

THE PUBLIC CHOICE CASE AGAINST THE ITEM VETO

MAXWELL L. STEARNS*

I. INTRODUCTION

Since the Supreme Court, in *Bowsher v. Synar*,¹ struck the automatic budget-cutting mechanism in the Gramm-Rudman-Hollings Act,² the burgeoning federal deficit has become an increasingly prominent political issue.³ During the Reagan administration, the federal budget exceeded an unprecedented one trillion dollars and the federal budget deficit correspondingly reached an unprecedented high.⁴ Congress amended the Gramm-Rudman-Hollings Act in 1987 to cure the constitutional defect and to restore the automatic sequestration procedure by vesting it with the Office of Management and Budget, an arm of the executive branch, rather than with the

* B.A. 1983, University of Pennsylvania; J.D. 1987, University of Virginia School of Law. The author, presently a litigation associate at Pepper, Hamilton & Scheetz in Philadelphia, Pennsylvania, will be an Assistant Professor this fall at George Mason University School of Law in Arlington, Virginia.

The author would like to thank Professor Glen O. Robinson for his insightful guidance and comments on the initial draft of this article. In addition, the author is indebted to the following individuals for their valuable comments on prior drafts: Matthew H. Adler, Esq.; Richard S. Gabriel, Esq.; Aaron Krauss, Esq.; James R. Pagano, Esq.; Bruce Steen, Esq.; and Thomas E. Zemaitis, Esq. Finally, the author wishes to thank Staci Johnston for her secretarial assistance, Janis Lee for her diligent work in tracking down hard-to-find source materials, and Mary Beth Lee for her fine art work in converting his rough sketches into the matrices that appear in the text.

1. 478 U.S. 714 (1986).

2. *Bowsher v. Synar*, 478 U.S. 714, 735-36 (1986). Section 251 of The Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901 (1988), *et seq.*, authorized the Comptroller General to set forth budget cuts, binding on the President, in the event that Congress did not limit the deficit to a specified amount in any given year based upon a statutory formula. 2 U.S.C. § 901. Because the Comptroller General is removable by Congress rather than by the President, the *Bowsher* Court held the statute's automatic budget-cutting mechanism an unconstitutional violation of separation of powers on the ground that the statute vests an arm of Congress with an executive function. *Bowsher*, 478 U.S. at 734. The Court further held the unconstitutional provision severable from the remainder of the statute, leaving in place the statute's fallback provision, § 274(f). *Id.* at 735-36. That provision authorizes Congress, through joint resolution, to recommend a deficit reduction proposal to the President. *Id.* at 718-19.

3. William F. Buckley, Jr., *The Big D; Federal Deficit*, NAT'L REV., Feb. 13, 1987, at 60-61; Joel Dreyfuss et al., *Boo to the Boring Budget of 1988*, FORTUNE, Feb. 2, 1987, at 8; Paul C. Roberts, *Budget Delusions . . . and Fiscal Follies*, WASH. TIMES, Feb. 8, 1991, at F1; Barbara Rudolph, *Pie in the Sky, the White House and Congress Battle to Cut a Trillion Dollar Budget*, TIME, Jan. 12, 1987, at 52-53; *Think Tank Sees \$1 Trillion U.S. Deficit*, UPI, March 11, 1991, available in LEXIS, Nexis Library, UPI File.

4. See Rudolph, *supra* note 3, at 52.

Comptroller General, an arm of Congress.⁵ Nonetheless, the federal budget, and deficit, have continued to grow.⁶

Among the most frequently proposed tools to help deal with this looming budgetary crisis is the item veto.⁷ The item veto would enable the President to veto particular items in proposed legislation without having to veto the entire bill.⁸ The concept underlying the proposal is simple: by enabling the President to accept bills without having to accept the expensive riders attached to them through the legislative process of "logrolling," the item veto, it is argued, would significantly reduce congressional spending, while at the same time allowing the President to sign otherwise desirable legislation into law.⁹ At least eight Presidents, including Presidents Reagan and Bush, have advocated that the chief executive be given this tool to confront effectively Congressional spending excesses.¹⁰ President Bush has gone even further and has stated that if presented with the appropriate bill, he would exercise item veto power as a test case.¹¹

5. See The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 1987 U.S.C.C.A.N. (101 Stat.) 754 [hereinafter Act] (codified throughout 2 and 42 U.S.C.). For a discussion of the amended statute, see Kate Stith, *Rewriting the Fiscal Constitution: the Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593 (1988). The author explains that the exemption of mandatory spending from the automatic sequestration provisions prevents the Act from achieving its stated goal of eliminating the federal deficit by 1991. *Id.* at 596, 652-68.

6. See Roberts, *supra* note 3, at F1.

7. See Paul R.Q. Wolfson, Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 838 (1987) (noting that "[a]s a solution to the perceived congressional aversion to fiscal discipline, members of Congress, influential voices in the press, and President Reagan have suggested that Congress grant the President an 'item veto' power over appropriations bills."). The item veto is often referred to erroneously as the line-item veto; see also ROBERT J. SPITZER, *THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY* 122 (1988) (stating that "[t]he term *item veto* [is] . . . often erroneously called *line-item veto*—federal appropriations bills are not itemized line by line . . .") (emphasis in original); Calvin Bellamy, *Item Veto: Shield Against Deficits or Weapon of Presidential Power?*, 22 VAL. U. L. REV. 557, at 557 n.1 (1988) (noting that "[t]he item veto is not limited to a 'line' and may include whole paragraphs or sections of a legislative proposal.").

8. See AMERICAN ENTERPRISE INSTITUTE LEGISLATIVE ANALYSES, PROPOSALS FOR LINE-ITEM VETO AUTHORITY 1 (1984) (noting that item veto "would allow [the President] to veto individual items of appropriations measures that he must now approve or reject in their entirety.").

9. See Russell M. Ross & Fred Schwengel, *An Item Veto for the President?*, 12 PRESENTIAL STUD. Q. 66, 66 (1982) (asserting that item veto "would grant to the chief executive the power to reject specific items within legislation passed by both Houses of Congress rather than presenting the President with the necessity of accepting the entire bill or vetoing it in its entirety.").

10. See Denise C. Twomey, Comment, *The Constitutionality of a Line-item Veto: A Comparison with Other Exercises of Executive Discretion not to Spend*, 19 GOLDEN GATE U. L. REV. 305, 309 n.20 (1989) (identifying Presidents who have expressed support for the item veto); John W. Mashek, *Sununu Sees Partisan Storms in 1991*, BOSTON GLOBE, Dec. 12, 1990, at 13 (noting that Bush has asked Congress for item veto).

11. See J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 439, 447 (1990) (quoting President Bush in July

The item veto has long been the focus of both political and academic debate.¹² Proponents of the item veto cite three primary justifications for this so-called curative device to “restore” the balance of power between the executive and legislative branches: first, the favorable experience of the forty-three states that provide their governors with this budget-cutting tool;¹³ second, the seeming inability of Congress to curb its own spending excesses;¹⁴ and third, such modern congressional innovations as riders and eleventh-hour omnibus appropriations bills that, if vetoed in their entirety, would effectively shut down the federal government.¹⁵

Item veto detractors counter by claiming first, that the state analogy is of limited application to the federal legislative situation;¹⁶ second, that federal packaging of appropriations bills is not conducive to effective use of the item veto;¹⁷ third, that the vast majority of federal expenditures are

25, 1989 interview as stating: “I’d like to test [the item veto] the way it is. I can’t quite find the right case. I’m sure you’re familiar with the theory that the President has that inherent power, and if I found the proper, narrowly-defined case, I’d like to try that and let the courts decide whether it’s there.”); *Bush Seeks Chance to Try Line-item Veto*, BOSTON GLOBE, Oct. 24, 1989, at 3 (quoting an administration official as stating that “Bush has decided that ‘if the Congress won’t give [the item veto] to him, he wants to see if he has the authority to use piecemeal vetoes without further authorization. . . .’”).

12. See SPITZER, *supra* note 7, at 126-29 (discussing history of item veto debate).

13. See, e.g., Alan J. Dixon, *Line-Item Veto Controversy*, 64 CONG. DIG. 259, 286 (1985) (quoting Senator Dixon as stating that “[i]f a Federal item veto with majority override works as well at the Federal level as it does in my own State of Illinois, it could save \$27 billion a year or more.”); Ross & Schwengel, *supra* note 9, at 74 (stating that “[i]t is significant . . . that in no state where the item veto authority has once been conferred upon the governor has it subsequently been withdrawn.”); Twomey, *supra* note 10, at 2 n.1 (“None of the 43 states which currently include item veto provisions in their constitutions have ever acted to repeal the provisions.”).

14. See, Dixon, *supra* note 13, at 282-83 (asserting that “[l]og-rolling, and packaging good and bad programs into a single omnibus bill, have become a way of life. . . . Congress will never resolve the deficit problems if it continues this ‘business as usual’ approach.”).

15. See Ross & Schwengel, *supra* note 9, at 77 (positing that “[w]hen appropriations bills are rushed through Congress in the closing days, and perhaps hours, of the legislative session, as is often the case, the President has, for all practical purposes, no choice at all.”); see also Judith A. Best, *The Item Veto: Would the Founders Approve?*, 14 PRESIDENTIAL STUD. Q. 183, 187 (1984) (stating that “proposals such as riders and pork barrel appropriations have no other purpose than to intimidate the President, to emasculate the veto power, [and] to foreclose the opportunity for reconsideration.”); Alan J. Dixon, *The Case for the Line-Item Veto*, 1 NOTRE DAME J.L., ETHICS & PUB. POL’Y 207, 221 (1985) (stating that “[t]he legislative tactics that have eroded the President’s veto power were uncommon when the Constitution was written.”); Richard A. Givens, *The Validity of a Separate Veto of Nongermane Riders to Legislation*, 39 TEMP. L.Q. 60 (1965) (asserting that “[t]here is no evidence that the practice of attaching riders was foreseen at the time of the writing or adoption of the Constitution.”).

16. See Louis Fisher & Neal Devins, *How Successfully Can the States’ Item Veto be Transferred to the President?*, 75 GEO. L.J. 159, 161, 180, 186 (1986) (outlining “serious deficiencies” of “state analogy”).

17. See Bellamy, *supra* note 7, at 577-580 (comparing state and federal appropriations processes and explaining why item veto would be a less effective tool to reduce federal appropriations than it is to reduce state appropriations).

mandatory and would thus be immune from the item veto;¹⁸ and finally, and perhaps most importantly, that the item veto would substantially rework the separation of powers envisioned by the framers of the Constitution.¹⁹

While literature on the item veto is extensive,²⁰ surprisingly little attention has been focused on how this tool, if conferred upon the President, would be used in the day to day bargaining over legislative proposals between the executive and legislative branches.²¹ By relying upon the analytical tools advanced by public choice theorists, this article will employ both static and dynamic legislative bargaining models to address this issue. The conclusion reached from the analysis is that the item veto in practice may have precisely the opposite of its intended effect of enabling the President to curb congressional spending by carving out offensive pork barrel riders from otherwise desired legislation. Instead, the item veto would enable the President to influence substantially the direction and shape of legislative policy, while surprisingly, it would offer the chief executive relatively little opportunity to excise offensive special interest items.²²

This article will first review the constitutional debate surrounding the item veto. This review is necessary to understand the arguments both for and against the item veto. Then, using the tools employed by public choice theorists, this article will analyze the item veto by considering both static

18. See *id.* at 579-80 (explaining that entitlement programs and interest on public debt are mandatory expenditures that would be immune from item veto).

19. See *id.* at 581-87 (discussing impact of item veto on balance of power between President and Congress); Wolfson, *supra* note 7, at 851 (asserting that “[a] transfer of spending power to the President would give him primary authority to set priorities for legislation. . . . As the Framers understood it, the legislature possessed the power of the purse as a guard against executive power.”).

20. For an extensive bibliography on the item veto, see HOUSE COMM. ON RULES, 99TH CONG., 2D SESS., ITEM VETO: STATE EXPERIENCE AND ITS APPLICATION TO THE FEDERAL SITUATION, 282-90 (Comm. Print 1986) [hereinafter *Item Veto: State Experience*].

21. One article that does explore how the dynamics of legislative bargaining may change if item veto power is conferred upon President is Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988). Professor Robinson analogizes the balance of power between the executive and legislative branches to a bilateral monopoly and treats the packaging of riders as a type of tying arrangement used by Congress to coerce the President to accept its special interest items. *Id.* at 407-12. One interesting question raised by the analogy is exactly what each branch of government is trying to maximize in the legislative bargaining process. Certainly Congress as an institution has no incentive to seek presidential approval of special interest items. The incentives lie with the individual Congressmen seeking to maximize their political clout and support. See *infra* notes 184-87 and accompanying text. Professor Robinson concludes that while he is not certain how successful the item veto will be in reducing pork barrel legislation overall, even potential marginal reductions “are not to be spurned.” *Robinson, supra*, at 420. Professor Robinson recommends trying the item veto on a trial basis. *Id.* at 421-22. If this article’s predictions are correct, however, the more fundamental issue in the item veto debate is not the extent of budget reductions that the item veto may achieve, but rather, the extent to which the item veto will increase executive influence on general matters of legislative policy. See *infra* notes 178-83 and accompanying text.

22. See generally *infra* notes 163-87 and accompanying text (discussing dynamic legislative bargaining model).

and dynamic models of the legislative bargaining process as each relates to this innovative tool. Finally, this article will test the thesis that the item veto may produce the opposite of its intended effect of carving out offensive riders from otherwise desired legislation by considering studies that involve presidential impoundments and gubernatorial use of the item veto.

II. CONSTITUTIONAL ANALYSIS²³

Both proponents and opponents of the item veto have looked to the wording and history of the Constitution to support their respective positions as to whether the framers, had they considered the issue, would have conferred item veto power upon the President.²⁴ Item veto supporters have argued that, in light of modern legislative practices such as logrolling, attaching nongermane riders to legislation, and passing eleventh-hour omnibus appropriations bills, the item veto would merely serve to "restore" Presidential veto power.²⁵ These congressional practices, it is argued, involve

23. While the primary focus of this article is to analyze the item veto as a matter of policy, rather than to assess the competing arguments whether the Constitution in its present form provides the President with item veto authority, the logical starting place to begin the item veto analysis is the Constitution itself. First, the Constitution provides the *status quo* or backdrop against which a change in the separation of powers that the item veto would entail must be assessed. Second, as shown below, the constitutional debate itself provides valuable insights for analyzing the item veto as a matter of policy. While the insights from this analysis are helpful, the issue whether the item veto is constitutional is only dispositive of the item veto debate if the President tries to assert item veto authority through executive fiat or if Congress tries to confer item veto power through ordinary legislation.

In the 99th Congress, Senator Mattingly introduced a bill, S.43, that would have conferred upon the President item veto power through ordinary legislation on a two-year trial basis. See Edward M. Kennedy, *Line Item Veto Controversy*, 64 CONG. DIG. 259, 266 (1985); *Recent Action in the Congress*, 64 CONG. DIG. 265 (1985) [hereinafter *Recent Action*]; Mack Mattingly, *Line Item Veto Controversy*, 64 CONG. DIG. 259, 272 (1985). The bill was co-sponsored by 46 Senators. *Recent Action*, *supra*, at 265. If successful, the bill would have circumvented the issue whether the President can veto items within an appropriations bill absent a constitutional amendment by forcing Congress to divide all appropriations bills into discrete items before presentment to the President. Kennedy, *supra*, at 268. This subterfuge would be unnecessary if the item veto were enacted through a constitutional amendment. In addition, at least one author has argued that the separate veto of a rider, or nongermane amendment, would presently withstand constitutional muster without either a constitutional amendment or special legislation. Givens, *supra* note 15, at 64.

24. Compare Best, *supra* note 15, at 188 (arguing that had framers considered issue, they would have conferred item veto authority on President) with Mickey Edwards, *The Case Against the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 191, 196-97 (1985) (stating that framers would have rejected item veto as undue encroachment by President on legislative process).

25. See, e.g., Best, *supra* note 15, at 188 (asserting that "[i]t is reasonable that the Founders would not find the item veto to be a dangerous innovation but rather a rehabilitation of an original and essential check and balance."); Dixon, *supra* note 13, at 282 (stating "I say restore because the truth is that the presidential veto is now a much weaker weapon than it once was."); Ross & Schwengel, *supra* note 9, at 77 (stating that "[t]he item veto would restore the veto power to the President.").

a misappropriation of legislative power at the expense of the President.²⁶ In contrast, opponents contend that the item veto would result in an unintended and undesirable shift in the balance of power from the legislative branch, where power is relatively decentralized, to the executive branch, where power is extremely centralized.²⁷

A. Constitutional History of Veto Power

The three primary sources that provide data from which to glean historical support for these positions are the Records of the Federal Convention of 1787,²⁸ the Federalist Papers,²⁹ and, of course, the Constitution itself.³⁰ It is impossible to discern from these documents, however, how the framers would have reacted to the item veto, because none of the three ever mentions the device.³¹ The debate surrounding the veto power ultimately included in the Constitution, contained in Article 1, Section 7, centered instead on three issues: first, whether to provide the President with an absolute or qualified veto power;³² second, if qualified, what percentage vote would be required for an override;³³ and third, whether the President

26. See Best, *supra* note 15, at 187; Givens, *supra* note 15, at 60-63 (arguing that because framers did not anticipate legislative practice of attaching riders, Supreme Court should interpret "bill" in Article 1, § 7 of Constitution to mean "an interconnected piece of legislation concerned with one or more related subjects.").

27. See *The Committee on Federal Legislation, The Line Item Veto*, 41 REC. ASS'N BAR CITY N.Y. 367, 370 (1986) (positing that "the framers were naturally wary of consolidating power in the one branch of government in which, by virtue of its unitary nature, power could not be fragmented or otherwise internally checked."); see also Edwards, *supra* note 24, at 195-97; Robert J. Spitzer, *The Item Veto Reconsidered*, 15 PRESIDENTIAL STUD. Q. 611, 612 (1985).

