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How Successfully Can the States' Item Veto be Transferred to the President?

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I. INTRODUCTION

After attempting to reassert its fiscal prerogatives in 1974 by passing the Congressional Budget and Impoundment Control Act,[1] Congress in recent years has passed through a period of institutional self-doubt. Less confident in its internal budgetary process, it appears willing to let power drift either to the President or outside agencies and to rely on automatic mechanisms to control spending and deficits. The automatic deficit reduction procedures contained in the Balanced Budget and Emergency Deficit Control Act of 1985,[2] commonly known as the Gramm-Rudman-Hollings bill, illustrate this attitude.

That the item veto proposal commands so much attention in Congress provides further evidence that some members are willing to surrender additional budgetary duties. The item veto would permit the President to veto individual items within an appropriations bill. Although in the last century this proposal has been offered as a constitutional amendment numerous times,[3] rarely has it received any serious consideration. Prior to 1984, the only floor action occurred in 1938 when the House of Representatives voted to give the President item veto authority by statute.[4] The final bill, however,

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1. Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at scattered sections of 2 U.S.C. & 31 U.S.C.).

2. Pub. L. No. 99-177, §§ 251-256, 99 Stat. 1037 (1985) (codified at 2 U.S.C. §§ 901-906 (Supp. III 1985)).

3. One of the earliest efforts to enact an item veto occurred in 1876, when Rep. Charles Faulkner introduced a joint resolution so to amend the Constitution. *See* H.R.J. Res. 45, 44th Cong., 1st Sess., 4 CONG. REC. 477 (Jan. 18, 1876).

4. 83 CONG. REC. 355-56 (1938). An amendment to the appropriations bill authorized the President to eliminate or reduce any appropriation, in whole or in part, subject to congressional disapproval within 60 days.

did not contain this provision.[5] In 1984 and again in 1985, Senator Mack Mattingly attempted to give the President item veto authority by statute.[6] These efforts provoked extensive Senate debate and hearings,[7] but no legislation. Joint resolutions to amend the Constitution by granting item veto au-

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5. Act of May 23, 1938, Pub. L. No. 534, ch. 259, 52 Stat. 410.

6. In 1984, Sen. Mattingly introduced an amendment that would have authorized the President to "disapprove any item of appropriation." *See* 130 CONG. REC. S5297 (daily ed. May 3, 1984). The bill also proposed, however, that Congress could override the President's action by a simple majority vote of each chamber rather than the two-thirds required by article I, § 7, of the Constitution. *Id.* The Senate rejected his amendment by upholding a point of order raised by Sen. Lawton Chiles, who argued that the amendment was legislation attempting to change the Constitution. *Id.* at S5312, S5323. *See generally* Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 719-22 (1985) (discussing Senate debate on constitutionality of Mattingly's amendment).

In 1985, Sen. Mattingly proposed that the enrolling clerk be authorized to separate each "item" from an appropriations bill and treat each item as a separate bill or joint resolution to be submitted to the President for his signature or veto. S. 43, 99th Cong., 1st Sess. (1985). *See* 131 CONG. REC. S135-36 (daily ed. Jan. 3, 1985) (statement of Sen. Mattingly).

7. *See* 131 CONG. REC. S9600-27 (daily ed. July 17, 1985); *id.* at S9703-23 (daily ed. July 18, 1985); *id.* at S9793-9806 (daily ed. July 19, 1985); *id.* at S9827-40 (daily ed. July 22, 1985); *id.* at S9872-78 (daily ed. July 23, 1985); *id.* at S9915-47 (daily ed. July 24, 1985). After three unsuccessful efforts to end a filibuster, Senate Majority Leader Robert Dole requested unanimous consent that the motion to proceed to Mattingly's bill be withdrawn. 131 CONG. REC. S9947 (daily ed. July 24, 1985); *see Line Item Veto: Hearings on S. 43 Before the Senate Comm. on Rules and Administration*, 99th Cong., 1st Sess. (1985) [hereinafter *Line Item Veto Hearings*].

An item veto created by statute rather than amendment would be subject to serious constitutional challenge. The veto power given the President by the Constitution is limited to discrete enactments, not portions of a bill. Recent statutory alternatives have proposed that the enrolling clerk would take an appropriations bill that had cleared both houses of Congress and add to each numbered section or unnumbered paragraph of the bill an enacting or resolving clause, provide an appropriate title to these "mini" bills, and presumably affix a new bill number. *See* S. 43, 99th Cong., 1st Sess. (1985); *Line Item Veto Hearings*, *supra*, at 85 (statement of Louis Fisher, Congressional Research Service). The possibility that Congress is empowered to craft such a procedure is clouded by the Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983). In holding the legislative veto unconstitutional, the *Chadha* Court emphasized that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 944. *Chadha*, if followed, demands that constitutionally designed processes of bicameralism and presentment of legislation be followed by Congress and the President. Article I, § 7 of the Constitution provides that every bill presented "shall have passed the House of Representatives and the Senate." Each "mini" bill presented to the President under S. 43, described above, would only have passed each house in aggregate form. *See generally Line Item Veto Hearings*, *supra*, at 10-12, 13-20 (statement of Johnny Killian, Congresional Research Service) (testimony regarding constitutional implications of *Chadha* decision on line item veto); *id.* at 82-85 (statement of Louis Fisher, Congressional Research Service) (same).

In addition to questioning the identification of an item as a "bill," the item veto can be challenged as an improper delegation of legislative power to the President. As recognized by Johnny Killian of the Congressional Research Service:

> Delegation of legislative authority is always made to the President . . . in the context of the execution of the law. . . .
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> The attempted delegation to the President of an item veto would not involve his executive functions; it would rather enlarge his legislative responsibilities, his power to participate in the legislative process. As such it woujld [sic] be subject to the objections . . . to a

thority to the President are introduced in every Congress.[8]

The Senate debates in 1984 and 1985 underscore the unusual interest in the item veto proposal. If the Gramm-Rudman-Hollings Act fails to solve the federal deficit problems, either because of the Supreme Court's decision in *Bowsher v. Synar*[9] or because of stalemates between Congress and the President, the item veto will loom as a likely tool for budgetary restraint. It represents another seemingly mechanical alternative to making politically difficult choices and promises to relieve Congress of some budgetary responsibilities.

The item veto requires careful consideration at this time for another reason. The Reagan Administration has been making a concerted effort to obtain this authority for the President, claiming it will help redress the chronic inability of the federal government to control spending and budget deficits. In support of this contention, the President has pointed to the fact that most governors have this authority: "I ask you to give me what 43 Governors have: Give me a line-item veto this year. Give me the authority to veto waste, and I'll take the responsibility, I'll make the cuts, I'll take the heat."[10]

A. THE RISKS OF EMULATION: UPSETTING THE BALANCE OF POWER

This article is motivated by two concerns. First, it is necessary to look closely at the legal, political, and administrative problems of trying to borrow the item veto from the states and graft it onto the federal system. Second, the

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general enlargement of those legislative powers and it would not be subject to the counter arguments that successful delegations of legislative power to the executive could supply.

Id. at 18. These issues will not be explored in this article. Rather than examining whether any statutory item veto would be unconstitutional and consequently whether the item veto can only be created through a constitutional amendment, this article is concerned with the operation of the item veto.

8. For example, in the first session of the 99th Congress alone, at least 10 separate constitutional amendments to give item veto authority to the President were introduced. *See* S.J. Res. 11, 99th Cong., 1st Sess. (1985); S.J. Res. 162, 99th Cong., 1st Sess. (1985); H.R.J. Res. 15, 99th Cong., 1st Sess. (1985); H.R.J. Res. 18, 99th Cong., 1st Sess. (1985); H.R.J. Res. 49, 99th Cong., 1st Sess. (1985); H.R.J. Res. 57, 99th Cong., 1st Sess. (1985); H.R.J. Res. 97, 99th Cong., 1st Sess. (1985); H.R.J. Res. 130, 99th Cong., 1st Sess. (1985); H.R.J. Res. 139, 99th Cong., 1st Sess. (1985); H.R.J. Res. 337, 99th Cong., 1st Sess. (1985).

9. 106 S. Ct. 3181 (1986). The Court struck down the provision of the Gramm-Rudman-Hollings Act that gave the Comptroller General "the ultimate authority to determine the budget cuts to be made." *Id.* at 3192 (citing Pub. L. No. 99-177, § 252(a)(3), 99 Stat. 1074 (1985) (codified at 2 U.S.C. § 902(a)(3) (Supp. III 1985)). Chief Justice Burger reasoned that Congress had unconstitutionally retained control over enforcement of the Act since the Comptroller General may be removed by a joint resolution. *Id.* The Court left the remainder of the Act, with its alternative budget reduction mechanisms, intact, but whether the Act retains its efficacy is yet to be seen.

10. President's State of the Union Address, 22 WEEKLY COMP. PRES. DOC. 135, 136 (Feb. 4, 1986). In his 1987 State of the Union Address, President Reagan "once again" urged Congress to give him "the same tool that 43 governors have—a line-item veto." President's State of the Union Address, *reprinted in* Wash. Post, Jan. 28, 1987, at A8, col. 3.

granting of item veto authority to the President may fundamentally alter the constitutional balance between Congress and the President.

The "state analogy" suffers from a number of serious deficiencies. The item veto exercised by the governors of many states is sustained by a governmental design unique to the states and cannot be severed from it. State constitutions differ dramatically from the federal Constitution, especially in their distribution of executive and legislative powers. There is a much greater state bias against legislatures than exists at the national level. State budget procedures differ substantially from federal procedures. Appropriations bills in the states are structured to facilitate item vetoes by governors. Appropriations bills passed by Congress contain few items. Finally, state judges have experienced severe problems in developing a coherent and principled approach to monitoring the scope of item veto power. Many of those problems would be duplicated and possibly compounded at the federal level.

More fundamentally, the adoption of what might appear to be a relatively modest reform proposal could result in a radical redistribution of constitutional power. The item veto has significance beyond the budgetary savings that may, or may not, be realized. At stake are the power relationships between the executive and legislative branches, the exercise of Congress' historic power over the purse, and the relative abilities of each branch to establish budgetary priorities.

B. HISTORICAL CONTEXT

For more than a century, Congress has considered and consistently rejected proposals to grant an item veto to the President. These repeated rejections have been founded on the understanding that the item veto would gravely undermine the fiscal responsibilities of Congress and greatly augment the ability of the President to impose his political agenda on the nation.

Prior to 1921, the President had no formal budgetary responsibilities.[11] Congress felt that granting such power to the President would improperly diminish legislative power. Joseph Cannon, Speaker of the House from 1903 to 1911, warned that an executive budget would signify the surrender of the most important element of representative government: "I think we had better stick pretty close to the Constitution with its division of powers well defined and the taxing power close to the people."[12]

The financial implications of World War I—especially the huge national debt that had to be managed by the Treasury Department—led to passage of

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11. *See* L. FISHER, PRESIDENTIAL SPENDING POWER 9-35 (1975) (discussing presidential duties in budget matters prior to the 1921 Budget and Accounting Act).

12. J. CANNON, THE NATIONAL BUDGET, H.R. DOC. NO. 264, 66th Cong., 1st Sess. 28-29 (1919).

the Budget and Accounting Act of 1921.[13] The Act required the President to construct and submit an annual budget but allowed Congress complete freedom to alter the proposed budget.[14] Some budget reformers wanted to prohibit Congress from appropriating money altogether unless it had been requested by a department head or Congress could secure a two-thirds majority.[15] Just as the British Parliament had yielded the initiative in financial legislation to the Cabinet, thus denying legislators any right to amend the budget submitted, so too was Congress urged to relinquish its powers to the President.[16]

These ideas for reform were considered inimical to the American system of separation of powers and the financial prerogatives accorded Congress under the Constitution. The Budget and Accounting Act allowed Congress to increase or decrease the President's budget by simple majority vote. The Act respected two essential constitutional principles: the President's responsibility for his proposals and Congress' ultimate responsibility for appropriations subject only to the President's veto. Congressional fiscal prerogatives were not surrendered or diluted, nor was there any invasion of executive prerogatives. Neither branch was made subordinate to the other; their respective roles were carefully preserved.

Congress again sought to protect its budgetary prerogative and preserve the balance of power between the executive and itself when it enacted the Congressional Budget and Impoundment Control Act of 1974.[17] This legislation was passed in response to what Congress perceived to be a loss of power to the President, demonstrated particularly by the refusal of the executive to spend appropriated funds during the administrations of Lyndon Johnson and Richard Nixon.[18] The 1974 Act contained a number of provi-

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13. Pub. L. No. 13, Ch. 18, 42 Stat. 20 (1921).

