Budget Reform and the Balance of Powers

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ESSAYS

BUDGET REFORM AND THE BALANCE OF POWERS

NEAL DEVINS*

Great, I say do it. I say great. Let us change the balance of power slightly. Let us give to the President slightly more power over the budget. Congress has flunked the test. We do not deserve the status quo. We have flunked. We are dunces, we are truants, we are juvenile delinquents with the budget.¹

Our budget deficit woes are well known. Deficits have risen forty-fold in the past two decades, from less than $5 billion in 1963 to more than $200 billion in 1985.² When President Reagan took office in 1981, the accumulated national debt approached $1 trillion; by the time he left office, the accumulated debt had more than doubled,³ and by 1992, it will approach $3.5 trillion.⁴ With the exponential rise of the budget deficit, observers often view Congress' fiscal policymaking with disrespect, if not contempt. A typical anti-Congress⁵ assessment might read as follows:⁶ Budget-

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2. See Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1989 Historical Tables, Table 1.1 (1988) ("Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1934-1993"). Remarkably, total outlays in 1970 were less than $200 billion. Id.
4. See id.
5. I use anti-Congress, rather than conservative, because proponents of budget reform do not follow traditional ideological lines. For example, conservative Representative Mickey

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ary decisionmaking is out of control. Soaring budget deficits con-
bust with legislative practices and reveal Congress’ inability to
function as a deliberative democratic body. Appropriations deci-
sions, for example, are made by a handful of powerful legislators
who ensure majority passage through “log rolling”7 and “pork bar-
reling.”8 Aside from increasing budgetary outlays, this legislative
horse trading results in the passage of omnibus legislation whose
individual provisions could not garner majority support.9 The
President, moreover, cannot veto such mega-bills without risking a
shutdown of the federal government10 or the devastation of critical
federal programs. This diminution of veto authority undermines a
critical check on budgetary excess; for the President’s emphasis on

Edwards and Senator Orrin Hatch question the viability of a presidential item veto to rem-
edy legislative budgetary excess. Proposing an Amendment to the Constitution Relating to
a Federal Balanced Budget: Hearings on S.J. Res. 9, S.J. Res. 23 and S.J. Res. 31 Before
the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 101st Cong., 1st
23 and S.J. Res. 31] (official hearing transcript; printed version not available as of this
printing). In contrast, liberal Senator Paul Simon is a sponsor of item veto reform. See id. at
1 (statement of Sen. Simon). In a similar vein, liberal columnist Michael Kinsley endorses
the item veto. See Kinsley, So Give Him a Line-Item Veto, Wash Post., Nov. 2, 1987, at
A27, col. 5.

6. Sponsor statements in favor of current reform proposals are emblematic of the attitude
described in the text. See infra notes 19-28.

7. Log rolling occurs when several disparate items lacking majority support are combined,
and a coalition of minority interests are forged into the majority necessary to secure the
enactment’s passage. See generally W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE

8. Pork barreling occurs when regional projects are added to a bill of national applicabil-

9. Critics also argue that these omnibus bills are loaded with substantive measures that
could not have garnered sufficient support for separate enactment. See Devins, Regulation
of Government Agencies Through Limitation Riders, 1987 DUKE L.J. 456; Fisher, The Au-

10. Appropriations are often enacted in eleventh hour continuing resolutions presented to
the President immediately before the close of the fiscal year. Because the Anti-Deficiency
Act demands that federal programs be fueled by available appropriations, the President’s
veto of such continuing resolutions risks the shutdown of government operations. 31 U.S.C.
Fiscal Year 1988 Continuing Resolution, 1988 DUKE L.J. 389, 399; Stith, Congress’ Power of
national—as opposed to local or regional—concerns makes his budgetary veto especially useful.  

This view of the budget as filled with wasteful programs that neither a majority in Congress nor the President support is disheartening. When considered in conjunction with the deficit problem, this alleged breakdown of majority rule and constitutional checks and balances becomes revolting. Responsive action, under this scenario, is clearly necessary.

One response to the deficit is to try to balance the budget through traditional means, such as increasing revenues through taxes and decreasing expenditures through the elimination or reduction of nonessential programs. An alternative approach is to restructure the budgetary process. The critics' vision of a weakened President unable to check a Congress that has run amok supports structural change. Indeed, this very vision of budgetary politics underlies current reform proposals.

In addition to the recently amended Gramm-Rudman-Hollings Act, Congress is now considering four structural reform proposals: a constitutional amendment requiring a balanced budget; a constitutional amendment authorizing the President to "disapprove any item of appropriation" subject to traditional two-thirds override; a constitutional amendment empowering the President to "reduce or disapprove any item of appropriation" subject to ma-


12. This is the view expressed by Senator Mark Hatfield. In chiding proponents of structural budget reform, Senator Hatfield recently commented: "[A]ny Senator so concerned about all of this wasteful spending has the power to address the problem, the only needed element is courage. Not another procedure." 135 Cong. Rec. S15,343 (daily ed. Nov. 9, 1989) (statement of Sen. Hatfield); see infra note 127 (remarks of Rep. Brooks).


14. The plethora of structural reform proposals introduced in 1989 is typical. Since the first item veto amendment was introduced in 1876, more than 140 similar proposals have been made. Ross & Schwengel, An Item Veto for the President?, 12 Pres. Stud. Q. 66 (1982); see Dixon, The Case for the Line-Item Veto, 1 Notre Dame J.L. Ethics & Pub. Pol'y 207, 212-13 (1985).


16. Id. at S175.
majority override; and a statute enabling the President to "rescind all or part of any item of budget authority" subject to legislative override. All four of these proposals are rooted in the critics' characterization of our budgetary woes.

Take the case of the item veto. Three impulses lie behind sponsor statements in support of these proposals. First, Congress lacks sufficient "fiscal discipline" to reduce significantly the federal deficit. Reliance on "staff, and the knowledge, character, and ability of the . . . subcommittee chairmen and ranking Members" has proven inadequate. At present, Gramm-Rudman-Hollings appears little more than "blue smoke and mirrors." President Bush, moreover, has suggested numerous costly initiatives. Immediate action is therefore necessary. Although the item veto is not a panacea, it is a necessary forward step. Forty-three states have it and "it works." Furthermore, congressional approval of the item veto sends "a clear message to the American public that we are making a serious effort to get our fiscal house in order."