28. See MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 4 vols. (1966).

29. See *THE FEDERALIST* (Jacob E. Cooke ed., 1961). All cites hereinafter are to this edition.

30. One additional primary source is contemporaneous correspondence by the framers. In a letter to Thomas Jefferson, James Madison described the debate surrounding the proposed veto power in these terms:

[S]ome contended for an absolute negative, as the only possible mean of reducing to practice the theory of a free Government which forbids a mixture of the Legislative & Executive powers. Others would be content with a revisionary power, to be overruled by three fourths of both Houses. It was warmly urged that the judiciary department should be associated in the revision. The idea of some was that a separate revision should be given to the two departments—that if either objected two thirds, if both, three fourths, should be necessary to overrule.

31. See FARRAND, *supra* note 28, at 133. The idea of a revisionary power was ultimately rejected, apparently with little or no debate. See SPITZER, *supra* note 7, at 20.

32. See SPITZER, *supra* note 7, at 123 (stating that "[n]o debate on an item veto appears in the transcripts of the federal [constitutional] convention, and no formal proposal on the subject was offered."); see also *infra* notes 37, 39.

33. See SPITZER, *supra* note 7, at 11-12 (discussing debate over issue of providing President with veto power).

34. *Id.* at 13.

would exercise the veto power alone or in combination with one or more members of the judiciary.³⁴ As adopted, Article 1, Section 7 provides:

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 shall approve he shall sign it, but if not he shall return it. . . .³⁵

Congress may override a presidential veto by a two-thirds vote.³⁶

Nowhere in the Constitution itself does the word "veto" even appear.³⁷ In the Records of the Federal Convention of 1787, the word appears, at most, twice,³⁸ and in the Federalist Papers it appears only once.³⁹ This is not fortuitous. The framers of the Constitution were well aware that the veto power could be associated with its monarchical roots.⁴⁰ Both the supporters of the Constitution and the antifederalists were heavily influenced by the works of Montesquieu and his emphasis on the importance of an absolute separation of powers between the executive and legislative branches.⁴¹

34. *See id.* at 13-14 (discussing counsel of revision proposal).

35. U.S. CONST. art. I, § 7.

36. *Id.* As presently interpreted, the art. I, § 7 veto power contains four variants. When presented with a bill, the President can (1) sign it into law; (2) veto it, thus returning the entire measure; or (3) allow the bill to become law without signature by failing to return it within ten working days. *See* 135 CONG. REC. S14,387 (daily ed. Oct. 31, 1989) (printing letter from Professors Tribe and Kurland to Senator Kennedy on constitutional validity of item veto absent amendment) [hereinafter Tribe and Kurland], *reprinted in* Sidak & Smith, *supra* note 11, at 437. The fourth variant, derived from the third, provides the President an absolute veto when he chooses not to sign a bill and when "Congress by their Adjournment prevent [the bill's] return." U.S. CONST. art. I, § 7, cl. 2. *See also* Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in our Constitutional System*, 23 SAN DIEGO L. REV. 791, 817 (1986).

37. *See* U.S. CONST. art. I, § 7. *See also* SPITZER, *supra* note 7, at 17 (noting that "[n]owhere in the Constitution does the word veto appear, even though the paragraph that describes it is the second longest in the document.").

38. *See* SPITZER, *supra* note 7, at 17-18.

39. *See* Sidak & Smith, *supra* note 11, at 441 n.15 (asserting that "[t]o our knowledge, the word 'veto' is used only once in the Federalist—and even then it is used as a label for a type of executive power (the 'absolute negative' of the British monarch) that Hamilton emphasized did not correspond to the lawmaking powers being conferred by the Constitution upon the American President.") (citing THE FEDERALIST No. 73, at 492, 498 (Alexander Hamilton)).

40. *See* SPITZER, *supra* note 7, at 18 (observing that "[i]t is well understood that this semantic ploy was no accident, but reflected a keen awareness of the monarchical roots of this power and the resentment that its use by the king and his colonial governors had engendered in America.").

41. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 49-50 (1962) (noting that "Montesquieu, whose writings were taken as political gospel, had shown the absolute necessity of separating the legislative, executive, and judicial powers."). For a discussion of the framers' reliance upon the works of Montesquieu, see Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 2-3 (1986); 3 FARRAND, *supra* note 28, at 133 (citing letter from Madison to Jefferson that is quoted *supra* note 30).

The veto was seen as a potential encroachment of this necessary absolute separation of powers.⁴²

A review of the constitutional history of the veto makes clear that, in establishing "the qualified negative of the President,"⁴³ the framers were not guided by a single principle from which to discern their legislative intent. While it is true that the framers sought to expand executive power vis-a-vis the legislature, they sought to do so precisely because the drafters of the Articles of Confederation, in their zealously to guard against executive excesses, went too far.⁴⁴

Three aspects of the Articles created what has been described aptly as "headless" federal government:⁴⁵ the lack of an executive branch; the power of any five states to block any proposed federal legislation; and the requirement of unanimity among the states to pass an amendment to the Articles.⁴⁶ While a stronger federal government, and in particular the creation of an executive branch, was essential to the survival of the young nation, the framers of the Constitution nonetheless remained fearful of both legislative and executive excesses. The constitutional structure reflects these balanced concerns.

The framers of the Constitution envisioned a republican government in which "the legislative authority, necessarily, predominates."⁴⁷ The framers chose an elected legislative body rather than direct lawmaking by the electorate because an elected body, they hoped, would "break and control the violence of faction."⁴⁸ James Madison feared that in a democratic government, majorities would rapidly form "who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁴⁹ But Madison saw faction as something to be controlled rather than eliminated because faction, he believed, was firmly rooted in liberty.⁵⁰

42. See SPITZER, *supra* note 7, at 22 (noting that "[a]s a legislative power given to the executive, the veto was seen as contradicting the maxim, derived from Montesquieu, that the best way to avoid the abuse of power is to divide it.>").

43. THE FEDERALIST No. 73, at 494 (Alexander Hamilton).

44. See EDWARD C. MASON, *THE VETO POWER ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES (1789-1889)* 19-23 (1967) (explaining that framers of Constitution vested executive with veto power in response to inadequacies of executive power in Articles of Confederation); VERNON L. WILKINSON, *OBSERVATIONS ON THE ITEM VETO* (1936), reprinted in *Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary United States Senate*, 98th Cong., 2d Sess. 137, 138 (1984) (noting that "[w]ithin a few years the weakness inherent in a 'headless' government became apparent."); see also FARRAND, *supra* note 41, at 49-50 (discussing recognized need for separate executive branch).

45. See WILKINSON, *supra* note 44, at 138.

46. See SPITZER, *supra* note 7, at 10.

47. THE FEDERALIST No. 51, at 350 (James Madison).

48. THE FEDERALIST No. 10, at 56 (James Madison).

49. *Id.* at 57.

50. See *id.* at 58-59.

Madison believed and hoped that an elected legislature would “refine and enlarge the public views.”⁵¹ Although the elected legislature itself might fall subject to the vice of factions, he hoped that the sheer size of the federal government, as opposed to that of smaller state governments, would counteract this tendency by making it more difficult for “men of factious tempers” to “betray the interests of the people.”⁵²

The framers created two devices to make passage of laws adverse to the public interest more difficult. First, the framers made lawmaking more difficult by establishing a bicameral legislature, in which one house will have “immediate dependence on, [and] an intimate sympathy with the people,”⁵³ and the other house will allow greater time for reflection and deliberation.⁵⁴ This structure protects the public interest because each house must agree on the language of each bill before passage.⁵⁵ Second, the framers granted the President a qualified veto subject to a two-thirds majority override by both houses of Congress.⁵⁶ Explaining these additional checks on the legislature, Madison wrote, “[a]s the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.”⁵⁷

The veto, as ultimately adopted, reflects the delicate balance forged by the founders between the executive and legislative branches. Alexander Hamilton, who favored a strong executive, initially argued for an absolute veto.⁵⁸ Madison, in contrast, favored a “qualified negative,” claiming that the President would rarely exercise this power without some support in Congress in the first instance.⁵⁹ Ultimately, even Hamilton was persuaded that a qualified veto would be “more effectual,” as it “would be less apt to offend.”⁶⁰ In addition to providing the President with a qualified veto power, the framers settled upon a two-thirds voting requirement in each house for an override with relatively little debate.⁶¹ The framers ultimately

51. *Id.* at 62.

52. *Id.*

53. THE FEDERALIST No. 52, at 355 (James Madison).

54. See THE FEDERALIST No. 62, at 418-19 (James Madison).

55. See U.S. CONST. art. 1, § 7.

56. See *id.*

57. See THE FEDERALIST No. 51, at 350 (James Madison). For a discussion of the inherent dilemma created by the combined democratic and antimajoritarian aspects of the Madisonian model of government, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-3 (1971).

58. See 1 FARRAND, *supra* note 28, at 107.

59. See *id.* at 99-100 (quoting Madison as stating that “if a proper proportion of each branch should be required to overrule the objections of the Executive, it would serve the same purpose as an absolute negative. It would rarely ever happen that the Executive constituted as ours is proposed to be would, have firmness eno’ to resist the Legislature, unless backed by a certain part of the body itself.”).

60. THE FEDERALIST No. 73, at 498 (Alexander Hamilton). For an informative summary of the debate at the constitutional convention surrounding whether the President should be afforded an absolute or qualified veto, see SPITZER, *supra* note 7, at 11-13.

61. See SPITZER, *supra* note 7, at 12.

rejected the proposal that the President share the veto power with members of the judiciary.⁶²

Two themes dominated the discussions at the constitutional convention concerning the use of the veto. The veto was seen as a tool, first, to enable the President to protect himself from legislative encroachment,⁶³ and second, to prevent laws that are "unwise in their principle, or incorrect in their form."⁶⁴ Hamilton thus described the veto as a device to prevent "an immediate attack upon the constitutional rights of the Executive, or in a case in which the public good was evidently and palpably sacrificed."⁶⁵

In light of this constitutional history, it is by no means clear whether the framers would have supported the item veto. Because the framers were motivated by conflicting principles, all one can absolutely discern is the compromise that was ultimately reached. Several authors nonetheless have claimed that this compromise, reflected in the wording of the Constitution itself, supports their arguments for an item veto.

B. Constitutional Arguments Over Item Veto

One author, Richard Givens, has argued that the President already may have the constitutional authority to veto nongermane amendments to legislation because the word "bill" in Article 1, Section 7 was not intended to mean a single piece of legislation embracing multiple subjects.⁶⁶ His argument is fairly straightforward. At the time the Constitution was written, individual bills generally consisted of only one subject.⁶⁷ Givens contends that because the framers did not anticipate the legislative practice of riders, there was

62. *Id.* at 13-14.

63. *Id.* at 15.

64. 1 FARRAND, *supra* note 28, at 139 (quoting James Madison); *see also* SPITZER, *supra* note 7, at 17.

65. THE FEDERALIST No. 73, at 497 (Alexander Hamilton); *see also* SPITZER, *supra* note 7, at 15 (stating that "[a]gain and again in the [constitutional] convention's consideration of the veto power, one central theme persistently surfaced: the veto as a device of executive self-protection against encroachments of the legislature."). For the first forty years following the enactment of the Constitution, Presidents limited their use of the veto power to acts violating executive prerogatives or otherwise violating the Constitution. *See* WILKINSON, *supra* note 44, at 154 and sources contained therein. Andrew Jackson was the first President to use the veto as a device to substitute executive judgment on issues of policy for that of Congress. *Id.* at 159.

66. *See* Givens, *supra* note 15, at 62; *but see* Richard A. Riggs, *Separation of Powers: Congressional Riders and the Veto Power*, 6 U. MICH. J.L. REF. 735, 745 (1973) (noting that "[t]here were no debates over the meaning of the word [bill] at the constitutional convention, and no other contemporaneous recognition that its interpretation would present any difficulties has been found.") (footnote omitted).

67. *See* Givens, *supra* note 15, at 60 (asserting that "[t]here is no evidence that the practice of attaching riders was foreseen at the time of the writing or adoption of the Constitution."); *see also* Dixon, *supra* note 15, at 221; Ross & Schwengel, *supra* note 9, at 67; *but see* SPITZER, *supra* note 7, at 124 (observing that although attaching unrelated riders to legislation was practiced in Britain before Constitution's enactment, evidence is inconclusive whether framers of Constitution were aware of such practice).

no reason for the framers to specify in the Constitution that "bills" could not include multiple subjects.⁶⁸ Therefore, Givens argues, the Constitution should not be interpreted as preventing the President from vetoing a rider attached to an unrelated bill where the President would not have accepted the rider independently from that bill.⁶⁹

Givens claims that the existence of House and Senate rules prohibiting nongermane amendments supports his construction of the word "bill."⁷⁰ Ironically, however, the very existence of these rules appears to undercut Givens's argument. If, in fact, the word "bill" means "an interconnected piece of legislation dealing with related subject matters,"⁷¹ then the House and Senate germaneness rules would be unnecessary because nongermane amendments would be voidable. However, even assuming that Givens is correct in asserting that the framers could not have anticipated the practice of attaching nongermane riders to legislation, which is debated,⁷² and that their failure to anticipate the practice warrants invalidating nongermane amendments, it does not follow that the President should be vested with separate authority to veto such items. An equally plausible solution would be to require judicial enforcement of the germaneness rule.

The argument favoring executive enforcement over judicial enforcement is based on expediency.⁷³ Obviously it would be easier for a President to

68. See Givens, *supra* note 15, at 63; see also CHARLES J. ZINN, HOUSE COMM. ON THE JUDICIARY, THE VETO POWER OF THE PRESIDENT 34 (Comm. Print 1951) (asking whether "[i]n the absence of any informative debates in the [constitutional] Convention, is it assuming too much to hold that the delegates thought of that term [bill] as meaning a legislative instrument setting forth one or more propositions of law, all related, however, to a single subject matter?"); Ross & Schwengel, *supra* note 9, at 67 (arguing that "[i]t is at least possible that . . . those attending the [Constitutional] Convention gave the term 'bill' a much narrower construction than has since been applied to the term. It may have been envisioned that a bill would be concerned with only one specific subject and that subject would be clearly stated in the title."); but see Eugene Gressman, *Is the Item Veto Constitutional?*, 64 N.C. L. REV. 819, 819 (1986) (asserting that "[b]y long usage and plain meaning, 'Bill' means any singular, entire piece of legislation in the form in which it was approved by the two Houses.").

69. See Givens, *supra* note 15, at 64 (arguing that "such a veto, if upheld in Congress, would appear to stand an excellent chance of being upheld in the courts as well.").

70. Givens, *supra*, note 15, at 63. At present, only the House rules prohibit nongermane riders. See WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988) at 25-26 note v. ("Absent a unanimous consent agreement, a senator may propose any number of amendments, including those wholly unrelated to the subject matter of the bill. (House Rule XVI, in contrast, limits amendments to those which are 'germane,' or related, to the subject of the bill.)"). The rules prohibiting introduction of nongermane amendments to which Givens was referring can be found at H.R. Res. 46, 44th Cong., 1st Sess., R.16, No. 7 (1876); S. Res. 18, 48th Cong., 1st Sess., R.16 (1884); see also Riggs, *supra* note 66, at 743 (arguing that "[t]he difficulty with [Givens's] approach . . . is that the rules [prohibiting nongermane amendments] do not provide that a bill loses its quality as a single bill when a nongermane provision is added; they merely provide that such amendments should not be introduced.").

71. See Givens, *supra* note 15, at 63.

72. See SPITZER, *supra* note 7, at 124.

73. Cf. Jeffrey G. Knowles, Note, *Enforcing the One-Subject Rule: The Case for a*

veto a rider than to wait for judicial enforcement of the construction of the word "bill." As yet, there is no judicial decision prohibiting the attachment of nongermane riders, notwithstanding the House and Senate rules.⁷⁴ Moreover, no procedural rule of Congress can alter the meaning of constitutional language.⁷⁵ If nongermane amendments were ruled invalid, however, then the strategic advantage to attaching them to bills, regardless of which branch has the power to enforce the rule, would be reduced.

The item veto, by allowing the President to effectively sever items from larger bills, appears to remove the incentive for legislators to incorporate such items into those bills. With the item veto, all legislation, however packaged, would consist of individual items subject to separate veto power from the standpoint of both the President and legislators. The policy question, then, dealt with below, is what impact this is likely to have on the process of legislative bargaining.

While Givens limits his argument to nongermane amendments, distinguishing proposals to grant the President item veto authority over appropriations bills on the ground that appropriations bills involve one related subject,⁷⁶ two authors, J. Gregory Sidak and Thomas A. Smith, have recently advanced a similar argument in support of a more generalized item veto.⁷⁷ Since the framers neither anticipated "riders" nor the now common legislative practices of attaching large scale pork barrel appropriations to general appropriations bills⁷⁸ and passing omnibus appropriations bills near the close of each session, such that if the President exercises his veto power he effectively closes the government,⁷⁹ it is argued that the framers' failure to restrict these practices should not mean that the President is constitutionally obligated to respect them.⁸⁰

In fact, however, the framers' silence on the issues of riders, large scale pork barrel appropriations within single bills, and delayed passage of appropriations bills, neither confirms nor denies how the framers would have reacted to these now common legislative practices. These practices evolved, at least in part, because the Constitution by its wording did not

Subject Veto, 38 HASTINGS L.J. 563, 586 (1987) (arguing that gubernatorial enforcement of single subject rule through veto power over nongermane amendments is more efficient than judicial enforcement of single subject rule).

74. See McGowan, *supra* note 36, at 810-11 n.103.

75. See Riggs, *supra* note 66, at 743.

76. Givens, *supra* note 15, at 63.

77. See Sidak & Smith, *supra* note 11, at 466-74.

78. See Sidak & Smith, *supra* note 11, at 472 (noting that "[w]e do not know how the framers would have advised the President to respond to the kind of legislative bundling that is now standard practice, for this practice, according to President Hayes, 'did not prevail until more than forty years after the adoption of the Constitution.'"); see also Best, *supra* note 15, at 187 (positing that "[s]ince the Founding. . . [t]he legislature has adopted the practice of adding riders to bills and in particular legislative riders and pork-barrel appropriations to vital bills.").

79. See Ross & Schwengel, *supra* note 9, at 77.

80. See Sidak & Smith, *supra* note 11, at 474.

prevent them. Instead, the compromise reached by the framers and embodied in Article 1, Section 7, by its plain wording requires the President either to accept or to reject bills as packages, the content of which is determined entirely by Congress. Thus, Professors Laurence H. Tribe and Phillip B. Kurland, in addressing the item veto question, concluded that the Constitution, in its present form, provides the President no opportunity for a *post hoc* audit of bills in the form of an item veto.⁸¹ Assuming Professors Tribe and Kurland are correct in stating that the Constitution's specific wording does not provide the President with item veto power, the issue remains whether the item veto is consistent with the constitutional structure.

