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WHERE'S THE PORK?
RESTORING BALANCE WITH A LINE-ITEM VETO

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In the past year, the line-item veto, a proposal which would allow the President of the United States to veto individual portions of appropriation bills, has received increased attention. In his 1984 State of the Union address President Reagan expressed his desire for such a power¹ and at the Republican National Convention both the President and Vice President Bush reiterated the Administration's request for presidential line-item veto authority.² More recently, in the 1985 State of the Union address, the President again voiced his interest in an expanded veto power.³

The primary benefit of the line-item veto is thought to be increased control over federal spending. With the deficit continuing to escalate, and with a Congress apparently una-


1. President Reagan stated:
Some 43 of our 50 States grant their Governors the right to veto individual items in appropriation bills without having to veto the entire bill. California is one of those 43 States. As Governor, I found this line-item veto was a powerful tool against wasteful and extravagant spending. It works in 43 states. Let's put it to work in Washington for all the people.
The State of the Union Address, 20 WEEKLY COMP. PREs. DOC. 90 (Jan. 25, 1984).

2. In accepting the nomination for a second term, the President remarked:
And we will fight, as the Vice President told you, for the right of a President to veto items in appropriations bills without having to veto the entire bill. There is no better way than the line-item veto, now used by Governors in 43 States to cut our waste in government. I know. As Governor of California, I successfully made such vetoes over 900 times.

3. President Reagan urged Congress to grant him line-item veto authority:
And I ask for the authority, used responsibly by 43 Governors, to veto individual items in appropriations bills. Senator Mattingly has introduced a bill permitting a 2 year trial run of the line-item veto. I hope you'll pass and send that legislation to my desk.
The State of the Union Address, 1984 PUB. PAPERS 140 (Feb. 6, 1985).
ble to control spending, increased executive involvement in the appropriations process seems particularly attractive. Proponents point to the successful exercise of some form of item veto in the 43 states which grant their governors such authority.

Even if item veto proponents' highest aspirations for the line-item veto were realized, however, a line-item veto would not be a panacea for all federal budgetary problems. Approximately 55% of the current budget is committed to entitlement programs and interest payments. These are not subject to a presidential veto in any form. Furthermore, the Reagan Administration is highly unlikely to make deep cuts in the defense budget. Thus, in 1984 the House Budget Committee estimated that only $83 billion of the projected total budget of $928 billion would involve appropriations subject to a line-item veto. Yet, even with such a small percentage of the federal budget subject to a line-item veto, proponents argue that substantial savings may be possible.

4. "The controversial initiative to strengthen presidential control over appropriations recently has earned surprising, if tentative, respect—largely because Congress seems unable to control the budget process it created ten years ago." Palffy, Line Item Veto: Trimming the Pork, 343 HERITAGE FOUND. BACKGROUNDER 1 (1984).

5. Six states, Indiana, Maine, Nevada, New Hampshire, Rhode Island and Vermont, do not grant their governors line-item veto authority. North Carolina grants no gubernatorial veto power.


8. On the other hand, a future President, seeking to reduce the defense budget, might use a line-item veto for that very purpose. See, e.g., Edwards, A Conservative's Case Against the Line Item Veto, Wash. Post, Feb. 8, 1984, at A19, col. 1.

9. The Committee reasoned:
This leaves only nondefense discretionary spending, about $83 billion, where the President could use a line-item veto. Included in this figure are appropriations for such programs as the FBI, Coast Guard, Drug Enforcement, Education and Training, National Institutes of Health, Cancer Research, and many other items which have been supported by this administration in all of its budget plans.

THE LINE ITEM VETO: AN APPRAISAL, supra note 7, at 5-6.

10. "While a 1 percent cut in the FY 1985 budget would amount to only $9.2 billion—a tiny fraction of the projected $200 billion deficit—the compounding effects of cutting 1 percent from the budget every year soon would become significant." Palffy supra note 4, at 4.
In addition to its use as a tool to reduce spending, proponents of the line-item veto argue that it is attractive for another important reason. They contend that the legislative practice of passing omnibus appropriation bills, combining unrelated and often unwise "pork-barrel" appropriations, has drastically reduced the presidential veto power. This reduction in presidential power has caused a shift in power from the executive to the legislative branch. If the President were permitted to isolate individual appropriations and return them to Congress for reconsideration, proponents argue, legislative pork-barreling could be curtailed, and the balance of power restored.

Assuming that the line-item veto would in fact help solve current federal budgetary problems and would restore the balance of power, it remains to determine the precise contours and limits to the grant of such authority. There is great diversity in the type and extent of item veto authority among those states which grant their governors an item veto. While the state experience with the item veto could assist in drafting a provision which would best alleviate federal budgetary problems, the purpose of this article is to examine the state item veto experience in an attempt to arrive at a line-item veto provision which most effectively restores the federal balance of power.

Section I argues that the balance of power between the executive and legislative branches has shifted due to the current legislative practice of attaching so-called riders to bills of national importance, thus significantly weakening the execu-
tive's prerogative. Such a shift requires an institutional change: the adoption of the line-item veto. However, any grant of line-item veto authority must carefully balance two competing concerns: (1) the tendency of the legislature to circumvent the executive's item veto authority, and (2) the tendency of the executive to use the item veto in an affirmative rather than a negative manner.

