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THE IMBALANCE OF POWER AND THE PRESIDENTIAL VETO: A CASE FOR THE ITEM VETO

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> [A]ll human Constitutions are subject to Corruption and must perish, unless they are timely renewed by reducing them to their first Principles.
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> - Machiavelli[1]

> A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.
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> - John Adams[2]

INTRODUCTION

The veto power of the President of the United States resides in the Constitution's Presentment Clauses.[3] These clauses give

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1. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 34 (1969) (quoting Machiavelli).

2. Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), *reprinted in* 4 THE WORKS OF JOHN ADAMS 185, 186 (C.F. Adams ed. 1851).

3. The Presentment Clauses are found in Article I, Section 7 of the United States Constitution. Article I, Section 7, Clause 2 provides in part:

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

Article I, Section 7, Clause 3 provides:

> Every order, resolution, or vote to which a concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the

the President the authority to approve by signing, or to reject by vetoing, all legislative enactments presented to him. The Framers intended the veto as a "check and balance" against congressional encroachment on the President's power, as well as a safeguard against the enactment of ill-conceived legislation.[4] The veto power authorizes the President to return to Congress, with comments, those bills that he finds objectionable.[5] Congress may then consider the President's comments and revise the legislation accordingly, or it may override the President's veto by a two-thirds majority.

The advent of omnibus appropriations bills[6] and Congress's propensity for attaching non-germane riders to legislation,[7] however, have made a mockery of the President's ability to exercise the veto power. In the current budget process, the President is frequently coerced into signing bills that contain objectionable provisions, at the peril of risking the very operation of government.[8]

One possible response to the growing ineffectiveness of the veto power would be to exercise an item veto, that is, a veto of individual items within pieces of legislation passed by Congress. The Framers were silent on the subject of a item veto.[9] The item veto has been on the national agenda for over 100 years.[10] Proponents of the item veto generally insist that the

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Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

4. *See infra* notes 64-65 and accompanying text.

5. What is now understood to be the executive veto power was referred to by the Framers as the "negative voice," "qualified negative," or "revisionary power." The term "veto," which is rooted in the Latin "I forbid," was seen as pejorative and did not come into use until later. The use of the word veto has obviated the need for the somewhat cumbersome term "negative voice"; for purposes of this Note, they are considered synonymous.

6. Omnibus appropriations bills are an amalgamation of assorted legislation grouped together and presented in a single bill or resolution.

7. *See infra* notes 98-102 and accompanying text.

8. The 1987 budget, for example, was completed and presented to President Reagan on the eve of Congress's adjournment, thereby forcing the President's signature lest he take responsibility for grinding the government to a halt. Congress therefore succeeded in securing Presidential approval to this unwieldy 2,100-page budget, which neither the President nor his advisers had time to read in its entirety before the President signed the bill. *See* Bartley, *Next President Must Start Now to Mend Office*, Wall St. J., Jan. 20, 1988, at 28, col. 3.

9. The item veto is often referred to as the "line-item veto," a misnomer, because Congress does not itemize bills by line. *See* R. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 122 (1988).

10. *See infra* notes 103-13 and accompanying text.

President needs this tool to ensure fiscal responsibility.[11] Although some commentators urge application of an item veto to both appropriations and general legislation,[12] most of the debate addresses only appropriations measures. Those favoring the implementation of the item veto to improve the federal budget process are divided on whether the Framers intended the Constitution to encompass the item veto.[13] Moreover, some commentators who acknowledge the breakdown of the budget process are unconvinced that the item veto would cure the problem.[14]

Two commentators have suggested that authorization of an item veto power could be achieved by (1) an act of Congress, (2) a change in the House and Senate rules, or (3) a constitutional amendment.[15] The prospects for congressional action, however, are remote at best; Congress is unlikely to relinquish to the President any power over the nation's purse strings.[16] The passage of a constitutional amendment has also been the topic of considerable discussion,[17] but this too seems unlikely.

This Note takes the position that none of the above approaches is necessary, because the item veto power currently resides within the President's constitutional authority. Part I of the Note explores the historical context in which the Framers drafted the Constitution to provide insight regarding their intentions respecting the veto power. The analysis examines the plain meaning of the terminology used and, in the case of ambiguities, what the Framers understood and intended for the

11. *See* Ross & Schwengel, *An Item Veto for the President?*, 12 PRESIDENTIAL STUD. Q. 66, 76-77 (1982) (item veto would reduce extravagance in public expenditures by discouraging "pork-barrel" appropriations). *See also* Miller, *An Expanded Veto Power and the Budget*, in PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 47, 50 (1988) [hereinafter PORK BARRELS AND PRINCIPLES]. *But see* Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 851-52 (1987) (spending power is a "core" legislative power).

12. *See, e.g.*, Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988); Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at 9.

13. *Compare* Best, *The Item Veto: Would the Founders Approve?*, 14 PRESIDENTIAL STUD. Q. 183 (1984) (answering in the affirmative) *with* Cooper, *The Line-Item Veto: The Framers' Intentions*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at 29 (Framers did not intend President to have item-veto power).

14. *See, e.g.*, Miller, *supra* note 11, at 48.

15. *See* Ross & Schwengel, *supra* note 11, at 67.

16. Although the notion of a quick legislative solution is appealing to those favoring the item veto, it is unclear whether such a legislative enactment would itself be unconstitutional. *See Line Item Veto: Hearings to Consider S. 43 Before the Senate Rules and Administration Comm.*, 99th Cong., 1st Sess. 13-20 (1985).

17. *See infra* notes 103-13 and accompanying text.

words of the Presentment Clauses to mean. Part II addresses the evolution of the veto power since 1789 by reviewing subsequent interpretations by the Executive and Judicial Branches of the Presentment Clauses. Part III discusses alternative approaches that presidents have used to skirt the item veto question. The discussion specifically addresses the impact of the Congressional Budget and Impoundment Control Act of 1974[18] on one such alternative, presidential impoundment. Part IV assesses the balance of power between the President and Congress today. In the past few decades, changes in the budget process have shifted a significant amount of control from the President to the Congress. The effect of this shift, viewed in light of the ambiguous nature of the veto provisions and the ideological foundations of the Constitution, leads to the conclusion that the Presentment Clauses should be read as authorizing the item veto.

I. The Item Veto and the Constitutional Convention

A. *Introduction*

When the Framers gathered to draft the Constitution in May 1787, they brought the sum of their educational and practical experience to bear. Schooled in Locke and Montesquieu, they had seen the principles of the English Constitution, once thought to be "[t]he noblest improvement to human reason,"[19] corrupted by the tyranny of man. Likewise, they had seen the mistakes made by state governments. This Part reviews the events leading up to the Constitutional Convention and analyzes the Framers' action with respect to the item veto.

B. *The Pre-Revolutionary Period*

The American colonists' early experience with the executive veto, although varied, included substantial experience with the item veto.[20] In the proprietary or self-governing American colonies, the governor possessed absolute veto power. In the pro-

18. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

19. G. Wood, *supra* note 1, at 32 (quoting an early American columnist).

20. The English Constitution contained an absolute negative possessed by the Crown, the House of Lords, and the House of Commons. A single no vote was sufficient to defeat pending legislation. *See* E. Mason, The Veto Power 17 (1891). After the Glorious Revolution of 1688, the negative voice, as directed against acts of Parliament, fell into disuse. *See* G. Wood, *supra* note 1, at 24.

prietary colony of Pennsylvania, the governor's proposed legislation originally was sent to tribunals. If the tribunals approved the legislation, it became law; if they withheld their consent, it failed.[21] That system was eventually changed, and the colonial governor, either a member of the Penn family or, later, its designee, repeatedly exercised the item veto.[22]

In the royal colonies, the Crown used the veto.[23] Between 1696 and 1776, the Board of Trade, acting on behalf of the Crown, reviewed 8,563 pieces of legislation submitted by the American colonial legislatures.[24] The board subsequently vetoed 469 of these in part or in entirety. In 1702, the board declared its policy to be that bills "might be altered in any part thereof."[25]

The royal governors possessed an analog of the item veto over nominations by the lower house of the legislature (the general assembly) of persons for membership in the upper house.[26] The governor could selectively accept or reject any of the lower house's appointees.[27] For the royal governor, who was not infrequently at loggerheads with his general assembly, this selective or item veto enabled him to reject those nominees with dubious loyalty.[28] The colonists complained that King George III and his governors were withholding his assent from laws that were essential to the public welfare.[29] The American Whigs believed that while the government had become "sunk in corruption," the principles underlying the constitution had to be preserved.[30] This tension between the desire for continuity and the desire to end tyrannous abuses provided the backdrop for the American Revolution.