Senator Dixon has argued that his proposed constitutional amendment that would have conferred item veto power upon the President subject to simple majority override is in accordance with constitutional principles because "the fact that a bill passes Congress is supposed to mean that there is majority support for that bill, including every item in it."⁸² This argument disregards the constitutional scheme. Just because Congress alone determines the package of items that form a bill, there is no reason to assume that a majority of either or both houses supports each provision contained in every bill. Rather, as shown below,⁸³ supporters of a bill, even a bill that is a matter of general interest but that does not yet have majority support in each house, will engage in compromises in the course of legislative bargaining. Those compromises will include agreeing to attach items which as independent bills would not garner majority support, in exchange for votes. While these compromises increase the number of special interest items presented to the President, they also increase the prospect of procuring desired general interest legislation. Congress, and not the President, determines the content of bills under the constitutional scheme. Therefore, the fact that a majority in each House of Congress would not have supported every special interest item contained in a bill had that item been voted on as an independent piece of proposed legislation does not mean that the President separately can disapprove that item yet approve the remaining items in the bill.

A variety of congressional practices consistent with the constitutional scheme have increased the opportunities for such legislative compromises. Numerous procedural hurdles to the passage of legislation, in addition to the substantial power given to a minority in Congress through the presidential veto power,⁸⁴ enable minorities in opposition to proposed bills, even

81. See Tribe & Kurland, *supra* note 36 (concluding that "[n]o provision is made for vetoing a portion of a bill or other measure, as opposed to the whole.").

82. Dixon, *supra* note 15, at 223. Senator Dixon introduced the bill through joint resolution in the 1st Session of the 98th Congress. *Id.* at 208 n.8 and accompanying text.

83. See *infra* notes 163-87 and accompanying text (discussing dynamic model and how it is affected by item veto).

84. See CHARLES O. JONES, AN INTRODUCTION TO THE STUDY OF PUBLIC POLICY 94-95 (2d ed. 1977) (noting that presidential veto power represents substantial minority power because two-thirds of both houses is required to override a veto).

those bills with substantial or majority support, to force compromises in their favor.⁸⁵ For example, the filibuster in the Senate was used to help defeat proposed civil rights legislation until 1964.⁸⁶ In addition, the committee structure in both houses can be used to thwart legislation with majority support. An adverse committee chair can send a bill to a subcommittee that the chair knows will defeat it by obstructing hearings or by managing to schedule votes at times when the bill's opponents will have the greatest advantage.⁸⁷ Finally, House Rules Committee procedures give individual Congressmen significant power to slow down or even stop a bill which has substantial or even majority support.⁸⁸ These and other practices give individual legislators who do not support a particular bill tremendous power to exact substantive compromises or even to attach riders in exchange for expediting passage.⁸⁹

While these practices may give individual legislators seemingly disproportionate power, they also reflect the Madisonian vision that rapid formation of majority factions is to be feared. These practices allow well placed representatives of minority groups who oppose particular legislative proposals to force compromises that will soften the adverse impact of the proposed legislation.

Although it is by no means certain how the framers would have reacted to a proposal not before them, it is apparent that the item veto would significantly compromise some of the protections given to minority interests. If devices such as the qualified veto, the filibuster, and the House Rules Committee procedures are useful in enabling minority interests to slow down or stop legislation supported by rapidly formed majoritarian "factions" by enabling those groups to coerce substantive changes to bills or to add riders as a precondition to passage, then the item veto may work to defeat some of these protections.⁹⁰ If those compromises or additions to legislation given

85. See *id.* at 96-97 (describing legislative processes in Congress that can require no fewer than fifty to sixty majorities to form at various junctures before a complex piece of legislation is approved for presentment).

86. See *id.* at 98 (explaining that to invoke cloture to defeat filibuster, sixteen Senators must sign petition and, until 1975, two-thirds of those Senators present needs to approve it; in 1975 the cloture rule was amended to require three-fifths for approval except in cases of a rule change, when two-thirds is still required).

87. *Id.* at 97.

88. For a discussion of some of these procedures, see ESKRIDGE & FRICKEY, *supra* note 70, at 13-14; see also House Rules XXVII, XXIV and XI; PETER H. ARANSON, *AMERICAN GOVERNMENT: STRATEGY AND CHOICE* 367 (1981); MICHAEL T. HAYES, *Lobbyists and Legislators: A Theory of Political Markets* 36 (1981) (noting "antimajoritarian" aspect of practices discussed in text).

89. See HAYES, *supra* note 88, at 153-54 (discussing proposals to abolish coercive practices).

90. One could argue that, in fact, the Madisonian fear of "factions" was exaggerated and that such practices as "riders" demonstrate that the real aggrandizement of power has not been composed of majoritarian factions adverse to the public good, but rather with special interests strategically situated to coerce majorities into offering compromises in their favor. Whether that is, in fact true, may be a test of the Madisonian model's strength rather than

in exchange for the support of well-situated opponents to a bill are subject to a separate item veto, then such support may not be forthcoming in the future despite any proffered compromises.

Implicit in the constitutional debate over the item veto is the idea that one form of compromise, namely that resulting in change to the substantive content of a bill as a precondition to support, is a legitimate byproduct of the Madisonian vision, while another form, namely bribery that results in riders, is not. Whether or not this assumption is valid, the next section will demonstrate that the item is an ill-conceived device to safeguard the former but prevent the latter form of bargaining.

In short, there is no obvious way to maintain the benefits of allowing minority interests to force compromises in their favor without also incurring the costs. If the President can item veto undesirable special interest riders, he may effectively prevent those legitimate compromises that a bill's supporters need in order to gain majority support. With the good comes the bad.

Whether or not the Constitution presently provides the President with item veto authority, the constitutional analysis leaves us with the following insight: Without the item veto, we may get more general interest bills along with more pork barrel items; with the item veto, we may get fewer general interest bills along with fewer pork barrel items. This insight provides the nucleus for analysis under public choice theory.⁹¹

III. PUBLIC CHOICE ANALYSIS OF THE ITEM VETO

Although constitutional analysis is the logical starting place to analyze the item veto, all but the most ardent item veto supporters acknowledge that the Constitution in its present form does not provide the President with this authority.⁹² The question remains, however, whether adopting the item veto represents a sound policy choice. Using the insights advanced by public choice theorists, as applied to this innovative tool, this section will address that issue.

Public choice theorists attempt to predict the types of legislation likely to result if certain assumptions are made about the participants in the legislative process. All players in the legislative arena are assumed to be rational self-interest maximizers.⁹³ Public choice theorists analogize Congress

its weakness. The feared violence of factions may be reduced precisely because of these existing protections for minority interests.

91. One remaining constitutional argument that requires an understanding of the dynamic public choice analysis will be addressed *infra* at notes 184-87 and accompanying text.

92. See Dixon, *supra* note 13, at 282 (explaining need for constitutional amendment to confer item veto on President).

93. See Arthur S. Goldberg, *Social Determinism and Rationality as Bases of Party Identification*, 63 AM. POL. SCI. REV. 5 (1969) (describing concept of rationality). The author states that:

Put most simply, being rational in a decision situation consists in examining the alternatives with which one is confronted, estimating and evaluating the likely

to a marketplace in which public interest groups and lobbyists attempt to procure favorable legislation to benefit their constituents.⁹⁴

Using this analogy, legislators are the suppliers of legislation, and the public, interest groups, and lobbyists are the demanders. Public choice theorists assert that individuals will seek to procure legislation only when the benefits to them of pursuing that legislation exceed the costs.⁹⁵ Similarly, on the supply side, legislators will provide legislative benefits when it best serves their goals, including their primary objective of being re-elected.⁹⁶

consequences of each, and selecting that alternative which yields the most attractive set of expectations. . . . All individuals are assumed to act so as to *try* to maximize expected value. In this sense all are equally rational. However, there is room for error in these calculations. Individuals may, therefore, vary in their effective rationality.

Id. at 5. (emphasis in original). For a further discussion on the concept of rationality in decisionmaking, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 4-11 (1957).

94. Earlier pluralist theorists posited that Congress was merely a conduit through which special interest groups bargained to achieve their own legislative compromises. See EARL LATHAM, *THE GROUP BASIS OF POLITICS* 35 (1952) (asserting that “[t]he legislature referees the group struggle, ratifies the victories of the successful coalitions, and records the terms of surrenders, compromises, and conquests in the form of statutes.”); THEODORE J. LOWI, *THE POLITICS OF DISORDER* (1971) at xviii-xix (stating that “[t]he basis of pluralism and political quiescence is the organized group and group interactions, with political man holding the whole together through delegation and negotiation.”). For an interesting pluralist analysis of the passage of the Hawley-Smoot Bill, see ELMER E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF, A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF* (1935). The author provides an early insight into the logrolling process, explaining that while negotiating the tariff “the fear of retaliation is the basis of the strategy of reciprocal non-interference.” *Id.* at 140. Through this process of mutual non-interference among special interests, and the failure of groups harmed by the tariffs to form effective lobbies, *id.* at 222, the overall bill was actually harmful to the economy as a whole. *Id.* at 283. Unlike pluralists who viewed legislators as referees in the struggle among interest groups, public choice theorists instead contend that legislators and lobbyists have a unique symbiotic relationship resulting in legislation that benefits both parties. See RAYMOND A. BAUER ET AL., *AMERICAN BUSINESS AND PUBLIC POLICY* 456-57 (1972) (arguing that “the appropriate general model is not one of linear causality, but a transactional one, which views all the actors in the situation as exerting continuous influence on each other. All the actors are to some extent in a situation of mutual influence and interdependence.”).

95. See generally HAYES, *supra* note 88, at 64-68. This is simply another way of saying that individuals are rational self-interest maximizers. This simple insight explains a fundamental tenet of public choice theory, namely that group behavior can be described only in terms of the motives of the group’s members. See ARANSON, *supra* note 88, at 21 (asserting that “[a] group can have no goal apart from those goals that individual members of the group might pursue.”). As will be seen *infra* at note 97, the fundamental problem explained by public choice theory is that it is often rational for individuals within a group to pursue goals that in the aggregate are detrimental to the group as a whole.

96. MORRIS P. FIORINA, *REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES* 31 (1974) (noting that “[e]mpirically goals are enormous. Reelection, legislative influence, prestige, policy, higher office, public service—all may play their part. But we would argue that reelection is the primary goal that the constituency controls: the district gives and the district can take away.”); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 16 (1974) (stating that “[t]he electoral goal . . . has to be the *proximate* goal of everyone, the goal that must be achieved over and over if other ends are to be entertained.”) (emphasis in original).

This article will employ two models of the legislative process derived from these assumptions. The first, "static," model employs a four box matrix to explain why it is possible that with both sides, the suppliers and the demanders, acting rationally in the legislative arena, the end result may be an abundance of special interest legislation that in the aggregate imposes high costs on all members of society with no apparent corresponding benefit.⁹⁷ This is the problem that the item veto is designed to cure. The static model will further demonstrate why the item veto appears to be a uniquely acceptable solution to this problem. The second, "dynamic," model will build upon the static model to show that, assuming again that all players behave rationally, there is little reason to believe that the item veto will achieve its proponents' stated goal of reducing undesirable pork barrel legislation. Instead, the item veto would rework a fundamental shift in the balance of power, providing the President with powerful opportunities to influence the direction and shape of legislative priorities, while affording him surprisingly little opportunity to excise the dreaded pork.

A. *The Static Model*

The tendency of Congress to produce legislation that in the aggregate leaves everyone worse off, called "Pareto inferior" legislation,⁹⁸ stems from two sources. On the demand side, individuals who would benefit from collective governmental action realize that others will also benefit and, thus, "hold out" in their lobbying efforts to procure such legislation. They instead wait for others to lobby on their behalf. Law and economics scholars have labelled this the "free-rider problem."⁹⁹ On the supply side, Congressmen often realize that legislation almost always provides benefits to some constituents but imposes costs on others. Behaving rationally, Congressmen will respond to these "conflictual" situations by either declining to provide any legislation or by providing the facade of meaningful legislation in the form of delegation.¹⁰⁰

97. See William H. Riker & Steven Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1236 (1973) (stating that "[t]his paradox [of vote trading] has the property that, while each trade is individually advantageous to the traders, the sum of the trades is disadvantageous to everybody, including the traders themselves."). *But cf.* JAMES M. BUCHANAN & GODRON TULLOCK, *THE CALCULUS OF CONSENT* 145 (1965) (explaining that while individuals with inadequate incentives to lobby against legislation imposing slight "externalities" onto them are disadvantaged by such legislation, those same individuals may benefit overall by legislative process because more than half the time they may be beneficiaries of legislation imposing externalities onto others).

98. See Riker & Brams, *supra* note 97, at 1236 (analyzing why vote trading yields Pareto inferior legislation).

99. See RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 147-66 (1976) (discussing free-rider problem); see also HAYES, *supra* note 88, at 133; MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 21 (1971).

100. See HAYES, *supra* note 88, at 28 (noting that "[t]hrough the delegation of broad, discretionary authority, legislators not only avoid having to choose among conflicting interests, with the attendant risk of electoral punishment by the losers, but through the appearance of

Two public choice theorists, James Q. Wilson and Michael T. Hayes, have used these insights to create a model of four legislative categories designed to predict which supply and demand configurations produce too much public action as well as which ones produce too little.¹⁰¹ While this analysis helps to provide an analytical framework, the more important issue for purposes of the item veto debate involves the relationships between and among certain of these legislative categories. This section will first outline the factors that affect the supply and demand for legislation in each of the four categories: distributed benefits/distributed costs, distributed benefits/concentrated costs, concentrated benefits/distributed costs, concentrated benefits/concentrated costs. This section and the next will then explain how the item veto will affect the process of joining together legislation from these various categories and what the implications are for the overall procurement of desired legislation.

For simplicity, Wilson and Hayes divide the benefits associated with public goods into general benefits to the public at large,¹⁰² for example, defense, and narrow or special interest benefits,¹⁰³ for example, an industrial

reform they may successfully appease those demanding change.”). In Lowi, *supra* note 94, the author criticizes delegation as a means by which politicians avoid dealing with critical political issues. The author explains:

A bad program is a government response to an urgent demand that expresses the appropriate sentiments (for example, “put an end to poverty”) but does not direct the coercive powers of the state clearly and effectively toward the pathology that activated the demand. Because the pressure is on, and good liberals feel they must have the program, they formulate it vaguely, delegate great discretion to the administrator, and expect him to work out the actual program in cahoots with all contestants. . . . But meanwhile, the energy behind the demands that go into the enactment is bought off, and the discovery that it is bought off usually comes too late to do anything about the program. This buying off is relatively easy, because new and inexperienced leaders are simply ignorant of what they are in for when they interact with governments and politicians. In this manner, a premature, vague government response in a bad program is far worse than no government response at all.

Id. at 59; *see also id.* at 179-80 (describing process by which establishment of Council of Environmental Quality enabled Congress during Nixon administration to avoid setting up meaningful environmental protection laws through facade of action). Lowi contends that “[i]t is obviously better not to have any program at all than to give the sense of having one, and later having it revealed as an ineffectual and privilege-prone program that brings the entire governmental apparatus into question.” *Id.* at 180.

101. *See generally* HAYES, *supra* note 88, at 99-126. While Wilson first posited these four categories, Hayes, relying upon the works of several public choice theorists, has substantially developed the original model; JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 332-37 (1973).

102. *See* HAYES, *supra* note 88, at 41 (describing nonexcludability as distinguishing public from private goods); WILSON, *supra* note 101, at 331-32 (noting that goods conferring widely distributed benefits may or may not be “collective goods” that provide benefits that are nonexcludable); *see also* ARANSON, *supra* note 88, at 79-80 (describing attributes of collective goods, including jointness of supply and jointness of consumption).

103. *See* HAYES, *supra* note 88, at 42 (noting that “[f]or small groups, however, the share of the collective benefit going to each member may be sufficient to outweigh their shares of the cost of providing the good.”); WILSON, *supra* note 101, at 331.

subsidy or tariff. Similarly, Wilson and Hayes divide the costs associated with public goods into those that are distributed widely, for example, the fifty-five mile-per-hour speed limit, and those that are distributed narrowly, for example, rent control or socialized medicine.¹⁰⁴ While the costs and benefits of most public goods fall between these extremes,¹⁰⁵ these categories are useful in setting up the analytical paradigm.

The difficulty with categorizing public goods between the extremes of conferring narrowly distributed and widely distributed benefits or imposing narrowly distributed or widely distributed costs is exacerbated by the fact that it is strategically beneficial for special interest groups to characterize special interest goods, for example a particular defense contract, as benefiting the general public, for example by claiming that it will help the national defense.¹⁰⁶ Professor Glen O. Robinson has offered a useful definition that helps to avoid this problem:

We can roughly define 'public goods' as those in which there is some symmetry in the distribution of benefits and costs (within some near-term time period), whereas 'private goods' are those where distribution of benefits and costs is asymmetrical; benefits are concentrated in a particular geographic region or special group, whereas costs are distributed more broadly over the general population.¹⁰⁷

The traditional view of Congress is that of legislators following their mandate collectively to supply goods benefiting the general public and bargaining only as to detail.¹⁰⁸ The irony highlighted by public choice theory is that individual members of society are least likely to lobby for such goods.¹⁰⁹ Because no one can be excluded from the benefits of such classic

104. See WILSON, *supra* note 101, at 331 (explaining that "[a] cost may be widely distributed (as with the general tax burden, generally rising crime rates, the widespread practice of some objectionable act such as the sale of obscene literature) or it may be narrowly concentrated (as with a fee or impost paid by a particular industry or locality or a highway construction program that destroys a particular community)), see also HAYES, *supra* note 88, at 65 (stating that "[c]osts of a given issue may be widely distributed . . . or narrowly concentrated.").

105. See Robinson, *supra* note 21, at 408-09 and authorities cited.

106. See ARANSON, *supra* note 88, at 91 (explaining that while defense is characterized by its proponents as a public good, in fact, defense contractors largely back defense lobbying precisely because of "redistributive" benefits).