14. L. FISHER, *supra* note 11, at 34.

15. *See* H.R. DOC. NO. 1006, 65th Cong., 2d Sess. 6 (1918) (precluding congressional appropriation in excess of amounts requested by executive); 2 D. HOUSTON, EIGHT YEARS WITH WILSON'S CABINET 88 (1926) (advocating that Congress adopt rule that it make no increases in appropriations reported out of committee except by two-thirds majority); SECRETARY OF THE TREASURY, 1918-1919 ANNUAL REPORT 117, 121 (1919) (Congress should not be permitted to increase President's budget requests); W. WILLOUGHBY, THE PROBLEM OF A NATIONAL BUDGET 146-49 (1918) (discussing opinion of Chairman of House Committee on Appropriations that budget power should be concentrated in the executive). *See generally* Collins, *Constitutional Aspects of a National Budget System*, 25 YALE L.J. 376 (1916) (discussing proposed national budget system that would give President responsibility for preparing budget); Fitzgerald, *American Financial Methods from the Legislative Point of View*, MUN. RES., June 1915, at 312, 322, 340 (recommending that Congress be prohibited from appropriating funds not requested in the President's budget except in extraordinary circumstances).

16. *See* L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 231-34 (1985) (discussing several early proposals to increase executive power over budget).

17. Pub. L. No. 93-344, title X, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601-688 (1982 & Supp. III 1985)).

18. L. FISHER, *supra* note 11, at 175-97.

sions designed to strengthen congressional control over fiscal affairs. Presidential rescissions of appropriated funds require approval by both the Senate and House.[19] The President could defer the spending of funds, subject to a one house veto.[20] The Act also created Budget Committees in the House and Senate,[21] established a Congressional Budget Office to supply technical support,[22] and required the adoption of budget resolutions to set overall limits on budget aggregates (such as total outlays and revenues) and permit debate on spending priorities.[23] Despite these changes, the 1974 Act did not alter the principles established by the Budget and Accounting Act of 1921. The President retained responsibility for the budget he submitted, and Congress did not attempt to control its contents. The budget passed by Congress, adopted in the form of a concurrent resolution, applied only to the internal workings of Congress. Again, neither branch invaded the other's core responsibilities.

In 1985, Congress divested itself of some budgetary control by passing the Gramm-Rudman-Hollings Act.[24] Under this Act, Congress and the President each prepare a budget within a maximum deficit ceiling specified by the statute. If presidential and congressional actions fail to abide by that ceiling, a sequestration report, prepared initially by the Congressional Budget Office and the Office of Management and Budget but put in final form by the Comptroller General, would implement across-the-board cuts to federal programs.[25] This mechanism was declared unconstitutional by the Supreme Court.[26]

Gramm-Rudman-Hollings represents something of a hybrid. Congress was no longer willing to trust its internal budgetary process, yet it also refused to trust the President. As a compromise, it delegated authority to the Comptroller General, an officer that the courts have located somewhere between the executive and legislative branches.[27]

The item veto is a step beyond this. It would deliberately take power from

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19. Pub. L. No. 93-344, §§ 1012, 1017, 88 Stat. 333-334, 337-338 (1974) (codified at 2 U.S.C. §§ 683, 688 (1982 & Supp. III 1985)).

20. *Id.* §§ 1013, 88 Stat. 334-335.

21. *Id.* §§ 101-102, 88 Stat. 299-302.

22. *Id.* §§ 201-203, 88 Stat. 302-305.

23. *Id.* §§ 301, 305, 88 Stat. 306-308, 310-312.

24. Pub. L. No. 99-177, tit. II, 99 Stat. 1037 (1985); *see* Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131, 131 (1985) (labeling Act "whole abdication of constitutional responsibility").

25. Pub. L. No. 99-177, tit. II, §§ 251-256, 99 Stat. 1063-92 (codified at 2 U.S.C. §§ 901-906 (Supp. III 1985)).

26. Bowsher v. Synar, 106 S. Ct. 3181, 3192 (1986).

27. *See* Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875, 884-86 (3d Cir. 1986) (Comptroller General exercises duties in both the executive and legislative branches); United States *ex rel.* Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94, 99-100 (D.D.C.) (Comptroller General performs both legislative and executive functions), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964).

Congress and place it in the hands of the President. Contrary to the constitutional principles followed in the Budget and Accounting Act of 1921 and the Impoundment Control Act of 1974, the President's budget would assume a superior status. Members of Congress could continue to add items that the President did not request, but they would now need a two-thirds majority to override his decision to strike the items. Not only would the President exercise the item veto to protect the budget he submitted, he and his assistants could use this power to control the votes of members of Congress on legislation, appropriations, nominations, and treaties. The dynamics of this political process will be explored in this article.

Differences in federal and state budgetary processes suggest that the major effect of a federal item veto would not be the reduction of budget deficits. Instead, the President would have greater power to advance his policy agenda at the expense of congressional priorities. For the reasons detailed below, we think granting item veto authority would do little to resolve the deficit problems, while seriously exacerbating conflicts between the executive and Congress and creating additional tensions between the political branches and the judiciary. Before considering the adoption of the item veto, the record of the states must be carefully reviewed. In addition, state cases similar to those that would be litigated in the federal courts if the item veto were adopted must be studied. Finally, careful consideration of the potentially profound changes in congressional-presidential relations implicated by the item veto is necessary.

Part II of this article describes the various forms that the item veto may take, highlighting the risks of simplistic thinking about this intricate concept. Part III reviews judicial approaches to the gubernatorial item veto. This review demonstrates that court rulings have been instrumental in defining the parameters of the governors' item veto authority and that among the state courts there are extreme variations in interpretations of similar item veto provisions. Part IV assesses the operation of the item veto in the states. Because proponents of the presidential item veto often cite the states' experience, it is important to determine whether the item veto has succeeded on the state level. Part V extrapolates from the states' experience to predict the likely operation of a federal item veto. First, the applicability of the states' model is considered. Second, the states' experience in three matters instructive in evaluating an item veto for the President are explored: (1) Is the item veto a deficit reduction measure or a partisan political tool? (2) How will the item veto affect the balance of power between the executive and Congress? (3) What role will the courts play in defining the scope of the item veto power? In each instance, the states' experience calls into question the desirability of a federal item veto.

II. DEFINING THE ITEM VETO

Although the "item veto" is generally treated as a simple concept, in fact the states have adopted a number of variations. In its simplest form, a governor may veto individual items in appropriations bills.[28] What constitutes an "item," however, is a source of constant reinterpretation by, and dispute among, governors, legislators, and courts. Some governors have been able to veto not merely appropriation (dollar) items but substantive provisions as well.[29] The latter is particularly controversial when the legislature intends the substantive provision to act as a condition or qualification on the appropriated amount.

In several states the "simple" item veto seemed too blunt an instrument, and state constitutions were amended to permit the governor not only the power to veto an item in its entirety but the option to reduce its level. Ten state constitutions explicitly give the governor this power, known as the "item reduction veto."[30] In some states without this explicit provision, such as Pennsylvania, court decisions yielded an implied gubernatorial power to reduce dollar amounts in appropriations bills.[31] This practice has provoked a number of court cases and will be discussed in more detail below.

Another type of item veto is the "amendatory veto," which allows a governor to condition his approval of an enacted bill by returning it to the legislature with suggestions for change. Specifically, the governor may present amendments for the consideration of legislators. First adopted by Alabama in its Constitution of 1901,[32] a constitutional provision authorizing some form of the amendatory veto has been adopted in seven states.[33] The procedure may be limited to technical and nonsubstantive corrections. In South Dakota, for example, the state constitution limits the scope of the amendatory veto by providing that the governor may return bills "with errors in

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28. *See* COLO. CONST. art. IV, § 12 (governor "shall have power to disapprove of any item or items of any bill making appropriations of money").

29. *See* Karcher v. Kean, 97 N.J. 483, 504-07, 479 A.2d 403, 414-16 (1984) (general conditions, limitations, or restrictions in appropriations act can be discrete subject of line item veto); Elmhurst Convalescent Center v. Bates, 46 Ohio App. 2d 206, 211, 348 N.E.2d 151, 155 (1975) (legislative restrictions on appropriation deemed item subject to veto).

30. ALASKA CONST. art. II, § 15; CAL. CONST. art. IV, § 10; HAW. CONST. art. III, § 17; ILL. CONST. art. IV, § 9(d); MASS. CONST. art. 90, § 4 (amending art. 63, § 5); MO. CONST. art. IV, § 26; NEB. CONST. art. IV, § 15; N.J. CONST. art. V, § 1, para. 15; TENN. CONST. art. III, § 18; W. VA. CONST. art. VI, § 51(11).

31. *See* Commonwealth v. Barnett, 199 Pa. 161, 48 A. 976 (1901) (allowing governor to approve $10,000,000 of an $11,000,000 appropriation).

32. ALA. CONST. art. V, § 125; *see* W. DODD, STATE GOVERNMENT 191 (1928) (stating that § 125 was adopted in 1901).

33. ALA. CONST. art. V, § 125; ILL. CONST. art. IV, § 9(e); MASS. CONST. amend. art. 90, § 3; MONT. CONST. art. V, § 10(2); N.J. CONST. art. V, § 1, 14(b)(3); S.D. CONST. art. IV, § 4; VA. CONST. art. V, § 6.

style or form" to the legislature with specific recommendations for change.[34] The amendatory veto, however, can also be used to make major policy changes. In Illinois, the belief that the process could be confined to minor and technical alterations was contradicted by major confrontations between the governor and the legislature.[35]

The precise contours of a governor's item veto authority are further complicated by court rulings and gubernatorial practices. As explained in subsequent parts, state courts are sharply divided on whether and to what extent item veto authority may undercut legislative intent. There are intense debates about the appropriate role of the judiciary in overseeing executive-legislative conflicts, and state legislatures have been able to limit item veto authority through adroit legislative drafting. Consequently, similar statutory or constitutional language often translates into quite different item veto authority. Furthermore, the frequency of use of this authority is unpredictable. Depending on executive custom, use of this power may prove commonplace or rare.

It appears likely that President Reagan would take a broad and activist view of any item veto authority. An Office of Management and Budget (OMB) study characterized item reduction authority as "vital," recommending that "great care must be taken to ensure that any federal proposal clearly grants this desirable power to the President."[36] The OMB study also urged that "any federal proposal should expressly grant" authority to the President to veto substantive provisions ("riders") attached to an appropriations bill.[37] Moreover, studies of Governor Reagan's record in California indicate that he actively used item veto authority.[38] Other administrations

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34. S.D. CONST. art. IV, § 4.

35. *See generally* Sevener, *The Amendatory Veto: To Be or Not to Be So Powerful?*, 11 ILL. ISSUES 14 (1985) ("because one governor has not understood basic separation of powers and has vastly abused his power . . . [this has] led to the ill repute of [the item veto] and led to friction between the two branches") (quoting original sponsor of item veto legislation); Comment, *The Illinois Amendatory Veto*, 11 JOHN MARSHALL J. PRAC. & PROC. 415 (1978) (discussing broad power of Illinois governor to use amendatory veto).

36. OFFICE OF MANAGEMENT AND BUDGET, ECONOMIC POLICY STUDY NO. 12, at 59 (1983).

37. *Id.* Congress sometimes resorts to the adoption of legislative riders on controversial measures that languish in authorization committees. *See generally* Devins, *The Regulation of Government Agencies Through Appropriations Riders* (forthcoming in *Duke Law Journal*).

38. *See* H. Griffin, The Politics of the Budgetary Process in California, 1965-1971, at 255-68 (1976) (Ph.D. dissertation, U.C.L.A.) (analyzing Gov. Reagan's aggressive use, and threats of use, of item veto) (copy on file at *Georgetown Law Journal*). For the actual veto amounts as well as the percentages vetoed by Gov. Reagan from 1967 to 1975, see CALIFORNIA DEP'T OF FIN., ITEM VETOES DURING GOVERNOR REAGAN'S TERM (1984) (copy on file at *Georgetown Law Journal*).

Also pertinent to the issue of the line item veto is City of New Haven v. United States, 634 F. Supp. 1449 (D.D.C. 1986), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987). President Reagan had used authority given him under the Budget and Impoundment Control Act of 1974 to defer funds for certain federal programs. By delaying the budget authority, he had severely restricted those programs. Congress could not use the one house veto provided in the Act, 2 U.S.C. § 684(b) (1982), to

might rely more or less heavily on such authority, and courts will inevitably shape the contours of permissible executive item veto authority. In sum, the item veto is not capable of simple assessment.

III. THE ITEM VETO AND THE COURTS

State court decisions concerning the item veto are important for several reasons. First, they highlight the confusion over the reach of this power. Second, they demonstrate that the item veto may prove to be a potent political tool. Third, these cases suggest that if the President is given item veto authority, the dimensions of this new power may well be decided in the courts.