17. Id. Senator Gordon Humphrey also introduced a statutory item veto. S. 33, 101st Cong., 1st Sess., 135 Cong. Rec. 305 (daily ed. Jan. 25, 1989). An item veto created by statute rather than amendment would be subject to serious constitutional challenge. Because the item veto empowers the President to pluck specific lines from appropriations, the constitutional demand of bicameralism in article I, § 7—that every bill presented "shall have passed the House of Representatives and the Senate"—may not be satisfied. See Fisher & Devins, How Successfully Can the States' Item Veto be Transferred to the President?, 75 Geo. L.J. 159, 160 n.7 (1986); Note, Curbing Legislative Chaos: Executive Choice or Congressional Responsibility, 74 Iowa L. Rev. 227, 235-40 (1988).

18. S. 155, 101st Cong., 1st Sess., 135 Cong. Rec. S172 (daily ed. Jan. 25, 1989). The legislative override feature of enhanced rescission proposals envisions a two-phase process. First, the President submits to Congress a list of projects he seeks to eliminate. If Congress disagrees with this list, a majority of both houses must vote against the proposed rescission. Second, if a majority disapproves the proposed rescission, the President may veto that majority disapproval. The rescission is then resubmitted to Congress. Two-thirds of both houses must then vote to override the veto. Otherwise, the rescission takes effect despite majority disapproval. See 135 Cong. Rec. S15,341 (daily ed. Nov. 9, 1989). On November 9, 1989, the Senate debated the adoption of a legislative rescission scheme that a group of seventeen senators proposed. After extensive debate, the Senate defeated the proposal by a vote of 51-40. Id. S15,358. For further discussion, see infra note 63.

20. Id. at S615.
21. Id. at S614.
22. Id.
23. Id.
24. Id. at S751 (statement of Sen. Thurmond).
creasing use of omnibus legislation has weakened the President's veto. The item veto therefore "helps restore"\textsuperscript{25} the appropriate balance of power between President and Congress. Third, legislative horse trading explains the inclusion of many items in an appropriation. Steps, therefore, must be taken to ensure majority support of appropriation provisions. The item veto forces Congress to garner at least a "simple constitutional majority"\textsuperscript{26} to support programs the President finds "wasteful."\textsuperscript{27} "Stated another way," proponents see the item veto as a mechanism to ensure that a majority of legislators actually supports items in previously enacted bills.\textsuperscript{28}

Sponsor concerns that the national debt is "perhaps the most important issue facing our Nation"\textsuperscript{29} are well taken. Although the prevalence of "pork barrel" projects seems overstated,\textsuperscript{30} and the contribution of early 1980s tax reform to our deficit woes seems undervalued,\textsuperscript{31} sponsors are correct in expressing concern over the all-or-nothing stakes of mega-bills and the enormous budgetary power wielded by a select group of legislators.\textsuperscript{32} Nonetheless, proposals that seek to eliminate the deficit by altering the balance of budgetary power between the President and Congress are ultimately misguided. First, our constitutional system presumes legislative superiority on budgetary matters. Alterations of the balance of power between Congress and the President should be disfavored. Second, an examination of state experiences with the item veto raises doubts about the deficit reduction power of structural change. Partisan politics, not fiscal restraint, seems the animating force of state item veto experiences. Third, even if state

\textsuperscript{25} Id. at S615 (statement of Sen. Dixon)
\textsuperscript{26} Id.
\textsuperscript{27} 135 CONG. REC. S15,340 (daily ed. Nov. 9, 1989) (statement of Sen. Coats). The President is empowered to determine which rescissions are economically useful without harming the "'national interest.'" Id. at S15,336 (quoting text of proposed Legislative Line Item Veto Act of 1989).
\textsuperscript{28} Id. at S615 (daily ed. Jan. 25, 1989) (statement of Sen. Dixon).
\textsuperscript{29} Id. at S743 (statement of Sen. Hatch).
\textsuperscript{30} See id. at S15,341-44 (daily ed. Nov. 9, 1989) (statement of Sen. Hatfield); Devins, supra note 10, at 391 n.16.
\textsuperscript{32} See generally Devins, supra note 10.
experiences were uniformly positive, state experiences are ultimately uninstructive because state budgetary systems are too different from the federal system to serve as a point of comparison. Fourth, problems of judicial interpretation of the gubernatorial item veto caution against these proposals. Fifth, President Reagan's experience demonstrates that mega-bills do not undermine the executive veto. Sixth, although the concentration of budgetary power in too few hands is problematic, majority rule exists. Furthermore, transferring power from Congress to the President calls for supermajority opposition to executive initiatives.

Structural reform costs much and offers little. Congress must undertake real reform the old fashioned way: through increased taxes and reduced spending. Transferring power from the legislative to the executive branch will not help. In the end, structural reform proposals do little more than deflect attention from a very real budgetary emergency.

I. THE PRIMACY OF LEGISLATIVE CONTROL

The power of the purse lies with Congress. The Constitution prohibits money "drawn from the Treasury, but in Consequence of Appropriations made by Law." This power was placed outside of the executive, for fear of the consequences of centralizing the powers of purse and sword. As James Madison wrote in The Federalist No. 58: "This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." As characterized in the Senate's Iran-Contra Report: The appropriations power is "the Constitution's most significant check on Executive power."

33. Professor Kate Stith argues that changes in budgetary procedure may be of modest help. See Stith, supra note 13, at 664-65.
35. THE FEDERALIST No. 58, at 300 (J. Madison) (M. Beloff ed. 1987).
The framers' conclusion that the "legislative department alone has access to the pockets of the people" does not mean that the President is proscribed from playing a role in legislative decision-making on appropriations. The Constitution guarantees the President a large role in legislative decisionmaking, including decision-making on appropriations. In the first place, the President may recommend to Congress measures that he considers "necessary and expedient." More importantly, the President possesses a qualified veto over legislation that allows him to force Congress to pay heed to his view of what is unnecessary or inexpedient. The framers regarded these separately enumerated powers as mutually supporting an ongoing legislative role for the President.

Nonetheless, the President's budgetary role is clearly subordinate to that of Congress. Congress determines funding levels and establishes parameters for the expenditure of appropriated funds. Although the power to recommend and especially the power to veto enable the President to communicate vigorously his views to Congress and to participate actively in the process, Congress makes the ultimate decision whether and to what extent executive sentiments should prevail.