107. Robinson, *supra* note 21, at 408-09.

108. See ARANSON, *supra* note 88, at 354 (positing that "in an idealized model of lawmaking . . . senators and representatives would be instructed by the electoral process as to what level of which public goods . . . constituents wanted produced. . . . They would then enter the Congress, thrash out the details, and hand over appropriately fashioned bills to the president . . .").

109. See generally OLSON, *supra* note 99, at 1-65 (assuming individuals behave rationally, they are least likely to form groups that seek to obtain benefits that are widely distributed, and more likely to form small groups that seek to obtain benefits that are narrowly conferred upon the group members); see also WILSON, *supra* note 101, at 23-24 (stating that "Olson shows that it makes little sense to join an organization above a certain size if one's sole motive is to increase perceptibly the organization's chances of achieving its goals.").

public goods as a lighthouse or defense, individuals will hold out in their lobbying efforts to procure such legislation, waiting for others to do so on their behalf.¹¹⁰ Because everyone engages in this behavior, goods providing benefits to the general public tend to be undersupplied.¹¹¹ In other words, while everyone benefits from them, no one is willing to incur the necessary costs to procure them.

Alternatively, there is a stronger incentive to lobby for goods that provide narrow and direct benefits to identifiable groups.¹¹² The hold out phenomenon is not eliminated altogether, but it is reduced to the extent that individuals can be excluded from the group benefiting from the legislation.¹¹³ The problem here is analogous to that of "cheaters" in a cartel.¹¹⁴ To avoid having potential beneficiaries of narrow benefit legislation "cheat" by not contributing to lobbying efforts, special interest lobbyists will try, where possible, to make the legislative benefits divisible and excludable.¹¹⁵

The problem with lobbying incentives is the same with respect to the costs of collectively supplied goods as it is with respect to the benefits.¹¹⁶ For public goods with widely distributed costs, one would expect minimal lobbying in opposition, just as one would expect minimal lobbying in support of goods conferring widely distributed benefits.¹¹⁷ Similarly, for goods imposing costs on a narrow group, one would expect greater lobbying in opposition, subject to the same free-rider or "cheating" problem that occurs

110. See OLSON, *supra* note 99, at 21 (asserting that "[t]hrough all of the members of the group . . . have a common interest in obtaining [the] collective benefit, they have no common interest in paying the cost of providing that collective good. Each would prefer that the others pay the entire cost, and ordinarily would get any benefit provided whether he had borne part of the cost or not."); see also HAYES, *supra* note 88, at 90 (claiming that "[w]idely distributed benefits or costs would tend to affect large, diffuse groups vulnerable to the free rider problem, whereas concentrated benefits and costs would be more likely to generate activity by organized groups.").

111. See OLSON, *supra* note 99, at 35 (explaining that "[t]his tendency toward suboptimality is due to the fact that a collective good is, by definition, such that other individuals in the group cannot be kept from consuming it once any individual in the group has provided it for himself."); see also HAYES, *supra* note 88, at 133 (concluding that "the supply of public goods will inevitably be suboptimal as a result of the free rider problem.").

112. See OLSON, *supra* note 99, at 35 (concluding that, "[a]ccordingly, the larger the group, the farther it will fall short of providing an optimal amount of a collective good.") (emphasis deleted); see also HAYES, *supra* note 88, at 90 (stating that "concentrated benefits and costs would be more likely [than widely distributed benefits or costs] to generate activity by organized groups.").

113. See ARANSON, *supra* note 88, at 235 (asserting that "the benefits flowing to a group's members should be divisible, private, in the sense that members of some other group will not receive benefits as a result . . .").

114. For a discussion of the problems associated with cheating in a cartel, see HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 85-89 (1985) (explaining opportunities for members in cartel to cheat and methods by which members of cartel can make cheating more difficult).

115. ARANSON, *supra* note 88, at 235.

116. HAYES, *supra* note 88, at 65; WILSON, *supra* note 101, at 331-32.

117. HAYES, *supra* note 88, at 65; WILSON, *supra* note 101, at 332-34.

with goods that confer narrow benefits.¹¹⁸ In sum, lobbying efforts in favor of, or in opposition to, legislation will increase in proportion to the degree to which benefits are narrowly conferred or costs are narrowly imposed.

The same factors driving the demand for legislation are at work in driving the supply. Just as constituents will press more vigorously for legislation conferring narrow and excludable benefits, legislators will supply legislation more readily when they can credibly claim credit with their constituents for having procured the legislative benefit.¹¹⁹ An individual Congressman is aware that his constituents will be dubious of claims that he was single-handedly responsible for a major legislative success. He also knows that his constituents will be more willing to credit him with a narrow and discreet legislative procurement aiding his district.¹²⁰ In addition, one theorist claims that Congressmen expect their constituents to remember votes against their interests longer than votes in their favor.¹²¹ This creates an obvious dilemma for legislators faced with some constituents who would benefit by proposed legislation at a price borne by other constituents. Congressmen can avoid this problem by exercising a third option beyond supplying or not supplying legislation. Specifically, Congressmen also can delegate decision making responsibility to agencies or courts.¹²²

Congressmen can be expected to exercise this third option in instances in which one constituent group benefits directly at the expense of another¹²³ whether the costs and benefits of the legislation are widely or are narrowly distributed.¹²⁴ Legislators can use delegation as a means to let both sides

118. HAYES, *supra* note 88, at 65; WILSON, *supra* note 101, at 334-37.

119. See generally MAYHEW, *supra* note 96, at 52-54. The author explains that because individual Congressmen cannot convincingly take credit for grandiose legislation, and because constituents are aware of immediate legislative procurements, Congressmen seek legislation that provides particularized benefits to their constituents. Particularized benefits must be given to an identifiable group and on an *ad hoc* basis so that a Congressman can have an identifiable role in their procurement.

120. See Benjamin Zycher, *An Item Veto Won't Work*, WALL ST. J., Oct. 24, 1984, at 32 (noting that "it is in the political self interest of politicians to bestow benefits that are measurable, and to impose costs that are not."); Robinson, *supra* note 21, at 411 (stating that "[t]he intuition may be that because of the President's nationwide constituency he is held specially accountable for the fate of general enactments By contrast, *individual* Congressmen cannot claim credit for such legislation, and hence are not blamed for its defeat.") (emphasis in original).

121. See FIORINA, *supra* note 96, at 38-39 (explaining influence on Congressmen of "the ungrateful electorate."). This phenomenon, which defies the pure concept of self-interest maximization upon which the public choice theory is founded, appears to rest instead on the psychological intuition that voters will focus on the question "[w]hat have you done for me lately?" when deciding for whom to vote. See *id.* at 39.

122. See THEODORE J. LOWI, *THE END OF LIBERALISM* 59 (1979) (describing process by which Congress avoids decision making in conflictual situations through broad delegation); see also HAYES, *supra* note 88, at 28.

123. See, e.g., MARK V. NADEL, *THE POLITICS OF CONSUMER PROTECTION* 25-27 (1971) (describing the elusive benefits to automobile consumers of regulatory legislation aimed at automobile consumer protection); see also HAYES, *supra* note 88, at 108.

124. For purposes of the item veto debate, the former category of legislation, distributed

claim victory in the legislative process,¹²⁵ while blaming the agency at some future date for imposing the legislative cost. Frequently, regulation results in the interest groups "capturing" the agency such that the ensuing regulation is closer to the model of legislation under the old pluralist theory.¹²⁶ In essence, the interest groups win at the expense of the general public.¹²⁷

Wilson and Hayes combine these demand and supply configurations to create four legislative categories. The four-box matrix on the opposite page summarizes the discussion to follow.¹²⁸

B. *The Four Box Static Model*

While the distributed benefits/distributed costs category is the category of legislation that Congress was traditionally expected to provide,¹²⁹ public choice theorists posit that, in fact, it is most likely to be undersupplied.¹³⁰ Because this legislative category involves a conflicting demand pattern in which all constituents receive a slight benefit and incur a slight cost, and because lobbying efforts are not likely to be intense on either side, legislators will respond with inaction, or with symbolic action in the form of delegation.¹³¹ As shown below in the section discussing the dynamic model, one method Congressmen can use to increase the likelihood that a proposed bill in this category will secure enough votes for passage is to agree to attach to the bill legislation from another category in which the incentive for lobbying is stronger.¹³² This is how nongermane riders come into being.

The distributed benefits/concentrated costs category is characterized by weak lobbying in support of legislation and strong lobbying in opposition, and is thus conflictual.¹³³ An example is socialized medicine. Because everyone at some point requires medical services, the benefits of socialized medicine would be distributed widely. The costs, in contrast, would be more

benefits/distributed costs is substantially more important than the latter, concentrated benefits/concentrated costs. See *infra* notes 163-84 and accompanying text.

125. HAYES, *supra* note 88, at 108.

126. For a discussion of the pluralist approach to legislative bargaining, see *supra* note 94. See also HAYES, *supra* note 88, at 104. Hayes explains that agency capture is sometimes the actual congressional goal "for only in this way could congressmen minimize the disturbance to the attentive groups important to their reelection while appearing concerned with the broader public interest." *Id.*; but cf. WILSON, *supra* note 101, at 336 (arguing that agency capture is less likely in cases where agency is regulating two organized competitors than where it is regulating one organized interest and one diffuse interest).

127. The propriety of Congressional delegation is well beyond the scope of this article. For a fuller treatment of the issue, see Lowi, *supra* note 122.

128. While neither Wilson nor Hayes actually employ a matrix to explain these four legislative categories, Professors Eskridge and Frickey have created two matrices from the Hayes model. See ESKRIDGE & FRICKEY, *supra* note 70, at 53, 55. The matrix in the text is a modified version as it relates to the discussion in this article.

129. See ARANSON, *supra* note 88, at 354; OLSON, *supra* note 99, at 35.

130. See HAYES, *supra* note 88, at 133; OLSON, *supra* note 99, at 35.

131. See generally HAYES, *supra* note 88, at 120-126.

132. See *infra* notes 163-83 and accompanying text.

133. See HAYES, *supra* note 88, at 102.

STATIC MODEL

BENEFITS	
WIDELY DISTRIBUTED	NARROWLY DISTRIBUTED
<p>PUBLIC INTEREST BILLS</p> <p>Insufficient Lobbying — Both Sides</p> <p>REACTION: Undersupplied or Delegation E.G.'s: Gramm — Rudman — Hollings Act; speed limit laws; tighthouse</p>	<p>SPECIAL INTEREST BILLS</p> <p>Strong Lobbying In Favor Inadequate Lobbying Against</p> <p>REACTION: Procurement of Pork Barrel Legislation E.G.'s: Tariff; Subsidy</p>
WIDELY DISTRIBUTED	NARROWLY DISTRIBUTED
COSTS	
<p>PROTECTED CATEGORY</p> <p>Inadequate Lobbying In Favor Strong Lobbying Against</p> <p>REACTION: Inaction or Delegation E.G.'s: Socialized Medicine; Rent Control NOTE: Concern — Rule of Factions</p>	<p>PLURALIST CONFLICTUAL PATTERN</p> <p>Intense Lobbying On Both Sides</p> <p>REACTION: Delegation E.G.'s: National Labor Relations Act; Labor Management Relations Act</p>

narrowly contained, falling, at least in the near-term, directly on members of the medical profession. Until very recently, the American Medical Association has lobbied successfully against proposals to fundamentally redistribute access to health care in the United States.¹³⁴

Legislators faced with this conflicting demand configuration are likely either to do nothing or to delegate.¹³⁵ The institutional protections or impediments to the passage of legislation discussed in the constitutional section are particularly important in this context.¹³⁶ In fact, one could argue that these negative legislative checkpoints¹³⁷ are in place to slow down or to stop legislation that benefits the public at large at a cost borne largely or entirely by a narrow interest group.¹³⁸

In the language of public choice theorists, these negative legislative checkpoints serve to increase the size of coalitions necessary to succeed in achieving procurement of desired legislation.¹³⁹ William Riker, who developed the theory of "minimum winning coalitions," has reasoned that, in theory, the most stable coalition in a legislative body will be comprised of one more than fifty percent. A larger coalition can benefit its membership by excluding others from the generalized benefits until a mere simple majority is achieved.¹⁴⁰ Riker's theory is really the public choice analogue

134. While the history of American Medical Association (AMA) lobbying efforts in response to proposals to redistribute access to health care is well beyond the scope of this article, an informative book that outlines that history from 1940 through 1984 is FRANK CAMPION, *THE AMA AND U.S. HEALTH POLICY SINCE 1940* (1984). The author explains that while the AMA lobbied against major legislative health care proposals since as early as 1935, *id.* at 7-8, it became a more sophisticated lobbying entity in the 1960's and 1970's. *See generally id.* at 305-24 (describing AMA lobbying efforts concerning proposed national health insurance). *See also* John K. Iglehart, *Health Report/Kennedy Efforts to Revise Health Manpower Carries Over to '75*, 6 NAT'L. J. REP. 1949 (1974) (discussing some unsuccessful proposals by Senator Ted Kennedy to redistribute access to health care). In March 1990 the AMA published a new sixteen point proposal, "Health Access America," to provide greater access to health care for those in need. The May 15, 1991 issue of the Journal of the American Medical Association consisted of a symposium of health care reform proposals, including an article explaining the AMA proposal. *See* JAMES S. TODD ET AL., *Health Access America—Strengthening the U.S. Health Care System*, 265 JAMA 2503, 2504 (1991) (stating that "[t]he AMA's number of physicians believe significant improvements in our system need to be made to improve access, to ensure continued high quality, and to moderate cost increases"). The JAMA editors did not endorse any particular viewpoint expressed in the symposium.

135. *See* FIORINA, *supra* note 96, at 38-39; LOWI, *supra* note 94, at 50.

136. *See supra* notes 84-89 and accompanying text.

137. The term "negative legislative checkpoints" is used to refer to the various loci at which an individual legislator or a group of legislators representing minority interests can slow down or stop a bill or, alternatively, at which minority interests can focus their lobbying efforts to procure legislative benefits. *See supra* notes 84-89 and accompanying text.

138. *Cf.* ARANSON, *supra* note 88, at 368-69 (asserting that "[c]ongressional rules and procedures partially avoid the hazards of such gambles [of being included in or excluded from a minimum winning coalition] by making sure that winning coalitions are very large.>").

139. *See generally* WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 32-46 (1962).

140. Riker's theory is limited to instances in which the legislative benefits and costs present a zero-sum situation. *See id.* at 32 (stating that "[i]n n-person, zero-sum games, where side-

to Madison's theory of factions. In essence, the negative legislative checkpoints in Congress and the constitutional impediments to the rapid formation of successful majority factions reduce the possibility that a simple majority will be a successful coalition.¹⁴¹

Protection against minimum winning coalitions is especially important in the distributed benefits/concentrated costs category. It is in this category that the interests of distinct minority groups are in the greatest danger of being thwarted in the legislative process. The benefits of these negative checkpoints as a device to prevent minimum winning coalitions are even more pronounced in comparison with state and municipal legislatures that lack them.¹⁴² While the American Medical Association has been successful in lobbying against proposals to fundamentally redistribute access to health care, landlords, for example, have been far less successful in opposing rent control in cities throughout the United States, including New York.¹⁴³ While the interests of the two groups, medical doctors opposed to socialized medicine and landlords opposed to rent control, bear striking similarities, the difference in legislative results may reflect the absence of these constitutional and structural impediments to the passage of legislation at the state or local level, as compared with their presence in Congress.¹⁴⁴

payments are permitted, where players are rational, and where they have perfect information, only minimum winning coalitions will occur."'). See also ARANSON, *supra* note 88, at 65 (positing that "a hypothesis derived from the size principle predicts that large, overweighted coalitions are less stable than small, minimum winning ones. Larger coalitions have less to distribute to their members to ensure their loyalty.'). But cf. MAYHEW, *supra* note 96, at 112 (explaining that as corollary to Riker's theory, one would expect congressional roll calls to be close, but, in fact, they are not).

141. See ARANSON, *supra* note 88, at 367 (stating that "[t]o pass, bills usually require more than simple majorities, because unconvinced lawmakers can use any number of lethal and dilatory strategies for defeating, or delaying, or substantially modifying them."); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 219-20 (1984) (explaining that devices such as House Rules Committee agenda controls and threat of presidential veto serve to increase size of winning coalitions); RIKER, *supra* note 139, at 89-101 (observing that historically, successful coalitions are larger than minimum winning size); see also JONES, *supra* note 84, at 95-100; Robinson, *supra* note 21, at 407-08 n.19.

142. See ARANSON, *supra* note 84, at 65 (asserting that according to available evidence, winning coalitions in state legislatures, as opposed to those in Congress, become increasingly stable as they approach minimum winning size).

143. See Charles H. Clark, *Rent Control and the Constitutional Ghosts and Goblins of Laissez-Faire Past: Pennell v. City of San Jose*, 108 S. Ct. 849, 14 U. DAYTON L. REV. 115, 115 (1988) (stating that "New York City has had ordinary peacetime rent control for almost the last half century. . . . Moreover, approximately ten percent of all private rental housing units in the nation were subject to rent control in 1983.').

144. These additional federal legislative hurdles provide protections beyond preventing the passage of unconstitutional laws. Thus, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988) the Supreme Court held that the rent control ordinance in San Jose, California, requiring that a hearing officer may consider a tenant's hardship before deciding whether to allow an increase in rent, did not violate the landlord's due process or equal protection rights. *Id.* at 11-14. The Court declined to reach the landlord's claim based on the takings clause on the ground that the issue was not ripe. *Id.* at 9. Because the federal legislative scheme has effectively prevented passage of similar laws regulating rates charged by medical doctors, these structural legislative hurdles may well provide extra-constitutional protections for minority interests.