A. THE DIMENSIONS OF ITEM VETO AUTHORITY

The first substantive issue addressed in these cases is purely definitional: what is the reach of the governor's item veto authority? In many cases, the courts must look beyond the constitutional language and either broaden or narrow the specified item veto authority.

For example, in interpreting a constitutional provision that appropriation bills "may be approved in whole or in part by the governor,"[39] the Wisconsin Supreme Court approved the governor's deletion of language in an appropriations bill in a way that substantially changed the bill's effect.[40] The governor had altered the financing of the state Election Commission Fund so that state money, rather than individual taxpayer contributions, would underwrite this fund. The court, applying a broad interpretation of this provision, concluded that "because the Governor's power to veto is coextensive with the legislature's power to enact laws initially, a governor's partial veto may, and usually will, change the policy of the law."[41] In the court's view, an item veto may be used "so long as the net result of the partial veto is a complete, entire, and workable bill which the legislature itself *could* have passed in the first instance."[42]

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override the President because the Supreme Court had declared the legislative veto unconstitutional. *See* INS v. Chadha, 462 U.S. 919 (1983) (declaring unconstitutional similar one house veto provision of Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982)). The District Court in *New Haven* said the authority used by the President amounted to a line item veto. 634 F. Supp. at 1458. The court held that the President's deferral authority was inseverable from the invalid legislative veto; Congress did not intend to grant the President the equivalent of line item veto authority. *Id.* This ruling was affirmed by the D.C. Circuit and casts doubts on the legality of similar Reagan deferrals, totaling close to $23 billion and involving more than 40 programs. *See* Lewis, *Reagan Spending Deferrals are Ruled Unconstitutional*, Wash. Post, May 17, 1986, at A-1, col. 2.

39. WIS. CONST. art. 5, § 10.

40. State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 708-09, 264 N.W.2d 539, 552 (1978).

41. *Id.* at 708, 264 N.W.2d at 552.

42. *Id.* at 715, 264 N.W.2d at 555 (emphasis added).

A more restrictive approach to the manner in which an item veto may disrupt legislative purpose was followed by the New Mexico Supreme Court.[43] In interpreting a constitutional provision granting the governor authority to veto "any part or parts, item or items, of any bill appropriating money,"[44] the court stated:

> The Governor may not distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand. He would thereby create new law, and this power is vested in the Legislature and not in the Governor.[45]

The New Mexico court's ruling against the use of the partial veto to alter legislative policy sharply conflicts with that of the Wisconsin Supreme Court, which recognized the governor's authority to "change the policy of the law" through a similar partial veto provision.

Finally, it is important to note that court interpretations of the same item veto provision may change over time. In 1936, a Massachusetts court held that the governor had improperly vetoed a condition on an appropriation. Words or phrases, the court said, were not "items or parts of items."[46] By 1981, the Massachusetts court abandoned this ruling and allowed the governor to delete restrictive words and phrases accompanying an appropriation item, provided that the language was separable from the appropriation.[47]

The cases above demonstrate two simple but quite significant propositions. First, the reach of an item veto provision is neither uniform nor static. As shown above, similar item veto provisions in New Mexico and Wisconsin have quite distinct meanings. Second, the courts are significant actors in shaping the meaning of item veto provisions. It is, therefore, important to determine whether and to what extent courts are capable of developing a coherent doctrinal approach to the item veto. In terms of defining the scope of item vetoes, the judicial record appears quite mixed.

B. EXECUTIVE AND LEGISLATIVE RESPONSIBILITY

The central issue raised in item veto cases is the degree to which authority can be granted to the governor without infringing on the responsibilities of the legislature. This matter often arises when a governor vetoes conditions in an appropriation while retaining the funds. State judges must then resolve such issues as whether the governor can convert a conditional appropriation into an unconditional appropriation; that is, whether he can strike legislative

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43. State *ex rel.* Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).
44. N.M. CONST. art. IV, § 22.
45. *Kirkpatrick*, 86 N.M. at 366, 524 P.2d at 982.
46. Opinion of the Justices, 294 Mass. 616, 619-20, 2 N.E.2d 789, 790 (1936).
47. Opinion of the Justices, 384 Mass. 828, 832-38, 428 N.E.2d 117, 120-23 (1981).

language from a dollar amount or must treat the two as a single item to be accepted or vetoed in whole. These issues have bedeviled state courts for nearly a century, and no "bright lines" yet define the governors' powers.

Reviewing courts generally adopt one of two rationales. If the court disapproves of the item veto or the manner in which it has been wielded, it emphasizes the need to safeguard the legislative prerogative. If it approves, the court holds that the item veto is part of the government structure and must be preserved. The New Mexico and Wisconsin state court rulings reflect these competing approaches. While the New Mexico court stressed the sanctity of the legislative process,[48] the Wisconsin court pointed to the governor's coequal power.[49] Other state court decisions reflect this basic and enduring division.

Illustrative of court decisions that protect legislative prerogatives is an 1898 Mississippi case.[50] In prohibiting the governor from vetoing objectionable conditions on appropriations, the court explained that appropriations bills had three essential parts: the purpose of the bill, the sum appropriated for the purpose, and the conditions upon which the appropriation would become available.[51] Allowing the governor to strike the conditions would produce a law that had never received the legislature's assent:

> [T]he executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power. If the governor may select, dissect, and dissever, where is the limit of his right? Must it be a sentence or a clause or a word? Must it be a section, or any part of a section, that may meet with executive disapprobation? May the governor transform a conditional or a contingent appropriation into an absolute one, in disregard and defiance of the legislative will? That would be the enactment of law by executive authority without the concurrence of the legislative will and in the face of it.[52]

Similar themes surfaced repeatedly in later cases: the legislature may place conditions on appropriations; the veto is destructive and not creative; the governor may not use the item veto to dissect a bill and distort the legislative will. As subsequent parts will reveal, states courts discovered that it was not an easy matter to distinguish appropriate conditions from inappropriate, to separate the act of destruction from creation, or to determine (much less preserve) the legislative will.

Like the Mississippi court, many state courts have invoked these themes to preserve legislative prerogatives. An item veto by the governor of Washing-

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48. *See Kirkpatrick*, 86 N.M. at 366, 524 P.2d at 982.
49. *See* State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 707-09, 264 N.W.2d 539, 551-52 (1978).
50. State v. Holder, 76 Miss. 158, 23 So. 643 (1898).
51. *Id.* at 181, 23 So. at 645.
52. *Id.*

ton in 1909 raised the perennial question of how the veto can be exercised on a portion of a bill without disrupting the internal consistency and logic of the sections that are preserved.[53] The governor had vetoed the first four sections of a bill while approving the last two, one of which repealed an earlier statute. As originally passed by the legislature, the repealing section was connected in substance and logic to the first four sections. The court held that when the first four sections fell because of the item veto, so did the repealing section: "In other words, when the executive approved the repealing section he approved something that his veto had already destroyed."[54] The repealing section was, therefore, a nullity.

Some governors have displayed ingenuity in using item veto power. One governor, for example, struck the words "per annum" from the item "$2500 per annum."[55] The effect was to reduce a two-year amount from $5000 to $2500. He also reduced "$4500 per annum" to "$3500 per annum."[56] The reviewing court held that the governor could not disapprove part of an item.[57] He had to disapprove the item entirely because item reduction without the express authority of the constitution "would be a clear encroachment by the executive upon the rights of the legislative department of the state."[58] In a similar case, another governor attempted unsuccessfully to exercise his item veto authority by striking the numeral "2" from a $25 million bond authorization.[59]

In some cases, however, courts have drawn the line in favor of executive power. These cases often arose when a legislature tried to circumvent the governor's item veto power. In one case, for example, the California legislature sought to undercut the governor by inserting in an appropriations bill a proviso that empowered the state controller, at the request of the state director of education, to transfer appropriations from one program to another.[60] The proviso had the effect of placing the power to determine the amount appropriated to an item in the hands of the governor's subordinate. The

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53. *See* Spokane Grain & Fuel Co. v. Lyttaker, 59 Wash. 76, 109 P. 316 (1910).

54. *Id.* at 86, 109 P. at 320.

55. Fergus v. Russel, 270 Ill. 304, 347, 110 N.E. 130, 147 (1915).

56. *Id.*

57. *Id.* at 348, 110 N.E. at 147.

58. *Id*; *see* Black & White Taxicab Co. v. Standard Oil Co., 25 Ariz. 381, 403-04, 218 P. 139, 146-47 (1923) (unconstitutional excess of veto power to object to part of bill not an item); Fairfield v. Foster, 25 Ariz. 146, 153-54, 156, 214 P. 319, 322-23, 325 (1923) (unconstitutional to veto condition of appropriation while allowing appropriation itself to stand; constitutes affirmative legislation without concurrence of legislature); Callaghan v. Boyce, 17 Ariz. 433, 456-58, 153 P. 773, 782-83 (1915) (unconstitutional to permit veto of separate section of general appropriation); Miller v. Walley, 122 Miss. 521, 536, 84 So. 466, 468 (1920) (unconstitutional to veto condition of appropriation while approving appropriation).

59. State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 720, 264 N.W.2d 539, 557 (1978) (Hansen, J., concurring in part and dissenting in part).

60. Wood v. Riley, 192 Cal. 293, 296, 219 P. 966, 968 (1923).

court sustained the governor's item veto of this provision, stating that the proviso would "by indirection, defeat the purpose of the constitutional amendment giving the Governor power to control the expenditures of the state, when it could not accomplish that purpose directly or by an express provision in appropriations bills."[61]

Many courts have developed tests to separate valid item vetoes from invalid ones. Some courts have held that a governor may sever sections from a bill if such action is merely "negative" in effect.[62] However, the same actions have also been labeled as "affirmative" on the ground that they create "a result different from that intended, and arrived at, by the legislature."[63] In 1940, a Virginia court invoked an intriguing medical analogy to distinguish between severable and inseverable items.[64] It defined an "item" as something that could be taken out of a bill without affecting its other purposes or provisions: "It is something which can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue, nor should any scar tissue result therefrom."[65] The court announced that if a provision or condition is "intimately interlocked" with other portions of the bill, the veto is unauthorized.[66] Such tests, however, have proved too abstract to apply.[67]

State courts also differ in rulings governing the structure of appropriations bills. Some state constitutions and statutes include specifications for the style and format of appropriations bills.[68] To prevent the erosion of the governor's item veto authority, some state courts have given additional guidance to state legislatures regarding the manner in which they may draft appropria-

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61. *Id.* at 305, 219 P. at 971; *see* People v. Tremaine, 252 N.Y. 27, 42-43, 168 N.E. 817, 821-22 (1929) (legislative condition may not undercut item veto by granting administrative powers to legislators).

62. *See, e.g.*, Fairfield v. Foster, 29 Ariz. 146, 156, 214 P. 319, 323 (1923) (describing veto power as purely negative in nature); Cascade Tel. Co. v. State Tax Comm'n, 176 Wash. 616, 620, 30 P.2d 976, 978 (1934) (upholding veto with "purely negative" effect).

63. *Cascade Tel. Co.*, 176 Wash. at 623, 30 P.2d at 979 (Steinert, J., dissenting); *see* Washington Ass'n of Apartment Ass'ns v. Evans, 88 Wash. 2d 563, 566, 564 P.2d 788, 791 (1977) ("governor may not use the veto power to reach a new or different result from what the legislature intended").

64. Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940).

65. *Id.* at 290, 11 S.E.2d at 124.

66. *Id.* at 302, 11 S.E.2d at 130. *But see* Orleans Parish School Bd. v. Louisiana Bd. of Educ., 215 La. 703, 715, 41 So. 2d 509, 512 (1949) (veto of several appropriation items did not nullify remainder of section); Shelton Hotel Co. v. Bates, 4 Wash. 2d 498, 509-10, 104 P.2d 478, 483 (1940) (veto of one section of act did not render unenforceable remainder of wage provision); State *ex rel.* Stiner v. Yelle, 174 Wash. 402, 408, 25 P.2d 91, 93-94 (1933) (veto of parts of an act leaves remainder as only bill to be considered).

67. *See* Washington Fed'n of State Employees v. State, 100 Wash. 2d 536, 546, 682 P.2d 869, 874 (1984) (affirmative-negative test "unworkable and subjective"); *see also* State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 721, 264 N.W.2d 539, 557 (1978) (Hansen, J., concurring in part and dissenting in part) (affirmative-negative distinction is "disingenuous").