Through its control of budgetary decisionmaking, Congress also is empowered to create formal mechanisms of communication between the executive and the legislature on budgetary matters. Prior to 1921, the President had no statutory responsibilities for submitting a budget. The President's formal role began with the Budget and Accounting Act of 1921 (1921 Act), which Congress enacted in response to the huge national debt accumulated during World War I. The 1921 Act required the President to construct and submit an annual budget, but allowed Congress complete freedom to alter the budget. Congress was expected to coordinate its

38. U.S. Const. art. II, § 3.
42. Ch. 18, 42 Stat. 20 (1921).
43. See L. Fisher, supra note 41, at 34.
revenue and spending decisions with the President’s budgetary recommendations. The President was supposed to be responsible for overall budget aggregates, with Congress retaining the right to set priorities within those aggregates.44

Although the 1921 Act accorded greater budgetary responsibility to the President, it did not alter the fundamental balance of power between Congress and the President.45 The President’s responsibility to establish budget aggregates was more than tempered by Congress’ power to increase or decrease the President’s budget by a simple majority vote. The 1921 Act thus respected two essential constitutional principles: the President’s responsibility for his own proposals and Congress’ ultimate responsibility for appropriations, subject to only the President’s veto. Under the 1921 Act, Congress did not surrender or dilute its fiscal prerogatives, nor invade any executive prerogatives. In fact, the 1921 Act did not subordinate either branch to the other but carefully preserved their respective roles.

Congress sought again to protect its budgetary prerogatives and preserve the balance of power between the executive and itself when it enacted the Congressional Budget and Impoundment Control Act of 1974 (Budget Act).46 Congress passed the Budget Act in response to the impoundment controversy of the early 1970s in which President Nixon claimed that the executive could refuse to spend appropriated funds if he judged such refusal to be in the national interest.47 Presidential impoundments threatened the

44. See L. Fisher, Constitutional Conflicts Between Congress and the President 226-27 (1985).
45. As stated in the House Report:
   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 pre-
   rogative. 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.
1, 2 & 31 U.S.C.).
47. See generally Abascal & Kramer, Presidential Impoundment Part I: Historical Gene-
sis and Constitutional Framework, 62 Geo. L.J. 1549 (1974); Fisher, Funds Impounded by
the President: The Constitutional Issue, 38 Geo. Wash. L. Rev. 124 (1969); Note, Address-
ing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Im-
budgetary balance of power. By withholding appropriations, the President could control aggregates and priorities.

The Budget Act contained a number of provisions designed to strengthen congressional control over fiscal affairs. Under the Budget Act, presidential rescissions of appropriated funds required both Senate and House approval. 48 The Budget Act also created Budget Committees in the House and Senate, 49 established a Congressional Budget Office to supply technical support, 50 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. 51 In formulating its budget resolutions since 1974, Congress has often applied economic, technical and policy assumptions different from those presented in the executive budget. 52

The principal consequence of this transformation was fiscal irresponsibility. The Budget Act hinged on a centralized process, the budget resolution. Yet Congress, unlike the quintessentially centralized executive, is strongly decentralized. Consequently, as Louis Fisher has observed, "[i]nstead of staying within the president's aggregates, members of Congress could vote on generous ceilings in a budget resolution and then announce to their constituents that they had 'stayed within the budget.' " 53 Furthermore, by manipulating his aggregates to accommodate policy preferences, the President submitted unrealistic budgets to Congress.

50. Id. §§ 201-203, 88 Stat. at 302-05.
51. Id. §§ 302, 305, 88 Stat. at 306-08, 310-12. Through the use of a congressional budget adopted in concurrent resolutions, Congress sets "macro" policy and allocates the outlays and budget authority among a number of broad categories, such as national defense, health and agriculture. Congress is still supposed to formulate and fund specific programs through regular appropriation bills, but within the broad outlines of the budget resolution. A. Schick, Legislation, Appropriations, and Budgets: The Development of Spending Decision-making in Congress 41-43 (Cong. Res. Serv. 1984).
By 1985, budget deficits were so outrageous that Congress felt compelled to act. Its solution was the peculiar Gramm-Rudman-Hollings Deficit Control Act (Gramm-Rudman). Gramm-Rudman represents something of a hybrid. In enacting the bill, Congress proved it was no longer willing to trust either its own internal budgetary process or the President's. Consequently, in both Gramm-Rudman's original form and its 1987 reincarnation, an automatic sequestration procedure ensures that the budget conforms to deficit reduction targets. Specifically, if the regular appropriations process does not produce a budget within Gramm-Rudman's prescribed deficit reduction target, the President's Office of Management and Budget prepares a sequestration order to be issued shortly after the start of the fiscal year. In order to limit executive control, Congress has specified mandatory formulas for allocating the spending cuts. The executive therefore cannot use the sequestration order as an opportunity to control budget priorities. As Senator Phil Gramm explained:

54. See Brooks, Gramm-Rudman: Can Congress and the President Pass This Buck?, 64 Tex. L. Rev. 131, 131 (1985) (labeling Gramm-Rudman "a wholesale abdication of constitutional responsibility").


58. For a description of this process, see Stith, supra note 13, at 630-33.

59. The White House, however, can reap benefits from the sequestration order. For example, President Bush threatened to veto the FY 1990 budget bill and consequently let the Gramm-Rudman sequestration take effect in order to further both his budget priorities and his bargaining position with Congress. See Allen, How the Administration is Beating Congress in the Budget Game, Wash. Post, Nov. 8, 1989, at B3, col. 1; Kenworthy & Dewar, Bush Demands Hill Set New Budget Cuts, Wash. Post, Nov. 13, 1989, at A1, col. 5. In other words, a President willing to let across-the-board budget cuts take hold can put pressure on Congress to draft a budget bill that matches presidential priorities. See Allen, supra; Kenworthy & Dewar, supra. This proposition, of course, assumes that Congress would disfavor the Gramm-Rudman sequestration order more than the President. If the reverse were true, that is, the President disfavored across-the-board cuts more than Congress, Gramm-Rudman would enhance legislative bargaining power.
Let me make note of... why this is significantly different than impoundment, and why it is significantly different than any line-item veto approach. We all know that the difficulties in those procedures is that Members of Congress are jealous of their powers, and they do not want to transfer power to the executive branch. This bill does not create new powers.⁶⁰