The concentrated benefits/distributed costs paradigm is characterized by strong demand for legislation and weak lobbying in opposition.¹⁴⁵ As one would predict, the result in this situation is the procurement of legislation in favor of the active lobbying group.¹⁴⁶ The most important legislative byproduct of this category is the rider. In fact, the skewed lobbying incentives in this category that result in the legislative process of logrolling are the problem to which the item veto is addressed.¹⁴⁷ Logrolling is the process by which legislators trade votes for each others' concentrated benefit/distributed cost items in exchange for their own.¹⁴⁸ The result is an excess of pork barrel appropriations the sum total of which may leave everyone worse off than had no legislation been passed at all.¹⁴⁹ Not surprisingly, perhaps, the logrolling problem is exacerbated in large part by the very negative legislative checkpoints designed to protect special interests from general benefit legislation enacted at their expense. The same legislators empowered to slow down or stop bills encroaching on the rights of particular interest groups also can use their power to coerce items conferring narrow benefits on these or other special interest groups.¹⁵⁰

The final category, concentrated costs/concentrated benefits, like the first configuration, is conflictual. But unlike with the first configuration, lobbying efforts here are intense on both sides.¹⁵¹ This is a classic situation in which legislators will opt out by delegating their authority to either an agency or to courts.¹⁵² Examples include the National Labor Relations Act,¹⁵³ establishing the National Labor Relations Board, and the Labor Manage-

145. See HAYES, *supra* note 88, at 99; WILSON, *supra* note 101, at 333-34; see also MAYHEW, *supra* note 96, at 137 (positing that "Congress will favor the passage of transfer programs when they are championed by powerful interest groups against unorganized opposition.").

146. See HAYES, *supra* note 88, at 99.

147. See, e.g., Ross & Schwengel, *supra* note 9, at 75 (stating that "[t]he item veto would help to reduce extravagance in public expenditures by curbing the effectiveness of 'logrolling' and discouraging 'pork-barrel' appropriations."); Daniel Quayle, *Line Item Veto Controversy*, CONG. DIG. 259, 278, 279 (November 1985) (asserting that "the threat of a potential [item] veto can serve as a powerful disincentive to legislators tempted to attach extravagant, wasteful riders to appropriations bills").

148. See generally DENNIS C. MUELLER, PUBLIC CHOICE II 82-86 (1989) (analyzing logrolling process); see also ARANSON, *supra* note 88, at 369 (defining logrolling as "vote trading, and back-scratching").

149. Schattschneider describes the logrolling process as "a mutuality under which it is proper for each to seek duties for himself but improper and unfair to oppose duties sought by others." SCHATTSCHNEIDER, *supra* note 94, at 135-36. The author adds that "[t]he very tendencies that have made the legislation bad . . . have, however, made it politically invincible." *Id.* at 283.

150. See Robinson, *supra* note 21, at 417-18 (explaining how senior members of appropriations committee can exact pork for their districts as price for their support for bill).

151. See HAYES, *supra* note 88, at 108.

152. See *id.*; Lowi, *supra* note 94, at 59; see also *supra* notes 123-27 and accompanying text (explaining factors that create incentives to delegate).

153. See 29 U.S.C. § 153 (1973); see also ESKRIDGE & FRICKEY, *supra* note 70, at 53.

ment Relations Act,¹⁵⁴ vesting federal district courts with authority to resolve disputes over labor-management contracts. Delegation allows legislators to claim credit for creating legislative benefits while blaming the agency or courts for imposing the costs.¹⁵⁵ For the purposes of this article, this paradigm is not particularly important.

C. *Insights from the Static Model*

The static model explains the incentives that create a proliferation of Pareto inferior legislation. Stated differently, the model explains why the legislative process is like a prisoners' dilemma, in which the interest groups are prisoners, each seeking to gain at the expense of everyone else with society as a whole losing in the process.¹⁵⁶ Although legislation in the distributed benefits/distributed costs category is desired by all and beneficial to all, it tends to be undersupplied.¹⁵⁷ Conversely, while legislation in the concentrated benefits/distributed costs paradigm is not useful to society as a whole, it tends to be oversupplied.¹⁵⁸

Item veto supporters see the device as a way to reverse this trend.¹⁵⁹ The item veto, supporters argue, would enable the President to sign into law bills in the distributed benefits/distributed costs category without having to accept items from the concentrated benefits/distributed costs category.¹⁶⁰ In fact, however, as the next subsection will demonstrate, public choice theory can be used to demonstrate why the item veto will not "cure" the rider problem. The very forces that create an oversupply of special interest legislation and an undersupply of general interest legislation work to combine legislation from the two categories. This is the public choice explanation for the proliferation of nongermane special interest riders.

154. See 29 U.S.C. § 185 (1978); see also ESKRIDGE & FRICKEY, *supra* note 70, at 53.

155. See HAYES, *supra* note 88, at 108.

156. See ARANSON, *supra* note 88, at 385 (stating that "the members of Congress have solved *their* legislative prisoners' dilemma while perpetuating the associated dilemma among constituents and interest groups.") (emphasis in original). The classic prisoners' dilemma has been stated as follows:

The police nab a pair suspected of a crime, separate them, and present each with the following proposition. If one confesses and supplies evidence that can convict the other who refuses to talk, the authorities will release the confessor and throw the book at the silent one. If both prisoners remain silent, the authorities have evidence to convict both only on minor charges. If both prisoners confess, both are in big trouble. Without communicating, each prisoner must choose either to remain silent or to confess.

John S. Wiley, *Reciprocal Altruism as a Felony: Antitrust and the Prisoner's Dilemma*, 86 MICH. L. REV. 1906, 1915 (August 1988).

157. See HAYES, *supra* note 88, at 133; OLSON, *supra* note 99, at 35.

158. See HAYES, *supra* note 88, at 133; see also WILSON, *supra* note 101, at 333-34.

159. See *infra* note 162 and accompanying text.

160. See Ross & Schwengel, *supra* note 9, at 77 (asserting that "[g]ranting the President the item veto authority would allow him to reject unnecessary and wasteful appropriation items, and perhaps legislative 'riders,' without at the same time having to reject needed expenditures, thus endangering the public welfare.").

The two most obvious solutions to the rider problem are first, to remove the barriers to legislation that require numerous supermajorities to achieve legislative success, and second, to provide the President with authority to audit legislation after it has been passed with an item veto. While removing the structural impediments to the passage of legislation would potentially ameliorate the rider problem, however, it would also prevent minority interests in opposition to legislation passed at their expense from forcing substantive changes to proposed bills as a precondition to passage. In other words, this solution would undermine a legitimate by-product of the Madisonian vision of the legislature. In contrast, the item veto does not suffer the same deficiency. The item veto will not prevent well placed minority interests from using their power to exact substantive compromises to legislation. In theory, it may prevent the arguably more coercive and illegitimate tactic of bribery in the form of riders. In short, the item veto appears to be a perfect solution because it will allow legitimate legislative compromise while enabling the President to remove pork.

As shown below in the discussion of the dynamic model, however, the problem with the item veto is that, in practice, it is likely to be ineffective in curbing legislative practices that benefit special interests at the public's expense. Nor is it always the case that special interest legislation is an abuse of the legislative process. The sole means of securing passage of some bills in the distributed benefits/distributed costs category is to grant a concession in the form of a rider that benefits a narrow group at the public's expense.¹⁶¹ Advocates argue that the item veto would enable the President to defeat these concessions as the price to secure otherwise desired legislation.¹⁶² This argument fails to consider that once the rules of the legislative bargaining process change, so too will the dynamics of legislative bargaining. The item veto will work effectively only if legislators act as if the item veto were not one of the new rules of the game. As discussed below, legislative and executive behavior is likely to change in direct response to the adoption and use of the item veto.

D. *The Dynamic Model*

The dynamic model builds upon the static model's analogy of Congress to a marketplace. Unlike the static model, however, this model is concerned with options that sponsors of bills in the distributed costs/distributed benefits category can employ to "buy" votes necessary to secure passage.¹⁶³

161. See *infra* notes 163-83 and accompanying text; see also Riggs, *supra* note 66, at 737-39.

162. One author further contends that because legislators will know that their pork barrel items are subject to the item veto, the item veto will have the prophylactic effect of actually discouraging logrolling. See Best, *supra* note 15, at 189. According to Best, "[t]he [item] veto is designed to be an incentive for legislative self-control as well as a method of executive control." *Id.*

163. One author has developed a bargaining model similar to the dynamic model used in

The dynamic model is also concerned with the tactics that the vote "seller" can employ to ensure the greatest likelihood that his proposed rider, from the distributed costs/concentrated benefits category, will be signed into law.

Some bills may be of sufficient general interest that, even without major concessions to special interests, sponsors can successfully forge a majority coalition. Such bills are rare. Even the Gramm-Rudman-Hollings Act,¹⁶⁴ which had extremely widespread support,¹⁶⁵ contains provisions designed to protect, in whole or in part, "politically sensitive" programs from the Act's automatic budget-cutting mechanism.¹⁶⁶ Not all bills, however, even if aimed at a matter of significant public concern, will gain majority support so easily.

The dynamic model focuses on two of the principal tactics that the sponsor of a general interest bill can employ to gain support. First, the sponsor can agree to modify the wording of the bill itself.¹⁶⁷ If there are particular provisions that harm constituents in an opponent's district or that, for any reason, his opponent dislikes, the bill's sponsor can agree to delete or modify those provisions in exchange for his opponent's vote. Because this form of compromise alters the initial bill's substantive components, it will be labelled "substantive compromise."¹⁶⁸ This form of compromise is not only condoned by, but is an intended by-product of, the Madisonian legislative scheme. The problem is that a bill's sponsor may be unable to secure enough votes through substantive compromise, or simply

this article to test the theorem that "[i]n two-party legislative bodies in which the requirements of internalized party identification and support are met the degree of intraparty cohesion is a direct function of the degree of interparty competition." David B. Meltz, *Legislative Party Cohesion: A Model of the Bargaining Process in State Legislatures*, 35 J. POL. 647, 662 (1973). Meltz's model tests the relationships among the majority party leadership, nonleadership party members interested in the passage of particular legislation, and potential party defectors as a function of the party's relative size in the state legislature. *See id.* at 651-55. The author assumes that all intraparty bargaining over proposed legislation takes place before the leadership buys votes from "across the aisle." *Id.* at 657. The present article, in contrast, is concerned with three principal players: first, the sponsor of a bill seeking to secure passage of that bill; second, the vote "seller" seeking to ensure maximum likelihood that his rider will be signed into law; and third, the President seeking to sign the general interest legislation he favors into law without having to sign into law unnecessary pork. The model predicts the conduct of all three players in the legislative marketplace both with and without the item veto.

164. 2 U.S.C. § 903 (1988).

165. For a discussion of the widespread support in Congress for the Gramm-Rudman-Hollings Act, see Stith, *supra* note 5, at 596 & nn.12-13.

166. *See id.* at 631 and cites contained therein (explaining that major entitlement programs, among others, were expressly exempted under the Gramm-Rudman-Hollings Act).

167. *Cf. Meltz, supra* note 163, at 562 (positing that "[o]nce this wording [of a proposed bill] is fixed, any deviation lowers the value of that motion to the leadership, since by assumption the original motion is optimal with respect to what the leadership considers to be in the best collective interests of the party.>").

168. *See id.* at 656. Professor Meltz observes that because the relative value of the bill to the leadership decreases as the bill's substantive components are compromised, the price that the leadership is willing to pay to secure passage also decreases. *See id.* at 654.

may not want to water down the substantive content of his bill beyond a certain point,¹⁶⁹ to secure passage. To secure still further support, however, the sponsor has a second mode of attack. The sponsor can "buy" votes by offering to attach special interest items or riders favorable to those who either oppose or who are indifferent to the bill's success.¹⁷⁰ Because this form of compromise does not alter the substance of the bill's pre-existing provisions beyond the changes already made through substantive compromise, but rather adds new provisions, it will be labelled "length compromise." In essence the bill's sponsor agrees to add items to the bill, often unrelated to the bill's fundamental purpose, in exchange for votes. Revisiting the new revised four box matrix on the next page may help to understand this model and the discussion to follow.

Because special interest items impose a cost on everyone, these items make the bill less popular with other Congressmen and more likely to be vetoed by the President.¹⁷¹ The bill's sponsor, therefore, will not want to attach any more special interest items than are necessary to secure passage.¹⁷²

To fully understand the model, it is necessary to consider the bargaining process from the vantage point of the vote seller. Once the vote seller receives a favorable rider in exchange for his commitment to vote for a bill, he too wants the bill to pass and not be vetoed. Because each additional item adds unpopular weight to a bill, a vote seller will seek to attach his item to the bill most likely to be signed into law by the President.¹⁷³ Thus, as the number of special interest items in a given bill increases and, correspondingly, as the number of supporting votes increase, sellers of votes

169. *Cf. id.* at 652.

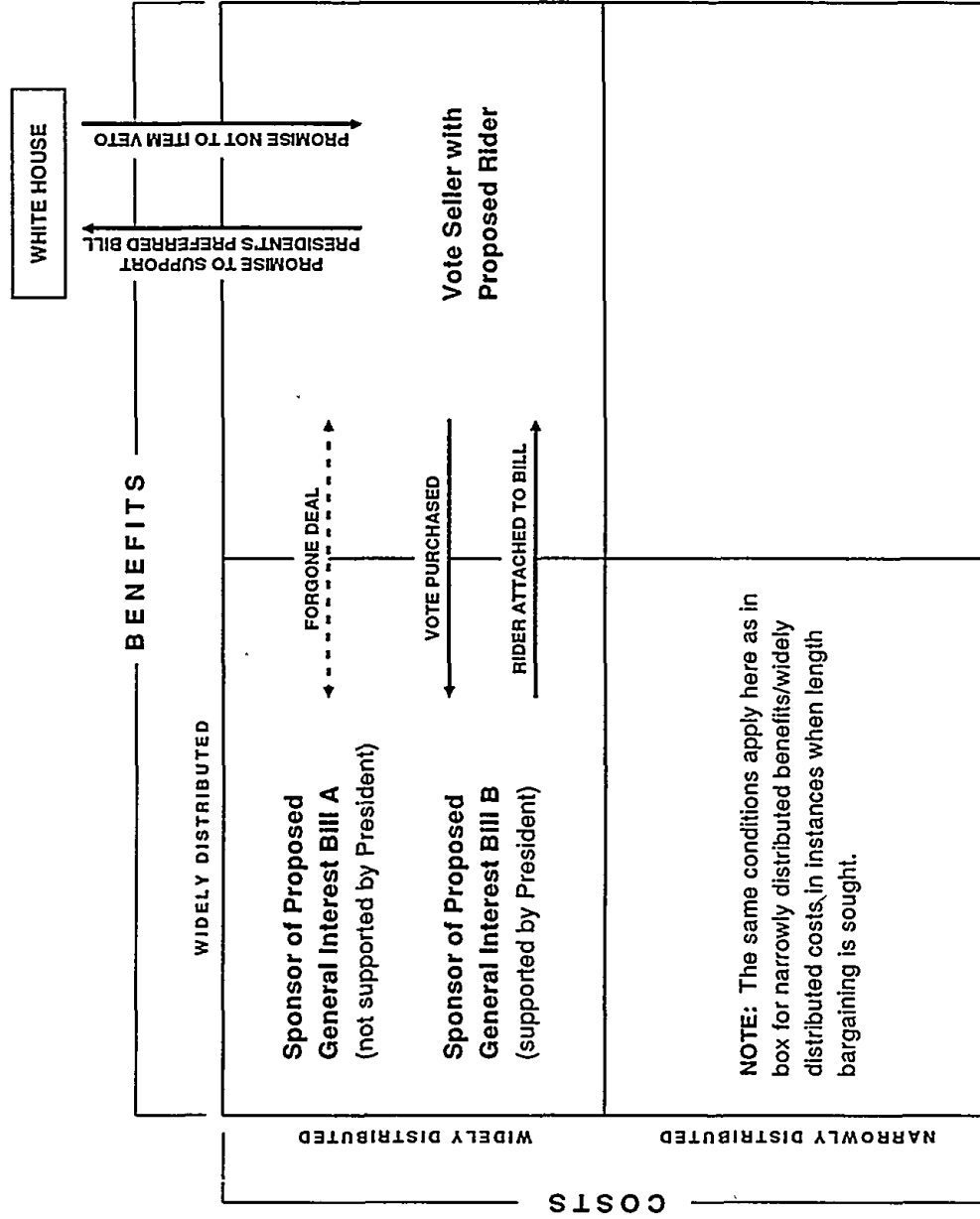
170. *Cf. id.* at 657-58. Professor Meltz explains that after the "watered-down motion" emerges from the process of negotiating the wording with party members, the leadership can then buy votes from the other party through a number of means, including logrolling. *Id.*; see also Riggs, *supra* note 66, 739 (1973) (stating that "[t]he practice of enacting legislation through riders . . . can significantly expedite the legislative process.").

171. *Cf. WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 17-18 (5th ed. 1981).* The authors describe the overriding goal of a bill's sponsor as garnering sufficient support to secure passage with the minimum number of concessions to gain that support. *Id.* at 17. The authors observe that the result is often a bill with "a curious assortment of provisions," the end product of which no one, including the sponsors, "really wants." *Id.* at 18. For a discussion of some additional devices the sponsor of a bill can employ to build a successful coalition, see RIKER, *supra* note 139, at 108-14.

172. The sponsor's desire to avoid adding unnecessary special interest items is the flip-side of Riker's theory of minimum winning coalitions. *Cf. RIKER, supra* note 139, at 32-33. In other words, a bill's sponsor will seek to avoid adding a special interest item to gain votes that are no longer necessary once a successful majority is achieved.

173. Just as coalitions larger than a simple majority are theoretically unstable because coalition members can benefit by excluding those beyond a simple majority, here too all members of the coalition, regardless of when or how they joined, *e.g.*, whether through substantive bargaining or through length bargaining, now seek to exclude any additional "dead weight" in the form of special interest items that are not essential to the bill's passage and that may increase the prospect of a presidential veto. *Cf. RIKER, supra* note 139, at 32-33.

DYNAMIC MODEL WITH ITEM VETO



will seek out other bills in need of support in exchange for their special interest items.¹⁷⁴ Specifically, they will look to those bills that are the least likely to be vetoed even with their riders attached.¹⁷⁵

The result of this process is that both the substantive content of a bill as well as its length¹⁷⁶ are the product of a series of negotiated compromises. At first blush, the item veto appears to remove the incentive for the second, but not the first, form of bargaining. And because the first form of bargaining is seen by some as more legitimate than the second,¹⁷⁷ the item veto is viewed as a uniquely acceptable solution. Because sellers of votes exchange their support for general interest bills for the inclusion of desired riders, they will not sell their votes if their items are subject to a separate veto. The whole point of the compromise from their standpoint is to enhance the likelihood that the President will sign their riders into law. If the bill's sponsor cannot assure them of this, then their incentive to bargain is removed. This may prevent sponsors of general interest legislation from buying the votes necessary to forge a successful coalition.

