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FOUR FACES OF THE ITEM VETO: A REPLY TO TRIBE AND KURLAND

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At Sen. Edward Kennedy's request, constitutional scholars Laurence Tribe of Harvard and Philip Kurland of the University of Chicago considered the following question: In the absence of a constitutional amendment, does the President have the authority to use a "line-item" veto to kill portions of a bill passed by Congress, while signing the remainder of the legislation into law? The Senator inserted into the *Congressional Record* their response to his query, in which Tribe and Kurland concluded that "any attempt to exercise such a 'line-item veto' would clearly be unconstitutional."[1]

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[1] 135 CONG. REC. S14,387 (daily ed. Oct. 31, 1989) [hereinafter *Tribe-Kurland Response*]. The text of the *Response* reads in full:

October 31, 1989

Dear Senator Kennedy:

We write in response to your request for our views regarding whether it would be constitutional for the President to attempt to veto a portion of a bill passed by Congress, while permitting the remainder of the bill to become law. We believe that any attempt to exercise such a "line-item veto" would clearly be unconstitutional.

The language of the Constitution itself limits the President's veto power only to entire bills and other measures passed by both the Senate and the House of Representatives. Article I, section 7, clause 2 provides:

"Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be law."

And article I, section 7, clause 3 provides:

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

On this conclusion, Sen. Kennedy emphasized, "two highly respected authorities—who have broadly differing views on many matters of constitutional interpretation—agree unequivocally."[2] Only "conservative extremists," the Senator said, would continue to advocate that

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It has been suggested that the latter provision supports the existence of a presidential line-item veto. *See, e.g.*, Glazier, Reagan Already Has Line-Item Veto, *Wall Street Journal*, Dec. 4, 1987, at A14, col. 4. According to James Madison's notes from the Constitutional Convention, this provision was added to ensure that Congress did not evade the President's veto authority by congressional acts "under the form and name of Resolutions, votes &c." *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 465 (Ohio Univ. Press ed. 1984).

By its terms, however, the clause requires the President to exercise his veto power by returning the entire "Order, Resolution or Vote" to the Congress. The Constitution thus contemplates that a President may do one of three things when presented with a bill or other measure that has passed the House and Senate: sign the bill, return "it" (*i.e.*, the entire measure), or permit the bill to become law without presidential signature. No provision is made for vetoing a portion of a bill or other measure, as opposed to the whole.

This commonsense reading of the constitutional text is supported by the absence of any evidence that the framers contemplated that the Constitution would permit a line-item veto. *See* Fisher, The Presidential Veto: Constitutional Development, in *Pork Barrels and Principles: The Politics of the Presidential Veto* 17-19 (1988). There is ample reason to believe, however, that the framers understood that appropriations bills enacted by the Congress would address more than a single subject. In this regard, the practices of the First Congress are instructive. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983). In 1789, "[t]he first appropriations bill passed by Congress was omnibus," Fisher, *supra* at 22; yet the concept of a presidential line-item veto did not surface in U.S. law until the Civil War-era. *Id.* at 19.

In any event, presidential line-item veto authority would require far more than a federal constitutional rule against omnibus bills, or bills combining unrelated matters. For such a rule would at most tell the President that he should veto a "bill" in its entirety on constitutional grounds upon concluding that it covers too disparate a set of subjects. Pruning such a bill represents an altogether different exercise of power—power inherently legislative in character.

Moreover, since the Constitution was ratified, the executive branch has consistently manifested belief in the view that the President lacks line-item veto authority. More than one dozen Presidents since Ulysses S. Grant have sought constitutional amendments granting such authority; and no President has attempted to exercise a line-item veto. All have shared the view that such lawmaking power is beyond the reach of the executive branch.

Our conclusion is also buttressed by the aftermath of the Reagan Administration's instructions to federal agencies not to comply with certain provisions of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, because President Reagan believed the provisions were unconstitutional. The provisions in question were later upheld by the United States Court of Appeals for the Ninth Circuit. The court's discussion of the Administration's actions in directing federal agencies not to comply with certain provisions of the Act is instructive.

> "Art. I, sec. 7 does not empower a President to revise a bill, either before or after signing. *It does not empower the President to employ a so-called 'line-item veto' and excise or sever provisions of a bill with which he disagrees.* The only constitutionally prescribed means for the President to effectuate his objections to a bill is to veto it and to state those objections upon returning the bill to Congress. *The 'line-item veto' does not exist in the federal Constitution*, and the executive branch cannot bring a de facto 'line-item veto' into existence by promulgating orders to suspend parts of statutes which the President has signed into law." *Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir.), *rehearing granted*, 863 F.2d 683, *decision withdrawn on other grounds*, No. 87-5670 (9th Cir. July 17, 1989) (emphasis added).

In sum, we believe that the President lacks the constitutional authority to exercise a line-item veto.

Sincerely,

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Harvard Law School

Phillip B. Kurland
William R. Kenan Distinguished Service Professor
University of Chicago

Id.

[2] 135 CONG. REC. S14,387 (daily ed. Oct. 31, 1989) (remarks of Sen. Kennedy).

President Bush test the constitutionality of a line-item veto.[3] Predictably, the newspaper headline the following day announced: "Line-Item Veto Unconstitutional, Legal Scholars Say."[4]

Despite its pedigree, the Tribe-Kurland response to Sen. Kennedy's question contains little real analysis of the Constitution or its history. Although it is quite possible that the President does not have the inherent power under the Constitution to wield a line-item veto, the issue is far more subtle and ambiguous than Tribe and Kurland admit. In particular, Tribe and Kurland do not define what they mean by an "item veto" or what constitutes a "bill" for purposes of presentment to the President. Nonetheless, their ultimate conclusion is not one with which political conservatives necessarily would disagree. Indeed, two noted conservative lawyers who served in the Department of Justice under President Reagan—Bruce Fein and William Bradford Reynolds—have asserted that there is no defensible argument that an item veto exists implicitly in the Constitution.[5] This appears to be the same conclusion that Assistant Attorney General Charles Cooper reached and gave to President Reagan in an Office of Legal Counsel memorandum not yet publicly available.[6]

This skepticism notwithstanding, it is hardly "insulting the Constitution," as Sen. Kennedy asserted,[7] to probe the question of whether the President has an as yet unexercised veto power. Although a number of lower federal courts have stated in dicta that the President has no item veto,[8] the Supreme Court obviously has never addressed the question. It is not surprising, therefore, that reasonable minds differ on this constitutional question—as they do on abortion, the War Powers Resolution, affirmative action, the death penalty, and many other constitutional issues. Indeed, as we discuss below, on November 3, 1989, President Bush asserted a kind of item veto and, on November 20, 1989, Rep. Tom Campbell[9] and five other members of Congress introduced a resolution urging the President to execute a line-item veto expressly for the purpose of test-

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[3] *Id.*

[4] Wall St. J., Nov. 1, 1989, at B7, col. 2.

[5] Fein & Reynolds, *Wishful Thinking on a Line-Item Veto*, LEGAL TIMES, Nov. 13, 1989, at 30 ("the line-item veto is unconstitutional"; all arguments in its favor "have been wholly discredited"); *cf.* W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 25 ("The Federal Executive veto does not include the power to veto a part of a bill.").