68. *See, e.g.*, ALA. CONST. art. IV, § 45; MD. CONST. art. III, § 29; OKLA. CONST. art. V, § 57.

tions bills.[69] Other courts have accepted the legislature's prerogative to structure appropriations bills in any fashion it desires, even if the consolidation of numerous items into a single aggregate undercuts the governor's item veto authority.[70] In most cases, however, the judiciary has intervened to prevent the legislature from blunting or nullifying the executive's power to veto items.[71]

The sharp conflicts among the reviewing courts are not surprising. These cases ask judges to draw the line between executive and legislative power. Subjective judgments are necessarily involved when courts determine whether some provision is essential to the legislative will, or whether the separation of powers is respected through a literal or revisionist interpretation of specified item veto authority. Because of the subjective nature of such judgments, it is unlikely courts will develop a coherent doctrinal approach to the issue. For the same reason, courts will probably continue to play a significant role in defining item veto authority. Nevertheless, some state judges in recent years have become increasingly skeptical about their ability to discriminate between negative and affirmative vetoes. They fear that such tests involve the courts in "disingenuous semantic games" and are unworkable in practice no matter how appealing in theory.[72]

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69. Opinion of the Justices, 373 Mass. 911, 913-15, 370 N.E.2d 1350, 1351-52 (1977) (when separate sections of bill constitute one item governor may veto only entire item not individual sections); Helena v. Omholt, 155 Mont. 212, 221-22, 468 P.2d 764, 769 (1970) (suggesting means by which legislature could circumvent item veto); City of Camden v. Byrne, 82 N.J. 133, 145-46, 411 A.2d 462, 468 (1980) (constitutional provision permitting only one approrpriation law per fiscal year renders multiple appropriations invalid).

70. *See, e.g.*, Green v. Rawls, 122 So. 2d 10, 14 (Fla. 1960) (legislature may determine specificity of items though they may be no broader than single subject of appropriation); Regents of the State University v. Trapp, 28 Okla. 83, 92-93, 113 P. 910, 913-14 (1911) (special appropriation bill for State University one item and governor may not veto parts of bill); Fulmore v. Lane, 104 Tex. 499, 529, 140 S.W. 405, 421 (1911) (within power of legislature to group many items of appropriation into single item, even if deliberately done to deny partial veto).

71. *See, e.g.*, Fairfield v. Foster, 25 Ariz. 146, 156-57, 214 P. 319, 323 (1923) (vetoed single item despite "lumping" of items by legislature); Wood v. Riley, 192 Cal. 293, 305, 219 P. 966, 971 (1923) (proviso on budget bill treated as item subject to veto); People v. Brady, 277 Ill. 124, 131, 115 N.E. 204, 207 (1917) (item veto of specific portions of bill valid though bill appropriated only lump sum without allocating amounts to each item); Opinion of the Justices, 384 Mass. 840, 846-47, 429 N.E.2d 1019, 1022 (1981) (act requiring approval by both houses of legislature of executive agency action that would alter public benefits program held unconstitutional); Opinion of the Justices, 373 Mass. 911, 914, 370 N.E.2d 1350, 1352 (1977) (veto of language restricting use of previously appropriated funds is proper to disable legislature from circumventing item veto); Helena v. Omholt, 155 Mont. 212, 221, 468 P.2d 764, 769 (1970) (legislative act invalidated as device to blunt veto power); People v. Tremaine, 281 N.Y. 1, 7, 21 N.E.2d 891, 893-94 (1939) (lump sum appropriations contrary to constitution's intent for itemized appropriations); State *ex rel.* Public Util. Comm'n v. Controlling Bd., 130 Ohio St. 127, 131-32, 197 N.E. 129, 131 (1935) (dictum) (legislature powerless to confer on administrative board authority thwarting veto power).

72. State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 721, 264 N.W.2d 539, 557 (1978) (Hansen, J., concurring in part and dissenting in part); *see* Washington Fed'n of State Employees v. State, 100

C. THE PROBLEM OF NONAPPROPRIATIONS

In determining the reach of item veto authority, state courts have had to determine whether spending, direct or indirect, can be done outside the regular appropriations process. An Arizona court, for example, ruled that because the governor's item veto authority was restricted to appropriations items he could not disapprove a gasoline tax.[73] Similarly, a Wisconsin court ruled that the governor could not exercise his item veto on a revenue bill that contained a revolving fund, even if it impaired his item veto authority.[74] The court treated taxation and appropriation as "more nearly antonyms than synonyms."[75] This kind of reasoning encourages lawmakers to dilute item veto authority by financing programs indirectly through the revenue system rather than through a direct appropriation.

A 1975 Montana case[76] illustrates the variety of state funding practices. The court noted that its previous rulings had limited the scope of "appropriation" to the general fund covering the basic operating costs of the state.[77] As a result of statutory changes, as well as amendments to the Montana constitution, the court found it necessary to reexamine the definition of appropriation.[78] The court extended the term to cover the general fund, the earmarked revenue fund, and most of the federal and private revenue funds.[79] Excluded from this new definition of appropriation were six types of funds: the sinking fund; the federal and private grant clearance fund; the bond proceeds and insurance clearance fund; the revolving fund; the trust and legacy fund; and the agency fund.[80]

In defining the scope of item veto authority, state courts have had to delve into a multitude of highly complex budgetary practices. An Alaska court, for example, held that the governor's exercise of the item veto to disapprove a general obligation bond authorization was unconstitutional because a bond

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Wash. 2d 536, 546, 682 P.2d 869, 874 (1984) (affirmative-negative test "unworkable and subjective").

73. Black & White Taxicab Co. v. Standard Oil Co., 25 Ariz. 381, 397-98, 218 P. 139, 144-45 (1923).

74. State *ex rel.* Finnegan v. Dammann, 220 Wis. 143, 149, 264 N.W. 622, 624 (1936).

75. *Id.* at 148, 264 N.W. at 624. For other opinions limiting the governor's power to vetoing items only in appropriate bills, see Patterson v. Dempsey, 152 Conn. 431, 439-40, 207 A.2d 739, 745 (1965) (power of partial veto applicable only to "bill making appropriations of money embracing many items"); Opinion of the Justices, 58 Del. 475, 478, 210 A.2d 852, 854 (1965) (partial veto applicable only to "bills appropriating money"); Opinion of the Justices, 349 Mass. 804, 810, 212 N.E.2d 562, 567 (1965) (partial veto applicable only to bills that authorize payment of state funds from state treasury).

76. Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975).

77. *Id.* at 445, 543 P.2d at 1330.

78. *Id.* at 445-46, 543 P.2d at 1330-31.

79. *Id.* at 445, 543 P.2d at 1330 (citing 1947 version of Montana code section 79-415).

80. *Id.* at 445, 543 P.2d at 1330-31 (interpreting 1947 version of Montana code §§ 79-410 & 79-415).

authorization was not an "appropriation."[81] A dissenting judge remarked that examination of the debate at the constitutional convention of the item veto "sheds little light on the subject,"[82] and that it was "apparent that the delegates never foresaw the problems" involved in defining "appropriation," nor did they understand the interactions between the debt financing provision and the governor's veto.[83]

In one New Jersey case,[84] several municipalities and counties complained that the governor's vetoes in the general appropriations bill deprived them of state revenue disbursements authorized by previous statutes.[85] The court upheld the governor's right to item veto nonappropriations, noting that the purpose of a general appropriations bill was to remedy the piecemeal system of state financing that had given counties automatic access to dedicated revenues.[86] The court also examined statutes that either allocated use of state funds for county highways or disbursed revenues from such sources as the sales and use tax, the transfer inheritance tax, and the bus franchise replacement tax. Such statutes, the court ruled, "do not constitute legislative appropriations in and of themselves."[87] Three years later, a lower appellate court in New Jersey ruled that the governor's line-item veto power extended to a bill dealing with the distribution of franchise and gross receipts taxes.[88] The appellants had claimed that the apportionment formula for these receipts did not constitute an item of appropriation.[89] A year later the New Jersey Supreme Court affirmed the lower court's conclusion that item vetoes could be used to reduce the amount of state aid to the municipalities from the utilities franchise and gross receipts taxes.[90]

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81. Thomas v. Rosen, 569 P.2d 793, 795-96 (Alaska 1977).

82. *Id.* at 797 (Boochever, C.J., dissenting).

83. *Id.*

84. City of Camden v. Byrne, 82 N.J. 133, 411 A.2d 462 (1980).

85. *Id.* at 141-42, 411 A.2d at 466.

86. *Id.* at 146-47, 411 A.2d at 468-69.

87. *Id.* at 146, 411 A.2d at 468.

88. *In re* Karcher, 190 N.J. Super. 197, 220-21, 462 A.2d 1273, 1285-86 (Super. Ct. App. Div. 1983), *aff'd in part and rev'd in part sub. nom* Karcher v. Kean, 97 N.J. 483, 479 A.2d 403 (1984).

89. 190 N.J. Super. at 218-20, 462 A.2d at 1284-85.

90. Karcher v. Kean, 97 N.J. 483, 495, 479 A.2d 403, 409 (1984). For other complexities of state funding practices and their impact on the item veto, see Caldwell v. Meskill, 164 Conn. 299, 308, 320 A.2d 788, 792 (1973) (language imposing restrictions on expenditure of money not subject to veto power as appropriation); People *ex rel.* I.F.T. v. Lindberg, 60 Ill. 2d 266, 270-72, 326 N.E.2d 749, 751-52 (constitutional provision that membership in state pension system is enforceable contractual relationship did not preclude governor from reducing appropriations made to pension funds), *cert. denied*, 423 U.S. 839 (1975); Opinion of the Justices, 384 Mass. 840, 846-47, 429 N.E.2d 1019, 1022 (1981) (act requiring approval of both houses before alteration of public benefits program "immunizes" legislative action from veto); Opinion of the Justices, 373 Mass. 911, 914, 370 N.E.2d 1350, 1352 (1977) (amendment placing restrictions on prior appropriations subject to veto; otherwise legislature could evade item veto by two step process); Helena v. Omholt, 155 Mont. 212, 221, 468 P.2d 764, 769 (1970) (legislative restrictions on appropriated funds "can blunt" veto

These cases raise highly technical budgetary process questions, but federal courts will have to apply this degree of analysis and involvement if the item veto is transferred to the federal level. In light of the state courts' inability to develop uniform objective criteria, such judicial involvement is cause for concern.

D. THE APPROPRIATE ROLE FOR THE JUDICIARY

State courts, without question, have played a central role in determining the contours of a governor's item veto authority. They have not been unabashed activists, however. Instead, the courts have frequently found themselves acting as referees of highly political and technical battles between the governor and the legislature.

On several occasions, individual judges and courts have openly asserted that this judicial role is problematic. One judge, upset with the standards used in his state, complained about the elusive tests employed by state judges:

> To hold that the exercise of the partial veto power may not have an "affirmative," "positive" or "creative" effect on legislation, or that the veto may not change the "meaning" or "policy" of a bill, as some courts elsewhere have done, would be to involve this court in disingenuous semantic games. While these tests may be appealing in the abstract, they are unworkable in practice. . . . These tests are inescapably subjective. Without an objective point of reference, this court would be reduced to deciding cases upon its subjective assessment of the respective policies espoused by the legislature and the executive, an unseemly result which would foster uncertainty in the legislative process. More importantly, such a result would defeat its own purpose; the judicial department may no more assume the proper functions of the legislature, or interfere with their discharge, than may the governor.[91]

The Florida Supreme Court similarly voiced its exasperation with having to adjudicate disputes over item vetoes. In 1960, it held that the governor may veto an item within an item, allowing him to delete legislative restric-

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power); State *ex rel.* Akron Educ. Ass'n v. Essex, 47 Ohio St. 2d 47, 50-51, 351 N.E.2d 118, 120 (1976) (veto void because vetoed bill not specific appropriation of money); State *ex rel.* Brown v. Ferguson, 32 Ohio St. 2d 245, 251-52, 291 N.E.2d 434, 438 (1972) (partial veto valid despite lumping of appropriations); Jessen Assocs. v. Bullock, 531 S.W.2d 593, 600 (Tex. 1975) (rider to general appropriations act not item which could be separately vetoed); State *ex rel.* Brotherton v. Blankenship, 157 W. Va. 100, 112, 207 S.E.2d 421, 428 (1973) (no veto power over legislative budget as it relates to judiciary); State *ex rel.* Sundby v. Adamany, 71 Wis. 2d 118, 130, 237 N.W.2d 910, 916 (1976) (partial veto applicable whether item of approriation or not if vetoed portion severable and remainder workable).