Section II analyzes the language of several state line-item veto provisions, and interpretive case law, within the framework of the two concerns mentioned above. It begins by examining two states where the governor may only veto "items" of appropriation, and two states where the governor may veto "parts" as well as "items." Finally, it addresses the power of reduction, examining one state that provides its governor with this additional power, and one state that does not.

Section III synthesizes the state experience with the line-item veto, observing first that the legislature is more likely to circumvent the item veto if the executive is permitted to object to only "items." While judicial interpretation could prevent this tendency, it is more expedient to directly grant the executive a veto over "parts" as well as "items."

Second, section III observes that although the likelihood of legislative circumvention is lessened if the executive can veto "parts," the ability of the executive to use the veto power affirmatively, thereby encroaching on the legislative function, would be increased. Restrictive language is therefore necessary in order to prevent the executive from distorting the legislative intent of a bill.

Third, section III argues that, although a reduction power increases the flexibility of the veto power, it tends to involve the executive affirmatively in the legislative appropriations process.

Section III concludes by proposing a model line-item veto constitutional amendment which attempts to minimize

16. With the reduction power, a governor may reduce the amount of an item of appropriation to a level of his choosing, rather than having to approve or disapprove of an individual item in its entirety.

17. While most line-item veto proposals have been presented in the form of a constitutional amendment, some proponents have suggested a statutory grant of authority. See, e.g., Wall St. J., Feb. 7, 1985, at 34, col. 1., for a discussion of Senator Mattingly's bill, which would statutorily grant the President line-item veto authority, but require renewal every two years. Since this article is concerned with the specific language of a line-item veto provision, and not the manner in which such a provision is
both legislative circumvention and executive overreaching.

I. THE NEED FOR A CHANGE IN THE VETO POWER

Proponents of the line-item veto argue that, since the balance of power between the executive and legislative branches has shifted in favor of Congress, an institutional change is needed in order to restore the balance of power to its originally intended form.\(^8\)

In his role as a legislator, a congressman is expected to represent the local interests of his constituents zealously in the appropriations process. In fact, a congressman should not be faulted for paying particular attention to those in whose hands his re-election rests.\(^9\)

At the same time, a congressman is expected to legislate for the national good. The pressure to please constituents can often run counter to this second, equally important, duty.\(^10\) While pursuing the local interests of his constituents may not be inherently wrong, if such advocacy is conducted at the expense of the national interest, the practice raises serious ethical questions.

Recognizing the dangers of factional pressures,\(^11\) the Framers of the Constitution\(^12\) provided the Executive with a
qualified veto. They attempted to steer a narrow course between an absolute veto which they feared the President would hesitate to use, and the absence of a veto power altogether. In short, they thought it advantageous to allow questionable legislation to be reconsidered, rather than to allow for its immediate passage through haste or passion. In
tent controls present day interpretation of constitutional issues. Supporting the Originalist theory, which permits the United States Supreme Court to look to the text of the Constitution and the intention of its adopters are: R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977) ("The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties." Id. at 366, n. 15 (quoting Story).) See also 1 J. Story, Commentaries on the Constitution of the United States 295 (4th ed. 1873); 1 T. Cooley, Constitutional Limitations 124 (8th ed. 1927); Bork, Neutral Principles and some First Amendment Problems, 47 Ind. L. J. 1 (1971); Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693 (1976).

Critics include: Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980) (Contending that the most effective way to protect the democratic system of government and its fundamental values is through non-originalist adjudication, rather than strict originalism which in effect amounts to "guessing how other people meant to govern a different society a hundred or more years ago." Id. at 238.) See also Munzer & Nickel, Does the Constitution Mean What it Always Meant? 77 Colum. L. Rev. 1029 (1977); R. Dworkin, Taking Rights Seriously (1977); Saphire, Judicial Review in the Name of the Constitution, 8 U. Dayton L. Rev. 745 (1983); Antieau, Constitutional Construction: A Guide to the Principles and Their Application, 51 Notre Dame Law. 358 (1976).


24. Arguing for a qualified rather than absolute veto, Hamilton observed:

Instead of an absolute negative, it is proposed to give the Executive the qualified negative already described. This is a power which would be much more readily exercised than the other. A man who might be afraid to defeat a law by his single VETO might not scruple to return it for reconsideration, subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections. Id.

25. Observing that the veto power would introduce reconsideration into the legislative process, Hamilton noted:

The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn.
arguing that the President should be permitted to return questionable legislation to the Congress for reconsideration, Alexander Hamilton suggested that:

The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.  

By providing for a qualified veto, a veto that could be overridden, the Founders created a method for reconsideration of questionable legislation which Presidents would actually use.

Under the existing veto provision, however, the President can no longer submit questionable appropriation legislation to Congress for reconsideration without, in many cases, risking grave consequences. The President must either pass or veto an entire bill, but cannot isolate and veto an individual item of appropriation. Consequently, by attaching riders to bills of national importance, Congress can force the President to make the unpleasant choice of either passing appropriations he deems unwise, or of vetoing an entire bill, containing many desirable appropriations. A President is understandably hesitant to choose the latter option. In such a circumstance, the qualified veto is no more useful than the absolute veto which the Founders avoided. Since the President can no longer force reconsideration of all questionable legislation, his check on the legislature, the veto power, has been weakened. The balance of power has therefore shifted from the executive branch toward the legislative branch.