[6] After leaving the Justice Department, Cooper wrote an article elaborating on the analysis in his Office of Legal Counsel memorandum. *See* Cooper, *The Line-Item Veto: The Framers' Intentions*, in PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 29 (1988) (published by the National Legal Center for the Public Interest) [hereinafter PORK BARRELS]; *see also* Crovitz, *Introduction*, in PORK BARRELS, *supra*, at xi.

[7] 135 CONG. REC. S14,387 (daily ed. Oct. 31, 1989) (remarks of Sen. Kennedy).

[8] *See, e.g.*, Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1124 (9th Cir.), *reh'g en banc ordered*, 863 F.2d 693 (9th Cir. 1988), *withdrawn on other grounds, per curiam*, 893 F.2d 205 (9th Cir. 1989) (en banc); Thirteenth Guam Legislature v. Bordallo, 430 F. Supp. 405, 410 (D. Guam App. Div. 1977), *aff'd*, 588 F.2d 265 (9th Cir. 1978) (per curium).

[9] Formerly a law professor at Stanford University.

ing its constitutionality.[10] Sen. Robert Dole, the Senate Minority Leader, had already publicly urged the President to do so in January 1989.[11] A prominent constitutional scholar, Ronald Rotunda, has also raised this suggestion.[12] And President Bush himself has stated to the press that he would like to create a test case on the item veto.[13]

President Bush, Sen. Dole, Rep. Campbell, and constitutional scholars other than Professors Tribe and Kurland are not indulging in conservative extremism or constitutional churlishness. What steps the Constitution permits the President to take to protect perhaps his most important formal power—the veto—from the measures that Congress has taken to weaken it is one of the most pressing questions anyone who cares about the separation of powers must face. Whether the item veto is

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[10] H.R. Res. 297, 101st Cong., 1st Sess. (Nov. 20, 1989). The resolution read:

> Whereas Federal spending and the Federal budget deficit have reached unreasonable levels; Whereas the duty of the President under the Constitution to ensure that the laws are faithfully executed prohibits him from expending funds in excess of revenues; Whereas a line-item veto would enable the President to eliminate waste from the Federal budget before considering cuts in important programs; and Whereas without this line-item veto, the practice of attaching riders onto bills and resolutions has become widespread and is thwarting the intent of the framers of the Constitution that the President have veto power over any measure passed by both Houses of Congress: Now, therefore, be it *Resolved*, That, for the purpose of determining the constitutionality of the line-item veto, the House of Representatives encourages the President to execute a line-item veto.

Id. (emphasis in original).

[11] Dole, *Bush Can Draw the Line*, Wall St. J., Jan. 25, 1989, at A21, col. 1 (letter to the editor).

[12] Professor Rotunda has suggested that President Bush "could create a test case by vetoing a non-germane piece of pork-barrel legislation tucked in a large bill." Rotunda, *Line-Item Veto: Best Budget Fix?*, LEGAL TIMES, Mar. 27, 1989, at 15, 16; *accord* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 10.7 (1986) (forthcoming 1990 supp.). Another advocate of test cases on matters of separation of powers is Professor Eugene Rostow, who writes:

> If the extraordinary gains in power Congress has achieved [since the mid-1970s] are to be undone, the change will have to be achieved by the President and the federal courts acting together. . . . The judiciary cannot act, however, without test cases, and the President has always been an important initiator of test cases.

Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT'L L. 740, 741 (1989).

In other areas of constitutional law, of course, test cases have produced important precedents. See, for example, the discussion of the litigation that produced Griswold v. Connecticut, 381 U.S. 479 (1965), in R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 95-97 (1990).

[13] When asked by reporters in July 1989 whether he was retreating from an earlier position supporting a line-item veto amendment, President Bush said:

> 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.

Interview of President George Bush by Owen Ullmann and Ellen Warren of Knight-Ridder News Service, at the White House (July 25, 1989) (Office of the Press Secretary) (transcript copy on file with the *Northwestern University Law Review*).

Similarly, the *Wall Street Journal* reported that in the week before Sen. Kennedy's publication of the Tribe-Kurland letter, "White House spokesmen . . . said Mr. Bush is considering simply declaring that the Constitution gives him the power" to assert an item veto and thereby "invit[e] a court challenge to decide whether he has the right." Seib, *If Bush Tests Constitutionality of Line-Item Veto, Reverberations Could Transform Government*, Wall St. J., Oct. 30, 1989, at A12, col. 1.

constitutional or not, it challenges our understanding of the separation of powers and of the significance of the original meaning of the Constitution in defining the roles of Congress and the President in the lawmaking process.[14]

In Part I of this Article, we discuss the ambiguity that surrounds the veto power because of the words that the framers used, and failed to use, in drafting the Constitution. In Part II, we show that the item veto can take at least four different forms. These forms differ in the degree to which one can plausibly argue that the President already possesses them. Part III identifies and analyzes several intriguing constitutional puzzles posed by the item veto. Part IV approaches the item veto from a different direction by asking what the word "bill" means for purposes of the veto power.

I. MISSING WORDS

The word "veto" does not appear anywhere in the Constitution, let

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[14] It might be useful if some contemporary theoretical paradigm could be imposed on the item veto debate such that competing constitutional principles and textual provisions would neatly fall into place. We are skeptical, however, that such a paradigm exists. Although public choice (or other) models may produce a robust positive theory of the separation of powers in the lawmaking process, they do not necessarily assist—indeed, they may impede—the task of construing the text, history, and structure of the Constitution. Consider, for example, the analogy to bilateral negotiation in contract. One might assert that the Constitution should be construed so as to preserve equality of bargaining power between Congress and the President in the lawmaking process. But it should quickly be apparent that this seemingly evenhanded characterization is inapt, for it is hardly clear that the framers intended the legislative powers of the President and of Congress to be of equivalent, offsetting magnitudes (assuming that one could even measure such magnitudes).

The framers, for example, vacillated between requiring a two-thirds vote and a three-fourths vote to override a veto, settling ultimately on the lower supermajority requirement. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 66, 465, 627-30 (1966 ed.) (1840). There are many other instances of disparate lawmaking powers. The President, for example, cannot originate legislation; he can merely recommend it. U.S. CONST. art. II, § 3, cl. 1; *see* Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079 (1989) [hereinafter Sidak, *The Recommendation Clause*]. Congress, on the other hand, has only a limited power to make law through treaties, since the Constitution provides only for the ratification of treaties by the Senate. U.S. CONST. art II, § 2, cl. 2.