91. State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 721, 264 N.W.2d 539, 557-58 (1978) (Hansen, J., concurring in part and dissenting in part). This dissenting opinion was later cited with approval by the Washington Supreme Court. Washington Fed'n of State Employees v. State, 101 Wash. 2d 536, 546-47, 682 P.2d 869, 875 (1984).

tions on the use of appropriated funds.[92] Florida amended its constitution in 1968 to overturn the decision, prohibiting the governor from vetoing any qualification or restriction without also vetoing the appropriation item related to it.[93] The need for subsequent judicial interpretation of the terms "qualification" and "restriction" ensured continued controversies between Florida's judiciary and the political branches. In a 1980 decision,[94] the same court struggled to determine which "qualifications" were subject to the item veto and closed its opinion with the admonition that "it would be a serious mistake to interpret our acceptance of jurisdiction in this cause as a general willingness to thrust the Court into the political arena and referee on a biennial basis the assertions of power of the executive and legislative branches in relation to the appropriations act."[95]

Despite these complaints, court involvement in this matter has increased substantially in recent years. The period 1970 to 1984 saw an extraordinary upsurge in the number of cases on the item veto. Over these fifteen years

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92. Green v. Rawls, 122 So. 2d 10, 16 (Fla. 1960).

93. FLA. CONST. art. III, § 8(a).

94. Brown v. Firestone, 382 So. 2d 654 (Fla. 1980).

95. *Id.* at 671. For other cases during this period dealing with conditions on appropriations bills, see Opinion of the Justices, 306 A.2d 720, 723 (Del. 1973) (partial veto applicable only to item of appropriation); Division of Bond Fin. v. Smathers, 337 So. 2d 805, 807 (Fla. 1976) (governor may not qualify action or restriction on appropriation without vetoing appropriation); *In re* Opinion to the Governor, 239 So. 2d 1, 9 (Fla. 1970) (appropriations may be made contingent on matters related to appropriation but not upon unrelated matter); Cenarrusa v. Andrus, 99 Idaho 404, 413, 582 P.2d 1082, 1091 (1978) (governor may disapprove only money items of appropriation; item different from condition that must be observed); Welden v. Ray, 229 N.W.2d 706, 710 (Iowa 1975) (if governor vetoes qualification upon appropriation, must veto appropriation also); State *ex rel.* Turner v. Iowa Highway Comm'n, 186 N.W.2d 141, 148 (Iowa 1971) (provision vetoed not condition or qualification but item subject to veto); Henry v. Edwards, 346 So. 2d 153, 157-58 (La. 1977) (while vetoed provision was couched in language of condition, it was not directed to expenditure of funds and was subject to veto); Opinion of the Justices, 384 Mass. 828, 832, 428 N.E.2d 117, 120 (1981) (provisions in appropriation bill did not constitute restrictions or conditions; thus provisions subject to veto); Opinion of the Justices, 384 Mass. 820, 826, 429 N.E.2d 750, 754 (1981) (to maintain constitutional balance, partial veto extends to any separable provisions in general appropriations bill); Attorney Gen. v. Administrative Justice, 384 Mass. 511, 515, 427 N.E.2d 735, 737 (1981) (governor may not veto restriction or condition on item of appropriation without also vetoing entire item); State *ex rel.* Cason v. Bond, 495 S.W.2d 385, 393 (Mo. 1973) (governor powerless to strike merely "purpose" language from appropriation); Karcher v. Kean, 97 N.J. 483, 504-07, 479 A.2d 403, 414-16 (1984) (general conditions, limitations, or restrictions in appropriations act can be discrete subject of line item veto); State *ex rel.* Sego v. Kirkpatrick, 86 N.M. 359, 364, 524 P.2d 975, 980 (1974) (legislature may not abridge veto with conditions or limitations on appropriations); State *ex rel.* Link v. Olson, 286 N.W.2d 262, 271 (N.D. 1979) (governor may not veto conditions or restrictions on appropriations without vetoing appropriation itself); Elmhurst Convalescent Center v. Bates, 46 Ohio App. 2d 206, 211, 348 N.E.2d 151, 155 (1975) (legislative restrictions on appropriation deemed item subject to veto); Brault v. Holleman, 217 Va. 441, 447, 230 S.E.2d 238, 242 (1976) (governor cannot veto appropriation without vetoing conditions and cannot veto condition without vetoing appropriation); State *ex rel.* Brotherton v. Blankenship, 214 S.E.2d 467, 484 (W. Va. 1975) (governor may delete language of conditions from item but may not retain appropriated amount without classification of purpose).

there were about fifty decisions, compared to about sixty-three for the entire previous seventy-seven years.[96]

IV. THE ITEM VETO AND THE STATES

A. THE RATIONALE FOR AN ITEM VETO

Three factors contributed to the proliferation of the gubernatorial item veto: the states' antilegislative bias; balanced budget requirements in forty-nine states;[97] and state budget cycles.

The most significant consideration is the fear of legislative excesses, manifested in the belief that state budgetary decisions ultimately should be made by an executive officer. Fear of irresponsible legislative actions fueled the initial push for the item veto in the late nineteenth century. According to one observer, state legislatures during this period "were perceived . . . as being corrupt, open to bribes for introducing private and special legislation," while governors were considered "less venal than legislators. Thus, being the lesser of evils, trust ought to be given to governors to act as guardians of the public purse against avaricious legislators . . . ."[98]

In general, the governor's power over the budget grew from 1900 to 1970 due to the popular perception that the executive branch was a more capable manager than the legislature. This view was rooted in the belief that the government should operate as a business with the governor as chief administrator.[99] Gubernatorial power was further enhanced during the Depression era, in an effort to eliminate nonessential spending.[100] Until Vietnam and Watergate shook the nation's confidence in the President, trust in executive responsibility remained strong. By the time legislatures reasserted themselves at the state and national levels, the item veto was an established gubernatorial power.

Constitutional constraints on legislative action were closely tied to, and in part responsible for, the growth of the item veto. Limitations were placed on

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96. Chronological list of appellate court cases on item veto and appendix of annotated citations of cases on item veto (copy on file at *Georgetown Law Journal*).

97. Vermont is the only state that has not amended its constitution to require a balanced budget. 26 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 1986-87, at 246 (1986) (table indicating requirements of budget procedures of states) [hereinafter 1986-1987 BOOK OF STATES]. Similarly, no such requirement appears in the federal Constitution.

98. R. Moe, Prospects for the Item Veto at the Federal Level: Lessons from the States 11 (Aug. 29-31, 1985) (paper prepared for American Political Science Association 1985 Annual Meeting).

99. *See* F. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 5-8 (1911) (urging application of systematic management techniques to promote national efficiency); D. WALDO, THE ADMINISTRATIVE STATE 49-59 (1948) (advocating American business practices be accepted for governmental administration).

100. *See generally* Prescott, *The Executive Veto in Southern States*, 10 J. POL. 673 (1948) (analyzing extreme measures utilized for fiscal stability during Depression; tracking movement toward adopting executive budget).

state borrowing.[101] Prohibitions also barred a host of private, special, and local laws.[102] State constitutions included detailed prohibitions on the enactment of private or local laws that attempted to fix the rate of interest,[103] remit fines, penalties, or forfeitures,[104] exempt property from taxation,[105] provide for the management of public schools,[106] alter the salaries of public officers during their term in office,[107] and impose other restrictions that would be totally inappropriate for the federal Constitution.[108] These constraints, by impeding the legislature's authority to pass laws and appropriate funds, further enhanced the governors' power over the budget.

The item veto is also based, in part, on the requirement in nearly all states for a balanced budget. Some governors justify item vetoes as a technique for remaining within the confines of a balanced budget, as required by either the state constitution or law. For example, Governor Dick Thornburgh of Pennsylvania explained his opposition to a general appropriations bill: "Since the Constitution requires that I enact a balanced budget, I am required by law to reduce the expenditures contained in this bill."[109] As a New Jersey court recently noted, the item veto "serves the governmental need to have a balanced budget in place at the start of the fiscal year."[110]

Some states judges are reluctant to be drawn into a dispute about the legitimacy of executive actions needed to balance a budget. Said a New York court in 1977:

> Assuming it were feasible to convert a courtroom into a super-auditing office to receive and criticize the budget estimates of a State with an $11 billion budget, the idea is not only a practical monstrosity but would duplicate exactly what the Legislature and the Governor do together, in harmony or in conflict, most often in conflict, for several months of each

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101. J. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENTS 179-80, 194-98 (rev. ed. 1969).

102. *E.g.*, ALA. CONST. art. IV, § 104; IDAHO CONST. art. III, § 19; KY. CONST. § 59; MO. CONST. art. III, § 40; N.D. CONST. art. IV, § 43; OKLA. CONST. art. V, § 46.

103. *E.g.*, ALA. CONST. art. IV, § 104, para. 13; ARIZ. CONST. art. IV, § 19, para. 10; KY. CONST. § 59, para. 21; MISS. CONST. art. XII, § 90(d).

104. *E.g.*, ALA. CONST. art. IV, § 104, para. 28; ARIZ. CONST. art. IV, § 19, para. 14; MO. CONST. art. III, § 40, para. 7; N.D. CONST. art. III, § 43, para. 17.

105. *E.g.*, ALA. CONST. art. IV, § 104, para. 25; MISS. CONST. art. XII, § 90(h); PA. CONST. art. III, § 32, para. 6; VA. CONST. art. IV, § 14, para. 7.

106. *E.g.*, KY. CONST. § 59, para. 25; MISS. CONST. art. XII, § 90(p); S.D. CONST. art. III, § 23, para. 10; WASH. CONST. art. II, § 28, para. 15.

107. *E.g.*, N.Y. CONST. art. III, § 17, para. 10; VA. CONST. art. IV, § 14, para. 14.

108. To combat "logrolling" by the legislature, for example, state constitutions often limited the number of subjects that could be included in a bill. In Florida the constitution was amended in 1868 to require that each law "enacted in the Legislature shall embrace but one subject and matter properly connected therewith." Green v. Rawls, 122 So. 2d 10, 13 (Fla. 1960).

109. D. Thornburgh, Governor's Message to the Senate of Pennsylvania 1 (July 11, 1983) (transcript on file at *Georgetown Law Journal*).

110. Karcher v. Kean, 97 N.J. 483, 507, 479 A.2d 403, 416 (1984).

year.[111]

The third justification for the governor's item veto is the longer budget cycle that operates in the states.[112] When state legislatures meet only once every other year or adopt a biennial budget, it is necessary to delegate to the governor substantial authority over the two-year period, including the flexibility to veto items and impound funds. Moreover, some state legislatures that meet annually still adopt a biennial budget.[113] The federal government, of course, continues to pass appropriations bills annually.

B. OTHER ATTRIBUTES CONDUCIVE TO AN ITEM VETO

Two other features of most state governments are especially conducive to the item veto. First, state constitutions generally contain specific controls on the process of authorizing and appropriating funds. The legislature, therefore, cannot evade the governor's item veto by incorporating funding measures into authorization bills. Second, state appropriations bills are highly specific, thereby granting the governor greater opportunity to exercise the item veto.

State constitutions are filled with detailed prescriptions and proscriptions on the authorization-appropriation process.[114] Many state constitutions direct that general appropriations bills shall embrace nothing but appropriations.[115] The effect is to prohibit the addition of substantive legislation to appropriations bills. A state legislature may be constitutionally prohibited from using an appropriations bill to create, amend, or repeal substantive legislation.[116] Furthermore, general appropriations bills are restricted to specific subject areas, while other appropriations are to be made by separate bills, each embracing but one subject.

Some examples help illustrate the degree to which state constitutions govern the authorization and appropriation process. The Alabama Constitution states that

> [t]he general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the state, for interest on the public debt, and for the public

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111. Wein v. Carey, 41 N.Y.2d 498, 505, 393 N.Y.S.2d 955, 960, 362 N.E.2d 587, 591 (1977).

112. *See* 25 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 1984-85, at 244-45 (1984) (table indicating frequency of budget in each state; 20 states have biennial budget) [hereinafter 1984-1985 BOOK OF STATES].

113. *See* 1986-1987 BOOK OF STATES, *supra* note 97, at 83-86, 220-22 (tables indicating frequency of legislative sessions and budget).

114. *See infra* notes 117-20 and accompanying text.

115. *E.g.*, ARIZ. CONST. art. IV, § 20; COLO. CONST. art. V, § 32; MISS. CONST. art. IV, § 69; N.M. CONST. art. IV, § 16.

116. *See* Anderson v. Lamm, 195 Colo. 437, 443, 579 P.2d 620, 624 (1978) (interpreting COLO. CONST. art. V, § 32 to prohibit substantive legislation in a general appropriation bill).

> schools. . . . All other appropriations shall be made by separate bills, each embracing but one subject.[117]

The Louisiana Constitution requires that "[t]he general appropriation bill shall be itemized and shall contain only appropriations for the ordinary operating expenses of government, public charities, pensions, and the public debt or interest thereon."[118] The Mississippi Constitution provides that "[l]egislation shall not be engrafted on the appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what purposes paid."[119]

State constitutions even prescribe the format and style of bills. The Alabama Constitution provides that public laws

> shall be divided into sections for convenience, according to substance, and the sections designated merely by figures. Each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length.[120]

This type of specification, commonplace in state constitutions, serves two purposes: it restricts the legislature and it protects the governor's item veto power. By contrast, the federal Constitution does not direct the style and form of appropriations bills nor does it distinguish between authorizations and appropriations.