The item veto Congress trade-off therefore appears to be the following: With the item veto Congress can be expected to produce less pork, but also to produce less general interest legislation; without the item veto Congress can be expected to produce more of both. Assuming *this is* the trade-off, there is no way to determine in theory which result is better.

In fact, however, the item veto trade-off is *not* so straightforward. A closer analysis of the dynamic model makes less clear exactly what the item veto trade-off really is. Ironically, perhaps, the changed relationship between the President and Congress resulting from the item veto actually may serve

174. Of course, a vote seller will not trade his vote for any bill in exchange for a rider. If the proposed legislation is grossly inconsistent with either the seller's own values or his perception of the values of his constituents, the seller may forgo the trade altogether.

175. For some bills that result in logrolling, the supermajority may be of sufficient size that any fear of a veto is removed. If the bill generates sufficient supermajority support for an override, vote sellers will be less concerned with Presidential approval. In fact, however, presidential vetoes rarely are overridden. One author calculated that of 1398 presidential vetoes, only 98, or seven percent, were overridden. See Bellamy, *supra* note 7, at 575. Of those 98 overrides, three Presidents, Andrew Jackson, Harry Truman, and Gerald Ford, account for about forty percent. *Id.* This emphasizes the extent to which most legislation passes as a result of supermajorities at a relatively narrow margin, e.g., between 51 and 66 votes in the Senate, and the corresponding percentage in the House of Representatives. The relatively small number of critical "swing" votes increases the power of legislators to exact concessions in the form of substantive and length compromise.

176. By length of a bill, I do not mean physical length *per se*, as items obviously vary in length as do bills, but rather the number of items in the bill, especially the number of items added solely to secure votes and that increase the prospect of a presidential veto.

177. See *Bergzon v. Secretary of Justice*, 299 U.S. 410, 415 (1937) (describing process of logrolling and resulting creation of riders as "pernicious"). *But see Riggs, supra*, note 66, at 739-40 (describing expediting passage of legislation and enhancing Congress's bargaining power with President as positive aspects of riders). Riggs argues that if the President possessed a separate veto power over nongermane riders, he "would possess a much larger bargaining chip with which to purchase compliance on the part of Congress, and the use of riders to force presidential acceptance of legislation would be eliminated." *Id.* at 756.

to tie the President's hands with respect to the special interest legislation that the item veto is designed to reduce, while at the same time greatly enhancing the President's role in determining which general and broad-based matters of legislative policy actually get passed.

While theoretically the item veto is designed to reduce the bargaining incentives that lead to pork barrel legislation, the item veto in practice is more likely simply to change the players in that process. Assume, for example, that the sponsor of a general interest bill needs votes to secure the bill's passage but either is not willing to water down his bill via substantive compromise or has already engaged in all the substantive compromises he is willing to make. The previous discussion suggests that with the item veto he no longer can employ length bargaining. In fact, he still can. Provided that the President supports his bill, the legislator still can engage in length compromise by getting the President to promise not to item veto the vote seller's special interest item.¹⁷⁸ Assuming that the President places a high value on his credibility, he is not likely to take such bargains lightly. To ensure his ability to make such compromises in the future, the President will not likely renege on a promise to refrain from using his item veto power.¹⁷⁹

Thus, the item veto changes the bargaining strategies that legislators who are either willing to sell their votes or who are empowered to exercise negative legislative checkpoint powers are likely to employ. With the item veto in place, legislators will look not only at the overall likelihood that a bill with their special interest item attached will survive the President's general veto, but also will look more favorably at bills that the President supports as a matter of policy. Legislators will do so because attaching a

178. Professor Robinson posits two hypothetical scenarios in which a legislator can coerce the President vested with item veto power to accept special interest items in exchange for agreeing to support a bill the President supports. See Robinson, *supra* note 21, at 417. In the first, the legislator makes an arms-length exchange with the President of mutual support for each other's favored legislation. *Id.* In the second, the legislator, uncertain of whether the President intends to separately veto his special interest item, severs the item and has it presented as a separate bill, holding his support for the President's favored legislation "hostage" to the President's approving his pork item. *Id.* at 418-19. Of course, for the latter strategy to work, the legislator would need to obtain sufficient support for his special interest item in both Houses of Congress to secure passage. *Id.*

179. In promising to refrain from item vetoing a particular rider, the President does not necessarily promise to refrain from vetoing in its entirety the bill to which the bargained for rider is attached. The President can credibly take the position with the rider's sponsor that while he will not separately veto the rider, he reserves the right to veto the entire bill if the bill becomes weighted down with too many riders to justify signing the bill into law. By limiting his promise to the rider itself and not to the entire bill, the President immediately places the rider's sponsor on his side in future negotiations over the bill with congressmen empowered to exercise future negative legislative checkpoint powers. Neither the President nor the rider's sponsor will want further dead weight added to the bill. The Congressman's willingness to accept these terms will depend upon his perception as to first, whether the bill is likely to pass without so much additional dead weight added that it will incur the President's general veto; and second, whether his prospect for having his rider signed into law is greater if the rider is attached to a different proposed bill with presidential support.

special interest item to a bill that the President will not veto in full no longer ensures that the President will refrain from item vetoing the "purchased" special interest item. But if the President supports an overall piece of legislation still in need of votes for passage, then a vote seller might be able to secure the President's promise not to veto that item in exchange for the vote seller's support for the bill. One final look at the matrix, on the opposite page, may help to illustrate the revised bargaining process.

The vote seller will now seek to attach his rider to that bill, still in need of votes, that the President favors and that is least offensive to him politically. The sponsors of bills with presidential approval will look for those riders that are the least costly overall or least offensive politically to attach, offering in exchange the President's promise not to exercise his separate veto. As the more neutral, or least partisan, bills with presidential approval gain sufficient support for passage, vote sellers will face increasingly difficult decisions whether to support less agreeable bills sponsored by the President or whether to forgo altogether their pork barrel items.

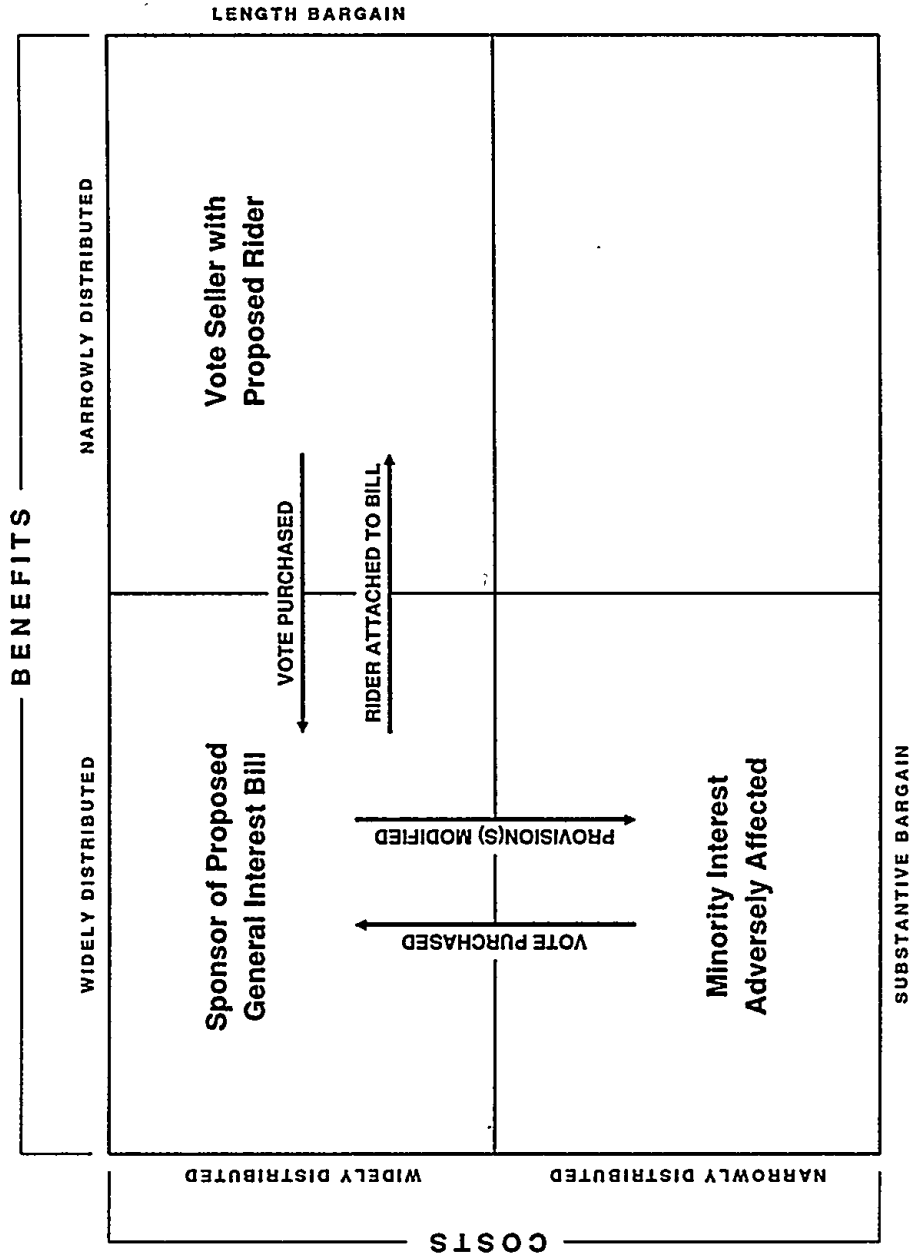
The end result of this process is that the item veto authority will greatly increase a President's power to determine which matters of general legislative policy get passed without the need to veto, in full or in part, legislation. Instead of having to confront Congress directly with a highly publicized general veto to control the direction of legislative policy, the President can now achieve the same result through a nonconfrontational and indirect means. By simply not promising to refrain from exercising his item veto authority with respect to particular special interest items, the President can effectively decide which bills, among those still in need of support, secure enough votes for passage.

The irony inherent in this analysis is twofold. First, the item veto may wind up conferring real power over general legislative policy issues¹⁸⁰ onto the President, but comparatively little power to excise narrow, special interest items. Second, the item veto would enable the President to influence the shape of legislation without having to actually veto anything, whether it be an item or an entire bill. It is easier for the President to choose which general legislation to support actively than it is for him to choose with whom he must bargain to get that legislation passed. In other words, the President cannot control which Congressmen possess the various negative legislative checkpoint powers that can slow down or stop his favored legislation from passage.¹⁸¹ Similarly, the President has little or no control

180. *Cf.* Riggs, *supra* note 66, at 757 (stating "the added power to veto nongermane amendments to bills would not only increase executive influence but would establish the presidency as the primary locus of policy-making in the federal government.").

181. The fact that the President cannot control which Congressman is empowered to slow down or stop a favored bill explains why the President may not always succeed in buying the cheapest pork as the means to secure passage of favored legislation. It does not explain, however, why the President often may end up having to buy the most expensive pork. To understand that, it is necessary to develop the model somewhat by introducing the concept of side payments. *Cf.* RIKER, *supra* note 139, at 108-23 (describing generally various types of

DYNAMIC MODEL WITHOUT ITEM VETO



over which of his political opponents will be swing votes necessary to pass his favored bills. Because a bill must survive numerous legislative hurdles or checkpoints before enactment,¹⁸² and because multiple majorities at different times are necessary to secure passage of any bill, a President may wind up tying his hands with respect to the special interest items that the bill's sponsors must "buy" to secure that bill's passage.

In addition, the President can avoid having to become involved in the day-to-day bargaining necessary to gain support for bills he supports by delegating to the bill's sponsors the authority to make the necessary promises not to veto items attached to the bill in exchange for critical votes. Because the sponsors of bills with presidential approval are likely to be the President's political allies, the item veto is further likely to enhance the political clout of those allies.

It is worth noting that even if the item veto is limited to appropriations bills, the President's power to determine the direction and shape of legislative policy will dramatically increase. Just as the item veto makes the aggregation of items within a bill irrelevant, so too, it makes the separation of items between bills irrelevant. Suppose for example that the President supports a particular bill, Bill B, that needs additional votes for passage. Suppose further that Bill B is not an appropriations bill but rather is a bill that confers general legislative benefits. A vote seller or a legislator empowered to exercise a negative check on Bill B now can negotiate with the President over a special interest appropriation in Bill A. If the President will refrain from item vetoing the special item attached to Bill A, the legislator promises to vote for, or to expedite the passage of, Bill B. Because many special interest items are in the form of appropriations, bargaining across bills in

side payments in the legislative bargaining process). For purposes of the dynamic bargaining model set forth in this article, a side payment is simply another type of legislative bargain that arises when a Congressman empowered to exercise a negative legislative checkpoint power, *see supra* note 137, to slow down or stop the President's favored bill, agrees to condition passage, not on the President's promising to refrain from item vetoing his own pork project, but rather on the President's promising to refrain from item vetoing a colleague's pork project. In return for substituting his colleague's pork project for his own, the first Congressman will demand a side payment from his colleague. That side payment can take a variety of forms, *e.g.*, a promise to reciprocate, a promise to support an altogether different bill that the first Congressman supports, or a promise of support for succession to an important committee chair, to name a few. Of course, the bargain could also be a repayment of a prior side payment in the opposite direction in which the second Congressman gave up his own pork project to ensure that the President would not item veto the first Congressman's pork project. The first Congressman's willingness to engage in such side-payment bargaining will depend upon how he assesses the relative value of his own pork project at the time he is empowered to exercise a negative legislative checkpoint power versus the relative value of the return promise, in whatever form it may take. The end result, however, from the President's standpoint is that he is often left having to accept the more expensive piece of pork as the price for passage, even if the pork belongs to a Congressman not then in immediate control of the particular negative legislative checkpoint, rather than simply having to accept random pork.

182. *See supra* notes 84-89 and accompanying text.

this manner is quite likely.¹⁸³ Thus, even if item veto authority is limited to appropriations bills, the effect of the item veto may be less significant with respect to special interest or pork barrel items than it is with respect to larger matters of legislative policy.

Finally, the dynamic model can be used to illuminate the constitutional debate. The model demonstrates that part of the brilliance of the constitutional structure is that it both benefits by and promotes individual Congressmen and Senators acting in pursuit of their own self interest and those of their constituents. It is this very quality of the Constitution that renders the item veto unnecessary.

Sidak and Smith recently argued in support of their position that the President may presently possess item veto power that if Professors Tribe and Kurland are correct in stating that Congress alone determines the package of legislation that constitutes a "bill," then "[i]n an extreme case, Congress could take an entire session's work (including appropriations legislation) and package it in a single piece of omnibus legislation."¹⁸⁴ The authors go on to state: "[t]he Constitution should be read to avoid this absurdity, if possible."¹⁸⁵ Similarly, in theory, even without the item veto, Congress could package all items as individual "bills" and render item veto power unnecessary. This hypothetical, the flipside of that offered by Sidak and Smith, suffers from the same deficiency. Neither takes into account the incentives on the part of individual legislators that result in the size, content, and number of bills passed during each session of Congress. The dynamic model can be used to display the limitations of Sidak and Smith's *reductio ad absurdum* as a justification for conferring item veto power upon the President.

183. Spitzer speculates that with the item veto, the President may engage in a similar bargaining process across bills. See SPITZER, *supra* note 7, at 131 (asserting that "[t]here is no reason to believe that Reagan, or any other president . . . would refrain from threatening to item veto favored projects of wavering congressmen as a method of lining up votes (e.g., for a bill the president favo.s.>"). Fisher and Devins have observed that:

White House lobbyists could advise a member of Congress that certain projects in his or her district or state are being considered for an item veto. At the same time, the member could be asked how he or she plans to vote on the administration's bill scheduled for consideration the following week. Perhaps a minor project would survive in return for the legislator's willingness to support a costly program.

Fisher & Devins, *supra* note 16, at 191. See also Thomas B. Cronin & Jeffrey J. Weill, *An Item Veto for the President*, 12 CONGRESS & THE PRESIDENCY 127, 138 (1985) (stating that "[a] determined 'arm twisting' President, for example, could threaten to item veto perfectly legitimate expenditures of importance to individual legislators merely because they dare to oppose the White House on one of the President's pet projects."); Norman J. Ornstein, *Veto the Line Item Veto*, FORTUNE Jan. 7, 1985, at 109 (positing that "[i]f the line item veto had been available last year when Congress cut 25% from Reagan's proposed outlays on the MX missile, calls would have been made by the White House to recalcitrant legislators suggesting that a favored dam or building would be item-erased if the law maker didn't support the MX. We would have paid for all those dams and buildings—and more MXs.>").

184. See Sidak & Smith, *supra* note 11, at 467; see also William A. Clineburg, *The Presidential Veto Power*, 18 S.C. L. REV. 732, 753 (1966).

185. Sidak & Smith, *supra* note 11, at 467.

The sponsors of one piece of general interest legislation seeking to buy votes through length bargaining become the vote sellers, seeking to have their own riders purchased by sponsors of other such bills. All are players in a continuous dynamic process. These same legislators actively oppose still other general legislation and further seek to prevent the passage of riders that do not benefit their bills but impose general costs on their constituents. In each session of Congress, each Congressman and Senator seeks to maximize his own benefit by engaging in exchanges that will provide the greatest likelihood that the general interest legislation that he supports, and the riders that he has sold, will be passed and signed into law. At the same time, each Congressman and Senator seeks to minimize the prospect that the bills of general interest and riders that he opposes will pass. It is through this continuous and complex process that the large number of bills of varying content and length, passed in each session of Congress, take their form.

The Sidak and Smith hypothetical assumes that Congress as an institution seeks to have all its bills signed into law each session. Instead, Congress is really an aggregation of individual Congressmen and Senators, each of whom seeks to have some bills signed into law and to prevent other bills from being signed into law.¹⁸⁶ The same dynamic legislative bargaining process that affects the substance and length of each bill further affects the number of bills passed each session of Congress. It is difficult to imagine a single legislator, let alone all 535 of them, who would be willing to rubber stamp any and all legislative proposals that cross his desk or who would agree with the content of every bill passed each term. When Congress is properly viewed as an institution comprised of individual legislators, each seeking to maximize his own benefits and those of his constituents, rather than as an institution with a collective institutional psyche at odds with the White House,¹⁸⁷ the hypothetical's value loses its force as justification for conferring item veto power upon the President.