The asymmetry that is likely to exist between co-equal branches with respect to any one particular duty or prerogative suggests that it would not be particularly faithful to the text of the Constitution (or to its history and structure) to construe the veto power as if the President and Congress were perfect bilateral monopolists depicted in an Edgeworth box. *See, e.g.*, G. STIGLER, THE THEORY OF PRICE 73-74, 215-16 (4th ed. 1987). Moreover, even the theory of bilateral monopoly would be indeterminate as to the "price" negotiated between Congress and the President. *Id.* at 215-16. Although analogizing the bundling of legislation to the phenomenon of the tie-in in antitrust law has some initial appeal, Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 409-10 (1988), and although there are astute public choice arguments for how the bundling of legislation can transform the President's veto from a discrete variable into a continuous one, see generally, *e.g.*, J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 131-45 (1962), we decline to impose the economic construct of contract negotiation on the question of whether some kind of item veto is inherent in the Constitution.

alone the phrase "line-item veto." What is commonly called "the veto power of the President" does not even appear in article II, which creates the executive and defines the President's duties and prerogatives.[15] At the Constitutional Convention, the framers called the veto either the President's "negative" or "qualified negative," or the "revisionary check" or "revisionary power."[16] This phraseology might shed light on the framer's conception of the veto power. Former Assistant Attorney General Cooper (and, evidently, the Office of Legal Counsel), however, has dismissed this supposition.[17] Cooper argues that "[w]hile the term 'revision' and its variants, 'revise' and 'revisal,' today imply the act of correcting or altering an original, two centuries ago these terms meant [Cooper claims] either the act of (1) simply reviewing something or (2) reviewing and amending it."[18] He relies on the 1828 edition of Webster's *An American Dictionary of the English Language* and asserts that "[t]he first meaning is consistent with Samuel Johnson's earlier, and authoritative, dictionary, which defines 'Revisal' simply as 'Review; reexamination.' "[19]

On the other hand, the phraseology might reflect a conception of this authority held by the framers that differs markedly from our own. The framers may have conceived the veto as a grant to the President of the power to revise legislation, as opposed to the cruder power simply to forbid the enactment of legislation. Professor Forrest McDonald takes this view, and he claims that it was universally understood to be the case in the era of the framers.[20]

Cooper's textual evidence is not impregnable. The *Oxford English Dictionary*, for example, cites usages predating 1787—including a usage by Blackstone in 1768—that support the definition of "revision" as "[t]he

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15 To 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. THE FEDERALIST No. 73, at 492, 498 (A. Hamilton) (J. Cooke ed. 1961).

16 J. MADISON, *supra* note 14, at 66 (Elbridge Gerry) (June 4, 1787); *id.* at 80-81 (James Madison, Rufus King, James Wilson) (June 6, 1787); *id.* at 629 (James Madison) (Sept. 12, 1787). The Convention did not really get started until May 25, 1787; it adjourned September 17, 1787. *Id.* at 23, 659.

17 Cooper, *supra* note 6, in PORK BARRELS, *supra* note 6, at 43 ("arguments based on . . . revision cannot be used to provide the President with item-veto authority").

18 *Id.* At the time of the Convention only two states—New York and Massachusetts—had constitutions providing a veto power. *See* McDonald, *The Framers' Conception of the Veto Power*, in PORK BARRELS, *supra* note 6, at 1, 3. Both veto provisions used the word "revision." *Id.*

19 Cooper, *supra* note 6, in PORK BARRELS, *supra* note 6, at 43 n.38 (quoting S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1756)). Thus, "although the provision in the Massachusetts constitution conferring veto power upon the governor is framed in terms [of] 'revision' and 'revisal,' the use of these terms does not suggest that the governor of Massachusetts could exercise an item veto." *Id.* at 43.

20 McDonald, *supra* note 18, in PORK BARRELS, *supra* note 6, at 3-4.

action of revising or looking over again; esp. critical or careful examination or perusal *with a view to correcting or improving*."[21] On balance, Professor McDonald's interpretation seems more plausible purely as a matter of textual interpretation, if only because (1) Blackstone seems a weightier authority than Dr. Johnson in questions of legal interpretation, (2) it does not require ascribing a counterintuitive meaning to "revision,"[22] and (3) it is plainly more consistent than is Cooper's interpretation with the conspicuous absence from the Constitution of the word "veto," which literally means "I forbid" in Latin.[23] How a process of revision was to be effected by exercise of the veto power is, however, far from clear.

The operative language in article I, section 7, clause 2 upon which the framers settled provides in part that

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.[24]

This provision is now known as the presentment clause.[25]

If the textual evidence surrounding the meaning of the phrase "revisionary power" is ambiguous, the historical evidence on the presentment clause does not clarify matters. The New York Constitution of 1777[26]

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21 13 OXFORD ENGLISH DICTIONARY 833 (2d ed. 1989) (emphasis added); *id.* (analogous use of the verb "revise" attributed to Blackstone in 1768). This definition of revision, of course, goes beyond mere review or re-examination.

22 "The words used in the Constitution are to be taken in their natural and obvious sense . . . , and are to be given the meaning they have in common use unless there are very strong reasons to the contrary." The Pocket Veto Case, 279 U.S. 655, 679 (1929) (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816); Tennessee v. Whitworth, 117 U.S. 139, 147 (1886)). In fairness, it must be admitted that, for inexplicable reasons, the framers declined to actually put the word "revision" in the Constitution. Cooper, *supra* note 6, in PORK BARRELS, *supra* note 6, at 43 (although early versions of art. I, § 7, cl. 2 did use the term, the final version of the clause did not). Nonetheless, the framers used the word during the Convention to refer to the veto power.

23 OXFORD LATIN DICTIONARY 2050-51 (P.G.W. Glare ed. 1982). For a history of the veto power from Roman times to the drafting of the Constitution, see Franklin, *Problems Relating to the Influence of the Roman Idea of the Veto Power in the History of Law*, 22 TUL. L. REV. 443 (1947); *see also* Watson, *Origins and Early Development of the Veto Power*, 17 PRES. STUD. Q. 401, 401-02 (1987); Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 209-12 (1952). The authoritative work on the American veto power as exercised during the first century of the Constitution is E. MASON, THE VETO POWER: ITS ORIGINS, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES, 1789-1889 (1890) [hereinafter E. MASON, THE VETO POWER].

24 U.S. CONST. art. I, § 7, cl. 2.

25 An analogous provision, U.S. CONST. art. I, § 7, cl. 3, requires the presentment to the President of "Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary . . . ." For an explanation of its significance, and the rationale for the label we attach to it—the "residual presentment clause"—see Part IV(C) of this Article, *infra* at notes 161-69 and accompanying text.

26 N.Y. CONST. art. III (1777).

and the Massachusetts Constitution of 1780[27] most influenced the drafting of the presentment clause, according to Hamilton's explanation in *The Federalist* No. 69.[28] The New York Constitution created a Council of Revision consisting of the governor, the chancellor of the Court of Chancery, and the judges of the Supreme Court.[29] The Council, according to Ronald Moe of the Congressional Research Service, had two kinds of lawmaking power. It could veto a bill outright (subject to a two-thirds override), but it could also return a bill to the legislature for its reconsideration, within ten days of presentment.[30] Moe writes that "[i]n the event that the Council concluded that a bill was unconstitutional, or inexpedient, *even after reconsideration by the legislature*, it could veto the measure."[31] From this, it would appear that the Council had the power to state the amendments to the bill necessary to induce it not to veto the bill when it was re-presented after its "revision" by the legislature. Although this process is not an item veto, it is a more robust "revisionary" power than that envisioned by Cooper.

The presentment clause in the United States Constitution ultimately departed from the New York Constitution and followed the Massachusetts Constitution in the sense that the framers rejected the vesting of the veto jointly in the executive and judicial branches.[32] Though the framers ultimately repudiated a proposed federal Council of Revision,[33] the power of New York's Council to return a bill for "reconsideration" drew

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27 MASS. CONST. art. II, § 1, pt. 2 (1780).

28 THE FEDERALIST No. 69, at 462 (A. Hamilton) (J. Cooke ed. 1961). Hamilton wrote in a New York newspaper on March 14, 1788:

> The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the Council of revision of this State, of which the Governor is a constituent part. In this respect, the power of the President would exceed that of the Governor of New-York; because the former would possess singly what the latter shares with the Chancellor and Judges: But it would be precisely the same with that of the Governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the Convention have copied.

Id. at 464.