With a line-item veto, the President could isolate questionable items of appropriation, despite the fact that they

The Federalist No. 73, at 443 (A. Hamilton) (C. Rossiter ed. 1961).
26. Id.
28. U.S. Const. art. I, §7, cl. 2, provides in pertinent part:
Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become 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.
30. Id. at 188.
might be part of a larger bill containing several distinct expenditures. He could call upon Congress to reconsider these appropriations,\footnote{31} as intended by the Founding Fathers. Finally, because the President would no longer be faced with the unpleasant choice of vetoing many unnecessary appropriations in order to return a single objectionable item, he would possess a veto power which he could actually use.

In attempting to draft a line-item veto provision which restores effectiveness to the executive veto, two concerns arise. First, a line-item veto provision must not permit Congress, through clever drafting, to circumvent this new authority\footnote{32} in the manner that Congress, over the years, has circumvented the present executive veto.\footnote{33}

On the other hand, consistent with the principle of separation of powers, the provision must not permit the President to become excessively involved in the legislative process.\footnote{34} The Founders contemplated that the veto power would enable the President to prevent objectionable bills from becoming law, unless the Congress overrode his veto.\footnote{35} Thus, the executive veto power was intended to be a negative rather than an affirmative power.\footnote{36} This "negative" nature of the veto power should be preserved.

Within the framework of those two competing concerns,

\footnote{31} Arguably, an individual congressman would not seriously reconsider his stance on his individual pet project. Because members frequently vote for large spending bills not because they support each item, however, but because of the accommodation and bargaining which occur amongst the members, the line-item veto, by isolating the individual items, could eliminate congressional accommodation and force serious reconsideration. \textit{See generally} Wildavsky, \textit{The Politics of the Budgetary Process} (2d ed. 1974).

\footnote{32} Palffy, \textit{supra} note 4, at 9.

\footnote{33} Best, \textit{supra} note 27, at 187.

\footnote{34} James Madison argued in favor of a government of separated powers:

\textit{The reasons on which Montesquieu grounds his maxim [that the legislative, executive, and judiciary departments ought to be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."} \textit{The Federalist} No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961).

\footnote{35} \textit{See generally} \textit{The Federalist} No. 69, at 416 (A. Hamilton) (C. Rossiter ed. 1961).

\footnote{36} The Founders referred to the veto power as "the qualified negative." \textit{Id.} at 417. \textit{See also} \textit{The Federalist} No. 73, at 442 (A. Hamilton) (C. Rossiter ed. 1961).
an analysis of state experience with the line-item veto will assist in arriving at language which will effectively restore the executive veto power without excessively expanding the role of the executive.

II. THE EXPERIENCE IN THE STATES

An examination of the constitutional provisions of the forty-three states which grant their governors line-item veto authority reveals two principal areas of difference in language. First, states differ as to what specific portion of an appropriation bill a governor may veto. While most provisions refer to the portion as an "item," terms such as "part," "section" and "appropriation" can also be found. Second, while most states allow the governor only to approve or disapprove of items of appropriation, a few states also allow the governor to reduce the amount of an individual appropriation.

In addition to the specific language states use to confer line-item veto authority, the judicial interpretation which this language has received is also significant in determining the actual extent of a governor's veto power. Thus, as the ensuing analysis will demonstrate, while two states may have identical language in their line-item veto provisions, the interpretation which each state court has given to the language may vary substantially. The first examination involves two states where the governor is permitted to veto only "items" of appropriation.

37. Fla. Const. art. 3, §8, cl. a ("specific appropriation"); Ga. Const. art. III, sec. V, ¶ xiii, cl. e ("appropriation"); Ky. Const. §88 ("part or parts of appropriation bills embracing distinct items"); Miss. Const. art. 4, §73 ("parts"); N.M. Const. art. IV, §22 ("part or parts, item or items"); N.D. Const. art. V, §10 ("item or items, and part or parts"); Okla. Const. art. 6, §12 ("item or appropriation"); S.C. Const. art. IV, §21 ("items or sections"); Wash. Const. art. 3, §12 ("section or sections, item or items"); Wis. Const. art. 5, §10 ("part"); and Wyo. Const. art. 4, §9 ("item or items, part or parts").

38. The states which allow their governors to reduce items of appropriation are: Alaska (Alaska Const. art. II, §15); California (Cal. Const. art. 4, §10, cl.b); Hawaii (Hawaii Const. art. III, sec. 17); Illinois (Ill. Const. art. 4, §9, cl.d); Massachusetts (Mass. Const. amend. art. LXIII, §5); Nebraska (Neb. Const. art. IV, sec. 15); and Tennessee (Tenn. Const. art. 3, §18).
A. The Veto of "Items"

1. Florida

The Governor shall have power to disapprove of any item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive.\(^{39}\)

In construing the meaning of "item," state courts attempt to balance two competing concerns: the tendency of the governor to exceed his limited veto power and excessively involve himself in legislating, and the tendency of the legislature to circumvent the governor's veto power by drafting bills in a manner that prevents the governor from vetoing certain appropriations.\(^{40}\) For example, in *Green v. Rawls*,\(^{41}\) the Governor of Florida vetoed the appropriations for two specific salaries in a general wage appropriation, stating that the amounts were inadequately low. Thereafter, when the State Budget Commission set the salaries at a level higher than the legislature had directed, the plaintiff brought suit to enjoin the State Comptroller from issuing warrants for the higher amounts.