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21. *See* 6 W. SHEPHERD, HISTORY OF PROPRIETARY GOVERNMENT IN PENNSYLVANIA 41-42 (1967).

22. *See id.* The veto applied to both appropriations and other types of legislation.

23. *See* R. SPITZER, *supra* note 9, at 5.

24. *See* McDonald, *Line-Item Veto: Older Than Constitution*, Wall St. J., Mar. 7, 1988, at 16, col. 4. These 8,563 pieces of legislation were all the laws enacted by the legislatures of the nine royal colonies in this 80-year period. *See id.*

25. *Id.*

26. *See* McDonald, *The Framers' Conception of the Veto Power*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at 1, 2. The upper house acted as the governor's executive council analogous to a combination of today's Cabinet and Senate. *See* O. DICKERSON, AMERICAN COLONIAL GOVERNMENT: 1696-1765, at 158-59 (1962).

27. *See* McDonald, *supra* note 26, at 2.

28. *See, e.g.*, J. BURNS, CONTROVERSIES BETWEEN ROYAL GOVERNORS AND THEIR ASSEMBLIES IN THE NORTH AMERICAN COLONIES 117, 173-74 (1923).

29. *See* R. SPITZER, *supra* note 9, at 5. The colonists focused their complaints not against the King's negative, but rather against his abuse of this authority.

30. *See* G. WOOD, *supra* note 1, at 32, 43-45.

To many of the colonial legislatures, a veto meant a selective veto. As this selective veto and other tools were used by the British monarchy in an increasingly abusive fashion, the colonists sought to diminish the throne's power to ensure that the will of the people could not be overridden by an overly powerful executive.

C. *Post-Revolutionary Period: 1776-1787*

Following the Declaration of Independence, most of the state governments removed the executive's veto power. At the same time, the revolutionary governments preserved much of the ideology of the English Constitution. The new governments of the states closely resembled the colonial charters;[31] however, the revolutionaries saw fit to abandon certain anachronistic provisions.

The most significant departure from the colonial charters was the metamorphosis of the magistery. Motivated by the desire to rid the government of tyranny and bruised by their experiences under English rule, the drafters of the new constitutions obliterated the "kingly" nature of the executive and "absolutely divested [it] of all [its] rights, powers, and prerogatives."[32] Most states also sought to subordinate the executive to the legislature.

Not all states, however, abolished the governor's position in their new charters.[33] Pennsylvania took the most radical step by replacing the governor with a council of twelve representatives of the people,[34] clearly reflecting the post-revolutionary desire to keep the bulk of the power with the people. The 1776 draft of the Virginia Constitution, proposed by Thomas Jefferson, delineated numerous checks on the governor's power.[35] These checks were so abundant that the ultimate effect was to strip the governor of virtually all authority.[36] Most states recognized the need for an executive with some power. Some states established councils that participated in gubernatorial duties,

31. *See id.* at 134.
32. *Id.* at 136.
33. *See* R. SPITZER, *supra* note 9, at 8.
34. *See* G. WOOD, *supra* note 1, at 137.
35. *See id.* at 136-37. "The Constitution explicitly removed the governor's role in legislation, his control over the meeting of the assembly, his powers to declare war, make peace, raise armies, coin money, erect courts or other offices, and pardon crime." *Id.*
36. *See id.*

thereby diluting the authority of the executive.[37] The absolute negative enjoyed earlier by the colonial governors was generally viewed during this period as repugnant to the revolutionary spirit of most of the fledgling states.[38]

While lingering revolutionary fervor precluded governors' participation in writing legislation in most of the new states, the Massachusetts Bay Constitution gave the governor the opportunity to negative bills.[39] The governor was given the power of "revisal."[40] Although the constitution is ambiguous on the issue of the item veto, the choice of words may suggest the permissibility of selective application. No governor, however, exercised the veto authority before 1787.[41]

The Massachusetts Constitution came to represent the ideal of a perfect constitution.[42] It embodied the separation of powers among the three branches of the legislature: the House of Representatives, the Senate, and the governor, in descending authority. The governor was elected by the people and empowered with a veto that was subject to override by two-thirds of the House of Representatives and Senate. The veto was seen as a means of maintaining separation of powers by instituting a check on the legislature. It ensured the autonomy of the executive by preventing the legislature from chipping away at his rights.[43] Meanwhile, the possibility of a two-thirds override in-

37. *See id.* at 138.

38. *See id.* at 141. Even proponents of a stronger magistrate found the concept of one person exercising his will over that of society inconsistent with the newly formed concept of "authority." *Id.* With few exceptions, the revolutionary constitutions prohibited their governors from participating in the formulation of legislation. *See id.*

South Carolina experimented with an absolute veto in its 1776 constitution, but when Governor Rutlage actually attempted to use this power, the public protest forced Rutlage's resignation and reconsideration of the provision. *See* Watson, *Origins and Early Development of the Veto Power*, 17 PRESIDENTIAL STUD. Q. 401, 405 (1987). South Carolina's revised 1778 constitution denied the governor the veto power. *See id.*

39. *See* R. SPITZER, *supra* note 9, at 9-10.

40. *See* E. MASON, *supra* note 20, at 19 n.2. The Massachusetts Constitution of 1780 provides in pertinent part:

> No bill or resolve of the senate or house of representatives shall become law, and have force as such, until it shall have been laid before the governor for his revisal: and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto . . . .

MASS. CONST. art. II, ch. I, § I.

41. *See* McDonald, *supra* note 24.

42. *See* G. WOOD, *supra* note 1, at 434.

43. This new approach to providing the governor a voice in formulating legislation, coupled with bicameralism (division into two houses of legislative power), reflected a

dicated a new "suspensive" role for the veto; this qualified veto amounted not so much to a requirement that the governor assent to legislation as a mechanism for him to place a check on it.[44]

The New York Constitution of 1777 is instructive in that it provided for a strong executive with an implicit item veto. The constitution provided for a council of revision with the authority to assess all bills passed by the state legislature.[45] The council was comprised of the governor, the chancellor, and the judges of the state supreme court.[46] If a majority of the council had reservations, the bill was returned to the chamber from which it originated with comments.[47] The legislature would then enact the bill into law, incorporating the proposed revisions.[48] After the enactment, the law was again reviewed by the council of revision.[49] Although the New York Constitution of 1777 was ambiguous on the power to veto items selectively, on February 3, 1778, the council of revision set precedent in its first exercise of veto authority by taking exception to several clauses in a legislative enactment.[50] The legislation was later passed in its entirety, the offending clauses having been revised.[51] It thus appears that the council had selective or item veto authority.

The post-revolutionary period is also helpful in providing a background understanding of the veto power with respect to appropriations. Although appropriations were made by the legislatures, spending was almost totally discretionary in the hands of the governor.[52] For example, the 1776 Constitution of North Carolina, the Massachusetts Constitution of 1780, and

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growing view that power is no less dangerous in the hands of the representatives of the people than in the governor's hands.

44. *See* G. WOOD, *supra* note 1, at 452-53. As noted at the Massachusetts Convention of 1780, the governor was granted some legislative authority "not because, as in England, the magistracy was a social entity which must consent and thus bind itself to all laws," *id.*, but rather, because this veto ensured a balance among the three capital powers of government.

45. N.Y. CONST. of 1777, § III, *reprinted in* 7 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 168, 172 (W. Swindler ed. 1978). *See also* McDonald, *supra* note 26, at 3. The use of the term "revision" indicates that the framers of the New York Constitution thought of the veto as revisionary, not merely nay-saying, power.

46. *See* N.Y. CONST. of 1777, § III.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See* McDonald, *supra* note 24.