29 *See* Moe, *The Founders and Their Experience with the Executive Veto*, 17 PRES. STUD. Q. 413, 419 (1987).

30 *Id.* at 419-20. Generally speaking, Moe asserts, the Council "possessed the power to 'revise all bills about to be passed into law by the legislature.' " *Id.* at 419. *See also* 1 F. PRESCOTT & J. ZIMMERMAN, THE POLITICS OF THE VETO OF LEGISLATION IN NEW YORK STATE 21 (1980) ("Evidently, the framers [of New York's 1777 Constitution] believed that they had provided a method of suggesting amendments that might improve the legislation without formally disapproving it."); A. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 203 (1859) (first action taken by the Council of Revision—on February 3, 1778—resulted in a "Bill amended by Legislature in accordance with objections, and then approved by the Council").

31 Moe, *supra* note 29, at 419-20 (emphasis added).

32 *Cf. id.* at 419-27.

33 *Id.* at 425. Those opposed to a federal Council pointed to separation of powers and judicial competence concerns. *Id.*

forth admiration and support. In 1894, a federal court said of the language that the Convention approved for the presentment clause:

> This section was couched in the very words of the constitution of New York: Every bill shall be presented to the President "*for his revision*;" "if upon *such revision*" he approve it, he shall sign it; "if upon *such revision* it shall appear to him improper for being passed into a law," he shall return it. On the 15th of August[, 1787], with this word *revision* three times repeated, "the thirteenth section of article 6, as amended, was then agreed to" by all the States. It is this vote which is expressive of the final intent of the convention. The verbal form in which the provision stands in the Constitution was the work of the Committee on Style.[34]

The framers declined to model the presentment clause exclusively on the New York Constitution. That decision, however, appears to have been based on reasons irrelevant to whether the framers intended the President's "revisionary power" to consist of more than simply the power to exercise an outright veto of legislation. The framers did not discuss the possibility of a comparatively more expansive presidential amending power at the Convention of 1787, but that might simply have reflected the fact that their principal concerns regarding the presentment clause were whether the President should have an absolute or qualified negative; whether the veto should reside exclusively in the executive or jointly with the executive and the judiciary; and whether the override of a veto should require a vote of two-thirds or three-quarters of both houses.

II. Four Faces

Because the words of the presentment and the residual presentment[35] clauses do not settle the question of whether the President has the authority to veto portions of a bill, whether omnibus or not, one must consider not only the history and text of these clauses, but also the structural significance that the framers ascribed to the veto in the overall scheme for the separation of powers. The key question is whether an item veto power comports or conflicts with the history, text, and structure of the presentment clauses.

The analysis of the issue is complicated by the fact that the item veto can take at least four different forms—a complexity that Tribe and Kur-

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[34] United States v. Weil, 29 Ct. Cl. 523, 545 (1894) (quoting N.Y. Const. art. III (1777)) (emphasis in original). The vote of the Constitutional Convention quoted by the court is recorded in J. Madison, *supra* note 14, at 465. In relevant part, the version of the presentment clause approved by the Convention on August 15, 1789, reads:

> Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States for his revision: if, upon such revision, he approve of it, he shall signify his approbation by signing it: But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider the bill.

Id. at 388-89 (Aug. 6, 1787 draft constitution).

[35] *See supra* note 25; *see also infra* notes 161-69 and accompanying text.

land do not acknowledge—and, moreover, that each type of "veto" poses different constitutional questions.[36] We delineate here, beginning with the least and concluding with the most constitutionally defensible form, the four principal variations on the claim that the Constitution implicitly confers item veto power on the President. The four fundamental forms the item veto power can take are what we term the line-item veto, the subject veto, constitutional excision, and the presidential shield veto.

Our purpose here is not to present all or even the most important arguments for and against the several forms of the item veto. We also acknowledge that, strictly speaking, the latter two powers are only functionally and not formally species of the veto power. We seek only to rebut the claim that the item veto can be dismissed, as Tribe and Kurland apparently have done, as prima facie unconstitutional. For each form of the item veto we advance reasons which, if not conclusive, certainly bolster the claim that the item veto must be given serious consideration.

A. Line-Item Veto

The framers intended the veto to serve two functions: to protect the Presidency from the encroachment of the legislative branch, and to prevent the enactment of harmful laws.[37] The line-item veto is one method by which the President might achieve the second objective, especially in the area of appropriations. The term "line item" refers to the line items in appropriations bills presented to the President, which usually consist of many appropriations that pertain to different "lines" in the federal budget—what one state supreme court called "separable fiscal units."[38] This version of the item veto power is best understood as a power that would give the executive greater control over the appropriations and federal budget process. Supporters often tout the line-item veto as a partial remedy for chronic federal deficits. Presumably, it would function as the veto power does currently in that the President could veto an individual line item of spending in an appropriations bill for the same reasons that he could veto anything else—because the spending in that line item would disserve his agenda, waste taxpayers' money, or, in Hamilton's words, expose "the community [to] the effects of faction, precipitancy, or . . . any impulse unfriendly to the public good, which may happen to

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[36] Tribe and Kurland do distinguish between a "line-item veto" and a constitutional rule against omnibus legislation. *Tribe-Kurland Response*, *supra* note 1, at S14,387. This distinction, however, just begins the discussion. As we explain below, it seems plausible both that bundling of nongermane legislation is constitutionally permitted and that one form of an implicit item veto would act as a check on this legislative "power."

[37] J. MADISON, *supra* note 14, at 629 (James Madison) (Sept. 12, 1787); THE FEDERALIST No. 73, at 492, 495 (A. Hamilton) (J. Cooke ed. 1961).

[38] *In re* Opinion of the Justices, 294 Mass. 616, 620, 2 N.E.2d 789, 790 (Mass. 1936).

influence a majority" of the legislature.[39]

The argument that the President has a line-item veto implicit in the Constitution is credited to New York attorney Stephen Glazier, who presented his thesis in a letter to President Reagan that was circulated through the White House in 1987.[40] This power, which the Confederate Constitution explicitly conferred on its president seventy-four years after the Convention of 1787,[41] is difficult to find implied in the United States Constitution and is the main object of Tribe and Kurland's criticism.

Nevertheless, powers similar to the line-item veto have long been exercised by Presidents. The practice of impoundment, by which Presidents selectively refuse to spend appropriated funds, can be seen as a line-item veto under a different name.[42] Proponents of the implicit line-item veto cite the custom of Presidential impoundment—which ended when Congress enacted the Impoundment Control Act of 1974 over President Nixon's veto[43]—as evidence rebutting the historical assertion that no

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39 THE FEDERALIST No. 73, at 492, 495 (A. Hamilton) (J. Cooke ed. 1961). The President signs a bill into law if he "approve[s]" it. U.S. CONST. art. I, § 7, cl. 2. It is interesting that the framers did not use the verb "consent" instead, as in the case of Senate's "Advice and Consent" powers over appointments and treaties. *Id.* at art. II, § 2, cl. 2.