Although Gramm-Rudman does not alter the fundamental budgetary balance of power, it sets the stage for current item veto and rescission proposals. Congress' utilization of automatic mechanisms and reliance on entities outside its control paves the way for the delegation of budgetary responsibility to the President. As Congressman Jack Brooks wrote in his lament of Gramm-Rudman: "Gramm-Rudman demonstrates once again that political accountability is an extremely difficult problem for the American system of government. Active efforts to cure a problem may be controversial and are seldom risk-free. It is tempting to believe that avoiding blame is a safer course."⁶¹

Budgetary reform that enables the President's budget to assume a status superior to Congress' is contrary to the constitutional principle of checks and balances. The Budget and Accounting Act of 1921 and the Impoundment Control Act of 1974 reinforce this principle. Gramm-Rudman, while limiting legislative discretion, is not contrary to this principle. Under our existing constitutional scheme,⁶² we should disfavor proposals that threaten to alter the balance of power.

Reform proponents offer three arguments to rebut this presumption. First, the granting of item veto and/or impoundment power to the President is a significant—perhaps necessary—step towards balancing the federal budget. This argument hinges on the positive effects of the gubernatorial item veto.⁶³ Second, reform proposals

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61. Brooks, supra note 54, at 137.
63. Arguments by rescission and item veto proponents are identical. For example, Senator John McCain, a rescission sponsor, characterized the rescission proposal as a line item veto. Hearings on S.J. Res. 9, S.J. Res. 23 and S.J. Res. 31, supra note 5 (submitted statement of
do not alter the fundamental balance of power between Congress and the President. Rather, because omnibus budget bills (frequently presented to the President in the form of last minute continuing resolutions) are veto-proof, reform proposals merely restore constitutionally guaranteed executive power. Third, Congress’ internal delegation of budgetary power to too powerful appropriations committees already subverts the balance of power. Consequently, because current item veto and rescission proposals include majority override provisions, transferring budgetary power to the President would further majority rule in Congress.

State experiences with the item veto and President Reagan’s experiences with omnibus legislation raise doubts about these proposals. Likewise, problems of judicial interpretation and escalating interbranch conflict caution against these proposals. Finally, the probable difficulties that Congress would encounter in rebuffing presidential item vetoes or rescissions suggest that structural reform will undermine majority rule.

II. THE ITEM VETO AND THE STATES

A. State Experiences

State experiences with the gubernatorial power to eliminate or reduce items in an appropriation have been unquestionably mixed. Although some evidence supports the notion that the item veto can be a significant deficit reduction measure, several studies call into question the item veto’s effectiveness for reducing expend-

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Sen. McCain). Another sponsor, Senator Daniel Coats, depicted the rescission proposal as a method to accomplish line item veto objectives without amending the Constitution. This comparison is sensible because enhanced rescission authority would enable the President to reduce or eliminate “lines” in appropriations. Indeed, the rescission measure debated in the Senate in November 1989 was titled “Legislative Line Item Veto Rescission Authority.” 135 Cong. Rec. S15,336 (daily ed. Nov. 9, 1989). Consequently, an assessment of the gubernatorial item veto is quite relevant to evaluating enhanced rescission authority proposals.

64. For parts of the discussion in this section, I borrow heavily from Fisher & Devins, supra note 17.

65. The sweep of gubernatorial item veto authority varies from state to state. See The Council of State Governments, The Book of the States 1988-89, at 113-14 (table comparing state item veto provisions). In the context of this essay’s discussion of state item veto experiences, the phrase item veto refers to both gubernatorial item veto authority and gubernatorial item reduction authority.
Moreover, available evidence suggests that the item veto often functions as a partisan political tool that causes strife between the executive and legislative branches in state government.67 The item veto has a reputation for saving money. A 1984 legislative analysis prepared by the American Enterprise Institute concluded that "governors have vetoed or reduced appropriations to achieve substantial savings."68 Specifically, this study pointed to Governor James 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 George Deukmejian of California, who achieved savings of $1.2 billion (more than four percent of the state budget), and Governor Richard Thornburgh of Pennsylvania, who used the item veto to reduce spending by $1.15 billion (twelve percent of the budget).69 Mark Crain and Jim Miller's recent analysis is even more striking. By focusing on states that allow governors to reduce items in appropriations, Miller and Crain conclude that an item-reduction veto cuts spending growth in half.70

Several studies, however, call into question the item veto's effectiveness for reducing expenditures. As Senator Mark Hatfield, Governor of Oregon from 1958-66, testified in 1984: "Legislators in states which have the line-item veto routinely 'pad' their budgets. It is a wonderful way for a Democratic-controlled legislature to put

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67. See Abney & Lauth, supra note 66, at 375 (use of item veto influenced by political partisanship); Gosling, supra note 66, at 298 (Wisconsin experience suggests that the President may use the item veto to control a Congress dominated by opposing political party).


69. Id. at 18; see Dixon, supra note 14, at 213 (citing poll of governors reporting savings through use of item veto).

a Republican Governor on the spot: Let him be the one to line-
item these issues that were either politically popular, or very emo-
tional." Studies from Pennsylvania and Michigan support this
conclusion. The Pennsylvania study suggested that "[w]hen a leg-
islator, 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." The Michigan study
claimed that the item veto at the state level encouraged legislators
to please their constituents by voting for appropriations far in ex-
cess of anticipated revenues, thus forcing the governor to make the
inevitable reductions and incur the wrath of the interests adversely
affected. In other words, the availability of an item veto allows
legislators to shift more of the responsibility for the fiscal process
to the executive. Finally, a 1988 regression analysis of the item
veto and expenditure restraint did not find "a single instance of a
significant negative relationship between item veto powers and
government spending."

Opponents of the item veto also question the methodology pro-
ponents have used. 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.