The governors' item veto authority is also enhanced because state appropriations bills are structured with a high degree of specificity. Individual projects are frequently itemized as a result of constitutional directives, legislative practice, and judicial review. Because such details are placed in appropriations bills, governors are given free rein to exercise their item veto power.

For those accustomed to lump sum funding in federal statutes, the detail found in state appropriations bills is extraordinary. In the California appropriations bill considered in 1984, the account for parks and recreation included a number of items under $100,000.[121] Mississippi appropriations bills have included such minutiae as $2,969 for an "Alcohol Essay." New York's appropriations for fiscal 1985 set aside energy funds for a number of $50,000

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117. ALA. CONST. art. IV, § 71.

118. LA. CONST. art. III, § 16.

119. MISS. CONST. art. IV, § 69.

120. ALA. CONST. art. IV, § 45.

121. Copy of California appropriations bill on file at *Georgetown Law Journal*. Included in the bill were allocations of $81,000 for a climate control study at Hearst San Simeon, $75,000 for a sediment runoff study at Malakoff Diggins, and $12,000 for an erosion control study at Woodson Bridge.

projects.[122]

Finally, through the impoundment of funds and so-called bill recall procedures, the governor can avoid a direct conflict with the legislature through use of the item veto. Impoundment refers to the executive's decision not to spend appropriated funds. Under this authority, a governor may unilaterally withhold funds to balance the state budget. The Missouri Constitution was rewritten in 1945 to give the governor explicit authority to withhold funds to maintain a balanced budget.[123]

Bill recall procedures, adopted in at least thirty-three states, permit the legislature to recall a bill from the governor before final gubernatorial action.[124] This procedure "creates a negotiating situation in which, under the threat of a full veto, the legislature may recall a bill and make changes in it desired by the governor, thus allowing him to exercise *de facto* amendatory power."[125]

The bill recall procedure has effects similar to those of an item veto. Between 1932 and 1973, a total of 1,401 bills were recalled by the New York legislature; 618 of those bills were subsequently resubmitted to the governor for his signature.[126] Of the returned measures, the legislature amended 451 to meet the governor's objections.[127] Massachusetts, a state which has an item veto, an item reduction veto, and an amendatory veto, experienced a sharp drop in the use of veto power between 1949 and 1960. The reason, according to one study, was the availability of the bill recall procedure.[128] Most conflicts were resolved informally through contacts between legislators and the governor's office.[129]

C. THE ITEM VETO AND THE STATES: AN ASSESSMENT

State experience with the item veto has been unquestionably mixed. Although some evidence supports the notion that the item veto can be a

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122. Copy of New York and Mississippi appropriations bills on file at *Georgetown Law Journal*.

123. The Constitution provides:

> The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based.

MO. CONST. art IV, § 27.

124. Benjamin, *The Diffusion of the Governor's Veto Power*, 55 STATE GOV'T 99, 104 (1982).

125. *Id.*; *see* 2 F. PRESCOTT & J. ZIMMERMAN, THE POLITICS OF THE VETO LEGISLATION IN NEW YORK STATE 1206 (1980) (governor often suggests recall as substitute for veto to amend or remove objectionable provision); *cf.* R. Moe, *supra* note 98, at 21 ("bill recall procedure plays a major part in the legislative process of many states").

126. 2 F. PRESCOTT & J. ZIMMERMAN, *supra* note 125, at 1206.

127. *Id.* None of these actions was recorded as a veto. *Id.*

128. Zimmerman, *The Executive Veto in Massachusetts, 1947-1960*, 37 SOC. SCI. 162, 167 (1962).

129. *Id.*

significant deficit reduction measure, several studies call into question the item veto's effectiveness for reducing expenditures.[130] Moreover, available evidence suggests that the item veto often functions as a partisan political tool and causes strife between the executive and legislative branches in state government.[131]

The item veto has a reputation for saving money. A recent legislative analysis prepared by the American Enterprise Institute concluded that "governors have vetoed or reduced appropriations to achieve substantial savings."[132] Specifically, this study pointed to Governor Thompson of Illinois who vetoed $174.7 million and used his item reduction powers to cut appropriations by an additional $26 million (about three percent of the appropriations), Governor Deukmejian of California who achieved savings of $1.2 billion (more than four percent of the state budget), and Governor Thornburgh of Pennsylvania who used the item veto to reduce spending by $1.15 billion (twelve percent of the budget).[133]

Opponents of the item veto, however, cite contrary examples and question the methodology utilized by proponents. Professor Aaron Wildavsky, for example, argues:

> The item veto does not qualify as an effective instrument of spending control because it locks the doors of the treasury after the spending bids have already been proposed. The trick is to prevent the presentation of excessive expenditure demands, not to engage in the futile task of rejecting a small proportion after they have been made.[134]

This claim has force. Gubernatorial reductions may merely cancel spending that the legislature added because the governor possessed item veto authority. A study in Pennsylvania suggested, "When a legislator, even though opposed in principle to an appropriation, is reasonably certain that the governor will slice it down to more moderate size, he is tempted to bolster himself politically by voting large sums of money to a popular cause."[135] Another

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130. *See* Abney & Lauth, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or an Instrument for Partisanship?*, 45 PUB. ADMIN. REV. 372, 374 (1985) (legislatures whose appropriations are subject to item veto are not more "fiscally irresponsible"); Gosling, *Wisconsin Item-Veto Lessons*, 46 PUB. ADMIN. REV. 292, 298 (1986) (Presidential "item veto will likely result in budget reductions" though size of reduction may not be great).

131. *See* Abney & Lauth, *supra* note 130, at 375 (use of item veto influenced by political partisanship); Gosling, *supra* note 130, at 298 (Wisconsin experience suggests that President may use item veto to control Congress dominated by opposing political party).

132. AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, PROPOSALS FOR LINE-ITEM VETO AUTHORITY 17 (1984) [hereinafter AEI ANALYSIS].

133. *Id.* at 17-18; *see* Dixon, *The Case for the Line Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 213 (1985) (citing poll of governors reporting savings through use of item veto).

134. Wildavsky, *Item Veto Without a Global Spending Limit: Locking the Treasury Door After the Dollars Have Fled*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 173 (1985).

135. McGeary, *The Governor's Veto in Pennsylvania*, 41 AM. POL. SCI. REV. 941, 943 (1947).

author claimed that the item veto at the state level "encouraged legislators to please their constituents by voting for appropriations far in excess of anticipated revenues thus forcing the governor to make the inevitable reductions and incur the wrath of the interests adversely affected."[136] In other words, the availability of an item veto allows legislators to shift more of the responsibility for the fiscal process to the executive.

During hearings in 1984, Senator Mark O. Hatfield, who was governor of Oregon from 1958-1966, noted:

> We also know that the legislators in States which have the line-item veto routinely "pad" their budgets, and that was my experience, with projects which they expect, or even want their Governors to veto. It is a wonderful way for a Democrat-controlled legislature, that I had, to put a Republican Governor on the spot: Let him be the one to line-item these issues that were either politically popular, or very emotional.[137]

The effectiveness of the item veto as a fiscal management tool sparks vigorous debate. A recent survey of legislative budget officers in forty-five states concluded that the item veto is used more to accomplish political aims than to reduce the budget.[138] Studies of the item veto in selected states support this conclusion. A review of Illinois Governor Thompson's use of the item veto concluded that the veto triggered numerous political battles.[139] A review by the U.S. House of Representatives Committee on the Budget regarding line-item veto procedures in California and Pennsylvania similarly noted that "[t]he power of line-item veto in the States has given rise to significant political strife which has, at times, threatened the shutdown of Government services and withholding of payments."[140]

The possibility of conflicts between the executive and legislature over item veto politics is heightened by various developments. Over the past fifteen years, state legislatures have taken a more active role in budgetary matters. Legislators are more willing to challenge the governor both in the develop-

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136. A. MACDONALD, AMERICAN STATE GOVERNMENT AND ADMINISTRATION 210 (1940).

137. *Line-Item Veto: Hearings on S.J. Res. 26, S.J. Res. 178, and S. 1921 Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 98th Cong., 2d Sess. 21 (1984). Another example of item veto politics recently occurred in Maryland. Maryland grants its governor an advance item veto, prohibiting the legislature from increasing any amount in the governor's budget. MD. CONST. art. III, § 51. In practice, however, the governor, in exchange for getting the funds he requested, submits a supplemental bill containing items supported by the legislature. *See Line Item Veto Hearings*, *supra* note 7, at 88-89 (when Maryland legislature proposed across-the-board reductions, governor threatened to withhold supplemental appropriations) (statement of Allen Schick).

138. Abney & Lauth, *supra* note 130, at 375-77.

139. *See* Sevener, *supra* note 35, at 14 (discussing controversy over Gov. Thompson's use of item veto).

140. STAFF OF HOUSE COMM. ON THE BUDGET, 98TH CONG., 1ST SESS., THE LINE-ITEM VETO: AN APPRAISAL 11 (Comm. Print 1984) [hereinafter APPRAISAL OF LINE-ITEM VETO].

ment of the budget and in seeking to overturn gubernatorial vetoes.[141]

Nor is the item veto's usefulness as a fiscal management tool proven by its universal implementation by governors; indeed, a governor may use the item veto infrequently, for numerous reasons. He might simply approve of the legislative budget, prefer to use some other power, iron out his differences with the legislature prior to his review of the budget, or be prohibited from using the veto as a consequence of legislative drafting or court interpretation. For similar reasons, frequent use of the item veto does not necessarily mean effective use of that power.

V. THE FEDERAL ITEM VETO: LESSONS FROM THE STATES

A. THE APPLICABILITY OF THE STATES' MODEL

Proponents of the item veto often point to the states to demonstrate that the President, armed with the item veto, could better control deficits. Many of the over 200 such resolutions that the Congress has considered since 1876 were based on the allegedly positive experiences states have had with the item veto.[142]

The states' model fails for several reasons, however. State governments are too different from the federal government to serve as useful models for a presidential item veto. Furthermore, the contours of item veto authority and practice vary so much from state to state that the states collectively appear much more like a kaleidoscope than a fixed point of reference.

Unlike state constitutions, which have a strong antilegislative bias, a balanced budget requirement, and specific controls on the process of authorizing and appropriating funds,[143] the federal Constititution contains few limitations on the spending power and is silent on the procedures to be adopted by Congress to authorize and appropriate funds. There are very few limitations on use of the spending power: Congress may not increase or decrease the compensation of a President during his term in office,[144] nor may it diminish the compensation of members of the federal judiciary[145] or use its funding

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141. *See* Kurtz, *The State Legislatures*, in 20 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 1974-75, at 62 (1975) (one way in which legislatures have asserted independence is to develop ability to analyze and review state budget); Pound, *The State Legislatures*, in 1984-1985 BOOK OF STATES, *supra* note 112, at 82 (legislatures taking more active role in developing budgets, overseeing expenditures, and estimating revenues).

142. *See* 131 CONG. REC. H1845 (daily ed. Apr. 3, 1985) (statement of Rep. Gallo); 131 CONG. REC. E454, E455 (daily ed. Feb. 7, 1985) (statement of Rep. Gekas); 131 CONG. REC. S425 (daily ed. Jan. 21, 1985) (statement of Sen. D'Amato). Congress' assumption, however, may be unfounded. *See* R. Moe, *supra* note 98, at 1-2 (little evidence exists to show successful use of item veto by states).

143. *See supra* notes 97-129 and accompanying text.

144. U.S. CONST. art. II, § 1.

145. U.S. CONST. art. III, § 1.

power to establish a religion.[146] For the most part, however, the spending power can be used broadly to achieve social, military, and economic goals.

