation and constitutionality of the item veto. As noted above, one of the problems with the accelerated judicial review provision and the “behind the veil” vote by Congress was the lack of legislative debate over the Act’s constitutionality. Not surprisingly, after the first few exercises of the item veto, some legislators are having second thoughts about their original support for the law.⁹⁹ The Court could be aided considerably by the views of the other branches on the constitutionality of the item veto in light of this experience.

This latter argument, it is important to note, stands the traditional ripeness analysis on its head. Under the standard theory, delay should place time and distance between the Court and the democratically elected legislature.¹⁰⁰ Here, delay may produce the opposite effect, as the legislative body that refused to take a constitutional position when it originally voted for the legislation “behind the veil” is now confronted over time with its actual operation. This was one reason why the use of fast-track statutes by the Court raises such serious prudential concerns, and should have been turned aside. The problem was not that expedited procedures left the Court too *close* to the constitutional politics of Congress, but the *reverse*; it gave Congress distance from the item veto and

97. 87 U.S. 654, 654 (1988).

98. Recently, several academics have questioned the effectiveness and the appropriateness of the independent counsel in light of this history. See generally TERRY EASTLAND, *ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989* (1989); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 92-95 (1995) (suggesting that frequent use of independent investigations poses risk of partisan abuse, encourages distrust of government and government officials, and prevents government from addressing the real problems of the nation); *Statutory Interpretation—Ethics in Government Act—Eighth Circuit Holds Attorney General’s Referral of Matters to Independent Counsel to be NonReviewable*, *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3257 (U.S. Oct. 7, 1996) (No. 95-2013), 110 HARV. L. REV. 793, 797-98 (1997); Peter W. Rodino, *The Case for the Independent Counsel*, 19 SETON HALL LEGIS. J. 5, 24-31 (1994) (supporting use of special prosecutors, but admitting that the current system is flawed). For discussions of *Chadha*’s impact, see Fisher, *supra* note 87; Fitts, *supra* note 8, at 1666.

99. In signing a recent veto, President Clinton himself observed, “I know that a lot of members who voted for the line-item veto in Congress now wonder whether they did the right thing now that I’m exercising it.” Lisa Hoffman Scripps, *Clinton Wields Line-Item Veto Lightly: Congress Piles Up 750 Pet Projects on Military Spending Bill; President Kills Just 13 of Them*, ROCKY MTN. NEWS, Oct. 15, 1997, at 32A.

100. *Raines*, 117 S. Ct. at 2324 (Souter, J., concurring).

deprived the Court of Congress's considered opinion of the item veto after it observed its operation. In recent years there have been several other instances in which Congress and/or individual legislators have sought strategic advantage by institutionally avoiding greater political accountability. The best example may be Gramm-Rudman, which not coincidentally also included a fast track judicial review provision.¹⁰¹ Delaying review in such cases may lead Congress to assume at least some greater constitutional responsibility.

Depending on how the Court ultimately resolves the issue, there also may be a strategic advantage to this approach—though, once again, for a somewhat different reason than the classic Bickelian analysis suggests. While time supposedly increases distance from the controversy and causes political participants to become more detached, in this instance it may actually bring them back into the fray—potentially on the side of the Court. Unlike most constitutional “confrontations,” it must be remembered, the Court in *Raines* is faced with both the executive and legislative branches initially approving of the change. Entering the fray immediately might have required the Court to challenge the formal positions of both branches. With time, as the real winners and losers become apparent, the politics of the item veto may transform the controversy before the Court.

Of course, this raises the question of how much time. Our personal view: a period sufficient to allow the President to exercise the veto in a variety of different political contexts and for Congress to respond. The first few exercises of the veto since its passage have been tentative and subsequent interbranch bargaining fairly extensive.¹⁰² Only time will tell whether this brief history confirms predictions that the item veto will be less significant than many opponents and supporters have predicted.

C. THE RIPENESS DOCTRINE

If all these reasons exist for delay, why didn't the Court simply base its decision specifically on ripeness grounds—the doctrine most focused on timing? The answer is not certain, though there are a number of likely reasons.

For one, it is not clear whether the ripeness concerns in this case are of constitutional dimension. The doctrinal distinction is important because Congress effectively waived any prudential concerns by passing the accelerated judicial review provision. The cases and the commentary on whether ripeness is

101. There are others examples as well, especially in the area of foreign affairs. See McGinnis, *supra* note 17, at 306 (stating that Congress has rationally shunned operational control of war and foreign policy matters in favor of criticizing the Executive's performance after the fact).