At the time *Green v. Rawls* arose, the Florida Constitution allowed the governor to "disapprove of any item or items making appropriations of money embracing distinct

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39. *Fla. Const.* of 1875, art. IV, §18. The Florida Constitution was revised and amended on November 5, 1968. The item veto provision presently provides: "In all cases except general appropriation bills, the veto shall extend to the entire bill. The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates." *Fla. Const.* art. III, §8, cl. 9.


   The Legislature may not properly abridge that power by subtle drafting of conditions, limitations or restrictions upon appropriations, and the governor may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation.

41. 122 So.2d 10 (Fla. 1960).
items." In the circuit court, the chancellor granted the injunction, holding that the overall appropriation for wages and salaries constituted an item, and that the individual salaries contained therein were parts of that item. The chancellor reasoned that, as long as the appropriation was for one subject, wages, the Governor could only veto the entire appropriation, regardless of whether the legislature further divided the subject into more specific categories.

In reversing the chancellor and holding that the individual salaries constituted items, the Florida Supreme Court stated:

It is true that these specifications as to amount and purpose were included within an overall appropriation for salaries for the two agencies of government, but this fact does not destroy their identity or substance as "items" for both had a specified purpose and the amount to be used therefor was designated. These two factors are the essentials of an item.

Thus, the court recognized that, under the chancellor's construction, the legislature might circumvent the governor's veto power by placing questionable appropriations under the same general heading as desirable appropriations. In holding as it did, the court emphasized that the chancellor's construction of the term "item" would run contrary to the purpose of the item veto provision of the Florida Constitution, and that the legislature could not, "by any device, deny the chief executive the power of veto over whatever they do."

Under the Green v. Rawls test, therefore, a portion of a bill with a specified purpose and a designated amount would be subject to an executive's item veto. While the Florida approach addresses legislative circumvention of the governor's veto power, it does not address the competing concern of affirmative use by the executive. For instance, an executive operating under that provision could veto one of two interrelated provisions contained in the same bill. The Virginia approach, which is discussed next, decreases the possibility of such affirmative use.

42. Fla. Const. of 1875, art. IV, § 18.
43. 122 So.2d at 14.
44. Id. at 16.
45. Id. at 17.
2. Virginia

The Governor shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object. The item or items objected to shall not take effect except in the manner heretofore provided in this section as to bills returned to the General Assembly without his approval.\(^6\)

In *Brault v. Holleman*,\(^7\) the Supreme Court of Virginia interpreted "item" in a manner similar to that of the Florida Supreme Court in *Green v. Rawls*,\(^8\) in order to prevent the legislature from circumventing the governor's line-item veto. Unlike *Green*, however, the court recognized the point beyond which the governor's use of the item veto would constitute affirmative use of that power.

In *Brault*, the legislature had appropriated $10 million in state aid for capital costs of Metro Rail, part of a mass transit system then under development in the Washington D.C. area. This amount was part of a larger lump sum appropriation to the Northern Virginia Transportation Commission (NVTC). The Governor vetoed that part of the appropriation relating to Metro Rail. In requesting a writ of mandamus challenging the validity of the Governor's partial veto, petitioners argued that the lump sum appropriation to the NVTC was an item. They further argued that since the appropriation contemplated a unified regional transit system, of which Metro Rail was but one part, the Governor could not veto the Metro Rail appropriation unless he also vetoed the other appropriations to the NVTC. Relying on prior caselaw,\(^9\) the court upheld the partial veto, reiterating that, "In the constitutional sense, an item of an appropriation bill is an indivisible sum of money dedicated to a stated purpose; the item refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions."\(^{10}\)

Addressing the issue of the impairment of legislative purpose, the court stated that the threshold question is whether or not the remaining provisions can still effectively serve their intended purposes in the absence of the eliminated pro-

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\(^7\) 217 Va. 441, 230 S.E.2d 238 (1976).

\(^8\) 122 So.2d 10 (Fla. 1960).


\(^10\) 217 Va. at 447, 230 S.E.2d at 242.
vision. Since the Metro Rail appropriation constituted an indivisible sum of money dedicated to a stated purpose, and since the other provisions concerning the NVTC were not dependent upon the Metro Rail provision, the court upheld the veto.

As in Green v. Rawls, the Virginia Supreme Court's interpretation of "item" prevents legislative circumvention of the executive's veto power, since it permits the governor to veto any indivisible sum of money dedicated to a stated purpose. In addition, the court's interpretation of the language, "the veto shall not affect the item or items to which he does not object," addresses the competing concern of excessive executive involvement in formulating legislative policy, by prohibiting the executive from vetoing a provision if its absence would affect the other purposes of a bill.