51. *See id.*

52. *See* McDonald, *supra* note 26, at 3.

the New Hampshire Constitution of 1784 all explicitly stated that no money could be removed from the public treasury without the consent of the governor.[53] The legislatures made lump-sum appropriations, and the governor allocated—or chose not to allocate—those funds as he saw fit within proscribed legislative boundaries.[54] This power of impoundment, which functioned in much the same way as an item veto, gave the governor discretionary authority over appropriations.[55]

D. *Changing Ideology—A Prelude to the Constitutional Convention*

The 1780s again witnessed a gradual shift of sentiment toward the appropriate structure of government. The people's fear of centralized authority, which at this point rested in the state legislatures, increased. This was accompanied by a growing cleavage between large property owners and other classes of society. After the adoption of the Articles of Confederation, characterized by the states' refusal to relinquish control and emphasis on a strong legislature,[56] growing recognition of legislative licentiousness created pressure for a stronger executive. The changing ideology reflected the observation, based in experience, that a concentration of power *anywhere* is potentially bad (even in an elected, representative body).[57]

By the time of the Constitutional Convention, prevailing wisdom argued that a stronger central government was essential.[58] At the same time, the Framers recognized the shortcomings of a headless government.[59] They sought to remedy this problem

53. *See id.*

54. *See id.*

55. *See infra* notes 114-17, 121-38 and accompanying text (discussing further executive's impoundment and its impact on the balance of power).

56. *See* ARTICLES OF CONFEDERATION art. II. The Articles contained no veto provision.

57. Madison, for example, expressed the fear that, in a system dominated by a majoritarian legislature, the few would be unnecessarily sacrificed to the many. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* THE PAPERS OF THOMAS JEFFERSON, 1788-1789, at 20 (J. Boyd ed. 1964).

58. Edmund Jennings Randolph opened the Constitutional Convention by enumerating the defects of the Confederate government. *See* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127 (J. Elliot ed. 1901) [hereinafter DEBATES]. He noted, in particular, the lack of security against foreign invasion and the lack of federal authority to check infighting among the states. *See id.*

59. *See* R. SPITZER, *supra* note 9, at 10. The Articles of Confederation had required concurrence of all 13 states to execute measures of importance to the union. *See id.* This restriction had virtually halted the operation of the national government. *See* THE FEDERALIST No. 15, at 106 (A. Hamilton) (C. Rossiter ed. 1961).

by strengthening the executive and dividing the powers of the federal government among three discrete branches.[60]

The doctrine of separation of powers thus became an underlying theme for the Framers. Although historians have suggested that separation of powers meant nothing more than a bar to duplicitous office-holding,[61] a closer examination of its application indicates that the doctrine was intended to keep the judiciary and the legislature from becoming like the power-amassing executive.[62]

E. *The Constitutional Convention—Adoption of the Veto Provision*

The Framers effected the dissemination of power within a strong central government by dividing the governing powers among the legislature, the executive, and the judiciary. The enumeration of the legislature's power in Article I of the Constitution is evidence of its primacy in the federal scheme.[63]

To ensure the autonomy of the three branches, the Framers sought institutionalized checks on the divided powers.[64] The dominance of the legislature, for example, necessitated a defense mechanism for the executive—the veto power. Because presentment and the veto power are inextricably intertwined, they were considered together at the convention. The discussion focused on whether this "check" was necessary and, if so, whether it should be held solely by the executive or shared with a council of revision. The Presentment Clauses were written to give the executive alone some means of defending against the usurpation of power by the legislature as well as to protect against the enactment of ill-conceived legislation.[65] Although the debates of the convention attest to the battles waged to secure approval of the Presentment Clauses, they offer scant insight into whether the item veto was included within those clauses' scope.

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60. *See* 5 DEBATES, *supra* note 58, at 127.

61. *See* G. WOOD, *supra* note 1, at 156.

62. *See id.* at 157.

63. *See* THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961). There was not absolute unanimity on the supremacy of the legislature, however. John Adams predicted the ultimate collapse of the government because the executive was rendered virtually powerless against its natural adversary, Congress. *See* L. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 51 (1948).

64. Madison commented that "[a]mbition must be made to counteract ambition." THE FEDERALIST No. 51, *supra* note 63, at 322.

65. *See* THE FEDERALIST No. 73 (A. Hamilton).

1. *Adoption of the Bills Presentment Clause*

On May 25, 1787, the Constitutional Convention convened. Edmund Jennings Randolph of Virginia opened business on May 29.[66] He proposed several resolutions, one of which provided for a council of revision—comprised of members of the judiciary—to examine acts of the national legislature and veto such acts that it deemed unsuitable.[67] A proposal for an executive negative also appears in a draft of a federal constitution presented to the convention on the same day by Charles Pinkney of South Carolina.[68]

On June 4, Randolph's proposal for a council of revision was taken up for debate.[69] Elbridge Gerry moved to postpone consideration of the issue because he believed that the judiciary ought not to be included in the legislative process.[70] Wilson and Hamilton wished to provide the executive with an absolute negative.[71] After some discussion, this proposal was defeated.

The council of revision proposal was reconsidered on June 6.[72] Madison supported the participation of judges, arguing that they could bolster the executive's resolve and prevent him from being wooed by the legislature.[73] He also noted that this check would prevent encroachment on the judiciary by the legislature. After Gerry argued that the executive could be more impartial when standing alone, the council of revision proposal was rejected.[74]

Having not received approval by the convention, the executive negative was once again the topic of debate on June 18. Alexander Hamilton presented to the convention his plan for the government, the fourth clause of which provided for a supreme executive authority to be vested in a governor with

66. *See* 5 DEBATES, *supra* note 58, at 127.

67. *See id.* at 128. Randolph's resolution, it appears, is derived from Madison's prior suggestion that appeared in a letter dated April 8, 1787. *See id.* at 107-08. Madison proposed that the national government "have a negative, in all cases whatsoever, on the legislative acts of the states, as the King of Great Britain heretofore had." *Id.*

68. *See id.* at 128.

69. *See* 4 DEBATES, *supra* note 58, at 623.

70. *See* 5 DEBATES, *supra* note 58, at 151.

71. *See id.* Gerry responded that, because the legislature would be comprised of the country's best, an absolute negative would be an unnecessary check. *See id.*

72. *See id.* at 164.

73. *See id.*

74. *See id.* at 154, 165-66. It was also noted that, standing alone, the executive would be the party with ultimate responsibility. *See id.*

veto power.[75] This proposal was ultimately reported in a draft of the Constitution on August 6.[76] On August 15, Madison moved once again to include the judiciary in the revisionary process. The proposal was rejected,[77] and the Bills Presentment Clause was adopted in its present form.[78]

2. *Adoption of the Orders Presentment Clause*

Another of Madison's suggestions did, however, provide the genesis for the Orders Presentment Clause.[79] On August 15, Madison observed that Congress could circumvent the executive veto by identifying a bill as an act or resolution.[80] Accordingly, he proposed that the language of the Bills Presentment Clause be amended to include more expansive terms.[81] After a rather confused discussion, the proposal was rejected.[82] The following day, Edward Jennings Randolph, at Madison's urging, proposed that all orders, resolutions, and votes requiring the approval of both Houses be presented to the President.[83] The language of Randolph's proposal was essentially lifted from a similar provision in the Massachusetts Constitution of 1780.[84]

The origin of the orders presentment clause of the Massachusetts Constitution, although rooted in the pre-revolutionary era, is particularly illuminating, because it served as a model for the Orders Presentment Clause of the United States Constitution.[85] In 1721, the Massachusetts legislature sought to circumvent a possible veto by the Board of Trade by calling its appropriations measure for the year a resolution rather than a

75. *See id.* at 205.

76. *See* 4 DEBATES, *supra* note 58, at 624.

77. *See* 5 DEBATES, *supra* note 58, at 428. Two reasons have been suggested for the rejection of Madison's proposal: (1) Judges might render biased opinions on legislation, having previously reviewed laws in a revisionary capacity; and (2) the Framers desired to keep the judiciary at a distance from the political process. *See* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 886 (1833).

78. *See* 4 DEBATES, *supra* note 58, at 624.

79. *See* NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 461-66 (A. Koch ed. 1966) [hereinafter NOTES ON THE DEBATES].

80. *See* 5 DEBATES, *supra* note 58, at 431.

