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FOREWORD

ETHICS AND THE LINE-ITEM VETO

JOHN H. ROBINSON*

In the Foreword to the Inaugural Issue of the *Notre Dame Journal of Law, Ethics & Public Policy*, Professor Douglas Kmiec offered the world a journal that would rigorously and consistently examine legal propositions through an ethical lens, thereby making practical application of the insights of both philosophy and the Judeo-Christian tradition to timely issues of public concern.¹ The articles included in the inaugural issue all, quite appropriately, focused on the relationship between law and morality, some in general terms, others in terms more closely tied to the role religion should play in determining public policy.

At first glance it might seem odd that this issue, the immediate sequel to the inaugural issue, should be devoted to the line-item veto. Isn't the item veto, after all, a perennial political football, sought by presidents and resisted by successive Congresses simply because the former want to increase their power and the latter resist any diminution in theirs? The short answer to that question is, "No." However tempting it is to reduce issues of this sort to matters of mere power, the item veto raises questions that conscientious politicians must address before they can cast a responsible vote on item veto proposals.

Foremost among the questions raised by the item veto is this one: What sort of duty does an elected representative have in a representative democracy, and how well do the current modes of forming majorities in our national legislature square with those duties? For a government that grounds its legitimacy in large part on the representativeness of its lawmakers, this question should be the first question that is

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1. Kmiec, *Why a Journal of Law, Ethics & Public Policy?*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1 (1984).

asked of any legislative practice, yet it is virtually never asked at all. Might it not be argued, perhaps even asserted as self-evident, that representatives have at least a *prima facie* obligation to their constituents to make an independent, personal judgment on each proposal that comes before the legislature? Isn't this precisely what we would require of ourselves in a direct democracy, faulting ourselves for unconsidered votes where with diligence we could have explored for ourselves the costs and benefits of a proposal?

If in the hypothesized direct democracy we had short-changed ourselves and our fellow citizens every time we gave approval to a proposal that we had not examined (in exchange, perhaps, for others' support for proposals of our own creation that they, in turn, had not examined), what is there about representative democracy that makes that process acceptable? The question is perhaps answerable, but it surely deserves to be asked. It can be argued that law-making in a society as vast and heterogeneous as ours has become so complex that any attempt to analogize what goes on in Congress to how a direct democracy might work or fail to work is more likely to mislead than it is to enlighten. The force of that argument is, of course, a function of the actual complexity of the law-making process. If each legislator's attending to the merits of each proposal put before the legislature is impossible, then it is also undesirable. If, on the other hand, an item veto, in at least some of its forms, would encourage legislators to take responsibility for each item that their vote endorses, and if thereby their duty to their constituents would be more fully discharged, then the item veto is deserving of consideration in a journal devoted to law, ethics, and public policy.

Another question raised by item veto proposals is this: What obligation do officials have to the Constitution? More precisely, what obligation do they have to the system of checks and balances that the founders so artfully wove into the horizontal separation of power among the legislative, executive, and judicial branches of the national government? They all take an oath to support and defend the Constitution;² we rarely note the surface oddity of making the Constitution and not the nation or the people the object of our officials' sworn fealty. It may be that Robert Bellah is correct in seeing the Constitution as the equivalent of the Covenant in

2. See 5 U.S.C. §3331 and U.S. CONST. art. VI, cl. 3; cf. U.S. CONST. art. II, §1, cl. 8 (presidential oath).

the experience of the Mosaic Jews and in the practice of colonial protestantism.³ In any event, all of our national officials owe a duty to the Constitution that transcends both their loyalty to party and their desire to see any particular political purpose achieved. When, therefore, it is alleged that something as important as the appropriations process is no longer consistent with what the Constitution requires, that allegation deserves attention, lest *realpolitik* displace the Constitution as the ultimate test of the legitimacy of a legislative practice. Such an allegation is, of course, central to the Constitutional case for an item veto, just as the claim that the item veto would radically alter the balance of powers is central to the Constitutional case against the item veto. Whatever the merits of the cases pro and con, it is hard to see how a responsible elected official could fail to look beyond issues of short-term self-interest to the abiding questions of constitutional structure that the item veto debate raises.