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71. Line-Item Veto: Hearings on S.J. Res. 26, S.J. Res. 178, and S. 1921 Before the Sub-
comm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 21
72. McGeary, The Governor's Veto in Pennsylvania, 41 AM. POL. SCI. REV. 941 (1947);
Perkins, The role of the Governor of Michigan in the Enactment of Appropriations, MICH.
GOVT. STUD. No. 11 (1943).
73. McGeary, supra note 72, at 943.
74. Perkins, supra note 72, at 56 (citing A. MacDONALD, AMERICAN STATE GOVERNMENT
AND ADMINISTRATION 209-10 (1940)).
75. Nice, The Item Veto and Expenditure Restraint, 50:2 J. Pol. 487, 497 (1988). Indeed,
according to Nice, "the few significant relationships were in the wrong direction." Id.
76. Wildavsky, Item Veto Without a Global Spending Limit: Locking the Treasury After
the Dollars Have Fled, 1 NOTRE DAME J.L. ETHICS & PUB. POL'y 165, 173 (1985).
In its 1986 assessment of state item veto experiences, the House Rules Committee also questioned the utility of calculating item veto savings. Noting that the utilization of item veto authority depends on lump sum funding, the availability of "bill recall" procedures and the success of informal negotiations between governor and legislature, the Rules Committee concluded that "[q]uantitative tests in this area are more likely to mislead than illuminate."77

Available evidence suggests, moreover, that the item veto is used more frequently as a political tool than a fiscal one. The 1986 Rules Committee study determined that the item veto "remains first and foremost, a political instrument."78 A 1985 survey of budget officers in forty-five states likewise concluded that the item veto is used more to accomplish political aims than to reduce the budget. A 1985 study comparing twenty-eight states found that states in which the legislature and governor were from opposing parties were more likely to use the item veto.79

Studies of the item veto in selected states likewise support this conclusion. A 1986 Wisconsin study concluded that states use the item veto primarily as a tool of policymaking and partisan politics.80 A 1985 review of Illinois Governor James Thompson's use of the item veto argued that the veto triggered numerous political battles.81 Finally, a 1984 review by the House Budget Committee determined that "[t]he power of the line-item veto in states [such as California and Pennsylvania] has given rise to significant political strife which has, at times, threatened the shutdown of Government services and withholding of payments."82

Studies of the item veto also reveal conflicts and controversies surrounding judicial interpretations of the gubernatorial item veto.

77. STAFF OF HOUSE COMM. ON RULES, 99TH CONG., 2D SESS., ITEM VETO: STATE EXPERIENCE AND ITS APPLICATION TO THE FEDERAL SITUATION 197 (Comm. Print 1986) [hereinafter HOUSE COMM. ON RULES].
78. Id.
79. Abney & Lauth, supra note 66.
80. Gosling, supra note 66.
These controversies are likely to extend to a presidential item veto. Item veto and item reduction proposals introduced recently in Congress envision the item veto as extending to "any item of appropriation." But what is an "item"?

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 disapproval? May the governor transform a conditional or a contingent appropriation into an absolute one, in disregard and defiance of the legislative will?

By the same token, what is an "appropriation"? Is it any matter in an appropriation bill or is it any fiscally-related item in any bill?

The range of approaches state judges take illustrates the possible reach of judicial authority in interpreting these terms. State court interpretations differ on several fundamental issues. Some courts emphasize legislative prerogatives, while others stress gubernatorial authority. Some courts interpret the item veto power literally, while others consider the context in which the governor exercises such power. State courts differ also in their understanding of whether the exercise of item veto authority is a positive or negative act. Furthermore, these courts often are unable to understand the complexities of the budgetary process. Questions concerning spending that occurs outside the appropriations process, for example, have confused several state courts.

On several occasions, individual judges and courts have asserted openly that this judicial role is problematic. The problem, however, is not capable of resolution. The vagaries of budgetary politics nec-

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83. Fisher & Devins, supra note 17, at 168-78; House Comm. on Rules, supra note 77, at 141-64.
84. State ex rel. Teachers and Officers of Indus. Inst. and College v. Holder, 23 So. 643, 645 (Miss. 1898).
85. The House Rules Committee identified nine critical issues on which state courts differed: (1) What is an appropriations measure?; (2) What is the meaning of the terms "item," "parts" or "section"?; (3) Can an item veto be used on provisos, constructions, limitations or conditions on appropriations?; (4) How far can a legislature go in attempting to curb a governor's item veto by using conditions, limitations or other devices?; (5) What is the application of an item veto to substantive provisions?; (6) Does the item veto power include the power to reduce?; (7) Is the item veto a negative power?; (8) What is the effect of adjournment on the use of an item veto?; and (9) What is the effect of an invalid item veto? House Comm. on Rules, supra note 77, at 141-64.
essarily make indeterminate the bounds of item veto authority. Witness two state courts' responses to the problem of dividing spheres of authority between the legislative and executive branches:

Upset with the elusive tests state judges employed, one judge advocated a hands-off approach to court review of gubernatorial item veto exercises:

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.86

In sharp contrast, another court viewed such judicial detente as a clear violation of separation of powers:

[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, dissent, and dissever... [t]hat would be the enactment of law by executive authority without the concurrence of the legislative will, and in the face of it.87

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. At the federal level, these controversies are likely to be at least as indeterminate as their state counterparts. The line separating appropriation from authorization is far more opaque at the federal than the state level. Federal budgetary decisions are frequently made outside the appropriations process. Moreover, Congress often attaches conditions to appropriations bills.88 For example, Congress has attached riders to appropriations bills that have prohibited federal funding of abortion, restricted American military activity during the Vietnam War and limited ef-

87. Holder, 23 So. at 645.
88. See Devins, supra note 9.
forts by the Internal Revenue Service to ensure that private school operations are nondiscriminatory.\textsuperscript{69} While these riders are frequently designed to express legislative dissatisfaction with presidential policy initiatives, they may well fall prey to a presidential item veto.

Indeed, 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. Additionally, because the 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 be called upon inevitably to resolve these ambiguities by drawing discrete lines of power between the President and Congress.

The prospect of pervasive judicial involvement must be taken seriously.\textsuperscript{60} In the states, court rulings have been instrumental in establishing the scope of the gubernatorial item veto. Indeed, court involvement in this matter has increased substantially in recent years. The past twenty years have seen as many item veto decisions (about 118) as in the previous eighty years.\textsuperscript{91}

Federal court rulings would undoubtedly 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. Under either scenario, judicial interpretation could easily disrupt the delicate balance of power between the President and Congress. Moreover, as the House Rules Committee concluded


\textsuperscript{90} Cf. Hearings on S.J. Res. 9, S.J. Res. 23 and S.J. Res. 31, supra note 5, at 130 (statement of Sen. Paul Simon) (suggesting that courts will have no difficulty interpreting the scope of veto authority).