B. The Veto of "Parts"

Other states have attempted to prevent legislative circumvention of the line-item veto by drafting a provision permitting the governor to object to "parts" as well as "items" of appropriation. While the existence of this additional term may clarify the portion of a bill to which an executive may object, and thereby lessen the likelihood of legislative circumvention, the expanded power may also increase the likelihood that the executive will become excessively involved in the legislative process.

1. New Mexico

The governor may in like manner approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a

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51. The court continued:
The real question, therefore, is whether, from the terms of the appropriation bill itself, several appropriations relating to the same subject are so legally "tied up," are made so legally interdependent, that one cannot be eliminated from the enactment without, in the words of Dodson, "affecting its other purposes or provisions." If it is clear from the appropriation bill that, with the disapproved provision eliminated, the approved appropriations cannot effectively serve their intended purposes, the attempted elimination is invalid.

217 Va. at 449, 230 S.E.2d at 243-244.

52. 122 So.2d 10 (Fla. 1960).

law, and such as are disapproved shall be void unless passed over his veto, as herein provided.\textsuperscript{64}

In \textit{State ex rel. Sego v. Kirkpatrick},\textsuperscript{65} the New Mexico Supreme Court concluded that the additional language "part or parts" granted the governor a more expansive power than if the governor were allowed to veto only "items." In \textit{Kirkpatrick}, the Governor had attempted to exercise his partial veto power by deleting the language of several portions of the New Mexico General Appropriations Act of 1974. In a mandamus proceeding, a state senator sought to compel the Governor and other state officials to treat the partial vetoes as nullities.

Before examining the validity of the individual vetoes, the court discussed the scope of the terms "item" and "part." It began by recognizing the competing concerns of the executive and legislative branches.\textsuperscript{66} In balancing these two concerns, the court examined New Mexico and Iowa case law,\textsuperscript{67} and stated:

\begin{quote}
[t]he purpose or purposes for the inclusion of the terms "part or parts," "item or items" and "parts or items" in our Constitution were to extend or enlarge the partial veto power conferred by the constitutions of other states [Iowa] wherein that power is limited to (1) items of appropriation,
\end{quote}

\textsuperscript{54} N.M. Const. art. IV, §22.
\textsuperscript{55} 86 N.M. 359, 524 P.2d 975 (1974).
\textsuperscript{56} The court stated:
The legislative power of the State of New Mexico is vested in the Legislature. Article IV, §1, Constitution of New Mexico . . . . The supreme executive power of the State is vested in the Governor, whose principal function, insofar as legislatively enacted law is concerned, is to faithfully execute these laws. Article V, §4, Constitution of New Mexico. He does, however, have the power to exercise veto control over the enactments of the legislature to the extent that this power or authority is vested in him by Art. IV, §4 supra. As to bills appropriating money, he clearly has the power to veto a "part or parts" or "item or items" thereof. The Legislature may not properly abridge that power by subtle drafting of conditions, limitations or restrictions upon appropriations, and the Governor may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation.
\textsuperscript{524} P.2d at 980.
\textsuperscript{57} \textit{See} State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957); State ex rel. Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141 (Iowa 1971).
and (2) to general appropriation bills.58

The court noted, however, that although the governor's veto power is more expansive with the inclusion of "part or parts" language, the power is not without boundary. Thus, while the governor is not limited to items of appropriation, he must still use the veto power in a negative manner, and may not alter the effect of remaining items or distort the overall legislative intent.59

In applying its interpretation of the item veto provision, the court found some of the partial vetoes valid and others invalid. For instance, when the governor vetoed conditional language of an appropriation, the court held that he had become excessively involved in the creation of legislation.60 On the other hand, when the governor vetoed both a dollar amount and the language attached thereto, the court held that the veto was valid, since he had not changed the purpose of the appropriation.61

By allowing a governor to veto "parts" as well as "items" of an appropriation bill, the tendency of the legislature to circumvent the governor's veto would be reduced, since the legislature could not properly draft a lump sum appropriation, call it an item, and argue that the governor cannot reach its component parts. This added flexibility on the part of the governor, however, increases the likelihood that he will use the item veto in an affirmative rather than a negative manner. In Kirkpatrick, the New Mexico Supreme Court properly limited the veto power to prevent that tendency. Other states, however, have not limited the partial veto to a negative use.

2. Wisconsin

Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and

58. 524 P.2d at 981.
59. Id.
60. The court held:
   The Governor may not distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand. He would thereby create new law, and this power is vested in the legislature and not the Governor. Therefore, the attempted veto was invalid.
   Id. at 982.
61. Id. at 983-84.
the part objected to shall be returned in the same manner as provided for other bills. 63

Like New Mexico's, the Wisconsin Constitution does not limit the governor's partial veto power to "items of appropriation;" rather, it allows the governor to approve or disapprove of appropriation bills "in whole or in part."  64  Interpreting that language in State ex. rel. Kleczka v. Conta, 64 however, the Wisconsin Supreme Court recognized a far broader veto power than did New Mexico.