81. *See id.* Madison suggested that the term "or resolve" be included after "bill." *See id.*

82. *See id.*

83. *See* NOTES ON THE DEBATES, *supra* note 79, at 466.

84. *See, e.g.*, THE FEDERALIST No. 69, at 416 (A. Hamilton) (C. Rossiter ed. 1961).

85. *See* E. MASON, *supra* note 20, at 19 n.2.

bill.[86] This legislative "game of words" was successful until 1729.[87] The legislature then passed appropriations measures as votes.[88] Both methods of renaming appropriations bills allowed the legislature to bypass the royal governor and the Board of Trade.[89] By 1733, the Massachusetts colony had outspent itself, and the House of Representatives itself gave the governor an institutional check on the legislature by providing for the presentment of all orders, resolutions, and votes.[90] This provision was subsequently incorporated into the Massachusetts Constitution of 1780.

In light of the Massachusetts experience, the Framers recognized the need for comprehensive language to check congressional spending. After Roger Sherman of Connecticut observed that the Orders Presentment Clause was unnecessary except for appropriations bills, it was approved.[91]

3. *Conclusions*

In absolute terms, little can be drawn from the records of the Constitutional Convention with respect to the item veto. Certainly, the Framers intended to protect the President from legislative usurpation by empowering him with an institutional weapon to wield in the legislative process. Yet the reach of this weapon remains unclear. The Framers' non-inclusion of an explicit item veto provision, it could be argued, is indicative of their disapproval. Equally compelling, however, is the view that the language was deliberately left opaque to allow for possible contingencies in the application of the veto power. It is clear that the Framers, in light of the Massachusetts experience, considered the prospect of congressional avoidance of the veto and sought to prevent it by drafting the Orders Presentment Clause.

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86. *See* 3 H. OSGOOD, THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 185 (1924). The Board of Trade was only empowered to review bills.

87. *See id.*

88. *See* J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 57 (1966).

89. *See id.*

90. *See id.* For the remainder of the colonial period, the legislature was restrained, and spending became under control.

91. *See* 5 DEBATES, *supra* note 58, at 431. There was no other discussion of the differential application of the veto to appropriations bills and other types of legislation.

F. *Framers' View of the Constitutional Language*

Although some opponents of the item-veto authority draw a negative inference from the Constitution's silence and look to history to argue that the fear of a powerful executive precluded the possibility that the Framers would have authorized an item veto,[92] their arguments fail to provide a dispositive answer on the question. Alexander Hamilton, in delineating the scope of the executive's powers, analogized the President's role in developing legislation to that of the governors of New York and Massachusetts.[93] Recognizing the United States Constitution's departure from the absolute negative employed by the British sovereign, Hamilton likened the executive veto to the "revisionary authority" granted by the New York Constitution.[94] Hamilton then equated the presidential veto with that found in the Massachusetts Constitution and observed that it served as the model from which the presentment clause was derived. He wrote that the presidential veto power "would be exactly the same with that of the governor of Massachusetts, whose contribution, as to this article, seems to have been the original from which the convention have [sic] copied."[95] Hamilton thus left open the possibility of item-veto authority.

II. An Evolutionary Process: The Veto Since 1789

A. *Introduction*

Opponents of the constitutionality of the item veto contend that a power that has not been claimed by any president for 200 years needs more than an assertion.[96] Some have argued that

92. *See* Wolfson, *supra* note 11, at 844 (abuse of veto power by colonial executives demonstrated to Framers the desirability of giving spending power to lower houses); Edwards, *The New Congress's No. 1 Priority*, N.Y. Times, Jan. 26, 1987, at A35, col. 2 (acquiescence to an "imperial Presidency" threatens the foundation of our government). *But see* Best, *supra* note 13, at 188 (concluding the Framers would authorize an item veto to restore proper balance to executive).

93. *See* The Federalist No. 69, at 416-17 (A. Hamilton) (C. Rossiter ed. 1961).

94. *See id.* (President's qualified negative "tallies exactly" with revisionary authority granted by New York's Constitution). Hamilton noted, however, that the President's veto authority actually exceeded the New York governor's, because the President exercises the authority alone, while the governor was but one member of a revisionary council consisting also of a chancellor and judges. *See id.*

95. *Id. See also* E. Mason, *supra* note 20, at 19 n.2 (federal constitutional provision of veto power is improved version of Massachusetts provision).

96. *See* Bork, *Epilogue: The Decline of Presidential Power*, in Pork Barrels and Principles, *supra* note 11, at 57 (solution to balance-of-power shift that no one has thought of for 200 years bears burden of persuasion).

because the power has never been invoked, it cannot possibly be in the Constitution. Although it is true that the Supreme Court has never adjudicated the constitutionality of an implicit item veto, a variation of the item-veto power, presidential impoundment, has been employed by presidents throughout most of the history of the Constitution.[97]

B. *Executive Interpretation of the Veto Provision*

The practice of attaching riders to appropriations bills and other significant measures commenced in the United States Congress in 1820 when a bill for the admission of Maine was "amended" by adding a bill for the admission of Missouri.[98] Congress soon began using these riders as a means of coercing the President into assenting to measures he would certainly veto if presented individually.[99] This practice grew to excess by 1861, when the item veto was incorporated into the Constitution of the Confederacy.[100] After the Civil War, several states sought to incorporate explicit item veto provisions into their constitutions to promote efficient fiscal policy.[101] Although some governors have interpreted their state constitutions to sanction an implicit item veto, most state courts have not accepted such an interpretation.[102] These state court decisions,

97. *See infra* notes 114-17, 121-38 and accompanying text.

98. *See* E. MASON, *supra* note 20, at 48 n.1 (detailing history of legislative riders). *See also* Glazier, *Reagan Already Has an Item Veto*, Wall St. J., Dec. 4, 1987, at 14, col. 4. The term rider developed in the pre-Civil War era as Congress, with growing frequency, attached irrelevant amendments to appropriations bills in an effort to subvert the President. *See id.* Correspondingly, the term line-item veto was coined to characterize the executive response to this gradual limitation of his authority. *See id.*

99. *See* E. MASON, *supra* note 20, at 48. Initially, coercive riders were used by one house of Congress to coerce the other. *See id.* at 48 n.1.

100. *See* R. SPITZER, *supra* note 9, at 126. The item veto was introduced by Robert H. Smith as a means of empowering the President to arrest corruption and illegitimate expenditures. *See* Ross & Schwengel, *supra* note 11, at 69.

101. *See* R. SPITZER, *supra* note 9, at 134-35. Today, 43 states have an item veto specifically authorized by their constitutions. With the exception of only one state, every state admitted to the union since the Civil War, and many older states, have granted the item-veto authority to their governors. *See id.* at 134. Eleven states have a partial veto that allows the governor to reduce or delete items in appropriations bills. Early this century, several governors sought to expand their ordinary vetoes into partial vetoes, thereby increasing their participation in the legislative process. *See* Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1564 (1974).

102. In only one case, Commonwealth v. Barnett, 199 Pa. 161, 48 A. 976 (1901), has a state court sustained the governor's expansive interpretation of his veto authority. The *Barnett* Court noted that the advent of "omnibus bills," "riders," and "logrolling" subverted the executive's control over the legislative process. This balance of power, the court stated, could be restored by allowing the governor's interpretation to stand.

however, offer little insight as to how the issue should be resolved at the federal level. Each state constitution has its own unique structure and provisions and was approved under unique circumstances; in no other area of constitutional law do we expect the United States Supreme Court, in deciding cases under the United States Constitution, to follow state courts' interpretations of *state* constitutions.

In the absence of an explicit grant of authority, numerous presidents have appealed to Congress to pass a constitutional amendment granting them explicit item-veto power. The first such recorded appeal came in 1873, when President Grant recommended in his message to Congress a constitutional amendment to give the executive a discretionary veto.[103] In response to this request, Representative Faulkner of West Virginia proposed a constitutional amendment giving the President an item veto for appropriations bills.[104] This proposed amendment, of course, was never approved.