\textsuperscript{91} Copy of Westlaw search available from author.
in its 1986 study: "The prospect may be one of years of uncertainty despite the most careful statutory crafting."\textsuperscript{82}

### B. Comparability of State and Federal Systems

State experiences with the item veto are mixed. To the extent that state experiences are comparable to a presidential item veto, these experiences cast doubt on the wisdom of structural reform proposals. Yet even if the states’ experiences with the item veto were uniformly positive, state governments are too different from the federal government to serve as useful models for structural reform proposals that enhance presidential power.

State constitutions have a strong anti-legislative bias, balanced budget requirements and specific controls on the process of authorizing and appropriating funds.\textsuperscript{83} State legislatures granted governors item vetoes because the legislatures met for only a few months each year, sometimes meeting only every other year.\textsuperscript{84} Governors, therefore, were forced to assume most budget responsibilities. In 1983, Senator Lawton Chiles pointed to the contrast between governors and the President:

> I think we can say that 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 runng [sic] 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.\textsuperscript{85}

In sharp contrast, the framers of the federal Constitution viewed the separation of purse and sword as critical to the national government. The Constitution, moreover, contains few limitations on the spending power and is silent on the procedures Congress was

\textsuperscript{82} House Comm. on Rules, supra note 77, at 164.
\textsuperscript{83} See generally id. at 1-51.
\textsuperscript{84} Moreover, governors employ their item vetoes over jurisdictions smaller and more cohesive than that the President faces. Governors thus have a familiarity with local needs that we cannot expect of Presidents and their assistants.
to adopt to authorize and appropriate funds. Today, Congress may appropriate by tax, legislative 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.

Unlike states that include specifications for the style and format of appropriations bills, Congress may decide to appropriate in only large, lump sum amounts, eliminating from the bill specific projects and activities that the President hoped to veto. For example, the Energy and Water Development Appropriation for fiscal 1989 included an appropriations account containing more than $1 billion for rivers and harbors, flood control, shore protection and related projects. In fact, both Congress and the executive agencies prefer lump sum funding to accommodate the need for administrative discretion. Unless Congress alters substantially the structure of appropriations bills, the item veto would give the President little additional control over individual projects, programs or activities.

Item reduction power would strengthen the President’s hand in this regard. Presumably, the President could eliminate unnecessary pork from omnibus “items.” Two problems would accompany such an exercise of power, however. First, the President may ex-

96. See Fisher & Devins, supra note 17, at 178-82.
97. Id. at 186.
98. For a history of lump sum appropriation, see House Comm. on Rules, supra note 77, at 62-63.
100. Agency officials want the latitude and flexibility associated with lump sum funding. Members of Congress also benefit from lump sum appropriations because the only way to adjust statutory details to unexpected developments is to pass another public law.
101. Enhanced rescission authority would likewise increase presidential control over specific projects. See supra note 63.
pend a "reduced" appropriation however he sees fit.\textsuperscript{102} The reduced appropriation means simply that some approved expenditures will not go forward. Second, in order to exercise meaningful control, Congress may be forced to move away from lump sum funding to single item funding. Such a change would eliminate the existing advantages associated with lump sum funding currently enjoyed by Congress and executive agencies.

Preexisting budgetary demands also speak against structural reform. Half of all federal outlays are not contained in annual appropriations. Entitlements such as social security and medicare as well as interest on the national debt are handled by permanent appropriations and therefore are within the jurisdiction of the tax committees.\textsuperscript{103} Entitlements, moreover, are controlled by changing substantive law (for example, eligibility and level of benefits) rather than through the appropriations process. Finally, although technically subject to veto or rescission, appropriations that further presidential priorities are effectively veto-proof. For example, in light of President Reagan's commitment to maintaining defense spending, enhanced rescission authority or an item veto in the hands of the Reagan administration would have applied at best to less than fifteen percent of the budget.\textsuperscript{104}

The limits of a Reagan era item veto are best revealed in a list that President Reagan submitted to Congress of "wasteful, unnecessary, or low priority spending projects" in the fiscal year 1988

\begin{footnotesize}
\begin{enumerate}
\item[102.] Proposals to increase presidential rescission authority avoid this problem. The Legislative Line Item Veto Rescission proposal, for example, demands that the President reveal "the specific project or governmental functions involved." Legislative Line Item Veto Act of 1989, § 1111(2), \textit{reprinted in} 135 Cong. Rec. S15,336-37 (daily ed. Nov. 9, 1989).
\item[103.] As Senator Alan Dixon has pointed out, however, although entitlements account for roughly half of federal spending, they account for less than one-fourth of the annual deficit. \textit{See} Dixon, \textit{supra} note 14, at 214. Nonetheless, over the past 20 years, the composition of federal expenditures has changed in ways that limit the potential effectiveness of item veto and rescission proposals. As Douglas Arnold has demonstrated effectively, "[T]he notion that federal expenditures are increasingly shaped by congressional competition over local benefits is inaccurate." Arnold, \textit{The Local Roots of Domestic Policy}, in \textit{The New Congress}, \textit{supra} note 31, at 281. With the bulk of federal outlays devoted to entitlement programs and interest on the national debt, reform efforts that target regular appropriations bills are of limited value. See \textit{id.} at 282 for graph of figures substantiating Arnold's conclusions.
\end{enumerate}
\end{footnotesize}
The continuing resolution contained $604 billion in budget authority; the Reagan list of projects that could have been excised with an item veto contained $970 million. Moreover, with respect to presidential rescissions, the Reagan administration proposed $43.3 billion during its tenure. Savings of $970 million in one year or even $43 billion over eight years simply do not dent a $150 billion annual deficit. Indeed, the President's 1985 Economic Report proclaimed bluntly that the item veto "may not have a substantial effect on total Federal expenditure," but may be used by the President "to change the composition of Federal expenditure—from activities preferred by the Congress to activities preferred by the President." Bush-era structural reform might operate much the same way. As Senator Alan Dixon recognized: "Let us not forget a number of costly initiatives have been discussed by President Bush. Where does the money come for those initiatives when the deficit continues to eat away at our ability to meet the needs of the country."