On a somewhat less lofty plane, it is more than merely arguable that the national legislative process itself is out of control, that the colossal deficits of recent years suggest a serious failure of both intelligence and will on the part of those whom we have elected to exercise both wisdom and courage, and that this failure is a culpable one, victimizing this generation by the foolish or venal allocation of funds and the next generation by the debt and decay that they will inherit.

It is, perhaps, this sense of a process run amok that gives line-item proposals their current urgency as it is their perceived utility as budget-improving devices that will determine their political fate. Here too an ethical concern surfaces for the conscientious public official. At what point do legislators' duties reach beyond the service of their immediate constituencies within the limits of business as usual and impose upon them a duty to take responsibility for the process itself in which business as usual is conducted? The strongest candidate for that point would be the point at which business as usual begins to disserve the nation at large, when the consequence of each legislator's maximizing the return on his district's investment in him, or on hers in her, is some palpable loss to all, both currently and prospectively. But the factual premise of current line-item advocates is that we are at such a point in our political history right now. Insofar as legislators share

3. R. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 30-35 (1975).

that premise, they are, it seems, duty-bound to take line-item proposals seriously, even if their mastery of the process as it is currently constituted lets them get for their respective districts their fair share, and more, of the federal pie.

The articles included in this issue address these questions and others. What is more, they run the gamut of positions that can be taken on the item veto. Aaron Wildavsky, for example, argues that an item veto would increase Congressional budgetary irresponsibility while creating a drastic alteration in the separation of powers that would ultimately weaken the ability of the federal government to resist the manifold pressures to let federal spending outstrip revenues.⁴ As an alternative remedy to the deficit problem, Wildavsky proposes a global spending limit. Once that limit is in place, he sees some value in a presidential item veto. Peter Schultz, on the other hand, believes that the deficit problem is not fundamentally an institutional phenomenon, amenable to correction *via* such institutional devices as the item veto. To his mind, deficits are political phenomena, traceable to our dual commitment to an expensive welfare program and an even more expensive defense capability. Like Wildavsky, Schultz sees in the item veto an invitation to greater congressional irresponsibility, but unlike Wildavsky, Schultz puts no stock in a global spending limit, preferring instead presidential resort to the impoundment power, the constitutionality of which Schultz defends, as a means of limiting congressional profligacy.⁵

Congressman Edwards opposes the item veto because it will, in his judgment, effect a major shift in policy-making power from the legislature to the president and because such a shift, whatever efficiency it facilitated, would lead to such a consolidation of power in the hands of one person as to threaten the liberty of us all.⁶ According to Congressman Edwards it is not simply because Congress is jealous of its power that it resists the item veto, but because congressional retention of its legislative prerogatives is the constitutionally provided check on executive usurpation and the constitutionally provided mechanism by which the people are assured that

4. 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 (1985).

5. Schultz, *An Item Veto: A Constitutional and Political Irrelevancy*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 177 (1985).

6. Edwards, *The Case Against the Line-Item Veto*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 191 (1985).

those over whom they have the most control, their representatives, have the crucial say in the setting of policy, especially spending policy. Senator Dixon, in contrast, favors a qualified item veto as one way of reducing the federal deficit and as the best way of exposing logrolling and pork-barrelling to the light of day. He also sees the item veto as the unique means of restoring the presidential veto to its full vigor, so that the president can once again play the role in the appropriations process that the authors of the Constitution intended him to play.⁷ The qualification that Senator Dixon builds into his item veto proposal is a considerable one: it allows a bare majority of Congress to override a veto, not the two-thirds supermajority required by Article I, Section 7 for the overriding of a plenary veto. He believes that this device will give the President a chance to call the Congress's attention to provisions in omnibus spending bills that almost surely received scant attention as the bill progressed through the two houses, and that this would bring about a reduction in wasteful spending without effecting a radical shift in the balance of power between the legislative and executive branches of the federal government.