IV. HISTORICAL EVIDENCE

Two sources provide the closest historical data to test the thesis advanced in the preceding section. This section will address first, presidential impoundments and second, state experience with the item veto. The data show that, historically, Presidents and governors vested with impoundment authority and item veto authority respectively have not used those powers to curtail unwanted pork barrel legislation, but rather have used their powers to impose their legislative priorities in place of those of the legislatures.

186. Cf. ARANSON, *supra* note 88, at 21 (asserting that "[a] group can have no goal apart from those goals that individual members of the group might pursue.").

187. *See id.*

A. Presidential Impoundments¹⁸⁸

While the first President reported to have impounded funds appropriated by Congress was Thomas Jefferson,¹⁸⁹ the history of impoundment really begins some one hundred seventy years later with Richard Nixon.¹⁹⁰ Whereas in 1803 Jefferson refused to spend money appropriated by Congress for gunboats to protect the east bank of the Mississippi River because the Louisiana Purchase made such protection unnecessary,¹⁹¹ an action with which Congress agreed,¹⁹² Nixon freely refused to spend money appropriated by Congress simply because he disagreed with congressional priorities.¹⁹³ This new use of impoundment power has been characterized by some critics as a *de facto* item veto.¹⁹⁴

Louis Fisher distinguishes the two types of impoundments, labelling Jefferson's impoundment "routine" and Nixon's impoundment "policy."¹⁹⁵ Fisher describes the distinction as follows:

188. It is important to distinguish the actual exercise of impoundment power from the types of practices discussed in the preceding section. The preceding section asserted that item veto power may allow the President to exert great influence over legislative policy by providing him with a trump card in the legislative bargaining process. In contrast, presidential impoundment comes into play only after a statute is passed.

In theory, of course, the same sort of bargaining could occur in the impoundment setting. Individual legislators empowered to substantially modify or slow down bills that the President supports could bargain for promises that the President will not impound funds earmarked for their pork barrel projects. Such bargaining may have been less likely in the impoundment context simply because impoundments with which Congress disagreed have been of dubious legality. See generally L. Harold Levinson & Jon L. Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 220 (1974) (stating that "[t]he consensus is that the President does not possess any authority that justifies him in terminating or drastically curtailing a program in frustration of the intent of Congress."); Warren J. Archer, Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. CHI. L. REV. 328, 356 (1972-73) (positing that "[the President] has no authority to use impounding as an absolute, retroactive, or item veto."). Item veto power, in contrast, most likely would be conferred by constitutional amendment and thus the exercise of that authority would be legitimate. See Dixon, *supra* note 15, at 225 (explaining why constitutional amendment may be required to enact item veto).

189. See Cathy S. Neuren, Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 695 (1984).

190. See Levinson & Mills, *supra* note 188, at 199 (explaining qualitative differences between Nixon's impoundments and those of his predecessors); see also W. Bradford Middlekauff, Note, *Twisting the President's Arm: the Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209, 212 (1990) (stating that "the Nixon Administration changed the unwritten rules of the impoundment battle.").

191. See Middlekauff, *supra* note 190, at 191.

192. See *id.* (asserting that "[t]his refusal to spend caused little furor.").

193. See LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 150-51 (1975) at 150 (stating that President Nixon's efforts "directly challenged the right of Congress to make policies and decide priorities.").

194. See Timothy R. Harner, *Presidential Power to Impound Appropriations for Defense and Foreign Relations*, 5 HARV. J.L. & PUB. POL'Y 131, 135 (1982) (positing that "[i]f the President signs a bill which contains many appropriations and then impounds any of the appropriations, he has in effect exercised an item veto.").

195. See Louis Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. ON LEGIS. 413, 448 (1977).

Routine impoundments do not by themselves restrict authorized programs and activities and do not interfere with the priorities for spending which are established by Congress. Policy impoundments, however, reflect Presidential decisions to substitute administration spending priorities for those chosen by Congress and act independently of other circumstances to restrict congressionally authorized programs and activities.¹⁹⁶

Whereas prior Presidents had used impoundments to curtail military appropriations over which they had at least arguable constitutional authority as Commander in Chief,¹⁹⁷ Nixon for the first time used impoundment as a means to reorder, in wholesale fashion, congressional budgeting priorities.¹⁹⁸ In addition to relying on dubious historical arguments,¹⁹⁹ including analogizing his impoundments to Jefferson's, Nixon made at least three other types of argument to justify his impoundments.

First, Nixon often relied on the lack of mandatory spending language in appropriations statutes, arguing that the absence of this language implied executive discretion to spend or not to spend appropriated funds.²⁰⁰ Second,

196. *Id.* at 448. In *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia Circuit distinguished programmatic from policy deferrals using similar terms:

The critical distinction between "programmatic" and "policy" deferrals is that the former are ordinarily intended to *advance* congressional budgetary policies by ensuring that congressional programs are administered efficiently, while the latter are ordinarily intended to *negate* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation.

Id. at 901 (footnote omitted) (emphasis in original).

197. For a discussion of impoundment history in the context of military procurements, see Neuren, *supra* note 189, at 695-96; see also Harner, *supra* note 194, at 138-146.

198. See FISHER, *supra* note 193, at 150. Because Presidents prior to Nixon in their exercise of impoundment power did not attempt to subvert congressional priorities on policy matters, their use of impoundment is not germane to this article.

199. While Nixon was the first President to use impoundment as a full-scale policymaking device, see *id.*, he relied on several instances of earlier executive impoundment, almost all of which are distinguishable, to justify his actions. See generally Neuren, *supra* note 189, at 695-98 (distinguishing Nixon's impoundments from those of his predecessors); see also FISHER, *supra* note 193, at 176.

200. See FISHER, *supra* note 193, at 177 (stating that "the mere existence of discretionary authority, which had been granted by Congress to enable executive officials to administer the programs more effectively, was used as an excuse to deny the programs in their entirety."). The Supreme Court, as early as 1838, suggested that the President lacks this inherent discretionary authority.

In *Kendall v. United States ex rel Stokes*, 37 U.S. (11 Pet.) 524 (1838), the Supreme Court held that the Postmaster General could not refuse to expend appropriated funds that were required to fulfill a contractual obligation by the federal government. *Id.* While the actual holding of the case was thus limited insofar as the President did not himself impound the funds and the basis for the appropriation was contractual, the Court's language was not. See *id.* at 613. Thus, the Court stated: "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.*

The *Kendall* dictum suggests that the absence of mandatory spending language does not

Nixon claimed that specific statutes conferred impoundment power.²⁰¹ Finally, Nixon argued that fiscal emergency justified executive impoundment when Congress failed to act to ameliorate economic crisis.²⁰² In spite of the dubious nature of these purported bases for presidential impoundment, made clear by the nearly unanimous condemnation of this practice by courts and commentators,²⁰³ Nixon freely used impoundment to reorder Congressional priorities.²⁰⁴

Beginning early in his second term, Nixon requested that Congress enact a two-hundred and fifty billion dollar spending ceiling.²⁰⁵ When Congress failed to do so, Nixon responded by announcing one through executive fiat.²⁰⁶ To enforce this ceiling, Nixon impounded funds in several domestic programs, almost entirely along partisan lines, that in some cases effectively wiped out entire Democratic programs.²⁰⁷ For example, Nixon impounded funds appropriated for the Rural Environmental Assistance Program,²⁰⁸ the Water Bank Program,²⁰⁹ the Farmers Home Administration (FHA),²¹⁰ the Rural Electrification Administration,²¹¹ the Environmental Protection Agency,²¹² and Housing and Urban Development.²¹³

In contrast, Nixon allowed the full commitment of funds for defense programs such as the B-1 bomber and the C-5A cargo plane.²¹⁴ While a detailed analysis of the Nixon impoundments is well beyond the scope of this article, this section will briefly review two such cases, the first because it is typical of the others and the second because it demonstrates the extremes to which Nixon was willing to go to effectuate his partisan legislative priorities.

The first case involves the Department of Agriculture's refusal to release funds appropriated for the emergency farm loan program established under

imply executive authority to thwart congressional intent. *Id.* In fact, several cases during the Nixon administration confirm this broader reading. *See, e.g.,* Train v. City of New York, 420 U.S. 35 (1974); Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973) (requiring Secretary of Agriculture to release appropriated funds).

201. *See* Neuren, *supra* note 189, at 699-700 for a discussion of Nixon's claimed reliance upon the Budget and Accounting Act of 1921, Ch. 8, 42 Stat. 20, *repealed by* Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877; 1950 Amendment to the Antideficiency Act, General Appropriations Act of 1951, 31 U.S.C. §§ 1511-1512 (1982); and Employment Act of 1946, codified as amended, at 15 U.S.C. §§ 1021-1025 (1983).

202. *See* Neuren, *supra* note 189, at 701. Because Truman lost a similar argument in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Nixon supplemented this argument with one based on congressional acquiescence. *See* Neuren, *supra* note 189, at 701.

203. *See* Middlekauff, *supra* note 187, at 212.

204. *See generally* FISHER, *supra* note 193, at 150-51.

205. *See id.* at 175.

206. *See id.* at 176.

207. *See generally id.* at 175-97 (providing detailed account of Nixon's impoundments).

208. *See id.* at 177.

209. *See id.*

210. *See id.* at 179-80.

211. *See id.* at 181-83.

212. *See id.* at 184.

213. *See id.* at 192-94.

214. *See id.* at 180.

the FHA.²¹⁵ Secretary of Agriculture Earl Butz justified the impoundment on the ground that it was necessary both to comply with the President's budget ceiling and to counteract inflation.²¹⁶ After Butz instructed the Minnesota FHA office not to accept any more loan applications from farmers in the fifteen counties previously declared eligible for federal disaster relief funds, four farmers initiated a class action suit. In *Berends v. Butz*²¹⁷ the United States District Court for the District of Minnesota held that the Department of Agriculture's refusal to implement the program violated mandatory provisions of the Agriculture Act of 1961, the Department's own regulations, and the Due Process Clause.²¹⁸ Shortly thereafter, Congress amended the statute to remove the discretionary language.²¹⁹

The second case is even more striking. In 1972 Congress enacted the Federal Water Pollution Control Act Amendments over Nixon's veto.²²⁰ In spite of the override Nixon impounded fifty-five percent of the funds allotted under the program, basing his authority on allegedly ambiguous statutory language.²²¹ The dispute arose from a change in the language of the bill during the conference committee from a proposed requirement that all sums be allotted to a requirement that sums not to exceed a set amount be allotted.²²² This language actually was intended to prevent a veto, and the legislative history strongly suggests that Congress intended discretion at the expenditure rather than at the allotment stage.²²³ Notwithstanding the intent of the statute and that it was enacted over a veto, Nixon impounded more than half the funds and effectively terminated the program by stringing out the litigation for two years until he ultimately lost before the Supreme Court.

In *Train v. City of New York*²²⁴ the Supreme Court held that the change in language from "all sums" to sums "not to exceed" did not provide the President with discretion to commit a lesser amount.²²⁵ While the holding was limited to the statutory language,²²⁶ the Court implied that Congress is authorized to eliminate executive discretion over appropriations. The *Train*

215. *See id.* at 179-81.

216. *See id.* at 179-80.

217. 357 F. Supp. 143 (D. Minn. 1973).

218. *Berends v. Butz*, 357 F. Supp. 143, 149-52 (D. Minn. 1973).

219. *See FISHER*, *supra* note 193, at 181.

220. *See id.* at 184; *see also* Federal Water Pollution Act of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 834 (codified as amended at 33 U.S.C. § 1251-1387 (1982)).

221. *See FISHER*, *supra* note 193, at 191.

222. *See id.* at 184-85.

223. *See id.* at 184-86. *See also* *Train v. City of New York*, 420 U.S. 35 (1975) (holding that no discretion was allowed under statute at allotment stage).

224. 420 U.S. 35 (1975).

225. *Train v. City of New York*, 420 U.S. 35, 43-44 (1975).

226. *See id.* at 41 (stating that "[t]he sole issue before us is whether the 1972 Act permits the Administrator to allot to the States under § 205(a) less than the entire amounts authorized to be appropriated by § 207.") (footnote omitted).

decision thus set the stage for the Impoundment Control Act of 1974,²²⁷ which severely curtailed executive impoundment authority.

Although no President has been as willing as Nixon to supplant congressional policies with his own, even with the stricter statutory limits on impoundment authority, Presidents Ford, Carter, and Reagan have used impoundment as a device to reorder Congressional priorities, sometimes suffering setbacks by the judiciary and Congress as had Nixon.²²⁸

1. Policy Impoundments Under the Impoundment Control Act of 1974

In response to Nixon's abuse of the impoundment power, Congress enacted the Congressional Budget and Impoundment Control Act of 1974.²²⁹ In addition to establishing budget committees in each house of Congress, the Act established procedural limitations on presidential impoundment.²³⁰ Specifically, the Act divides impoundments into two categories, deferrals, which involve withholdings not to exceed one year, and rescissions, which involve permanent terminations.²³¹ As a result of a conference committee compromise, the Act established different procedures for each type.²³²

Under the statute, policy deferrals remained in force unless either house of Congress voted disapproval.²³³ This legislative veto provision was held unconstitutional in *City of New Haven v. United States*²³⁴ following the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*.²³⁵ The *City of New Haven* court further held that the legislative veto provision was inseverable from the statute's deferral section as a whole.²³⁶ Before the *City of New Haven* decision, Congress amended the Antideficiency Act to foreclose the President from relying on it for policy deferrals.²³⁷ Thus, the *City of New Haven* court left the President with authority only to make rescissions, with full congressional approval "within forty five days of a special impoundment message of the President,"²³⁸ and to make routine or administrative deferrals.²³⁹

227. Pub. L. No. 93-344, §§ 1001-1017, 88 Stat. 297, 332-37 (codified as amended at 2 U.S.C. §§ 681-688 (1982)).

228. See *infra* notes 240-56 and accompanying text.

229. Pub. L. No. 93-344, §§ 1001-1017, 88 Stat. 297, 332-37 (codified as amended at 2 U.S.C. §§ 681-688 (1982)).

230. See *id.*; see also FISHER, *supra* note 193, at 198.

231. See 2 U.S.C. §§ 683(b) and 684(b) (1991) (as amended); see also Neuren, *supra* note 186, at 704.

232. See FISHER, *supra* note 193, at 199.

233. See 2 U.S.C. § 684(b) (1982).

234. 809 F.2d 900 (D.C. Cir. 1987).

235. 462 U.S. 919 (1983).

236. *City of New Haven v. United States*, 809 F.2d 900, 902 (D.C. Cir. 1987).

237. See *City of New Haven*, 809 F.2d at 906 n.18.

238. See Neuren, *supra* note 189, at 704.

239. *City of New Haven*, 809 F.2d at 906, 909. The court noted that the amendments to the Antideficiency Act did not affect the President's authority to "implement routine programmatic deferrals." *Id.* at 906 n.18.

Ironically, perhaps, under the 1974 Act Gerald Ford actually increased the number of policy impoundments.²⁴⁰ Under the Ford Administration's reading, the Act provided broad authority to impound all funds.²⁴¹ Thus, roughly one-third of Ford's deferrals and almost all of his rescissions were policy impoundments.²⁴² In addition, almost all impoundments involved nondefense programs.²⁴³ One major reason why Congress was unable to respond effectively under the Act's provisions was that it was simply overwhelmed by the amount of paperwork generated by the Ford administration.²⁴⁴ The congressional disapproval rate for Ford's rescissions was sixty-three percent based upon total number of rescissions and seventy-one percent based upon total amount of rescinded funds.²⁴⁵

Jimmy Carter, in contrast, submitted both defense and nondefense impoundments to Congress under the Act.²⁴⁶ The disapproval rate for Carter's rescissions was twenty-nine percent based upon total number of rescissions and thirty-one percent based upon total amount of rescinded funds.²⁴⁷ While Carter impounded less frequently than did Ford,²⁴⁸ it is worth considering one case involving an appropriation under the Federal Highway Act.²⁴⁹

The Impoundment Control Act contained a provision that stated that the Act would not supercede mandatory spending provisions in other statutes.²⁵⁰ Carter interpreted this to apply only to pending cases, so that the Act's impoundment procedures would trump future appropriations with mandatory language.²⁵¹ Thus, Carter impounded forty-six and a half million dollars in highway funds allocated to the State of Maine.²⁵² In *Maine v. Goldschmidt*²⁵³ the United States District Court for the District of Maine

240. See FISHER, *supra* note 193, at 200 (observing that "[i]nstead of performing as a restriction on Presidential power, it was interpreted by the [Ford] Administration as a new source of authority for withholding funds.").

241. See *id.*; accord Neuren, *supra* note 189, at 705.

242. See Neuren, *supra* note 189, at 705.

243. See *id.* at 706.

244. *Id.* (noting that "Ford's impoundments generated a crippling amount of paperwork for Congress.").

245. See Middlekauff, *supra* note 190, at 219.

246. See Neuren, *supra* note 189, at 708.

247. See Middlekauff, *supra* note 190, at 219.

248. See Neuren, *supra* note 189, at 707-08.

249. See *id.* at 707; see also 23 U.S.C. § 101-58 (1991) (as amended).

250. See 2 U.S.C. § 681(4) (1982) (providing that "[n]othing in this Act . . . shall be construed as— . . . (4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.").

251. See *Maine v. Goldschmidt*, 494 F. Supp. 93, 99 (D. Me. 1980) (stating that "[t]he Secretary argues that the entire disclaimer in the Impoundment Control Act was intended solely as a temporary measure to avoid prejudicing then pending litigation over the impoundment issue.").

252. See *id.* at 96-97.

253. 494 F. Supp. 93 (D. Me. 1980).

held that the Act's procedures do not supercede appropriations statutes with mandatory language that are enacted after the 1974 Act.²⁵⁴

Finally, during the Reagan administration, the number of proposed rescissions increased dramatically, especially during the final six years, after the Republicans lost control of the Senate. During the last six years, the disapproval rate was seventy-six percent based upon total number of rescissions and ninety-eight percent based upon total amount of rescinded funds,²⁵⁵ whereas during the first two years, when the Republicans controlled the Senate, it was thirty-three percent based upon total number of rescissions and thirty percent based upon total amount of rescinded funds.²⁵⁶

2. Conclusions

The foregoing review of impoundment history demonstrates that ever since the Nixon administration, Presidents have been willing to use impoundment as a device to substitute congressional priorities with their own over matters involving not simply special interest legislation, but rather, matters of legislative policy.²⁵⁷ This history is illuminating for two reasons. First, the legal basis for many of these impoundments, especially during the Nixon era, was questionable at best. Second, and perhaps more importantly, given the questionable legal basis of these practices as well as the strong protests by congressional leaders, many impoundments subjected the Presidents who enacted them to public scrutiny and criticism.