40 Glazier presented the theory publicly in his now-famous newspaper article *Reagan Already Has Line-Item Veto*, Wall St. J., Dec. 4, 1987, at A14, col. 4; *see also* Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., Mar. 18, 1988, at 26, col. 4; Glazier, *A Plank Bush Should Stand On*, Wall St. J., Feb. 12, 1988, at 14, col. 4. There have been several proposals during the 1980s for legislation or a constitutional amendment to authorize the President to disapprove or reduce an item in an appropriations bill. *See Line-Item Veto: Hearing on S.J. Res. 26, S.J. Res. 178, and S. 1921 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) [hereinafter *1984 Line-Item Veto Hearings*]; ECONOMIC REPORT OF THE PRESIDENT 5 (1987) (request by President Reagan for legislation granting the President "the power to veto individual line items in appropriations measures"). Professor E. Donald Elliott, however, argues that "it is not likely that Congress will grant the President's request that he be given a 'line item veto,' because the line item veto would reduce the power of individual members of Congress over spending decisions." Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1103 (citation omitted). In a similar vein, Judge Abner Mikva concludes: "Because I believe the delicate balance between presidential power and congressional power is just about right, I think the line-item veto is not worth trying." Mikva, *Symposium on the Theory of Public Choice—Foreword*, 74 VA. L. REV. 167, 172 (1988).

41 CONFEDERATE CONST. art. I, § 7, cl. 2, *reprinted in* 1 THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY 37-54 (J. Richardson ed. 1966) (1905) [hereinafter JEFFERSON DAVIS PAPERS]; *see also* Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 483 (1917); Wells, *The Item Veto and State Budget Reform*, 18 AM. POL. SCI. REV. 782, 782 & n.4 (1924).

42 *See* Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied* [hereinafter Glazier, *Line-Item Veto*], in PORK BARRELS, *supra* note 6, at 12-15; *cf.* City of New Haven v. United States, 634 F. Supp. 1449, 1458 (D.D.C. 1986) (comparing impoundment to line-item veto), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987).

43 Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 681-688 (1982 and Supp. II 1984)). On the impoundment power and its statutory elimination in 1974, see Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974); *see also* Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 595, 615-20, 644-45 (1988).

President has ever asserted the right to exercise a line-item veto.[44]

Impoundment and the line-item veto differ crucially, however, in that impoundment permits the President to convert his veto of a line item from a discrete variable (limited solely to the choice between ratification and veto) to a continuous variable, whose magnitude in dollars the President can adjust at his discretion. The pure line-item veto, by contrast, simply permits the President to exercise, on a disaggregated basis, a discrete choice between ratification and veto.[45] In this respect, the impoundment power appears greater than the line-item veto—though this appearance, of course, does not in itself imply that the President necessarily has the lesser line-item veto authority. Even this difference between impoundment and the line-item veto might be eliminated if a President claimed he had the power to "veto" *portions* of lines in appropriations bills—a power that may seem extraordinary, but which on its face may not be far outside the revisionary power that the framers had in mind.

The President may also use other techniques to replicate in practice the effect of the line-item veto while avoiding the constitutional issues inevitably raised by it. Congress often issues its detailed instructions for the expenditure of appropriations not in the appropriations bill itself, but in the accompanying committee report. These reports are not presented to the President and, therefore, do not have the force of law. James Miller, Director of the Office of Management and Budget during the last three years of the Reagan administration, has advocated that the President issue a list of spending items enumerated in committee reports for which he refuses to authorize any expenditure of funds.[46] Congress could, of course, simply enact such instructions into law, and thus force the President's hand.

It may be, however, that the transaction costs of making such detailed instructions law—for example, the costs implicit in submitting spending instructions to the whole process of amendment by the Senate—might be high enough that Congress would be forced to pass more general appropriations bills, giving the President more discretion not to spend appropriated funds. Prudential considerations of avoiding constitutional controversy if possible obviously favor this approach over a line-item veto. President Bush has kept this option open by stating in his signing statement for the 1990 Department of Defense Appropriations Act that "Congress cannot create legal obligations through report language" and consequently "such language has no legal force or effect."[47]

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[44] *See* Glazier, *Line-Item Veto*, *supra* note 42, in PORK BARRELS, *supra* note 6, at 12-15.

[45] *E.g.*, H.R.J. Res. 181, 101st Cong., 1st Sess. (Mar. 8, 1989); *see also* Abascal & Kramer, *supra* note 43, at 1563-66.

[46] Miller, *A Presidential Veto for Pork Spending*, Wall St. J., Jan. 30, 1990, at A18, col. 4.

[47] Statement on Signing the Department of Defense Appropriations Act, 1990, 25 WEEKLY COMP. PRES. DOC. 1809, 1810 (Nov. 21, 1989).

B. Subject Veto

The second principal form of the item veto is what we call the "subject veto"—the veto by the President of nongermane measures tacked onto larger pieces of legislation, usually in the form of riders. Legislators often incorporate nongermane bills[48] into larger legislative proposals, knowing that the impracticality of vetoing the entire bill may ensure that nongermane provisions become law. A "subject veto" would serve to sever the distinct bills bundled into a larger "bill" in order to protect the controversial bill or bills from veto.

This basic idea of response to the legislative strategy of bundling is not new. President Rutherford B. Hayes favored the rule that "no law shall contain more than one subject, which shall be plainly expressed in its title,"[49] and more than forty state constitutions contain such proscriptions.[50] A similar requirement was adopted in the constitution of the Confederate States of America.[51]

The subject veto is more easily defended as an implied Presidential power than is the line-item veto because it merely responds to the tactic of bundling legislation and arguably only restores the veto power to the scope originally intended by the framers.[52] Of course, if it were concluded that the President had the implied power to exercise a subject veto—but not a line-item veto—debate could arise over whether, in a bill containing affirmative legislation and appropriations, the President was legitimately vetoing a nongermane subject rather than a line item of appropriation.[53]

In our view, the strongest argument against the implied existence of

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48 Hereafter, unless otherwise noted, we use the term "bill" to refer to proposed legislation on a single subject. Collections of bills styled as a single bill we refer to as "omnibus bills" or "bundled bills."

49 Veto Message of Rutherford B. Hayes (Apr. 29, 1879), *reprinted in* 7 MESSAGES AND PAPERS OF THE PRESIDENTS 523, 528 (J. Richardson ed. 1897) [hereinafter *Hayes Veto Message*].

50 *See* 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 17.01 (N. Singer 4th ed. 1984); Ruud, *"No Law Shall Embrace More than One Subject,"* 42 MINN. L. REV. 389 (1958); Federal Legislation, *The Legislative Rider and the Veto Power*, 26 GEO. L.J. 954 (1938) (by Vincent J. Casey & Thomas E. Naughten); Note, *Enforcing the One-Subject Rule: The Case for a Subject Veto*, 38 HASTINGS L.J. 563 (1987) (by Jeffrey Gray Knowles); Note, *Curbing Legislative Chaos: Executive Choice or Congressional Responsibility?*, 74 IOWA L. REV. 227 (1988) (by Courtney Paige Odishaw); Note, *Separation of Power: Congressional Riders and the Veto Power*, 6 MICH. J.L. REFORM 735 (1973) (by Richard A. Riggs); Comment, *Single Subject Restrictions as an Alternative to the Line-Item Veto*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 227 (1985) (by Nancy J. Townsend).

51 CONFEDERATE CONST. art. I, § 9, cl. 20, *reprinted in* 1 JEFFERSON DAVIS PAPERS, *supra* note 41, at 45 ("Every law, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title.").

52 *See* Clineburg, *The Presidential Veto Power*, 18 S.C.L. REV. 732, 751-53 (1966).