With reference to the two student comments on the item veto, Nancy Townsend views the item veto as neither implicit in the Constitution as it now stands nor desirable.⁸ Instead, she advocates a Single Subject Amendment on the grounds that such an amendment would effect all the good that the line-item veto would produce with none of its constitutional costs. Walter Brown focuses on what can be learned about how to formulate an item veto amendment from the interpretation that courts in the states that have item veto provisions have given to those variously-worded texts.⁹

In a journal committed to bringing the Judeo-Christian tradition to bear on contemporary policy questions, it is appropriate to note the religious dimension of the line-item debate. In this case, as in the case of most political disputes, the tradition will substantially "underdetermine" the outcome of the dispute; that is, it will not dispositively point to a particular resolution as uniquely and exclusively consistent with or

7. Dixon, *The Case for the Line-Item Veto*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 207 (1985).

8. Townsend, *Single Subject Restrictions as an Alternative to the Line Item Veto Authority*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 227 (1985).

9. Brown, *Where's the Pork: Restoring Balance with a Line Item Veto*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 259 (1985).

implied by the tradition. This is not a defect in the Judeo-Christian tradition; it is, instead, characteristic of the relation that ordinarily obtains between religious traditions and particular social or political rules. A tradition is, in fact, betrayed when it is made to appear that it inflexibly requires just one out of a range of defensible responses to a perceived problem. While the Judeo-Christian tradition cannot direct an answer to the line-item debate, it can direct us in our efforts to set the context in which we resolve that issue for ourselves.

At the most general level, the tradition unequivocally asserts that the function of government is to establish justice and that it is in the light of that overarching objective that micro-decisions concerning the relation between parts of the government are to be addressed. In the Biblical tradition justice is not the product of an idealized social contract that hypothetical rational bargainers would reach if they could be stripped of their biases. It is, instead, the product of the performance of an actual covenant struck at Sinai between Yahweh, The God of justice, and his chosen people. The people perform according to the covenant when they do justice, and the measure of their justice is their treatment of the weakest and most vulnerable people in their midst: the widow, the orphan, the poor, and the alien. Especially in the prophetic books, it is whole societies and not simply individuals who are judged according to this criterion of justice: that society is a just society where the powerless are protected, not exploited.¹⁰

In modern times at least one Christian confession, Roman Catholicism, has attempted to apply this biblical standard, mediated by the teachings of Jesus and by centuries of reflection upon that teaching, to current social, political, and international structures. The inspiration for this process can be found in a series of papal encyclicals and bishops' pastorals dating from *Rerum Novarum*, written in 1891, and in the Second Vatican Council's Pastoral Constitution on the Church in the Modern World (*Gaudium et Spes*). The fruits of this process, however, must of necessity be found in the way in which conscientious Christians in positions of power and influence employ that biblical vision as a criterion to test the acceptability of the structures in which we live and of proposed changes in those structures. This testing process requires that the nec-

10. See National Conference of Catholic Bishops, Pastoral letter on Catholic Social Teaching and the U.S. Economy, §§27-44 (First Draft 1984); reprinted in 14 ORIGINS 344 (1984).

essarily general mandates of the tradition be made somewhat more specific, even though the specificity achieved thereby will be both more fallible and more provisional than is true when the tradition is couched solely in generalities. As to an issue as deeply embedded in a particular political context as the item veto issue is, perhaps the most relevant specification of the Judeo-Christian tradition is this: it is the well-being of the powerless, not the aggrandizement of the powerful, that ought to be determinative of disputes about the allocation of political power in our system of government. Government "for the people" is not a mere shibboleth. It is instead a norm to be used in choosing between alternative ways of distributing political power.

On this analysis, the question for the religiously sensitive legislator is, will the item veto make the government more responsive to the people, especially to the least well off among them, or will it remove it further from them? That this question is extremely difficult to answer does not invalidate it, it simply warns us against accepting facile and self-serving answers to it. Over and over again, those who govern must be reminded that the enormous power that they wield is not an end in itself, is not theirs to use as they please, but is entrusted to them to be used for the common good, especially for the good of those least able to help themselves. Perhaps only our common biblical heritage can insinuate into the debate among the powerful over political power, this necessary reminder that it is the effect of their power-brokering on the powerless that is the ultimate test of the acceptability of the deals they strike and of the compromises they reach. If the articles in this issue help to put the item veto debate in that context, they will have served a useful purpose.