107. V. McMURTRY, RESCISSIONS BY THE PRESIDENT SINCE 1974: BACKGROUND AND PROPOSALS FOR CHANGE 10 (Cong. Res. Serv. 1989). Reform proponents emphasize that the vast majority of these proposed rescissions were rejected. 135 Cong. Rec. S15,339 (daily ed. Nov. 9, 1989) (statement of Sen. Coats). Although reform opponents admit that Congress approved only $15.7 billion of Reagan's proposed rescissions, they note that Congress did initiate $28 billion of rescissions during the Reagan era. Id. at S15,343 (statement of Sen. Hatfield). In other words, opponents perceive that shifting rescission authority from Congress to the President will accomplish little in the way of budget savings.
108. UNITED STATES GENERAL ACCOUNTING OFFICE, ECONOMIC REPORT OF THE PRESIDENT 96 (Feb. 1985). For this reason, I disagree with Professor Glen Robinson's argument that the item veto enables the President to veto "private good" pork, while preserving valuable "public good" features of legislation. Robinson, supra note 11. Evidence from the states and the frank admissions of the Reagan administration suggest that partisan politics will be the animating force behind item veto decisionmaking.
109. 135 Cong. Rec. S614 (daily ed. Jan. 25, 1989) (statement of Sen. Dixon). For a discussion of why an item veto might ultimately increase expenditures, see Fisher & Devins, supra note 17, at 190-91; see also Ornstein, The Politics of the Deficit, reprinted in Hearings on S.43, supra note 68, at 13; Wildavsky, supra note 76, at 170-71. In contrast, Senator John McCain offers a curious argument as to why structural reform will limit presidential budgetary excess: "If the President was able to threaten the use of his line item veto power, he would be less willing to ask for egregious provisions himself." Hearings on S.J. Res. 9, S.J. Res. 23 and S.J. Res. 31, supra note 5 (submitted statement of Sen. McCain).
Item veto and enhanced rescission authority therefore offer little hope of fiscal salvation. The gubernatorial item veto is not quite the unqualified success that item veto proponents promised. Furthermore, differences between state and federal systems suggest that structural reform cannot accomplish significant budget savings. To make matters worse, a presidential item veto appears a loose cannon. State court decisions suggest that the reach of this power is subject to conflicting interpretation.

III. The Balance of Power Reconsidered: The Executive Veto and the Meaning of Delegated Power

Proponents of structural reform discount Congress' supposed supremacy on budget matters. Proponents argue that structural reform restores, in the face of veto-proof omnibus legislation, essential presidential power. Proponents also argue that the legislative process presently empowers a handful of members who sit on key appropriations committees. Reform, so the argument goes, advances majority rule by forcing a true majority to stand up in opposition to presidential item vetoes or rescissions. Neither of these arguments is persuasive. Omnibus legislation has not proven the downfall of either the presidency or the veto power.110 The internal delegation of power to congressional committees, although prob-

110. Omnibus legislation clearly conforms with constitutional norms governing the President's veto. See Devins, supra note 10, at 406-12. At the same time, critics of omnibus legislation claim that the President is empowered to treat unrelated matters as separate enactments, each of which is subject to presidential veto. See Haswell, Partial Veto Power—Does the President Have it Now?, Federal Bar News and Journal, Mar./Apr. 1989, reprinted in 135 Cong. Rec. E3234 (daily ed. Oct. 2, 1989). This "item veto" power derives from constitutional language that empowers the President to veto "[e]very order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary." U.S. Const. art. I, § 7, cl. 3. I find opponents' arguments unpersuasive. First, even if the framers did not foresee omnibus legislation, the same cannot be said of congressional control over the legislative process or the limitation of the veto power to a thumbs up-or-down decision by the President. Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838, 840-44 (1982). Second, as Louis Fisher and others have demonstrated, we have had omnibus bills from the start. See, e.g., Killian, Constitutionality of Empowering Item Veto by Legislation, reprinted in Hearings on S. 43, supra note 68, at 13. In fact, the first three appropriations bills Congress passed were omnibus measures. Fisher, Micromanagement by Congress: Reality and Mythology, in The Fettered Presidency 139-58 (L. Crovitz & J. Rabkin eds. 1989).
lematic,\textsuperscript{111} does not mean that a majority does not ultimately endorse either the system that produces such delegations or the handiwork of the appropriations committees. In any event, transferring power to the President in the hope of galvanizing majority opposition or approval of presidential action is an absurd solution to the majority rule problem.\textsuperscript{112}

For reasons discussed already,\textsuperscript{113} structural reform proposals cannot be understood as mechanisms to restore presidential primacy in the budget process. Yet if the advent of omnibus legislation makes the President's use of his veto too costly, the President's essential role in the legislative process is undermined, thereby making structural reform a sensible alternative.\textsuperscript{114} President Reagan's experiences with omnibus legislation, however, suggest that presidential power is alive and well in this age of mega-legislation.

President Reagan was well served by the 1981 Omnibus Reconciliation Act. According to Louis Fisher, "The omnibus nature of the bill was championed by the White House and presidential supporters as the only way to make cuts in popular programs."\textsuperscript{115} Reagan-era omnibus continuing resolutions, moreover, did not undermine the veto power. Although omnibus legislation changes the nature of the exchange between the White House and Congress, the veto still functions as a mediating device. For example, in 1982, President Reagan vetoed two omnibus measures and weathered a

\textsuperscript{111} See Devins, supra note 10, at 390-400.

\textsuperscript{112} For an excellent summary of balance of power arguments, see AEI Analysis, supra note 68, at 11-15, reprinted in Hearings on S. 43, supra note 68, at 166-70.

\textsuperscript{113} See supra notes 64-109 and accompanying text.

\textsuperscript{114} 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." Best, The Item Veto: Would the Founders Approve?, 14 Pres. Stud. Q. 183, 188 (1984). On the other hand, item veto opponent Representative Mickey Edwards claimed 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." Edwards, A Conservative's Case Against The Line Item Veto, Wash. Post, Feb. 8, 1984, at A19, col. 1; see Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838 (1987).

shutdown of parts of the federal government.\textsuperscript{116} As a result, Congress was forced to rework these bills to satisfy presidential needs.\textsuperscript{117} More significantly, in 1987 the White House and Congress undertook extensive negotiations to ensure that a fiscal year 1988 continuing resolution was satisfactory to both sides. In the end, Congress abandoned the fairness doctrine and included Contra aid to stave off a threatened veto.\textsuperscript{118} If anything, such legislative compromises reveal that a President who is willing to use his veto wields enormous power in such negotiations. The vitality of the veto power therefore cannot be measured by its exercise. Rather, the effectiveness of the veto power must be measured by its impact on the political process. The "all or nothing" stakes of omnibus legislation enabled President Reagan to enhance his veto power through its threatened exercise.