The Governor had vetoed language in an appropriation bill dealing with financing of an election campaign fund. The original bill passed by the legislature provided that individual taxpayers could designate that their income tax liability be increased by $1 for deposit into the Wisconsin Election Campaign Fund. The Governor modified the bill by deleting certain language so that taxpayers, rather than increase their own tax liability, would merely designate that $1 be deposited into the Election Campaign Fund from state general funds. The effect of the Governor's modifications was to allow for an annual expenditure of approximately $600,000 for political purposes. 65

In attacking the veto, the petitioners argued that the deleted language was not severable and therefore not subject to partial-veto. They further argued that the Governor did not have the power to strike legislative conditions or provisos from an appropriation.

In upholding the Governor's partial-veto, the court traced the judicial history of the Wisconsin line-item veto provision. Examining three cases in which it had discussed the extent of the Governor's item veto power, 64 the court noted that:

Each of these cases emphasizes that the power of the Governor to approve or disapprove a bill "in part" is a far broader power than that conferred upon Governors under

62. Wis. Const. art. 5, §10.
63. Wis. Const. art. 5, §10.
64. 82 Wis.2d 679, 264 N.W.2d 539 (1978).
65. The parties stipulated to this figure. 264 N.W.2d at 541.
66. In summary, the court stated: "Three major Wisconsin cases have discussed the power of the Governor to partially veto a bill under the authority of art. V, sec. 10: State ex rel. Wisconsin Telephone Co. v. Henry, 218 Wis. 302, 260 N.W. 486 (1935); State ex rel. Martin v. Zimmerman, 233 Wis. 442, 289 N.W. 662 (1940); State ex rel. Sundby v. Adamany, 71 Wis.2d 118, 237 N.W.2d 910 (1976)." Id. at 550.
the partial-veto provisions of most state constitutions. In most instances, the power of the Governor is confined to the excision of appropriations or items in an appropriation bill.  

In summarizing its analysis of the three cases, the court concluded that the governor's power to disassemble bills by veto is coextensive with the legislature's power to initially assemble a bill. Thus, the only limitation on the Governor's exercise of his veto authority is that he preserve "a complete and workable law."  

In noting that this minimal requirement might result in a law distinct from that which the legislature had intended, the court further stated that, "because the Governor's power to veto is coextensive with the legislature's power to enact laws initially, a governor's partial veto may, and usually will, change the policy of the law." Therefore, although the bill, as approved by the Governor, materially changed the manner in which the Election Campaign Fund would be financed, since the remainder constituted a "complete and workable law," the veto was upheld.

The Wisconsin line-item veto provision, as interpreted by that state's supreme court, adequately protects against legislative circumvention of the governor's veto power. Additionally, the provision allows for a very high degree of executive involvement in the legislative process. The governor, by selectively deleting language, can essentially assume a legislative role and change the legislative intent of any law presented to him, provided that what remains is a workable law. Unless the governor, by partial veto, creates utter nonsense, his legislative power is unlimited. The Wisconsin Supreme Court determined that this is not excessive executive involvement in the legislative process. Under these circumstances it is hard

67. Id.
68. Id. at 551.
69. Id. at 552.
70. The court did point out, however, that the legislature retains its power to override:

It should be borne in mind, of course, that the very section of the Constitution which gives to the Governor the authority to change policy by the exercise of a partial veto also gives the final disposition and resolution of policy matters to the Legislature. The Governor's changed policy can ultimately remain in effect only if the Legislature acquiesces in a partial veto by its refusal or failure to override the Governor's objections.

Id.

71. In a footnote, the court stated that a "separation of powers" at-
to imagine what would constitute excessive executive involvement.

In summary, we see four distinct approaches. Florida, in an attempt to prevent legislative circumvention, interprets the term "item" by allowing the governor to veto any designated amount with a specified purpose. Likewise, Virginia interprets "item" as an indivisible sum of money dedicated to a stated purpose. Additionally, its provision attempts to restrict the governor to a negative use of the veto by prohibiting him from affecting the overall purposes of a bill. New Mexico attempts to restrict circumvention by enabling its governor to reject "parts" as well as "items." Like Virginia, it also confines the governor to a negative use by requiring that he not alter the effect of remaining items. Finally, Wisconsin, which also permits the governor to veto "parts," only requires that what remain be a complete and workable law. In this sense, the governor's item veto power is affirmative.

C. The Power to Reduce

In the forty-three states which grant their governor some form of line-item veto authority, the vast majority allow the governor only to approve or disapprove a specific portion of an appropriation bill. Some states, however, provide the governor with the additional power to reduce as well as approve or disapprove individual portions. 27 The issue of whether or not a governor should be permitted to reduce portions of an appropriation bill is less litigated perhaps because the term "reduce" is less vague than the terms "item" or "part," and therefore less subject to judicial interpretation. Nevertheless, the presence or absence of this dimension to line-item veto power raises important considerations as it relates to the federal veto power.

This added flexibility at the federal level may increase the likelihood that a President would use his partial veto power, as he would not be faced with the unpleasant choice

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tack on the Wisconsin partial-veto provision is inappropriate:

It is, therefore, constitutionally inappropriate to find answers to Wisconsin constitutional problems in respect to partial-veto powers by resort to the cliches that have supplied an unwarranted gloss on the true meaning of federal "separation of powers" or by seeking to analogize or to equate the Wisconsin Constitution with other state constitutions containing more restrictive grants of legislative power to the governor.