President Grant's request was renewed by Presidents Hayes and Arthur in 1879 and 1882, respectively. President Hayes was particularly frustrated by legislative riders, vetoing five appropriations bills in 1879 alone.[105] President Hayes systematically vetoed these measures on constitutional grounds, arguing that the attachment of riders "strikes from the Constitution the qualified negative of the President."[106] Hayes suggested a restoration of executive powers through the item veto.[107]

President Arthur was equally frustrated by the "serious pub-

Other state courts, however, have declined to follow the reasoning of *Barnett*. *See* Fairfield v. Foster, 25 Ariz. 146, 214 P. 319 (1923); Wood v. Riley, 192 Cal. 293, 219 P. 966 (1923); Stong v. People *ex rel.* Curran, 74 Colo. 283, 220 P. 999 (1923); Fergus v. Russel, 270 Ill. 626, 110 N.E. 887 (1915); Nowell v. Harrington, 122 Md. 487, 89 A. 1098 (1914); Mills v. Porter, 69 Mont. 325, 222 P. 428 (1924); Peebly v. Childers, 95 Okla. 40, 217 P. 1049 (1923); Regents v. Trapp, 28 Okla. 83, 113 P. 910 (1911); Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405 (1911); State *ex rel.* Jamison v. Forsyth, 21 Wyo. 359, 133 P. 521 (1913).

103. *See* Ross & Schwengel, *supra* note 11, at 69. Under President Grant's proposal, any rejected provisions would be subject to a two-thirds override, as is the case for entire bills under the Presentment Clauses. *See id.* Grant also recommended a cessation of legislation 24 hours prior to adjournment to give the President an opportunity to veto eleventh-hour bills. *See* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 242 (J. Richardson ed. 1899) [hereinafter COMPILATION] (President Grant's Fifth Annual Message to Congress, December 1, 1873).

104. *See* H.R.J. Res. 45, 44th Cong., 1st Sess., 4 CONG. REC. 477 (1876).

105. *See* Ross & Schwengel, *supra* note 11, at 70.

106. R. SPITZER, *supra* note 9, at 60 (quoting 4 MESSAGES AND PAPERS OF THE PRESIDENT 4483 (1913)). *See also* E. MASON, *supra* note 20, at 48.

107. *See* E. MASON, *supra* note 20, at 137.

lic mischief" he saw in the congressional practice of combining a wide array of appropriations, diverse in both their nature and subject. Arthur's 1882 message to Congress eloquently stated that appropriations tended to snowball, as citizens from one state demanded the benefits being extended to citizens from another state, thus simultaneously making a bill more objectionable and securing it more support.[108] He implored Congress to restrict appropriations to specific internal improvements or, alternatively, to give the executive the explicit constitutional power to veto individual items.[109] He reiterated his proposal in 1883 and again in 1884.

Subsequent presidents, with one exception, have been equally vocal about the need for an item veto. Franklin Roosevelt, Harry Truman, and Dwight Eisenhower all urged Congress to give the President an item veto either through legislation or through a constitutional amendment.[110] President Reagan repeatedly urged both Congress and the public that an item veto would restore order to the budget process.[111]

President Taft was the only president who did not support the item veto. Although he found the prevalence of congressional riders to contravene the efficiency of the legislative process, he thought that the item veto would give the President undue power.[112] He suggested that the remedy for excessive expenditures already existed: Through the electoral process, the people could voice their displeasure with runaway spending and oust the party responsible.

Opponents of the item veto have attempted to infer from the numerous presidential requests for a constitutional amendment or legislation explicitly authorizing the item veto, and from the fact that presidents have not ever employed an item veto,[113] that there is no implicit item veto power in the Constitution. Such an inference is not warranted, however. Presidents could have faced serious political repercussions from using an express item-veto power. Moreover, presidents have accom-

108. *See* R. SPITZER, *supra* note 9, at 61.

109. *See* 8 COMPILATION, *supra* note 103, at 138.

110. *See* Ross & Schwengel, *supra* note 11, at 72.

111. *See President Ronald Reagan on the Line-Item Veto*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at xiii (excerpts from the President's Radio Address to the Nation, November 8, 1986).

112. *See* Ross & Schwengel, *supra* note 11, at 72.

113. *But see* Crovitz, *President Bush Exercises the So-Sue-Me Line-Item Veto*, Wall St. J., Nov. 21, 1990, at A15, col. 3.

plished the same objective by employing other means already at their disposal. The rest of this Section examines two such means: the impoundment of funds and the use of "signing statements."

President Grant provides an early example of a president's using impoundment effectively to strike out provisions of an appropriations bill. President Grant was presented with a river and harbor bill that he signed into law, while at the same time objecting to Congress that certain harbor improvements sought in the bill did not serve the national interest.[114] He vowed that, during his administration, no public money would be expended on the improvements of which he disapproved.[115] No objection was made to the President's interpretation.[116] Since then, such approaches have repeatedly been used.

President Bush has made extensive use of "signing statements" as a "second-best" substitute for the item veto. He has already used this mechanism with respect to at least forty-one provisions of more than twenty bills passed by Congress.[117] In these instances, President Bush signed the legislation, but declared in his signing statements that certain provisions will not be enforced. Thus far, President Bush has restricted this technique to provisions he considers unconstitutional. He has not used signing statements to excise "pork" from spending bills, but his practice to this point establishes precedent for the practice of choosing which provisions of a "bill" will be enforced and which will be unenforced.

C. *Judicial Interpretation of Presentment Clauses*

The federal judiciary has not conclusively passed on whether the Constitution implicitly grants item-veto authority to the President. Because no president has yet tested the reaches of the Presentment Clauses by attempting to veto specific items in a bill, the Supreme Court has not had the opportunity to rule on the constitutionality of the item veto.

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114. *See* E. MASON, *supra* note 20, at 104.

115. *See id. See also* Ross & Schwengel, *supra* note 11, at 70 (text of Grant's message to Congress).

116. *See* E. MASON, *supra* note 20, at 104.

117. *See* Crovitz, *supra* note 113. *But see* Lear Siegler, Inc., Energy Products Div. v. Lehman, 842 F.2d 1102 (9th Cir. 1988) (Executive Branch cannot refuse to abide by certain provisions of statute signed by the President, even if President considers those provisions unconstitutional).

In *Lear Siegler, Inc., Energy Products Division v. Lehman*,[118] however, the United States Court of Appeals for the Ninth Circuit did state that the item veto does not exist in the Constitution. In that case, the Ninth Circuit held that the Navy acted in bad faith in disregarding part of the Competition in Contracting Act of 1984.[119] When signing that legislation into law, President Reagan stated that he considered certain provisions of the law to be unconstitutional based on separation of powers, and that the Executive Branch would therefore not enforce those provisions. The Ninth Circuit, however, ruled that the contested provisions were constitutional, and awarded legal fees to the plaintiff on the ground that the government acted in bad faith by refusing to enforce the law as passed by the Congress and signed by the President.

Though the Ninth Circuit in *Lear Siegler* indicated its belief that the item-veto power is not granted by the Constitution, the case did not turn on the existence of an item-veto power, because the President did not expressly exercise such power. Moreover, the legislation in question was not an appropriations bill. Finally, one cannot ignore the fact that the court's opinion was undoubtedly in large part a response to the President's effort to define the constitutionality of the provisions in question, thereby threatening the province of the judiciary.[120]

III. The Crisis in the Balance of Powers

During the past seventy years, a fundamental shift has occurred in the balance of power between Congress and the Executive Branch. Two main factors have contributed to this crisis and are considered here. The first is the erosion of the President's impoundment authority. The second is the advent of the omnibus budget reconciliation bill and omnibus appropriations measures. These two factors have handcuffed the President's ability to influence legislation and have rendered his veto authority nearly meaningless.

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118. 842 F.2d 1102, 1124 (9th Cir. 1988).

119. *See Lear Siegler*, 842 F.2d at 1121.

120. *See id.* at 1125 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)):

> We also note that in declaring the [Competition in Contracting Act] stay provisions unconstitutional and suspending their operation, the executive branch has assumed a role reserved for the judicial branch. It hardly need be repeated that "it is emphatically the province and duty of the judicial department to say what the law is."