53 *See* Bengzon v. Secretary of Justice, 299 U.S. 410 (1937); *In re* Opinion of the Justices, 294 Mass. 616, 620-21, 2 N.E.2d 789, 790 (Mass. 1936); Recent Cases, *Veto—What Constitutes an Item of an Appropriation Bill*, 50 HARV. L. REV. 843 (1937).

a subject veto is historical. Several state constitutions contemporaneous with the Convention of 1787 explicitly granted this power to the executive; the federal Constitution, however, is silent on the matter. Professor Tribe, for example, has written that

> Some state constitutions purport to require that laws deal with one subject at a time. No similar requirement—one that would cast doubt on the validity of the myriad unrelated riders routinely attached to tax and other congressional bills—can be found in, or should be read into, the United States Constitution.[54]

One federal court has concurred with this proposition, at least in dicta: "[t]he Constitution of the United States does not require the Congress to limit each Bill to one object, or to state that object in its title."[55]

Professor Tribe's analysis of germaneness and the item veto in his *American Constitutional Law* is merely conclusory, as is perhaps inevitable in a treatise so broad in scope. There is, however, one specific—and important—instance in which Tribe's assertion is contradicted by the text of the Constitution. The origination clause (found in article I, section 7, clause 1) provides: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."[56] The question may arise whether, after the Senate has made its amendments, the resulting revenue bill can still be said to have "originated" in the House. Occasionally, the Senate so completely rewrites a revenue bill that only the bill number survives from the House's original version. A recent Ninth Circuit decision, relying on the Supreme Court's 1911 opinion in *Flint v. Stone Tracy Co.*,[57] announced the rule that "[a] taxation bill which originates in the House and is subsequently amended in the Senate is constitutionally enacted when the amendment is 'germane to the subject-matter of the bill and not beyond the power of the Senate to propose.' "[58] By negative implication, this judicial construction of the origination clause seems to imply that a germaneness requirement of some sort does limit the Senate's ability to amend revenue-raising bills.

This origination clause argument, however, is a double-edged sword, for it invites an *expressio unius est exclusio alterius*[59] rebuttal. Because

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[54] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-4, at 1449 (2d ed. 1988). Why Professor Tribe says that these state constitutions, which explicitly require that bills be only on one subject, merely "purport" to so require is unclear.

[55] Doe v. Mathews, 420 F. Supp. 865, 886 (D.N.J. 1976).

[56] U.S. CONST. art. I, § 7, cl. 1.

[57] 220 U.S. 107 (1911).

[58] Harris v. United States, 758 F.2d 456, 458 (9th Cir. 1985) (quoting *Flint*, 220 U.S. at 143). In *Flint*, the Supreme Court permitted the Senate to substitute a corporation tax for an inheritance tax in a House-originated general bill for the collection of revenues. The Court stated: "The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case." 220 U.S. at 143.

[59] "Expression of one thing is the exclusion of the other." Akhil Amar brought this point to our attention.

the Senate's power to amend money bills is explicit, while the President's ability to amend bills presented to him is not, one could infer that the framers did not want the President to have any power to amend bills upon presentment. This result would be structurally consistent with the temporal priority of the Senate over the President in the lawmaking process. One could argue, in other words, that the framers intended the Senate to have the power to rewrite bills originating in the House because those pieces of legislation can be regarded as "working drafts" until both houses have approved and presented them to the President.[60] Indeed, the Senate's amendments take effect only if the House ratifies them by a simple majority vote. Thus, co-equality is preserved between both houses of the bicameral legislature. On the other hand, one could argue that the subject veto would not preserve co-equality between Congress and the President in the sense that the President's "amendment" of a bill by his exercise of a subject veto could be "ratified" by Congress by a vote of just more than one-third of the members of *either* house—that is, the minimum number of votes necessary to block an override of the President's veto.

If a germaneness requirement cannot be inferred from the Constitution, it may perhaps be enacted by statute, as Professors Rotunda, Nowak, and Young have suggested.[61] Rotunda notes further that although "[t]here would always be the danger that Congress would seek to repeal that statute whenever it became inconvenient, . . . that repeal would be subject to the traditional presidential veto."[62] Of course, one could take Rotunda's analysis a step further: Congress could override the President's veto of the repeal legislation. Thus, a statute imposing a germaneness requirement on the packaging of bills for presentment purposes could be circumvented at any time by a two-thirds vote of Congress. The same reasoning would apply to any other statutory approach to create an item veto or clarify the presentment process.

The defensibility of an inherent subject veto turns in part on the meaning of the word "bill" in the Constitution. We address that question in Part IV of this Article and demonstrate that there are plausible

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60 One federal court, for example, has defined a "bill" to be " 'a draft of a proposed statute submitted to the Legislature for enactment.' " Hubbard v. Lowe, 226 F. 135, 137 (S.D.N.Y. 1915) (quoting People v. Reardon, 184 N.Y. 431, 77 N.E. 970 (1906)). "It follows," the court noted, "that what the Constitution requires to originate in the House of Representatives is not the final product of the legislative will, not the statute, but a project for a statute, which may by amendment take a very different shape by the time it is ready for promulgation as law." *Id.* at 138. This point about the temporal priority of the Senate vis-à-vis the President in the lawmaking process breaks down somewhat if the President previously has made recommendations to Congress on the subject of the legislation. *See* U.S. CONST. art. II, § 3; Sidak, *The Recommendation Clause*, *supra* note 14.

61 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 12, at § 10.7 (forthcoming 1990 supp.) ("If a federal statute required that each appropriate item be sent separately to the President, the President would, in effect, have line-item veto power without a constitutional amendment.").

62 Rotunda, *supra* note 12, at 16.

arguments that the President has the inherent power to unbundle non-germane items of legislation.

C. *Constitutional Excision*

The President might possess a third kind of power arguably equivalent in result to an item veto—the power of "constitutional excision." This power enables the President to excise sections of a bill believed to be unconstitutional on their face. Although this putative executive authority has the effect of being an item veto, it accrues to the President, in our view, independently of the powers conferred by the presentment clauses. Thus, this power is an item veto only in a functional sense, and originates in the President's duties to faithfully execute the laws[63] and to defend the Constitution,[64] both of which are found in article II, not article I. Indeed, the greater relative plausibility of this power results *because* it need not be derived from the President's veto power.

The power of constitutional excision is best made clear by an example. Suppose that Congress attempted to codify into law the "fairness doctrine"—a now-abandoned Federal Communications Commission policy requiring that broadcasters present opposing sides of controversial issues[65]—by inserting the codifying provision into a "veto-proof" omnibus appropriations bill. President Bush might then "excise" it from the omnibus bill, pursuant to his oath to defend the Constitution, on the grounds that it violated the first amendment. By signing the legislation containing the offending section and issuing a statement that he regarded the section as unconstitutional, and thus void and severable from the rest of the act, the President could "veto" the unconstitutional part of the bill by refusing to enforce it. According to remarks made earlier this year by White House counsel C. Boyden Gray, President Bush is seriously considering creating a test case for this theory of the item veto.[66]

This species of veto presupposes, among other things, that a Presidential signing statement constitutes a relevant piece of legislative history, a proposition which the House of Representatives disputed after Presidents Jackson[67] and Tyler[68] issued signing statements explaining

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63 U.S. CONST. art. II, § 3, cl. 4 ("he shall take Care that the Laws be faithfully executed"). For a discussion of the meaning of this clause, see Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U.L. REV. 313 (1989).