Similarly, the authorization and appropriations process is without specific constraint. The federal Constitution is silent on the procedures to be adopted by Congress to authorize and appropriate funds. Appropriations and authorization bills are governed solely by House and Senate rules as a part of the internal procedures of Congress.[147] It was not until after the Civil War that Congress established appropriations committees.[148] Prior to that time, the House Ways and Means Committee and the Senate Finance Committee handled both appropriations bills and revenue measures.[149] Congress may today appropriate by tax committees, legislative committees, and appropriations committees. If Congress chose to do so, it could place substantive legislation in appropriations bills and allow authorization committees to fund programs directly through the use of "backdoor spending." These matters are left exclusively to House and Senate rules and to Congress' interpretation and execution of its rules.[150] Unlike states that include specifications for the style and format of appropriations bills, Congress may decide to appropriate only in large, lump sum amounts, eliminating from the bill specific projects and activities that the President hoped to veto. In fact, Congress and the executive agencies both prefer lump sum funding to accommodate the need for administrative discretion.[151] To protect its interests, Congress relies to a large extent on nonstatutory controls, specifying the allocation of lump sum amounts in such places as committee reports.[152] Unless Congress substantially alters the structure of appropriations bills, the item veto would give the President little additional control over individual projects, programs, or activities. Nevertheless, item veto proponents like President Reagan continue to insist that the item veto would permit him to "carve out the boondoggles and pork that would never survive on their own."[153]

Other differences between the state and federal systems weaken the case for a presidential item veto. Governors were granted item vetoes because state legislatures sat for only brief periods of the year, sometimes meeting only every other year.[154] This part time status required the governor to assume major budget responsibilities and to exercise substantial authority dele-

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146. U.S. CONST. amend. I; Flast v. Cohen, 392 U.S. 83, 103-04 (1968).

147. Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U.L. REV. 51, 53-54 (1979) (Constitution merely demands that appropriations be made by law; authorization-appropriation system is means for fulfilling this requirement).

148. *Id.* at 57.

149. *Id.* at 54.

150. *Id.* at 104-05.

151. L. FISHER, *supra* note 11, at 59-98.

152. *See infra* notes 169-70 and accompanying text.

153. President's State of the Union Address, *reprinted in* Wash. Post, Jan. 28, 1987, at A8, col. 3.

154. *See supra* note 112 and accompanying text.

gated to him. Item vetoes were also a means of complying with balanced budget requirements in state constitutions.[155] Neither condition applies to the federal government. Moreover, governors employ their item vetoes over jurisdictions smaller and more cohesive than that faced by the President. Governors have a familiarity with local needs that cannot be expected of Presidents and their assistants. Senator Russell Long questioned whether it is true that "when a Governor vetoes a line item involving even a single county within his State, he is usually familiar with what it is that he is vetoing, but that in many instances a President would be called upon and asked by his bureaucracy to veto something where he has never been there, never seen it, and has no direct familiarity with it at all?"[156] In 1983, Senator Lawton Chiles pointed to the contrast between governors and the President: "I think we can say the States tend to have much stronger executives, much stronger Governors. In fact, I think that was one of the problems when a Governor of Georgia came up here, and became President of the United States. He did not have any idea what he was running into with Congress because he had been dealing only with the Georgia legislature. . . . [J]ust because something works in the States is no reason for us to adopt it."[157]

The structural differences between state and federal budgetary processes, however, do not comprise the major issue. Instead, it concerns the balance of power between the executive and legislative branches. The history of the Budget and Accounting Act of 1921[158] is illustrative. The ingredients of a strong executive budget were included in many of the reform proposals that led to the Act, which placed upon the President the responsibility for submitting a comprehensive budget plan to Congress. As a way of constraining legislative action, reformers urged that Congress be prohibited from appropriating money unless requested by the head of a department or approved by a two-thirds vote in both Houses.[159] All such proposals were rejected by Congress.[160] The Budget and Accounting Act calls for an "executive budget" only in the sense that the President is responsible for the estimates he submits.[161] It is a "legislative budget" thereafter. Members of Congress may alter the President's budget as they please, up or down, by simple majority vote. The status of the President's budget as simply *a set of recommendations* was clearly established by the legislative history:

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155. *See supra* note 109-11 and accompanying text.

156. 129 CONG. REC. S14,941 (daily ed. Oct. 29, 1983); *see Review of the Congressional Budget and Impoundment Control Act of 1974, Hearings Before the Senate Comm. on Gov't Affairs*, 97th Cong., 1st Sess. 109 (1981) (remarks by Sen. Stevens echoing Sen. Long's skepticism).

157. 129 CONG. REC. S14,940 (daily ed. Oct. 29, 1983).

158. Pub. L. No. 13, ch. 18, 48 Stat. 20 (1921).

159. L. FISHER, *supra* note 16, at 232-33.

160. *Id.* at 233-34.

161. *Id.* at 234.

> It will doubtless be claimed by some that this is an Executive budget and that the duty of making appropriations is a legislative rather than Executive prerogative. The plan outlined does provide for an Executive initiation of the budget, but the President's responsibility ends when he has prepared the budget and transmitted it to Congress. To that extent, and to that extent alone, does the plan provide for an Executive budget, but the proposed law does not change in the slightest degree the duty of Congress to make the minutest examination of the budget and to adopt the budget only to the extent that it is found to be economical. If the estimates contained in the President's budget are too large, it will be the duty of Congress to reduce them. If in the opinion of Congress the estimates of expenditure are not sufficient, it will be within the power of Congress to increase them. The bill does not in the slightest degree give the Executive any greater power than he now has over the consideration of appropriations by Congress.[162]

If these differences are not enough, a close look at the states' experience with the item veto reveals that it is very difficult to generalize from their record. State practices range from the deletion of a single budgetary item in an appropriation bill to the alteration of both appropriations and authorizing legislation.[163] Similar differences exist among bill recall, impoundment, and other alternative devices to the item veto.[164] The ability of the legislature to undercut this authority through lump sum appropriations and other tactics also differs from state to state.[165] Finally, the predilections of the governors, the size of the state budgets, and the nature of the state balanced budget amendments all vary.

These differences notwithstanding, a review of the mechanisms and experiences of the states does provide useful insights for assessing a federal item veto proposal. Although the federal experience will not mirror that of any state, state experiences do reveal the sorts of issues that might arise if item veto authority is granted to the President.

B. APPLYING LESSONS FROM THE STATES

The states' experience may prove instructive in evaluating an item veto for the President in three regards: Is the item veto a deficit reduction measure or a partisan political tool? How will the item veto affect the balance of power between the President and Congress? What role will the courts play in defining the scope of the item veto power?

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162. H.R. REP. No. 14, 67th Cong., 1st Sess. 6-7 (1921).

163. *See supra* notes 30-35 and accompanying text (discussing variations of the simple item veto).

164. *See supra* notes 123-29 and accompanying text (discussing fund impoundment and bill recall).

165. *See supra* notes 73-90 and accompanying text (scope of item veto and definition of "appropriation" vary).

1. Deficit Reduction or Partisan Tool?

It appears unlikely that the item veto would allow the President to significantly reduce deficits. Under the current federal system and the political priorities of the Reagan Administration, the item veto would apply to less than fifteen percent of the budget—the domestic discretionary programs funded in annual appropriations bills.[166] The rest of the budget consists of interest on the federal debt, defense spending, and entitlement programs that are funded automatically through permanent appropriations or annually through the regular appropriations bills.[167] Whether funded automatically or annually, entitlements are controlled by changing substantive law (eligibility, level of benefits) rather than through the appropriation process. Through its power to control the structure of appropriations bills, Congress could easily neutralize the theoretical advantage of the item veto. State legislatures have become adroit at combining within a single item a program the governor dislikes with one that he supports. If Congress continued to appropriate in lump sum amounts, there would be no "items" for the President to veto. Programs could be funded indirectly through the tax laws, federal credit, or permanent appropriations or placed "off budget."

In 1970, the appropriations committees had responsibility for two-thirds of federal outlays; all other committees shared responsibility for the remaining third. The responsibility is now almost evenly divided. If entitlements subject to annual appropriations are included—an exercise purely ministerial and mechanical on the part of the appropriations committees—the other committees are now responsible for more than half of budget outlays. The bulk of this consists of Social Security, Medicare, and interest on the public debt, all of which are within the jurisdiction of the tax committees.[168]

One of the remarkable qualities of the proposal to grant the President an item veto is that proponents constantly ignore the fact that appropriations bills passed by Congress do not contain items. Specific projects are not

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166. *See Line Item Veto Hearings*, *supra* note 7, at 51 (statement of Sen. Hatfield). In making this assertion, Sen. Hatfield assumed that the Reagan Administration would not use the item veto to reduce defense expenditures. *Id.* In response to this claim, item veto proponents note that the prospects of "small [deficit] reductions amount to something that cannot be concluded to be insignificant." *Id.* at 70 (statement of Sen. Evans).

167. *See* AEI ANALYSIS, *supra* note 132, at 16-17 (opponents argue item veto would apply to only nondefense discretionary spending; proponents argue item veto could have important impact on spending); Dixon, *supra* note 133, at 214 (item veto would apply to only part of nondefense discretionary spending); APPRAISAL OF LINE-ITEM VETO, *supra* note 140, at 3-4 (current proposals for line-item veto would limit its use to those matters subject to nondefense discretionary annual appropriations).

168. *See* STAFF OF HOUSE COMMITTEE ON RULES, 98TH CONG., 2D SESS., ISSUE PRESENTATIONS BEFORE THE RULES COMM. TASK FORCE ON THE BUDGET PROCESS 25-26 (Comm. Print 1984) (Statement of James L. Blum, Assistant Director for Budget Analysis in the Congressional Budget Office).

placed in appropriations bills passed by Congress. Both branches, legislative and executive, prefer lump sum funding to accommodate the need for administrative adjustments as the fiscal year unfolds. Details are found only in nonstatutory sources.

For example, the Energy and Water Development Appropriation for fiscal 1985 included $864,500,000 for the General Construction account for the Corps of Engineers.[169] The individual projects are not mentioned in the public law; instead, such details are placed in the committee reports and agency budget justification documents.[170] Unless Congress substantially alters the structure of appropriations bills by following the state model, the item veto would give the President little additional control over individual projects, programs, and activities. He would have to strike the entire lump sum.

If Congress were to decide to pattern itself after the states by resorting to line itemization, the consequences may be undesirable. Agency officials want the latitude and flexibility associated with lump sum funding. Members of Congress do not want details fixed into public law either, for the only way to adjust statutory details to unexpected developments is to pass another public law. Neither the executive nor the legislature wants that rigidity.

The history of item vetoes at the state level reveals that legislatures are willing to appropriate excessive funds to please their constituents and place the onus of deficit reduction on the governor[171] and that governors often use the item veto as a threat to encourage reluctant legislators to approve the governor's proposals in exchange for the governor's agreement to preserve their projects.[172]

An item veto might make Congress more irresponsible. To satisfy constituent demands, even those of the most indefensible nature, a member need only add extraneous material to a bill with the understanding among his colleagues that the President will probably strike the offending amendment. The adoption of an item veto could make the problem of logrolling worse by triggering a new round of budgetary legerdemain and political unaccountability.

If Congress were to restructure appropriations bills to provide for line-itemization, Presidents, White House aides, and agency officials would have an additional weapon to influence members of Congress. As Senator Mark Hatfield remarked in 1984:

> The line item veto has wide ranging ramifications on the gamut of decisions made by the Congress. We have all witnessed the power of the President

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169. Energy and Water Development Appropriation Act of 1985, Pub. L. No. 98-360, 98 Stat. 403 (1984).

170. *See, e.g.*, H.R. REP. NO. 866, 98th Cong., 2d Sess. 19-22 (1984).

171. *See supra* notes 135-37 and accompanying text.

172. *See supra* notes 138-40 and accompanying text.

> when he lobbies Congress by telephone. It does not take much imagination to consider how much more persuasive he would be if his words were buttressed with a veto stamp over individual projects and activities within our States or districts.[173]

Whether this tactic would restrain or encourage spending is purely speculative. It is easy to imagine scenarios with either result. The threat of an item veto could force legislators to scale back the size of a program, but that can be done now with the regular veto. On the other hand, White House lobbyists could advise a member of Congress that certain projects in his or her district or state are being considered for an item veto. At the same time, the member could be asked how he or she plans to vote on the administration's bill scheduled for consideration the following week. Perhaps a minor project would survive in return for the legislator's willingness to support a costly administration program. Both sides would prevail in this accommodation, pushing budget totals upward. A particular project could also be held hostage in return for a member's support for a nominee or some other presidential objective.

Presidential item vetoes might also prove devastating to sparsely populated states. Despite their equal representation in the Senate, states with few House members would be hard pressed to gain support to override a presidential veto. The thirteen states with either one or two members in the House of Representatives would have little chance of achieving an override of a vetoed item.[174] As one study earlier this century noted: "To expect two-thirds of the Members of each House of Congress to take up their cudgels and fight for an appropriation of interest to only one small locality is to ignore facts in the great game of politics."[175]

2. The Balance of Power

The item veto would undoubtedly alter the relation between the President and Congress. State experiences with the item veto indicate that this gubernatorial power may well serve as leverage for the governor to advance his political agenda. For example, while governor of California, Ronald Reagan was adept at using the item veto for such purposes.[176]

Some proponents of the item veto claim that the change in the relationship between the two branches is proper; it merely restores the appropriate bal-

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173. 130 CONG. REC. S5307 (daily ed. May 3, 1984).