Id. at 553 n.3.

72. Supra note 38.
of approving or vetoing an entire program to which his only objection is its excessive cost. On the other hand, the additional flexibility would also permit the executive to encroach upon the legislative spending power.

1. California

The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. The Governor shall append to the bill a statement of the items reduced or eliminated with the reasons for the action. The Governor shall transmit to the house originating the bill a copy of the statement and reasons. Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as bills.

In Wood v. Riley, the Supreme Court of California highlighted what it perceived to be some of the advantages of the power to reduce as well as to eliminate items of appropriation. In Riley, the governor had reduced several items of appropriation in a general appropriation bill relating to salaries and support for certain state schools. The petitioners argued

73. The following example illustrates the added flexibility the reduction power would provide the President:

If Congress appropriated $5 million for some purpose, the President presumably would be able to approve $2 million and veto the remaining $1 million. Congress then could decide whether to insist on its original funding level by voting to override the President's veto. This authority to veto part of an appropriation would be a more flexible device, and, therefore, one that might be used more frequently than an item veto limiting the President's choices solely to approval or disapproval.


74. If the President could only approve or disapprove the appropriation for a program, the "power of the purse" would essentially remain with the Congress. In the case of an item veto, Congress would then have to propose a different (and presumably lower) funding level, but the program could be funded only at a level approved by Congress, either initially or in response to an item veto. On the other hand, if the President were given the power to reduce a program's appropriation, he could set a program funding level lower than Congress had approved, unless his veto were overridden.

Id. at 10.

75. Cal. Const. art. 4, §10, cl.b.

76. 192 Cal. 293, 219 P. 966 (1923).
that the power to reduce only applied to items of appropriation, and that since the reduced portions were merely "legislative direction," the reduction of these portions was invalid.

After rejecting the petitioners' argument that the veto provision could not apply to legislative direction the court observed that, because the California item veto provision had been amended to allow for the power of reduction, the governor's role in the legislative process had been significantly increased. The court did not address the concern that the additional power might amount to an affirmative use of the veto, even though the governor would essentially be setting the level of appropriation. Rather, the court focused on the additional choice which the power of reduction would make available to the governor:

Under the new plan he is not forced to choose between vetoing an item of appropriation for a meritorious purpose, or approving it for an excessive amount. Without entirely rejecting it, he may reduce the amount provided for to a sum in accord with his own view as to the need for the expenditure.

Under a provision similar to California's, an executive would probably be likely to use his veto power more liberally, as he would essentially have three choices available to him when faced with an item of appropriation: approve in entirety, disapprove in entirety, or reduce. The legislature, however, would no longer be setting levels of funding by the vote of a majority of its members. Rather, the executive would be able to reduce an amount to a level of his choice, and the legislature could only change this level by an override vote of two-thirds. In contrast to California, Michigan prohibits its governor from reducing items of appropriation because such a power would excessively involve the governor in the legislative process.

2. Michigan

The governor may disapprove any distinct item or items appropriating moneys in any appropriation bill. The part or
parts approved shall become law, and the item or items dis-approved shall be void unless re-passed according to the method prescribed for the passage of other bills over the executive veto.80

In _Wood v. State Administrative Board_,81 the Michigan Supreme Court interpreted its line-item veto provision as it related to the governor's power to reduce the amount of an appropriation. In that case, the governor reduced the amount of several specific appropriations to various state departments, officers, institutions and projects which were contained in a general appropriation act. The Michigan Constitution of 1908 allowed the governor to approve or disapprove of items of appropriation,82 but not to reduce those items. Consequently, the plaintiff brought suit to enjoin state officers from expending money pursuant to the bill, as reduced by the governor.

In holding that the attempted vetoes were invalid, the court began by focusing on the specific language of the item veto provision, which did not mention the power to reduce. The court stated:

Neither in the debates in the Constitutional Convention, nor in the Address to the People, was it suggested that the power given the Governor by section 37 includes authority to reduce an appropriation item . . .

The veto power is a legislative function, although it is not affirmative and creative, but is strictly negative and destructive.83

The court therefore recognized the legislative nature of the veto power. While the court apparently felt some executive involvement in the legislative process would be constitutionally permissible, it limited the amount of this involvement by prohibiting the governor from reducing items, because such a power would allow the governor to have a creative effect on

82. _Mich. Const. of, 1908 art. V, §37 provided: The governor shall have the power to disapprove of any item or items of any bill making appropriations of money embracing distinct items; and the part or parts approved shall be the law; and the item or items disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto. Although the Michigan Constitution was amended in 1964, the item veto provision was essentially unchanged. See _Mich. Const._ art. 5, §19.
83. 255 Mich. at 224, 238 N.W. at 17, 18.
legislation.

Most states which have limited their governor's line-item veto to the power to approve or disapprove seem to advance a rationale similar to that enunciated by the Michigan Supreme Court in *Wood*. That is, the states have attempted to prevent excessive gubernatorial legislating by forbidding an affirmative use of the veto power.\(^8^4\)

In summary, we see two distinct views of the reduction power. While California accords the governor greater flexibility with the power of reduction, it also involves the governor in the legislative process to a high degree. In contrast, Michigan confines the veto power to a negative use by limiting the governor's power to either approval or disapproval of individual items.