As a matter of simple mathematics, frequency of use is also a poor measure of the veto power's impact. Prior to the present era of omnibus legislation, Presidents infrequently used their veto power.\textsuperscript{119} Washington vetoed only two bills. Seven Presidents never used the power. Two Presidents, Franklin Roosevelt and Grover Cleveland, account for roughly half of all vetoes. In short, although Presidents may underutilize the veto power, the advent of omnibus legislation is not the cause of its infrequent use.

The majority rule argument is also unpersuasive. Although a byproduct of legislative compromise is undoubtedly the enactment of items that do not stand on their own, the creation of a "super Congress" in the Oval Office is surprising.

Bicameralism and presentment presume that majorities in both houses think it better to vote in favor of a bill than against it. Although another enactment might be more pleasing, all bills presumably further Congress' will. In contrast, structural reform pro-


\textsuperscript{117} See, e.g., Teeley, \textit{GOP Floats $1 Billion Housing Plan}, Wash. Post, July 22, 1982, at D1, col. 1.

\textsuperscript{118} See Calmes, \textit{Reagan Wins Concessions in Final Funding Bill}, \textit{45 Cong. Q. Weekly Rep.} 3185, 3186 (1987). The President also used his veto threat to preserve funds for anti-abortion counseling and for foreign assistance. \textit{See id.}

posals, recognizing the realities of legislative delegation and horse trading, view many provisions as inconsistent with the legislative will. On a provision-by-provision basis, this contention is almost certainly true. Yet when one views the legislative work product as a conglomeration of enactments, the delegation of authority to committee heads and the striking of compromises may well further congressional objectives. Structural reform will undoubtedly affect this dynamic.  

Indeed, the transfer of budgetary power from Congress to the President directly undermines majority rule. Whereas a simple majority override is available on the proposed item reduction amendment, both the item veto and enhanced rescission proposals call for a two-thirds override. Moreover, with respect to a simple majority override, legislators may hesitate, even if they support an appropriation, before they act against ostensible fiscal restraint by the President. This conclusion is buttressed by the fact that members of the President's party are extremely reluctant to override veto decisions. Finally, the President decides which items are subject to override. Consequently, programs favored by the President are simply not subject to override. This is especially dangerous because structural reform encourages members to defer to committees at the enactment stage and bear down at the override stage.

Structural reform, then, appears a boon to presidential priorities at the expense of legislative prerogatives. First, because the decision of whether a program is subject to elimination or reduction is

120. For a provocative discussion of how this changed dynamic will result in greater legislative spending by increasing log rolling, see Wildavsky, supra note 76, at 170-71.
121. See supra notes 17-18 and accompanying text. Moreover, proposals for enhanced rescission authority require Congress to endorse or reject the entire package of rescissions rather than to vote on each proposed reduction. Legislative Line Item Veto Act of 1989, § 1102, reprinted in 135 CONG. REC. S15,336-37 (daily ed. Nov. 9, 1989). This all or nothing decision increases the decisional costs to legislators of voting against the presidential package and hence makes its override even more unlikely.
123. Senator Arlen Specter discussed the prospect of such legislative acquiescence at the enactment stage. In explaining why he favored an item veto amendment to the Constitution, Specter commented on the "need" for the President to go through the budget with a "microscope" because of "the difficulty in identifying ... unwise expenditures." Hearings on S.J. Res. 9, S.J. Res. 23 and S.J. Res. 31, supra note 5, at 31.
lies with the President, personal taste and political advantage will preserve some programs that are at least as wasteful as those reduced or vetoed by item. Second, because legislative override of presidential item veto or reduction action demands substantially more than majority opposition, presidential action will likely take effect.

This expansion of presidential power is likely to encourage political conflict. The item veto invites the President to resist compromises and negotiations with Congress. Symbolically, the item veto presumes that “the President knows better” with respect to budgetary matters. As a result, the President expends little political capital when he exercises this power. The President consequently is likely to make use of this budgetary tool. Because ideology and partisanship will influence his use of the item veto or enhanced rescission authority, conflicts between the branches—as the states’ experiences reveal—are likely to arise. This conflict may well result in substantial delays in the enactment of appropriations bills and uncertainty on the part of agencies, state governments and private citizens regarding their funding levels.

CONCLUSION

Reform proponents do not pretend that their deficit reduction tools will remedy this nation’s fiscal woes. Nonetheless, proponents are too optimistic in their assessment of both the states’ experiences with the item veto and the President’s ability to serve as nonpartisan deficit reduction czar. Proponents also overstate the damage caused to the President’s veto by mega-bills and give short shrift to balance of power and majority rule problems likely to arise when budgetary power is transferred from Congress to the President. Finally, proponents have not considered the judiciary’s role in defining the item veto power.

Nonetheless, contrary to the arguments of some reform opponents, the current system is far from perfect. Deficiencies in the 1974 Budget Act and the peculiar incentives created by the

124. In contrast, through 1980, presidents have vetoed less than three percent of the bills presented to them. Copeland, When Congress and the President Collide: Why Presidents Veto Legislation, 45 J. Pol. 696, 697 (1983).

Gramm-Rudman-Hollings Act have contributed to a growing deficit and the centralization of power in too few legislative hands. The solution, however, is for members to regain control of legislative budgetary policies. As Congressman Mickey Edwards observed: "It takes great effort and a great expenditure of time and money and personal involvement to bring about change through the political process, but that is the system provided for in the Constitution." Although hoping that the ballot box will check legislative irresponsibility on budget matters may seem wistful, structural reform offers too little to justify altering the constitutional balance of power. Structural reform should be rejected then in the hope—if not the expectation—of democratic accountability.

126. See Devins, supra note 10, at 390-400.

   In the representative democracy created by the Framers, the Constitution gave the greatest political power to those who were placed in office by citizen voters . . . . Congress was charged with making and repealing law [subject to possible presidential opposition] . . . and, most important, the right of the people to express disapproval at the ballot box by refusing to return an elected official to power.

Brooks, supra note 54, at 134.