174. *See* 129 CONG. REC. S14,942 (daily ed. Oct. 29, 1983) (statement of Sen. Long). For the 99th Congress, six states have a single member in the House of Representatives: Alaska, Delaware, North Dakota, South Dakota, Vermont, and Wyoming. Seven states have two Representatives: Hawaii, Idaho, Maine, Montana, Nevada, New Hampshire, and Rhode Island.

175. V. WILKINSON, OBSERVATIONS ON THE ITEM VETO 30 (1936).

176. *See* H. Griffin, *supra* note 38, at 254-74 (analyzing Gov. Reagan's use, and threats of use, of item veto).

ance between the two branches. According to one advocate of the item veto, "It is fair to say that the veto power created by the Founders has been displaced and debilitated, and that some form of item-veto would be viewed by the Founders as necessary to reinstate the veto power they originally envisioned."[177] On the other hand, a critic of the item veto argues that it would "concentrate substantial new powers in that most concentrated of power bases, the presidency."[178] Representative Mickey Edwards noted that this "acquiescence to the imperial presidency . . . threatens the foundation of our form of government—a system carefully designed to balance powers and limit central authority."[179]

Although the President's general veto power has been weakened to some extent by omnibus appropriations bills, the Founders would be surprised by the powers that have accrued to the contemporary President. The powers include vast institutional resources available in the Executive Office of the President and are manifested by the deep involvement of the President in the legislative process. Allowing the veto of a portion of a bill would increase the President's role in the legislative process, perhaps to the extent of undermining the original purpose of the legislature. Deletion of some sections may make the remainder contrary to legislative intent, both technically and substantively, and may upset the political balance reached by tradeoffs and compromises and embodied in the legislation as a whole.

Second, the item veto would magnify the stature of the President's budget. When first initiated under the Budget and Accounting Act of 1921, the executive budget was nothing more than a proposal to be amended as Congress decided. The final judgment was for Congress to make, subject to presidential veto. But the President, armed with an item veto, could strike from an appropriations bill the programs that Congress had added or augmented. Rarely would Congress muster the two-thirds majority in each House to override him.

Administration officials who advocate item veto authority are very candid in admitting that congressional initiatives and add-ons would be vulnerable. For example, Budget Director Percival Brundage told the House Judiciary Committee in 1957 that "the authority to veto an appropriation item would include authority to reduce an appropriation—but only to the extent necessary to permit the disapproval of amounts added by Congress for unbudgeted programs or projects, or of increases by Congress of amounts included in the

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177. Best, *The Item Veto: Would the Founders Approve?*, 14 PRES. STUD. Q. 183, 188 (1984); *see Line Item Veto Hearings*, *supra* note 7, at 29 (statement of Judith Best) (item veto will reduce pernicious deal making among legislators).

178. Edwards, *A Conservative's Case Against the Line Item Veto*, Wash. Post, Feb. 8, 1984, at A19, col. 1.

179. *Id.*

budget."[180] The President's 1985 Economic Report explained that adoption of the item veto "may not have a substantial effect on total Federal expenditures" but may be used by the President "to change the composition of Federal expenditures—from activities preferred by the Congress to activities preferred by the President."[181] The item veto would improperly magnify the role of the President's budget in the appropriations process; his budget should be a starting point, not a fixed ceiling, for congressional action.

3. Role of the Courts

In the states, court rulings have been instrumental in establishing the scope of the gubernatorial item veto. Federal court rulings, undoubtedly, would play an equally significant role in determining the reach of the President's item veto authority. The federal judiciary might insist that congressional intent be preserved, thus limiting the item veto to dollar amounts. On the other hand, courts might view the item veto as a repository of vast executive power and allow the President to veto conditions on appropriations and even reduce the level of appropriations. Finally, federal courts, like their state counterparts, might be unable to develop a coherent doctrinal approach to the item veto. Irrespective of the course ultimately taken by the judiciary, the unpredictability of this endeavor is extremely troublesome.

The range of approaches taken by state judges illustrates the possible reach of judicial authority. State courts differ on several fundamental issues. Some courts emphasize legislative prerogatives, others stress gubernatorial authority. Some courts are literalists in their interpretation of this power, others consider the context in which the governor exercises item veto power. State courts also differ in their understanding of whether the exercise of item veto authority is a positive or negative act. Furthermore, these courts are often unable to understand the complexities of the budgetary process. Questions concerning spending that occurs outside the appropriations process, for example, have frustrated several state courts.[182]

Because the courts of different states have adopted different perspectives, identical item veto provisions have received quite different interpretations. If the President is granted item veto authority, the federal judiciary will be embroiled in some of the same issues presented in state courts. Federal budgetary decisions are frequently made outside the appropriations process. Moreover, Congress often attaches conditions to appropriations bills. For example, Congress has attached riders to appropriations bills that have pro-

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180. *Item Veto: Hearings before the House Comm. on the Judiciary*, 85th Cong., 1st Sess. 24 (1957).

181. R. REAGAN, ECONOMIC REPORT OF THE PRESIDENT 96 (Feb. 1985).

182. *See supra* notes 73-90 and accompanying text (discussing appropriations and funding through revenue bills).

hibited federal funding of abortion,[183] restricted American military activity during the Vietnam War,[184] and limited efforts by the Internal Revenue Service to ensure that private school operations are nondiscriminatory.[185]

Because so many aspects of the federal lawmaking process are incompatible with the item veto, such presidential authority would be subject to more extensive and more complicated litigation than the gubernatorial item veto. Federal appropriations bills do not currently contain specific items. Thus, the President may look to committee reports and other nonstatutory sources to delete specified projects from an appropriations measure. Additionally, because the federal Constitution does not distinguish between appropriations and authorizations, Congress may seek to limit a presidential item veto by funding projects either through the authorization process or indirectly through tax laws. The federal courts would inevitably be called upon to resolve these ambiguities by drawing discrete lines of power between the President and Congress.

Courts, in resolving such issues, might allow Congress to reduce the item veto power to a nullity by validating lump sum appropriations or holding that the item veto is limited to appropriations. At the other extreme, courts might view a presidential item veto as a near plenary grant of authority and might give the President item reduction authority or extend the item veto to nonappropriations. Under either scenario, the delicate balance of power between the President and Congress could be easily disrupted by judicial action.

The prospect of such judicial disruption is not fanciful. In *INS v. Chadha*,[186] the Court struck down the one house legislative veto through a formalistic reading of the Constitution's bicameralism and presentment clauses. The thrust of this decision was to discourage congressional over-

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183. *E.g.*, Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926 (Hyde Amendment for fiscal year 1980); Departments of Labor and HEW Appropriations Act, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1979) (same for fiscal 1979); Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat 1460 (same for fiscal 1978); *see* Roe v. Casey, 623 F.2d 829, 833 n.10, 836 (3d Cir. 1980) (noting Hyde Amendment enacted as part of appropriations bills and made substantive changes to Social Security Act, 42 U.S.C. 2000d (1974)); Zbaraz v. Quern, 596 F.2d 196, 199-201 (5th Cir. 1979) (same), *cert. denied*, 448 U.S. 907 (1980); Preterm, Inc. v. Dukakis, 591 F.2d 121, 123, 134 (1st Cir.) (same), *cert. denied*, 441 U.S. 952 (1979).

184. Department of Defense Appropriation Act, Pub. L. No. 91-171, § 643, 83 Stat. 469 (1969); *see* Berk v. Laird, 317 F. Supp. 715, 725-27 (E.D.N.Y. 1970) (Congress had limited scope of Vietnam conflict through policy statements in appropriation bills), *aff'd sub. nom* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 868 (1971).

185. Treasury, Postal Service, and General Gov't Appropriations Act, Pub. L. No. 96-74, § 615, 93 Stat. 577 (1980); *see* McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 460-61 (1984) (Congress blocked implementation of proposed IRS procedure by denying appropriations for enforcement). *See generally* Devins, *supra* note 37.

186. 462 U.S. 919 (1983). *See supra* note 7 (discussion of *Chadha*).

sight of the executive. Moreover, the Court paid short shrift to fifty years of delicate accommodations between the executive and legislative branches on this matter.[187] If judicial review of the item veto were similarly unsupportive of legislative interests, congressional control over the appropriations process would be significantly undercut. Such a result would substantially alter the traditional balance of power between Congress and the President on appropriations matters.

Federal court interpretations of a presidential item veto might have the unintended result of transforming the judiciary into arbitrators of the federal budgetary process. In light of state court decisionmaking, differences between the state and federal budgetary process, and federal court rulings that have affected the balance of powers, the prospect of such fundamental decisions being made in the courts is unsettling. The judiciary is the branch least suited to mediate the budgetary process.

VI. CONCLUDING THOUGHTS

The "item veto" is not a simple concept as implemented by the states, nor is there any easy method of predicting how it would function at the federal level. The importance of the item veto cannot be measured merely through statistics; quantitative tests in this area are more likely to mislead than to illuminate. The threat of an item veto might be more politically influential than its actual use, yet we are in no position to measure "threats." Informal negotiations by the governor and his assistants can result in the deletion of items that will never be recorded in the books as a veto. Furthermore, through the bill recall procedure, most governors are able to amend legislation without the formal use of their veto authority.

Infrequent use of item vetoes reflects the political realities of the budget making process. The governor and the legislature cooperatively produce a budget "and the governor does not welsh on agreements by vetoing items."[188] The structure of an appropriations bill may eliminate, as a practical matter, the opportunity for an item veto.[189] Some governors have hesitated to use the item veto too vigorously, fearing that this would transfer an excessive amount of budgetary responsibility to the executive branch and relieve legislators of the need to exercise independent and continuing judgment

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187. This criticism does not speak to the Supreme Court's constitutional ruling in *Chadha*. *See generally* Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705 (1985).

188. D. LOCKARD, THE POLITICS OF STATE AND LOCAL GOVERNMENT 394 (1963).

189. C. RANSOME, THE OFFICE OF GOVERNOR IN THE SOUTH 83 (1951); *see* Prescott, *The Executive Veto in American States*, 3 W. POL. Q. 98, 107 (1950) (item veto rarely used in Alabama because legislature uses lump sum appropriations).

on the merit of bills.[190]

Granting the President an item veto would undoubtedly introduce a powerful new dynamic to executive-legislative relations. Because of the informal and private communications between the branches, it would be practically impossible to maintain much accountability for fiscal results. Members would vote with new incentives, subjected to pressures and calculations that did not exist before.

Every governmental system seeks techniques and methods for resolving conflicts. The item veto may help resolve some disputes, but it can also heighten conflict among the branches. The exercise of item veto power continues to generate a substantial amount of litigation. Notwithstanding decades of state court decisions, no stable set of operating principles has yet to emerge. Indeed, the situation is more judicially unsettled than it was fifty years ago. Frequent and protracted cases are costly for all parties: the legislature, the executive, agencies, and the private sector.

When an executive possesses only general veto authority, the legislature is under both external and internal pressure to produce a budget that represents its best collective judgment. Whatever passes is likely to be enacted. The incentives of the system encourage compromise before the bill reaches the executive. Negotiations take place as the bill progresses from committee to the floor and from one chamber to the other. If the bill contains too many offensive passages, the executive may veto it and jeopardize delicate agreements and accommodations.

Availability of the item veto may diminish the incentives for lawmakers to closely control substantive provisions and the level of appropriations. This is especially the case if appropriations bills are recast by Congress to include specific projects and programs, following the custom of states. Legislators could insert extravagant and irresponsible items with the peace of mind that the executive could strike them from the bill. Colleagues in the legislative branch would be less likely to challenge these provisions, preferring to leave that task to reviewers in the executive branch. Instead of negotiating privately in good faith, important issues may be left unresolved until the bill reaches the executive. The result may be a series of confrontations between the President and members of Congress, with interest groups given one more opportunity to influence the outcome.

Under this scenario, political conflicts are not resolved as much as they are heightened. The item veto, billed as an essential instrument for accountability, may actually diffuse responsibility by constantly shifting the onus of action to another governmental body: from the legislature to the executive, from the executive back to the legislature, and from both political branches

190. Dorr, *The Executive Veto in Michigan*, 20 MICH. HIST. MAG. 91, 101-02 (1936).

to the courts. As these items are bounced back and forth between the branches like a political shuttlecock, there will be substantial delays in the enactment of appropriations bills and uncertainty on the part of agencies, state governments, and private citizens regarding their funding levels.

Like all political reforms, the item veto has been replete with unanticipated consequences. Transferring the item veto from the states to the national government is an exceptionally complex and hazardous step, to be taken only after the most careful and informed deliberations. There is more at stake than budgetary savings. At issue are such fundamental questions as the scope of presidential power and the preservation of congressional prerogatives.