### III. A Model Constitutional Amendment

The foregoing analysis evidences diversity not only in the language of the various state line-item veto provisions, but also in state court interpretations of this language. The choice of a particular provision will not necessarily delineate the powers of the legislative and executive branches with respect to the presidential veto. By choosing proper language, however, the propensity for abuse of the power by either branch may be reduced, thereby lessening the likelihood of litigation.

The state experience indicates that the legislature is more apt to circumvent the executive's veto power if the executive is able to object only to "items" of appropriation. For instance, Congress could send the President an appropriations bill with only one line.\(^8^5\) In such a case, in the absence of judicial interpretation of the term "item," the President would face the same problems presented by the existing veto power.

The Florida Supreme Court\(^8^6\) and the Virginia Supreme

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\(^8^4\) *See e.g.*, Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915): We think it clear that the power given the Governor by the Constitution to disapprove of and veto any distinct item or section in an appropriation bill does not give him the power to disapprove of a part of a distinct item and approve the remainder. To permit such a practice would be a clear encroachment by the executive upon the rights of the legislative department of the State. 270 Ill. at 348, 110 N.E. at 147. (Illinois later amended its Constitution to allow for a reduction power in the item veto. ILL. CONST. art. IV, §9, cl.d.)

\(^8^5\) Palffy, *supra* note 4, at 9.

\(^8^6\) *See supra* notes 39-45 and accompanying text.
Court interpreted the term “item” in a manner which enabled the governor to veto parts of items, thereby preventing legislative circumvention. While such definitional language could be included in a federal line-item veto provision, it appears that the same result could be achieved by drafting the provision to allow the President to veto “parts” as well as “items,” as in the case of the New Mexico and Wisconsin constitutions.

A line-item veto provision which permits the President to object to “parts” as well as “items” would militate against legislative circumvention. This added power, however, leaves room for an affirmative rather than a negative use of the line-item veto by the President. He could effectively alter legislative intent by vetoing one of two parts of a bill which are inextricably related. The Wisconsin Supreme Court chose to permit such an affirmative use, as it determined that the governor’s veto power is coextensive with the legislature’s power to originate legislation. Such a vast grant of executive power, however, is contrary to the scope of the veto power which the Founding Fathers intended.

The New Mexico Supreme Court, however, permitted the governor to veto “parts” as well as “items,” but limited the veto to a negative rather than affirmative use by prohibiting the governor from altering the effect of remaining items or distorting the overall legislative intent. If, in the body of the provision, the federal line-item veto included this restriction on the President’s veto of “parts” or “items,” the presence of the restriction might encourage a negative rather than an affirmative use of the line-item veto, or at least preclude litigation on the issue.

In addition to whether or not and to what extent a President should be permitted to veto parts as well as items of appropriation bills, whether or not the President should be permitted to reduce as well as disapprove “parts” or “items” also affects the balance between the legislative and executive branches.

If the President is only allowed to approve or disapprove of a “part” of an appropriation bill, Congress might be in-

87. See supra notes 46-53 and accompanying text.
88. N.M. Const. art. IV, §22.
89. Wis. Const. art. 5, §10.
90. See supra notes 62-71 and accompanying text.
92. See supra notes 54-61 and accompanying text.
clined to "pad" an otherwise meritorious "part" of a bill, knowing that the President would not veto the portion, despite its unsatisfactory amount. The additional power of reduction thus seems initially attractive, as it could prevent this type of legislative circumvention by permitting the President to whittle down a much needed appropriation to an acceptable level, rather than having to pass it at an excessively high level.

On the other hand, by allowing the President to reduce as well as eliminate a part of an appropriation bill, the President could assume an active rather than a passive role in the appropriations process, as he would essentially set the funding level of an appropriation, subject only to a Congressional two-thirds override. Although the President has participated in the federal budgetary process to varying degrees in the past century, allowing him such a hand in federal appropriations could enlarge the veto into something more than the qualified negative anticipated by the Founding Fathers.

In light of the foregoing conclusions, a constitutional amendment granting the President line-item veto authority should take the following form:

U.S. Constitution, article I, section 7, amended February 15, 1985—

(A) Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become 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 the Journal and proceed to reconsider it.

(B) The President shall have the power to approve or disapprove of any part or parts, item or items of appropriations


94. See supra note 35-36 and accompanying text.
bills, provided any such disapproval shall not affect the legislative intent of the overall bill. The part approved shall be law, and the part disapproved shall be void, unless repassed according to the rules and limitations for the passage of bills over the Presidential veto.

By allowing the President to veto "parts" as well as "items" of appropriation, the Congress could less readily bury appropriations in a lump sum and insulate them from executive review. Yet, because the provision would not permit the President to affect the legislative intent of an overall bill, his veto power would remain negative in form. Furthermore, because the power would not include the authority to reduce, Congress would still set the levels of funding.

In turn, the President could once again isolate questionable appropriations. He could once again call upon Congress to reconsider these appropriations. In the end, the President would once again possess a veto power which he could usefully employ.