102. See *supra* note 93 and accompanying text. Moreover, bargaining within Congress and among interest groups has intensified. See Guy Gugliotta & Eric Pianin, *Line-Item Veto Tips Traditional Balance of Power, Capitol Hill Plots Strategy to Counter President's Pen*, WASH. POST, Oct. 24, 1997, at A1 (describing changes in congressional bargaining); David E. Rosenbaum, *New Veto Alters Way Washington Works*, DALLAS MORNING NEWS, Oct. 22, 1997, at A20 (describing changes in interest group and OMB negotiations).

constitutionally based are divided,¹⁰³ as were the Justices themselves at oral argument.¹⁰⁴ Indeed, many who argue the ripeness doctrine is constitutionally based have limited their claims to delays needed for a delineation of the issues in the case, not due to hardship to the parties or, alternatively, ripeness of the issues in the broad sense articulated here.

More important, a ripeness claim would have precluded the Court from reaching out and addressing the congressional standing issue. Like the Congress that passed the line-item veto in the first place, the Court may have wished to address this issue in a relatively theoretical context, that is, to place a check on the evolution of the D.C. Circuit doctrine at a point when that doctrine had only limited significance to the parties.¹⁰⁵ There are obvious tactical advantages in deciding issues preemptively, as the Court's decision in *Marbury v. Madison*¹⁰⁶ demonstrated long ago.¹⁰⁷ As an internal matter, it also may have allowed the Court to reach a consensus on the general approach to congressional standing without resolving internally how the nuances of that doctrine would be applied in future cases.

Nevertheless, a holding on ripeness grounds in *Raines* might have afforded the Court doctrinal support for delaying decision in a future case brought by a private party before sufficient time has elapsed. As has been observed over the years, the well-documented ambiguity of standing in general and ripeness in particular offers prudential advantages. Because the standing doctrine is not "a highly principled and predictable process," it can afford the Court the "judicial discretion to engage in such avoidance of decision" and the "flexibility needed to discharge the [A]rticle III function wisely."¹⁰⁸ In the present context, the preferred moment for judicial intervention, we have suggested, would only be after the Court has had an opportunity to observe the exercise of the item veto in a variety of political contexts. This may not be the case if a challenge is brought by a private party this term. Under our policy analysis of the case, therefore, application of an expanded ripeness doctrine might well be appropriate, if not in *Raines*, then in some future challenge by a private party if brought at a point when the branches have not had substantial experience with the item veto.

CONCLUSION

In *The Least Dangerous Branch*, perhaps the most influential work ever published in constitutional law, Alexander Bickel explored the Supreme Court's use of jurisdictional and procedural devices to modulate its interactions with the

103. See, e.g., ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 116 (1989); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 78 (2d ed. 1988); Nichol, *supra* note 75, at 155-56.

104. See Transcript, *supra* note 42, at *5-8.

105. See *supra* text accompanying notes 57-61.

106. 5 U.S. (5 Cranch) 137 (1803).

107. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 6-33 (describing the history of *Marbury v. Madison*).

108. TRIBE, *supra* note 103, at 87.

elected branches of government. Bickel's predominant concern, of course, was with the Court's lack of democratic legitimacy; these devices, he reasoned, would ensure that issues before the Court were more fully developed for adjudicative resolution and the Court would not become prematurely entangled in controversies with the elected branches of government. The passive virtues, therefore, were one of the important ways the Court retained legitimacy and influence within a government of competing and otherwise more powerful elected institutions.

Bickel wrote, however, at a time when many current trends in modern government had not fully matured, or at least were not widely recognized.¹⁰⁹ These changes include the rise of the modern administrative state; the extensive political and legal interplay between the legislative and administrative bureaucracies on a weekly if not daily basis; and the frequent attempts by the different branches and their political inhabitants to claim success for themselves and deflect negative political responsibility onto other institutions and branches of government in an increasingly complex government of dispersed powers. All of these developments make the fundamental Bickelian arguments in favor of the exercise of the passive virtues of even greater relevance today, though they complicate the analysis and require that it be updated for the modern separation of powers context.

Raines offers one such opportunity. On the one hand, the reasons for delay were even stronger than those originally envisioned by Bickel. In the context of the item veto, delay allows the Court not only to learn about the mechanics of the item veto in a specific case, but also after it has been exercised (or not exercised) in a number of other contexts. How the modern Congress, Presidency, and federal bureaucracy will react to such legal interventions in a world of constant interbranch jousting can best be understood from this perspective. In addition, there is a normative benefit to delay; with time, the Court should be better able to explore the reflective views of the elected branches of government about the item veto in light of their own experience with it.