A. *Erosion of Presidential Impoundment Authority*

Presidents have historically regarded appropriations as subject to executive discretion.[121] President Washington received relatively general appropriations bills and used impoundment as a means of controlling spending.[122] In 1803, Thomas Jefferson refused to expend $50,000 that had previously been appropriated for gunboats to protect the Mississippi River—a function no longer required after the Louisiana Purchase.[123] Subsequent presidents continued to withhold appropriated funds, although this practice was generally confined to "pork-barrel" appropriations.[124]

In 1838, the constitutionality of impoundment[125] was challenged in *Kendall v. United States ex rel. Stokes*.[126] In *Kendall*, the Supreme Court was called upon to assess the propriety of the decision of President Jackson's Postmaster General to withhold what he believed to be excessive remuneration for a delivery contract.[127] To resolve the contract dispute, Congress ordered the Postmaster General to pay whatever amount was agreed upon by an outside arbitrator. The Postmaster General ignored the congressional mandate and chose to pay only the amount he thought warranted and impounded the remainder. The Court did not accept the administration's interpretation of the President's obligation to faithfully execute the laws as conferring upon his office the power to forbid their execution.[128]

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121. *See* L. FISHER, PRESIDENTIAL SPENDING POWER 148 (1975) (Executive Branch regards appropriations as permissive).

122. *See id.*

123. *See id.* at 150.

124. *See* Note, *Addressing the Resurgence of the Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 696 (impoundment targeted at pork-barrel bills). "Pork-barreling" refers to the congressional method of securing votes for legislation by which one congressman conditions his support for a colleague's bill on the colleague's support for his own. The resulting multi-faceted appropriations bill is then presented to the President. *See* Ross & Schwengel, *supra* note 11, at 75 (pork-barreling presents the president with an impossible choice).

125. Impoundment is defined as any action or inaction by the executive that effectively prevents the expenditure of monies previously allocated for a particular program or project. *See* Note, *supra* note 124, at 693 n.2. This Note delineates two types of impoundment, "routine impoundment," which is used to achieve savings, and "policy impoundment," which is used by the executive to obstruct funding of programs that the executive finds repugnant. *See id.* at 694. Generally, if the executive and the legislature concur, the impoundment is classified as routine; if they disagree, the impoundment is classified as a policy impoundment. *See id.* at 695.

126. 37 U.S. (12 Pet.) 524 (1838).

127. *See Kendall*, 37 U.S. (12 Pet.) at 527. The complaint was lodged by Mr. Stokes, who had secured the delivery contract. *See id.*

128. *See id.* at 613 (holding that writ of mandamus could issue directing Postmaster

Although the *Kendall* Court held that impoundment was not an inherent power, subsequent presidents continued to justify the practice on the basis of statutory authority,[129] or as a function of their role as commander-in-chief.[130] Throughout World War II, the president used impoundment as a fiscal policy tool.[131] This practice increased dramatically during the administration of Lyndon Johnson.[132] Congress, recognizing that President Johnson's impoundments were fiscally motivated, was generally supportive.[133]

President Nixon's subsequent use of impoundment met with no such congressional acquiescence.[134] During his first term, President Nixon encountered a congressional mandate to impound in the form of a mandatory, across-the-board reduction in spending.[135] As the President zealously imposed spending cuts in excess of those mandated by Congress, however, it became clear that several Democratic programs were imperiled.[136] Nixon focused his impoundments on public works, environmental appropriations, and public welfare programs, prompting critics to characterize his impoundments as a means of effecting his agenda rather than ensuring fiscal responsibility.[137] Nixon's unilateral spending decisions for the budget for fiscal year 1973 especially raised Congress's ire.[138] Congress responded by passing the Congressional Budget and Impound-

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General to comply with congressional directive). This case is exceptional, however, in that it involved an appropriation for payment for services already rendered. In the more common case, impoundment typically precludes payment for services that have not yet been rendered. *See* L. FISHER, *supra* note 121, at 159 (impoundment does not usually involve claim for services performed).

129. *See* L. FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 85 (1981) (impoundment justified by statutory authority or claim of executive right). Initial statutory authority was implicit in the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (repealed 1982). In 1950, an amendment to the Antideficiency Act of 1906, ch. 510, § 3, 34 Stat. 27, 48, gave the President explicit impoundment authority. *See* General Appropriations Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 595, 765.

130. *See* Note, *supra* note 124, at 696 (president's broad application of impoundment to defense appropriations justified by role as commander-in-chief).

131. *See id.* (wartime impoundment used to curb rampant congressional spending).

132. *See id.* (immense domestic impoundments began with Johnson administration).

133. *See id.* at 696-97 (Johnson's Great Society programs affected).

134. *See id.* at 697. *See also* J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 203 (1981) (Nixon deliberately flouted the will of Congress by deliberately provoking congressional opponents).

135. *See* J. SUNDQUIST, *supra* note 134, at 204 (1968 tax legislation required $6 million reduction in spending).

136. *See id.* at 205.

137. *See* Note, *supra* note 124, at 697.

138. *See id.* at 702 (Nixon vowed to impound expenditures in excess of $250 billion).

ment Control Act of 1974 (the 1974 Act), which was designed to proscribe sharply any future impoundments.

The 1974 Act requires the President to submit a report to Congress detailing his decision to withhold appropriated funds. If the withholding is temporary, it is considered a deferral, which is permitted only in certain circumstances.[139] If the President intends the withholding to be permanent, he must secure the support of both houses of Congress within forty-five days.[140] In the absence of congressional approval, the President must make the appropriated funds available.[141] The effect of the Act is to render executive exercise of the impoundment power almost nugatory, thus impairing the President's ability to influence legislation.[142]

Presidential impoundment was dealt another blow in 1975 by *State of Louisiana v. Brinegar*.[143] The case was brought by several states seeking injunctive relief to prevent the Secretary of Transportation from withholding highway funds authorized under the Federal-Aid Highway Act of 1956.[144] In granting the plaintiffs' motion for summary judgment, the court noted that the Executive Branch is precluded from impounding appropriated funds when the appropriations bill specifically prohibits impoundment.[145] In light of this ruling, Congress could further limit the President's role in spending decisions by prohibiting impoundment on precisely those bills where impoundment would be most effective.

This statutory limitation on presidential impoundment has necessitated a reexamination of the scope of the veto authority. For 200 years, presidents have used impoundment as an institutional budget-control device. This authority has provided a check on congressional appropriations by allowing the President some discretion over federal spending. In practice, impoundment functions in much the same way as an item veto would operate, by allowing the President to withhold his approval from specific spending measures as he deems prudent.

139. *See* 2 U.S.C. § 684(b) (1988).
140. *See id.* § 683(b).
141. *See id.*
142. *See infra* notes 146, 150-57 and accompanying text (discussing the effect of the 1974 Act on executive-legislative balance of power).
143. 388 F. Supp. 1319 (D.D.C. 1975).
144. *See id.* at 1321.
145. *See id.* at 1324 (such restriction is Congress's interpretation of the law and must be accorded due weight).

In the absence of both impoundment authority and item-veto power, the appropriations power of the President is drastically weakened, vis-à-vis Congress.

B. *Changes in Budget Process*

Other changes during the past two decades have also effected a gradual shift of power in the budget process from the Executive Branch to the Congress. Most notably, the Congressional Budget and Impoundment Control Act of 1974, enacted to streamline the federal budget procedure and impede presidential impoundment of appropriated funds,[146] resulted in a pronounced reduction in the President's role in the budget and appropriations process.

In 1921, the President was granted a more significant role in the development of the national budget.[147] In that year, Congress enacted the Budget and Accounting Act,[148] which directed the President to submit to Congress an annual national budget formulated with the assistance of the newly created Bureau of the Budget. Congress was then to make adjustments, subject to a majority vote.

Over the next fifty years, Congress increasingly found this process unworkable.[149] Congress enacted the 1974 Act based on this perceived loss of control and concerns raised by Watergate. In general terms, under the 1974 Act, the President offers broad budget goals in his annual budget; the Congress takes the budget under advisement and adopts its own budget goals. Individual spending bills are then reconciled with the goals set by Congress.

At the outset of the budget process, the President submits his budget recommendations to Congress.[150] By April 15, Congress is to complete action on a concurrent resolution on the

146. *See* Note, *The Intersession Pocket Veto and the Executive-Legislative Balance of Powers*, 73 GEO. L.J. 1185, 1210 (1985) (legislation curtails use of presidential impoundment); *id.* at 1212 (new budget procedure streamlines, coordinates, and brings responsibility to haphazard budget process).