To the extent that using the item veto affirmatively as a bargaining tool would increase executive control over the budget while decreasing public scrutiny, Presidents are that much more likely to use it.²⁵⁸ In fact, the item veto so exercised would give Presidents the best of both worlds: an increased perception of Presidential control over policy as more bills are passed that match the President's agenda, and a decreased perception that the President is acting at odds with Congress because the actual number of items or entire bills vetoed is reduced.

One could respond by asking, if impoundment authority under the Impoundment Control Act is a *de facto* item veto, why have Presidents since Nixon failed to use it as a bargaining tool in the manner predicted

254. *See id.* at 98-99.

255. *See Middlekauff, supra* note 190, at 219.

256. *See id.*

257. While the benefits associated with some of the projects subject to impoundment undoubtedly contained pork, the foregoing impoundment history nonetheless demonstrates that the device was used more generally to effectuate the President's partisan concerns and to substitute his own legislative priorities for those of Congress. As stated earlier in this article, most goods cannot be divided absolutely into the categories of public or private goods. *See supra* notes 105-07 and accompanying text. This definitional problem does not diminish the argument in the text that Presidents have not limited their use of impoundments to special interest projects to control the federal budget.

258. *Cf. HAYES, supra* note 88, at 158 (positing that "[p]olicymakers . . . thrive on imperfect information.").

by this article? In fact, it is not clear that they have failed to do so. After all, there is no public record of presidential conversations with congressional leaders. More importantly, however, the real issue is not whether they have, but whether they could. No President before Nixon had exercised impoundment authority as broadly and, indeed, as boldly as he did even though, theoretically, all had precisely the same authority or lack thereof to do so.

The lesson from the impoundment discussion is that proponents of a constitutional amendment to confer item veto power upon the President must consider not simply how the amendment reasonably can be interpreted and used, but also how it is capable of being interpreted and used. A politically adroit President could use the item veto to gain substantial control over general matters of legislative policy. While a President could try to use the 1974 Act to engage in such bargaining, there is one very fundamental distinction. An act can be repealed through ordinary legislation. A constitutional amendment cannot be. If Presidents have not so used their impoundment authority under the 1974 Act, it may be due to a perception that even limited impoundment authority is better than none at all. Given Congress's willingness to remove this power after Nixon's abuses, the somewhat reserved exercise of power by subsequent Presidents may simply reflect greater political aptitude. One need look no further than to the states, however, to see how drastically this picture could change with a constitutional amendment creating the item veto.

B. *The State Experience*

As indicated at the outset, forty-three states currently vest their governors with item veto power.²⁵⁹ While commentators dispute the relevance of the state experience to the federal situation,²⁶⁰ no one can dispute that the states provide an extremely rich source of data as to the potential uses and abuses of the item veto.

This section will first compare the federal budgetary process with those of the states to put the discussion in its proper context. This section will then review three statistical studies on the state experience with the item veto to show that even with the significant differences between both levels of government, the state experience generally supports this article's thesis.

1. The State/Federal Distinction

There are at least four major distinctions between the federal budget and state budgets. The first and most frequently cited distinction is the varying percentage of those government budgets devoted to mandatory

259. See Spitzer, *supra* note 27, at 611.

260. Compare Dixon, *supra* note 13, at 286 (asserting that "[i]f a Federal item veto with majority override works as well at the Federal level as it does in my own State of Illinois, it could save \$27 billion a year or more") with Edwards, *supra* note 24, at 201 (positing that "[s]tates are not small Federal governments. . . . There is no valid parallel.").

spending.²⁶¹ Because of the relatively large portion of the federal budget allocated to mandatory spending, including entitlement programs and interest on the deficit, the nondiscretionary portion has been estimated at five-ninths of the overall budget.²⁶² Of course, the remaining four-ninths is not likely to fall subject to the item veto because that portion is divided between defense and social programs.²⁶³ The real percentage of the federal budget subject to the item veto has been estimated at closer to thirteen percent, excluding one of these categories along partisan lines.²⁶⁴

In contrast, almost all state constitutions require balanced budgets and, thus, states typically have lower mandatory net interest payments than does the federal government.²⁶⁵ In addition, the percentage of mandatory spending overall is much lower at the state level because no state has a defense budget and because states have fewer mandatory social programs.²⁶⁶ As a result, a far higher percentage of items in state budgets can be subjected to the item veto.

The second major distinction between the federal and state budgetary processes is that most states have both balanced budget amendments and single subject amendments.²⁶⁷ As a result, the item veto at the state level is a supplemental rather than primary budget-cutting tool. At the federal level, even as amended the Gramm-Rudman-Hollings Act alone does not provide an effective means of eliminating uncontrolled congressional spending.²⁶⁸ In addition, there is no effective single subject requirement except the limitation on nongermane riders in the House of Representatives.²⁶⁹ Because the item

261. See, e.g., Aaron 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, 167 (1985); *Item Veto: State Experience*, *supra* note 20, at 57.

262. See *Item Veto: State Experience*, *supra* note 20, at 57.

263. See *id.* at 60.

264. See Wildavsky, *supra* note 261, at 167 (estimating federal discretionary spending at 13 percent of overall budget); *Item Veto: State Experience*, *supra* note 20, at 57 (estimating same at 4/9 of overall budget in 1985); see also Zycher, *supra* note 120 (estimating fixed expenses, based upon entitlements and interest, at \$495 billion of total \$925 billion 1985 budget); Ornstein, *supra* note 183 (estimating discretionary spending that would be subject to item veto for 1985 at \$62 billion out of overall budget of \$926 billion).

265. See *Veto Procedures in the States, Line Item Veto Controversy*, CONG. DIG. 259 at 264 [hereinafter "*Veto Procedures*"].

266. See Edwards, *supra* note 24, at 201.

267. See *Veto Procedures*, *supra* note 265, at 265 (stating that 49 states require balanced budget).

268. See Stith, *supra* note 5, at 599 (stating that "GRH does not and cannot take politics out of the spending process, and hence it cannot reduce the deficit without a sustained political consensus to achieve this end."). One reason why the Act is less effective than as originally proposed is precisely because in the course of legislative bargaining, "politically sensitive" programs were exempted from the automatic budget cutting mechanism. See *id.* at 631. In August 1990 an OMB spokeswoman estimated the automatic budget cuts under Gramm-Rudman-Hollings for the 1991 federal budget at about \$100 billion if Congress could not agree on a balanced budget. See also Barbara Gamarekian, *Uncertain Future at the Smithsonian*, N.Y. TIMES, Aug. 7, 1990, at C14; Steven Mufson & John E. Yang, *Both Parties Now Fearing Automatic Budget Cuts*, WASH. POST, May 9, 1990, at A7 (estimating automatic cuts for 1991 at \$36.5 billion).

269. See ESKRIDGE & FRICKEY, *supra* note 70, at 25-26 note v.

veto thus would be a primary rather than supplemental budget-cutting tool at the federal level, unlike at the state level, concerns over presidential involvement in the legislative process are that much greater.

The third major distinction between state budgets and the federal budget involves the structure of appropriations bills themselves. State appropriations tend to be well detailed and itemized.²⁷⁰ This detail, in part, enables governors with item veto power to use that power effectively.²⁷¹ In contrast, federal appropriations are lumped together, thereby leaving agencies greater discretion as to how to spend federal funds.²⁷² While committee reports at the federal level include recommendations as to how federal funds should be spent, the sheer size of the federal government precludes the level of detail within appropriations bills that is customary at the state level.²⁷³ As a result, the item veto is likely to be a far less effective tool for federal budget reductions than it is for state budget reductions.²⁷⁴

The final major distinction stems from the difference between the structure of Congress and that of most state legislatures. Members of Congress meet full time for relatively long sessions, whereas members of state legislatures often meet part time and for fairly short sessions.²⁷⁵ The result of this distinction is predictable; legislation at the state level is often in greater need of revision to fully effectuate its underlying policies.²⁷⁶ The increased executive role through use of the item veto at the state level may therefore be justified on straightforward functional grounds. The relatively greater degree of professionalism and the increased opportunities for reflection on legislative matters in Congress, in contrast, would tend to militate against heightened involvement of the President in the legislative process.

These distinctions aside, the states remain an extremely rich source of information on the potential change in executive-legislative relations that an item veto would entail.²⁷⁷

270. See *Item Veto: State Experience*, *supra* note 20, at 61 (stating that “[s]ome state constitutions require the legislature to consider detailed appropriations so that items are available to the governor to be vetoed. . . . Even without explicit constitutional or statutory direction, the courts have called for sufficient itemization in state appropriation measures to allow the governor effective use of the item veto.”).

271. See *id.*

272. Cf. *id.* at 63 (asserting that “[t]o demand that appropriations bills include detailed allocations in order to make the item veto more effective may cost more in executive discretion than it’s worth.”).

273. See *id.* at 56-65.

274. See *id.* at 56 (noting that “[b]ecause the individual projects are not specified in appropriation bills, the President could not veto the items he calls pork barrel projects.”).

275. See SPITZER, *supra* note 7, at 137 (observing that “[i]n short, state legislative executive relations are very different from those at the federal level. State legislatures are typically part-time bodies, meeting for only a few months out of the year. For this reason alone, state governors need greater authority.”).

276. See KEEFE & OGUL, *supra* note 171, at 367 (stating that “[i]n the states, the veto is used because bills duplicate one another, because acts of legislatures are vague and incapable of enforcement, or because technical flaws have occurred in drafting”); see also SPITZER, *supra* note 7, at 137.

277. For an extensive study of the state experience with the item veto, see generally *Item Veto: State Experience*, *supra* note 20.

2. Statistical Studies on Gubernatorial Use of the Item Veto in the States

Three studies have attempted to test whether use of the item veto correlates with fiscal irresponsibility on the part of the legislature. The first study, by Glenn Abney and Thomas Lauth,²⁷⁸ was based on a three-year history from 1979 to 1982 across forty-five states.²⁷⁹ The second study by James J. Gosling,²⁸⁰ was longitudinal, based on a ten-year history from 1975 to 1985 in Wisconsin.²⁸¹ The third study, conducted by Benjamin Zycher, compared per capita state, and state and local, spending in 1981 in the seven states without the item veto with similar spending in the forty-three states with the item veto.²⁸² While all three studies are designed to draw general conclusions applicable to the federal situation, the unique aspects of the Wisconsin item veto render that study somewhat less useful.²⁸³ Nonetheless, all three studies support the general thesis that the item veto, in practice, is likely to provide the President with greater opportunities to influence matters of general legislative policy than power to curtail unwanted special interest legislation.

Abney and Lauth sent questionnaires to the state legislative budget officers or the chief staff member of the house appropriations committee in each state and received forty-five responses.²⁸⁴ Using three measures of fiscal restraint the authors tried to determine whether fiscal restraint tended to reduce the incidence of item vetoes. These measures were: 1) "the propensity of the legislature to make decisions on the basis of benefits for the districts of legislators," commonly referred to as pork barrel; 2) "the propensity of the legislature to increase the budget recommendations of the governor"; and 3) "considerations of an agency's efficiency in legislative decisions about the agency's budget."²⁸⁵

Regardless of the measure used, there was no significant correlation between the frequency of item veto usage and legislative fiscal irresponsibility.²⁸⁶ The authors found a slight, but statistically insignificant, increase in item vetoes in states more prone to pork barrel legislation.²⁸⁷ Similarly, the item veto, in practice, was "not used to maintain the expenditure levels of the executive budget."²⁸⁸ Finally, while the authors found a positive correlation between use of the item veto and absence of efficiency mind-

278. See Glenn Abney & Thomas P. Lauth, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or an Instrument for Partisanship?*, 45 PUB. AD. REV. 372 (1985).

279. See *id.* at 374.

280. See James Gosling, *Wisconsin Item-Veto Lessons*, 46 PUB. ADMIN. REV. 292 (1986).

281. *Id.* at 294.

282. See Zycher, *supra* note 120.

283. See *infra* notes 294-301 and accompanying text.

284. Abney & Lauth, *supra* note 278, at 373.

285. *Id.* at 374-75.

286. *Id.*

287. See *id.* at 374.

288. *Id.*

edness in state legislatures, the correlation was statistically insignificant.²⁸⁹

The authors discovered that the use of item vetoes increased when different parties controlled the executive and legislative branches.²⁹⁰ In addition, in states with Republican governors and Democratic legislatures, governors were more likely to use the item veto as a tool of fiscal restraint.²⁹¹ In light of these data, Abney and Lauth concluded that if the President is granted item veto power he is more likely to use it as a partisan tool than as a tool to reduce the deficit.²⁹²

While Gosling was critical of Abney & Lauth's conclusion that the item veto is primarily a partisan tool,²⁹³ his own study did little to refute that thesis. To the extent that his conclusions do not support that thesis, it may be due to the unique qualities of item veto law in Wisconsin. The Wisconsin Constitution empowers the governor to veto all language including statutory or session law within appropriations bills in whole or in part.²⁹⁴ In a 1978 decision, *State ex rel Kleczka v. Conta*,²⁹⁵ the Wisconsin Supreme Court upheld the governor's use of the item veto to strike "provisos and conditions to an appropriation so long as the net result . . . is a complete, entire, and workable bill which the legislature could have passed in the first instance."²⁹⁶ Analyzing this decision, Gosling concluded that there were but two restrictions on the governor's use of the item veto: "appropriation amounts [must] be vetoed in their entirety (that selective striking of a digit or digits is not allowable), and that what remains after veto be a 'complete and workable' law."²⁹⁷ In fact, Gosling's conclusion proved premature. In 1988 the Wisconsin Supreme Court, as anticipated in the *Kleczka* dissent,²⁹⁸ upheld the Wisconsin governor's selective striking of digits and words.²⁹⁹ This decision was overturned by a constitutional amendment, passed by the Wisconsin legislature, and ratified by Wisconsin voters in April 1990.³⁰⁰

Essentially, the Wisconsin governor is empowered to become a creative legislator, wholly changing the intent of an appropriations bill, provided that what remains is a complete working law that is germane to the subject of the partially vetoed bill.³⁰¹ This additional legislative power on the part

289. *Id.*

290. *See id.* at 375-76.

291. *See id.*

292. *See id.* at 376-77.

293. *See* Gosling, *supra* note 280, at 293.

294. WIS. CONST. art. V, § 10; Gosling, *supra* note 280, at 293; *Item Veto: State Experience*, *supra* note 20, at 231.

295. 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

296. *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 715, 764 N.W.2d at 539, 555 (1978).

297. Gosling, *supra* note 280, at 293.

298. *Kleczka*, 82 Wis. 2d at 723, 264 N.W.2d at 558-59.

299. *See State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988).

300. *See* Mary E. Burke, Comment, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 WIS. L. REV. 1395, 1423-27.

301. *Id.* at 1427; *see also Item Veto: State Experience*, *supra* note 20, at 39.

of the governor may reduce the extent to which he must rely on his allies in the legislature to formulate items in line with his policy directives. By simply adding or deleting key terms, the governor can virtually create policy out of whole cloth.

In fact, the results of Gosling's study comport with this thesis. Analyzing 542 vetoes over a ten-year period based on several distinguishing characteristics including the type of language vetoed, the fiscal effect, whether the veto involved pork, and various separation of powers concerns,³⁰² the author concluded that the item veto is not primarily a tool of fiscal restraint.³⁰³ In fact, the author discovered that "only 14 percent [of items vetoed] directly affected appropriations."³⁰⁴ Instead, the author concluded that the primary impact of item vetoes was to substitute the governor's policy priorities for those of the legislature.³⁰⁵

Finally, Zycher's study demonstrates that overall spending at the state level, and state and local levels combined,³⁰⁶ were actually higher on average in the forty-three states with the item veto than in the seven states without the item veto.³⁰⁷ Zycher concludes that either the item veto is an ineffective tool to reduce pork barrel appropriations, or that it actually encourages legislative irresponsibility by enabling legislators to claim credit for legislative procurements while shifting the blame onto governors when those procurements are later taken away.³⁰⁸

While the state experience is not fully predictive of federal practice, the fact that most governors with item veto power have not used it as a tool of fiscal restraint is informative. These studies provide support for this article's central thesis that a President vested with item veto power is more likely to use that power to affect legislative policies than to curtail unwanted pork barrel legislation. Moreover, given the unique structural impediments to passing legislation at the federal level, the likelihood that the President will try to influence policy before legislation is passed through active

302. See Gosling, *supra* note 280, at 294-95.

303. See *id.* at 295.

304. *Id.*

305. See *id.* at 296; accord Burke, *supra* note 300, at 1423-24 (noting that "[h]istorically, most partial vetoes in Wisconsin appropriation legislation appear to have been motivated by policy or partisan considerations, rather than financial concerns.") (footnote omitted). For an analysis of the use of the item veto in the State of Washington, see Stephen Masciocchi, Comment, *The Item Veto Power in Washington*, 64 WASH. L. REV. 891 (1989). The author concludes that:

The use of the item veto power in Washington bears little relation to its historical purpose of reducing wasteful spending. The item veto power has placed the governor in the position of a superlegislator who eliminates legislative compromise through veto of provisos.

Id. at 911.

306. See Zycher, *supra* note 120. Zycher compared purely state spending with state and local spending because "what may be a state function in one place is a local responsibility elsewhere." *Id.*

307. See *id.*

308. See *id.*

participation in the bargaining process rather than through *post hoc* auditing is all that much greater.

V. CONCLUSION

This article has considered the constitutional debate surrounding the item veto and has then analyzed the item veto using public choice theory to predict how, in practice, this device is likely to change the dynamics of legislative bargaining between the White House and members of Congress. The prediction drawn from this analysis, that the item veto is likely to provide the President with greater power to control overall matters of legislative policy than it is power to curtail unwanted pork barrel appropriations, is supported by the history of both presidential impoundments and gubernatorial use of the item veto in the states. Both the analysis and the historical support demonstrate that the item veto seems both a misguided and potentially detrimental device to control federal budget excesses.