64 U.S. CONST. art. II, § 1, cl. 8; *see also* W. TAFT, *supra* note 5, at 19; THE FEDERALIST No. 78, at 521, 524 (A. Hamilton) (J. Cooke ed. 1961) ("No Legislative act . . . contrary to the constitution can be valid.").

65 *See generally* Syracuse Peace Council, 2 F.C.C. Rcd. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990).

66 Ingwerson, *Line-Item Veto: Bush, Congress Resume Battle*, Christian Sci. Monitor, Jan. 17, 1990, at 7, col. 2 ("[A]ccording to Gray, the White House will try a limited form of item veto that would claim presidential power to strip away riders attached to appropriations bills the president deems unconstitutional.").

67 In *Statutes At Large*, the following statement appears after the disputed statute but before

their understanding of the constitutionality or propriety of the laws that they were approving. An indignant House report, written in response to President Tyler's constitutional musings, argued that such Presidential statements could "be regarded in no other light than a defacement of the public records and archives."[69] Professor Tribe favors this view of the relevance of Presidential statements:

> Although the President may have a right to give some direction to executive officials charged with administering the statute, this does not encompass giving advice to the judiciary in how to interpret the law. The only meaningful form of presidential disapproval is the veto. The relevant legislative history is restricted to statements and reports of Members of Congress.[70]

Professor Edwin Corwin made a similar argument forty years earlier with respect to two signing statements made by President Truman in 1946 and 1947. "For a court to vary its interpretation of an act of Congress in deference to something said by the President at the time of signing," Corwin wrote, "would be to attribute to the latter the power to foist upon the houses intentions which they never entertained, and thereby endow him with a legislative power not shared by Congress."[71]

Some proponents of the item veto power think that the argument in favor of the President's having an implicit power of excision under the

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Jackson's signature: "I approve this bill, and ask a reference to my communication to Congress of this date, in relation thereto." 4 Stat. 427, 428 (May 31, 1830); *see also* Veto Message of Andrew Jackson (May 31, 1830), *reprinted in* 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1056 (J. Richardson ed. 1897).

68 Message to Congress of John Tyler (June 25, 1842), *reprinted in* 5 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 67, at 2012-13.

69 H.R. REP. No. 909, 27th Cong., 2d Sess. 2 (1842); *see also* Zinn, *supra* note 23, at 231-33.

70 L. TRIBE, *supra* note 54, § 4-13, at 265 n.24 (citing Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986)). Professor Tribe's reliance on a footnote from *Kelly v. Robinson* overstates his case. *Kelly* involved the construction of a section of the Bankruptcy Code. In relevant part, the footnote stated:

> We acknowledge that a few comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements.

479 U.S. at 51 n.13 (citing McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493-94 (1931); 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 48.10, at 319, 321 n.11 (N. Singer 4th ed. 1984)). These statements by the Court hardly imply that the signing statement of the President is irrelevant to the legislative history of a statute.

In any event, Professor Tribe exhibits an antipathy toward the Presidency which, however justified it may seem to some on political grounds, strikes us as alien to the basic organization of government intended by the framers. For example, we find it curious that Professor Tribe evidently thinks it only *possible* ("the President *may* have a right") that the President has the "right to give some direction to executive officials charged with administering [a] statute . . . ." L. TRIBE, *supra* note 54, § 4-13, at 265 n.24 (emphasis added). Can there be any doubt the President has not only this right, but also a duty to that effect?

71 E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1948, at 343-44 (3d ed. 1948). For two conflicting studies on the authority of Presidential signing statements, compare Garber & Wimmer, *Presidential Signing Statements As Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987), with Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209 (1988).

Constitution is stronger for structural reasons than the argument that he has a line-item veto over appropriations or a subject veto of perfectly constitutional measures sought by Congress. When Congress attaches a patently unconstitutional rider to an important omnibus bill, the veto of which would imperil the efficient operation of government, the President faces a difficult set of options in the absence of a power of constitutional excision. He may: (1) veto the entire omnibus bill; (2) sign the bill into law, enforce the unconstitutional provision, and hope that persons whose rights are violated will sue and win; or (3) sign the bill into law, and assert the power to enforce only those provisions that are constitutional. President Reagan adopted the third option, asserting the arguably broader power not to enforce unconstitutional laws that were part of legislation he had signed into law.[72]

One problem with this application of executive power is that it effectively vetoes legislation without giving Congress an opportunity to override that veto within ten days of presentment.[73] (Of course, the counterargument to this point is that, if the provision is in fact unconstitutional, that infirmity cannot be cured merely by an override vote.) Another problem seen in this assertion of power is that the duty to faithfully execute the laws does not necessarily imply the power *not* to enforce laws.[74] Persons holding this view rely on language in *Kendall v. United States* ex rel. *Stokes* suggesting that it "is a novel construction of the constitution, . . . and entirely inadmissible," for one "[t]o contend that the obligation imposed on the President to see the laws faithfully executed[] implies a power to forbid their execution."[75] Of course, this criticism loses considerable force in light of the President's oath to uphold the Constitution[76] and the explicit text in the supremacy clause establishing that the Constitution itself is law.[77]

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72 Professors Tribe and Kurland agree with dicta from a reversed Ninth Circuit decision that it was illegitimate for President Reagan to order executive branch officials not to comply with certain sections of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1199, which he had signed into law. *See, e.g.*, Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1124 (9th Cir.), *reh'g en banc ordered*, 863 F.2d 693 (9th Cir. 1988), *withdrawn on other grounds, per curiam*, 893 F.2d 205 (9th Cir. 1989) (en banc). The *Lear Siegler* case is analyzed (by a staff member of the Congressional Research Service) in Rosenberg, *Congress' Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 691-95 (1989).

73 *Cf. Lear Siegler*, 842 F.2d at 1124 ("Presumably, any extension of the veto power of the President would stop short of doing away with the power of Congress to override the veto.").

74 *See, e.g.*, Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 395-99 (1987).

75 37 U.S. (12 Pet.) 524, 613 (1838); *see also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 368-71 (1980).

76 U.S. CONST. art. II, § 1, cl. 8.

77 *Id.* at art. VI, cl. 2 ("*This* Constitution . . . shall be the supreme Law of the Land") (emphasis added); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803) (construing "the clauses of the constitution" as dispositive law).

The Third Circuit, for example, stated that while a "claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best,"[78] the President might have the power or duty to refuse to execute "a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals . . . ."[79] What is not clear is why the Presidential duty to not enforce unconstitutional laws should apply only to *patently* unconstitutional laws, or those that infringe fundamental rights of individuals. Why should the President not also refuse to enforce laws merely (not patently) unconstitutional, or laws that infringe on the powers of the Presidency?[80]

In the mid-1980s, President Reagan's Attorney General, Edwin Meese, suggested that the power not to enforce laws deemed unconstitutional by the President was inherent in the President's "oath to 'preserve, protect and defend' the Constitution."[81] Meese argued that, "far from showing any disrespect for the courts or Congress," the President's refusal to enforce such a law would "place the disagreement between Congress and the executive branch before the courts at the earliest opportunity."[82] Another formulation suggested to us is that the President, in signing a bill, may state his opinion that a particular provision is unconstitutional and that, until the Supreme Court has passed on this constitutional objection (assuming it to be justiciable), the President may refuse to enforce the provision. This view—which is not necessarily inconsistent with President Reagan's view—has the advantage of distinguishing between the Supreme Court and inferior courts, implicitly making only a decision of the Supreme Court binding on Congress and the President in disputes between those two branches.[83]

Yet, if the President has the power (indeed, the duty) not to enforce unconstitutional laws, it seems to us that he also might have the lesser power to identify portions of such laws and veto them. In a manner that we hope the debate over the veto powers ultimately will reveal, we think that the power of the President to excise unconstitutional parts of legislation either by an item veto or by refusal to enforce unconstitutional laws, or by both, is fundamentally similar to the other great implicit power in

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78 Ameron, Inc. v. United States Army Corps Eng'rs, 787 F.2d 875, 889 (3d Cir. 1986) (emphasis in original) (citing *Kendall*).