147. *See* L. FISHER, *supra* note 121, at 9 (1921 point of origin for presidential spending power). Dr. Fisher cautions against interpreting this to mean that prior presidents played no role in the budget process. *See id.* at 10. For purposes of this discussion, I do not examine developments before 1921.

148. Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (repealed 1982).

149. *See* AM. ENTER. INST., PROPOSALS FOR LINE-ITEM VETO AUTHORITY 6 (1984) (beginning in 1950s, Congress paralyzed by budget process).

150. *See* 2 U.S.C. § 631 (1988).

budget for the following fiscal year.[151] This resolution is based on both the recommendations of each standing committee of the House of Representatives and Senate and on the President's recommendation.[152] In approving appropriations bills, the relevant appropriations committee must file a report comparing the outlays in those bills with the concurrent budget resolution.[153] Each house must consider and approve all appropriations bills prior to the July congressional recess.[154] Congress must then complete action on a second concurrent budget resolution by September 15.[155] This second budget resolution directs House and Senate committees to recommend legislative changes to reconcile expected program expenditures with the broad budget goals prescribed by the first concurrent budget resolution.[156] These recommendations are then incorporated into an omnibus budget reconciliation bill, to be approved by Congress by October 1, the beginning of the fiscal year.

The problem with this lengthy process lies in the interim phase, that is, the setting of budget goals with which the subsequent legislation must be reconciled. These goals are set with no presidential participation; the concurrent budget resolution requires no presidential signature. Following the initial submission of his budget proposal, the President does not formally participate in the process until his final approval of the omnibus budget reconciliation bill and appropriations bills. In light of the breadth of these huge pieces of legislation, a presidential veto at this stage would literally close down the government.[157]

IV. Legal Theories for the Item Veto

As discussed in Part I, the Framers intended the presidential

151. *See id.* § 632(a). Note that this resolution, like all concurrent resolutions, requires no presidential approval.

152. *See id.* § 632(d). The Congress, however, is under no compulsion to give *any* weight to the President's recommendations.

153. *See id.* §§ 638-639.

154. *See id.* § 640.

155. *See id.* § 641.

156. *See id.* § 641(a).

157. In 1987, for example, President Reagan was presented a continuing resolution of over 2,000 pages, providing appropriations for most of the federal government for fiscal year 1988. The measure was completed by Congress and presented to the President on December 22, 1987, at 10:45 p.m., only hours before the Congress adjourned. In light of the time constraints, the President was forced to sign the measure without fully reading the resolution. *See* Bartley, *supra* note 8.

veto to serve as a check and balance against congressional encroachment on the authority of the Executive Branch. Due to the erosion of the presidential impoundment power and changes in the way Congress now legislates, the veto power no longer adequately serves to maintain that balance. Item-veto authority would enable the President to reassert his authority and counteract the recent encroachment by Congress. This Part presents several legal theories for finding implicit item-veto authority in the Constitution.

One route to imputing an implicit item veto in the Constitution is to explore the Framers' understanding of the term "bill." The first of the Presentment Clauses provides that any bill requiring a vote of both houses shall be presented to the President for his approval.[158] A narrow interpretation of what constitutes a bill would obviate the need for an explicitly granted item veto. Some proponents of the item veto have argued that the Framers were unaware of the possibility of legislative "riders" and non-germane amendments. The argument follows that, at that time, "bill" referred to legislation free of such non-germane provisions. If this was the case, the President should be empowered with an item veto to restore the Framers' vision of legislative and executive balance.[159] This reading of history, however, appears incorrect.

The process of attaching riders, then known as "tacking," originated in 1667.[160] Tacking fell into disuse in the Eighteenth Century, as it became perceived as a means of evading constitutional principles.[161] It is likely that the Framers were aware of the procedure of attaching riders to legislation.[162] On the other hand, there is no evidence that the Framers foresaw the extent to which this practice would evolve.[163]

A related theory has been offered by Stephen Glazier to clar-

158. *See* U.S. CONST. art. I, § 7, cl. 2.

159. *See* Ross & Schwengel, *supra* note 11, at 77 (item veto would restore power to executive); Best, *supra* note 13, at 188 (veto power created by Framers "displaced and discredited"; item veto necessary to restore balance).

160. *See* R. SPITZER, *supra* note 9, at 7.

161. *See id.* (citing T. TASWELL-LONGMEAD, ENGLISH CONSTITUTIONAL HISTORY 613-14 (1946)).

162. *See* Edwards, *Of Conservatives and Kings*, 48 HERITAGE FOUND. POL'Y REV. 24, 26 (1989) (debunking argument that Framers' grant of congressional preeminence in appropriations occurred prior to the development of riders).

163. *See* L. FISHER, *supra* note 129, at 24 (the President is no longer given the opportunity to consider discrete measures).

ify the Framers' intent in drafting the Presentment Clauses.[164] He relies essentially on the Framers' reasoning in revising the executive veto by adding the Orders Presentment Clause to Article I, Section Seven. Glazier points out that the Framers drafted the clause requiring presentment and presidential approval of "resolutions" and "orders" as an additional means of protecting the President from congressional avoidance of the executive veto.[165] The Orders Presentment Clause was proposed to prevent Congress from bypassing the executive veto by labeling legislative acts as something other than "bills."[166] Glazier contends that this institutional check on congressional usurpation was an unequivocal act by the Framers to give the President veto authority over individual legislative enactments requiring bicameral approval. The Framers granted broad veto powers to preempt Congress's game of "form and name," intended to evade the requirement of presentment. Glazier concludes by extension that the President implicitly has the constitutional authority to "unbunch" today's omnibus spending bills by vetoing individual items or riders. Today's omnibus bills, he argues, are merely another device intended to evade and make meaningless the presentment process. He concludes that the item veto is an essential and constitutionally permissible means to beat Congress at its current round of the game of "form and name."

Glazier's point can be illustrated by a not-so-extreme example, by present standards. Under the present system, including the view of an "all-or-none" veto power, all legislative acts passed by a Congress in its two sessions could be labeled a "bill" and presented to the President for approval. The President would be forced to sign the "bill" or risk grinding the government to a halt if Congress could not override his veto. This plainly defies the Framers' intent. Unfortunately, a reading of the Presentment Clauses that does not include an implicit item veto presents no short-term barriers, other than political repercussions, to this abusive behavior. The juxtaposition of recent rates of reelection of members of Congress and the extraordinary propensity of Congress to bunch legislation

164. *See* Glazier, *supra* note 98.

165. *See id.*

166. *See* Glazier, *supra* note 12, at 10. *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 301-02, 304-05 (M. Farrand rev. ed. 1937).

into separate "bills" calls into serious question the effectiveness of electoral feedback in controlling Congress's present-day game of "form and name."

Another, more compelling argument for an implicit item veto in the Constitution relies on the doctrine of separation of powers. In this regard, it is important to note that the Supreme Court has not settled on a single approach to resolving separation-of-power issues of this type in the past.[167] In *Youngstown Sheet & Tube v. Sawyer*,[168] the justices offered no less than three distinct modes of assessing the limitations on President Truman's authority. In *Buckley v. Valeo*[169] and *Immigration and Naturalization Service v. Chadha*,[170] the Court adopted a "formal" approach. When conducting a formal analysis, the Court examines the text of the provision being challenged, the context of the language being used, and the Framers' intent.[171] The Court then looks to any precedent for enlightenment.[172] Finally, the Court considers past practice and congressional acquiescence.[173]

In conducting a formal analysis of the constitutionality of the item veto, the Court would first review, as we have done above, the text of Article I, Section Seven of the Constitution. Because the Presentment Clauses are silent on the subject of the item veto, the Court would then look at the context within which they were drafted. This would entail an analysis of both the meaning of the words of the clauses to the Framers, and the motivation for their inclusion in the Constitution. Although the evidence is by no means conclusive, an examination of the Constitutional Convention debates suggests that the Framers may have intended the president to enjoy item-veto power.