Nevertheless, while the Bickelian justifications for repose in *Raines* were weighty, the challenges to the exercise of those virtues were—not coincidentally—also weighty. In a technique that has become increasingly common in modern separation of powers confrontations, Congress mandated expedited judicial review of the item veto before it had ever been exercised. Motivated in part by a desire to deflect constitutional responsibility and perhaps cognizant of the Court's tactical advantage in delay, Congress in effect expressed its direct opposition to the exercise of the passive virtues.

Superficially, the Court's decision to elude direct confrontation by dismissing on the grounds of congressional standing may appear to be the ultimate Bickelian maneuver. It avoided opposition to the passive virtues by exercising the

109. For a general discussion of Bickel's failure to take account of the modern administrative state, see Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 765-70 (1997).

quintessential passive virtue—dismissing on procedural grounds. We believe, however, that this modern confrontation over timing called for a non-Bickelian response. In light of the seriousness of the challenge to judicial autonomy, and the importance of delay in modern separation of powers confrontations, the Court should have addressed the expedited judicial review provision directly. By focusing on the congressional standing issue, the Court forfeited an opportunity to confront a device that seems to be increasingly prevalent in Congress, yet nonetheless disturbing in the separation of powers context.

What of the congressional standing decision itself? We have not offered a substantive evaluation of the Court's analysis, other than to speculate on why the Court might have wanted to reach out and decide the issue and, having done so, to confront the D.C. Circuit. Due to its structural role in protecting individual rights, the Court may have a very different view about being drawn into separation of powers controversies.¹¹⁰

That having been said, we doubt that the decision will stand as the final word on congressional standing. While the majority opinion expressed serious doubts about legislators suing in their official capacity for injuries to their official responsibilities, it ultimately announces no blanket prohibition against such actions. Indeed, there are a number of grounds upon which the decision can be distinguished in future cases. For example, in justifying the result, the Court specifically distinguished the plaintiffs' challenge in *Raines* from challenges by individual members of Congress to rules changes that impact upon them in a discriminatory manner.¹¹¹ If this language is taken seriously, constitutional challenges to congressional voting procedures with differential impacts might not be covered by the decision. The Court also distinguished *Coleman v. Miller*,¹¹² the 1939 decision allowing state lawmakers to sue in their official capacities, simply on the grounds that the plaintiffs' votes in *Coleman* were "completely nullified."¹¹³ Thus, the extent of the impact on future plaintiffs' political influence might also be grounds for establishing legislative standing. Finally, the Court's reliance on the failure of earlier legislators to bring suit in "analogous confrontations"¹¹⁴ might serve as limited precedent, in light of the spate of lawmakers challenges both to executive branch initiatives and to the internal workings of Congress.

There are also quite practical considerations to be factored in. The Court knew, and the concurring opinion specifically announced, that this issue—the constitutionality of the line-item veto—would return to the Court for ultimate resolution. How the Court will respond in another case without that luxury remains unclear. Given that the majority opinion only garnered five votes, there is certainly considerable room for future judicial development and evolution.

110. See *supra* Part II.

111. *Raines*, 117 S. Ct. at 2320 n.7.

112. 307 U.S. 433 (1939).

113. *Raines*, 117 S. Ct. at 2319.

114. *Id.* at 2320.

Viewed in this light, the decision seems quite consistent with recent Rehnquist Court decisions that have tended to set forth general principles or guidelines, rather than fixed rules, for constitutional adjudication.¹¹⁵ Whatever one's ultimate judgment about the *Raines* analysis of congressional standing, the narrowness of the decision may have special value in the separation of powers context. The ambiguities implicit in the law of standing have been a constant source of academic criticism over the years, yet a valuable foundation for judicial discretion in modulating the timing of judicial action. While Bickel identified this general point many years ago, it is especially relevant to the separation of powers context. The Court was wise to steer clear of the dispute.

Nonetheless, *Raines* remains unsettling. By failing to express concern with the provision in the Act mandating accelerated judicial review, *Raines*, in effect, winked at Congress and the White House's attempt to deflect political and constitutional responsibility through structural interventions. This is unfortunate. Whether or not the Court ought to speak the last word on the Constitution's meaning, the elected branches ought to speak the first word about the legality of their handiwork.

115. See Sullivan, *supra* note 22, at 24-27.