Continuing with the formal-analysis approach, there has been no prior executive assertion of item-veto power to provide a test case, and accordingly, no congressional acquiescence. Although several presidents have sought explicit item veto power through constitutional amendment, none has with-

167. *See* Note, *supra* note 146, at 1187.

168. 343 U.S. 579 (1952) (President Truman's seizure of steel mills exceeded scope of presidential power).

169. 424 U.S. 1 (1976) (per curiam).

170. 462 U.S. 919 (1983).

171. *See* Note, *supra* note 146, at 1188. *See also id.* at 1188 nn.16-19 (discussing the Court's use of the formal approach in *Buckley* and *Chadha*).

172. *See id.* at 1188.

173. *See id.* (past practice relevant but not determinative).

held his signature from select items in an appropriations bill. Certainly, 200 years of abstinence with respect to the item veto is probative, but the message to be drawn from this is unclear. Prior to the congressional roadblock erected by the 1974 Congressional Budget and Impoundment Control Act, presidents could effect their budgetary goals by impounding appropriated funds. Impoundment accomplished virtually the same end as an item veto. This practice of withholding appropriated funds, coupled with the insistence of nearly every post-Civil War era president on the propriety of an item veto, offers a legitimate explanation for 200 years of presidential practice. Ultimately, however, under a "formal" analysis such as that employed by the Supreme Court in cases involving the balance of power between the Executive and Legislative Branches, the constitutionality of the implicit item veto is not clear.

Separation-of-powers questions, however, are often resolved through a more functional approach, an approach that is more inclined to countenance an argument that the Constitution authorizes the item veto. Justice Jackson, for example, eschewed any approach that would precisely delineate the scope of each governmental branch's power. In his view, the Constitution disperses powers among the branches, entrusting politics to fashion them into a functioning whole.[174] Justice Powell similarly rejected the formal approach in his concurring opinion in *Chadha*.[175] He noted that the Constitution does not define the boundaries between the branches precisely,[176] but rather fixes them "according to common sense and the inherent necessities of governmental confrontation."[177]

This pragmatic analysis of separation-of-powers questions has been recognized by the majority of the Court in two recent decisions written by Justice O'Connor. In the 1984 case of *Thomas v. Union Carbide Agricultural Products Co.*,[178] the Court explicitly rejected "strict doctrinaire reliance on formal catego-

174. *See Chadha*, 462 U.S. at 978 (White, J., dissenting) (citing Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (Constitution diffuses power to ensure liberty, allowing practice to integrate powers into a workable government)).

175. *See id.* at 962-63 (Powell, J., concurring) (analysis should focus on functional impact of separation-of-powers doctrine).

176. *See id.* at 962 (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam)).

177. *Id.* (citing J.W. Hampton & Co. v. United Sates, 276 U.S. 394, 406 (1928)).

178. 473 U.S. 568 (1984) (Article III does not preclude Congress from vesting decisionmaking authority in tribunals that lack attributes of Article III courts).

ries."[179] Justice O'Connor cited Chief Justice Hughes's adoption of the substance-over-form approach to Article III inquiries.[180] The following year, in *Commodity Futures Trading Commission v. Schor*,[181] the Court rejected an unbending formalistic approach.[182] Instead, it balanced a number of competing factors, none of which was determinative, in order to assess the practical effect of Congress's decision to allow the Commodity Futures Trading Commission to adjudicate claims upon the constitutionally assigned role of the federal judiciary.[183]

Although these cases are limited to possible congressional intrusion into the province of the judiciary, the separation-of-powers analysis that the Court adopted is no less applicable to similar intrusions into that of the executive. Indeed, the Supreme Court has recently applied the functional approach in the executive-legislative context. In *Morrison v. Olson*,[184] the Court applied a functional approach in assessing the practical impact of congressional appointment of a special prosecutor on the balance of power between the Executive and Legislative Branches.[185]

Recent applications of the functional approach to separation-of-powers cases suggest that the item-veto power might be found in the Constitution. An overarching theme of these cases has been the preservation of checks and balances among the branches, in accordance with Madison's pronouncement that "the constant aim [of the Constitution] is to divide and arrange the several offices in such a manner that each may be a check on the other."[186] Justice Powell, arguing against a strict doctrinaire approach in *Chadha*, suggested that this aim may be subverted when one branch interferes impermissibly with the

179. *Thomas*, 473 U.S. at 587.

180. *See id.* at 586 (citing Crowell v. Benson, 285 U.S. 22, 53 (1932) (Congress could replace seamen's traditional negligence action in admiralty with statutory scheme of strict liability)).

181. 478 U.S. 833 (1986) (Commodity Futures Trading Commission's assumption of jurisdiction over common-law counterclaims not violative of Article III).

182. *See id.* at 851 (citing *Thomas*, 473 U.S. at 590).

183. *See id.* The Court focused on the concerns that drove Congress to divest the judiciary of some of its powers, thus departing from the requirements of Article III. *See id.* The Court also considered the extent to which the "essential attributes of judicial power," *id.*, were reserved to the judiciary.

184. 487 U.S. 654 (1988).

185. *See Morrison*, 487 U.S. at 685-97 (congressional appointment of "independent counsel" does not impermissibly interfere with the constitutional principle of separation of powers).

186. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

constitutionally assigned function of another or, alternatively, when one branch "assumes a function more properly entrusted to another."[187]

As discussed above, finding an implicit item-veto power would enhance the balance of powers, a balance that has been lost since the adoption of the Congressional Budget and Impoundment Control Act of 1974. The debacle of the 1988 federal budget process is illustrative. Congress's eleventh-hour submission of a 2,100-page continuing resolution clearly obviated the possibility of meaningful presidential participation in the legislative process.[188] Congress forced President Reagan to make the Hobson's choice of putting his imprimatur on a pork-rich budget or closing down the federal government.

Using a pragmatic analysis to assess the constitutionality of the item veto, the Supreme Court would review recent developments that have disrupted the delicate legislative-executive power balance. The statutory limitations on presidential impoundment imposed by the 1974 Act have circumscribed an area of executive power historically viewed as proprietary. Moreover, the lengthy budget process has effectively hamstrung presidential veto power. In view of the effect of the 1974 Act on this constitutionally assigned check on the legislature, the Court would be justified in finding that the item veto would simply restore the balance of power that existed before Congress's denial of the President's impoundment power.

Conclusion

It is time to recognize that an item veto for appropriations is consistent with the Framers' intentions. Today, Congress typically sends an amalgamation of unrelated legislation to the president for his approval. Meanwhile, Congress persists with the coercive pre-Civil War practice of attaching non-germane riders to appropriations bills. The current budget reconciliation process provides uncontroverted evidence of congressional supremacy that has developed over the past two decades. Most significantly, presidential impoundment, the President's major tool in the appropriations process, was severely restricted by the 1974 Congressional Budget and Impoundment

187. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 963 (Powell, J., concurring).

188. *See* Bartley, *supra* note 8.

Control Act.[189] Although the Framers were aware of legislative riders and other mechanisms used by legislatures to dominate the appropriations process, they certainly could not have anticipated the collection of factors that characterize the imbalanced budget process that we have today.

A presidential item veto would no doubt be difficult for Congress to swallow. It should be kept in mind, however, that Congress could override any item veto with a two-thirds vote. Therefore, if Congress felt strongly about a particular item, it could muster the votes necessary for its passage. In effect, the item veto would restore the Presentment Clauses to their intended function: a means for presidential self-defense and a protection against the enactment of ill-conceived legislation.

A formal analysis of the executive veto, while suggesting the possible existence of an implicit item veto, fails to provide unequivocal proof that the Framers intended for the President to have this authority. The Framers' silence on the subject of the item veto is not so damning, however, as its opponents would suggest. Rather, it provides a launching pad from which to pursue a functional analysis of the item veto in light of historical developments. Institutional changes of the past twenty-five years, including the Congressional Budget and Impoundment Control Act of 1974 and runaway congressional spending, have corrupted the delicate structure of shared powers effected by the Framers and made a mockery of the veto power. Equilibrium can only be restored by express recognition of item-veto authority in the Constitution. The time has come for the presidential veto to come of age.

189. The analysis of this Note may suggest an alternative route to redressing the balance-of-power crisis in the appropriations process: declaring unconstitutional the Budget and Impoundment Control Act on grounds of violation of separation of powers.