79 *Id.* at 889 n.11.

80 *Cf.* Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 [hereinafter Sidak, *The President's Power of the Purse*] (arguing that the principle of separation of powers, and not simply the first amendment, limits Congress' power under the appropriations clause).

81 Meese, *President's Right to Challenge a Law*, N.Y. Times, May 21, 1985, at A26, col. 1 (letter to the editor); *see also supra* notes 63-64 and accompanying text.

82 Meese, *President's Right to Challenge a Law*, *supra* note 81, at A26, col. 1.

83 *Cf.* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985).

the Constitution—judicial review.[84] Indeed, the concepts are so interrelated that the framers debated (but ultimately rejected) the idea of having the executive and the judiciary *jointly* exercise the "revisionary" power.[85] While one could argue that *all* of the revisionary power subsequently was vested in the judiciary, this view seems implausible in light of the framers' discussion of the President's veto as a "revisionary" power.

It is impossible to compare judicial review and executive powers of excision without considering the whole doctrine of severability—itself a vast and puzzling terrain. Article III courts have long asserted the power to sever unconstitutional portions of laws in the course of judicial review.[86] Without addressing those questions, however, one can observe that if the courts occasionally must interpret the Constitution in the course of deciding cases and controversies, so must the executive in the course of executing laws. If the excision of unconstitutional provisions is sometimes inherent in the judicial power, it is not immediately obvious why it is not equally inherent in the executive power. And if the President appropriately may identify some part of a bill as unconstitutional and unenforceable, he might also under some circumstances appropriately disapprove it formally by vetoing it.[87]

Returning an unconstitutional measure to Congress for another vote (if Congress so decides) would at least continue a constitutional colloquy between co-equal branches, a debate which is not always well-suited to the courts. Moreover, the formality of this process would enhance accountability in lawmaking by recording the precise nature of the disagreement between the branches and informing the electorate of that disagreement. This seems to us to be in the spirit of the revisionary process envisioned by the framers. That process provided for the return of a bill by the President "with his Objections" to the house of Congress originating it; that house was then required to "proceed to reconsider" the bill; and if an override vote was attempted, "the Names of the Persons voting for and against the Bill" were required to "be entered on the Journal of each House respectively."[88] An analogous process would then take place in the other house if two-thirds of the first house voted to

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84 We set to one side the question of whether the judiciary, in the course of reviewing acts of Congress, may legitimately assert the power of severability.

85 J. MADISON, *supra* note 14, at 61 (James Wilson) (June 4, 1787); *id.* at 79-81 (James Madison) (June 6, 1787). The proposal—"for joining the Judges to the Executive in the revisionary business"—was defeated, 8-3. *Id.* at 81. Connecticut, New York, and Virginia favored the proposal. *Id.*; *see also* Trimble v. Gordon, 430 U.S. 762, 777 (1977); THE FEDERALIST No. 73, at 492, 499 (A. Hamilton) (J. Cooke ed. 1961).

86 *See, e.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987).

87 One rebuttal argument, however, is that the President's power not to enforce an unconstitutional law does include the power to remove sections from a statute.

88 U.S. CONST. art I, § 7, cl. 2. The requirement of (prompt) reconsideration and the formality of the publicly recorded roll call vote suggests that the President's "Objections" were to be considered more seriously than Presidential recommendations under art. II, § 3, cl. 1.

override the veto. These measures plainly were intended to foster public debate and accountability. Thus, the expansion of the veto power to include the excision of unconstitutional measures would expand the opportunity for Congress and the President to conflict and compromise over the boundaries of their lawful powers.

Constitutional excision is also attractive because it would force Congress to consider a constitutionally dubious provision on its own merits. Congress as a body would have to deliberate over the vetoed bill; a single influential Senator or Congressman could not simply insert the dubious bill as a rider into a much larger legislative package, allowing all members to avoid any real accountability for the measure. This would probably make confrontation between the President and Congress less likely because most constitutionally dubious measures passed by Congress could probably never pass in the first place as anything but anonymous riders in large bills, let alone carry the supermajority of roll call votes necessary to override a Presidential veto.[89]

D. Presidential Shield Veto

Finally, the President might assert a veto over a specific section of a bill that would unconstitutionally impede the executive's duties and prerogatives under article II of the Constitution.[90] The Presidential shield veto thus would be a subset of constitutional excision defined by the boundaries of the President's duties and prerogatives under article II. Its name is suggested by Hamilton's thesis in *The Federalist* No. 73 that the first purpose of the veto is to "serve[] as a shield to the executive"[91] against the "depredations" of Congress.[92] In a similar vein, Madison warned in *The Federalist* No. 48 of how Congress "can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments."[93]

To understand how the Presidential shield veto might work in practice, consider the fiscal year 1990 appropriations act for the President's Office of Management and Budget, which contains a rider prohibiting the President from spending any funds to subject agricultural marketing orders to the routine cost-benefit analysis[94] required of all measures by Ex-

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89 *See, e.g.*, News Am. Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988); *see also* Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 112-14 (1987).

90 *See* Sidak, *The President's Power of the Purse*, *supra* note 80, at 1213-14; Sidak, *Spending Riders Would Unhorse the Executive*, Wall St. J., Nov. 2, 1989, at A18, col. 3 [hereinafter Sidak, *Spending Riders*].

91 THE FEDERALIST No. 73, at 492, 495 (A. Hamilton) (J. Cooke ed. 1961).

92 *Id.* at 494.

93 THE FEDERALIST No. 48, at 332, 334 (J. Madison) (J. Cooke ed. 1961).

94 Treasury, Post Office, Executive Office of the President, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-136, 103 Stat. 783, 793 (Nov. 3, 1989).

ecutive Order 12,291, issued by President Reagan in 1981.[95] Because this rider would prohibit the President from analyzing a government policy with a view toward recommending its reform to Congress, it violates the requirement in article II that the President shall make recommendations to Congress on matters of his choosing.[96]

This rider appeared in numerous appropriations bills during the Reagan Administration years. In 1989, Congress described the purpose of this "muzzling law" as follows:

> The Agricultural Marketing Agreement Act of 1937 gave direct supervision and control over the management of marketing orders to the U.S. Department of Agriculture. The Office of Management and Budget has never been given any legislative authority over marketing orders. OMB has attempted to become involved in the management of marketing order programs through the President's task force on regulatory review in recent years. The Committee has included language prohibiting OMB from acting with regard to marketing orders. The purpose of this language is to reaffirm USDA's sole authority in an area where they have developed the necessary expertise and trained personnel over the years to effectively monitor and enforce agricultural marketing order programs.[97]

When President Bush signed the appropriations bill for the Executive Office of the President on November 3, 1989, he said that the OMB rider "restrictions . . . raise constitutional concerns because they impair my ability as President to supervise the executive branch."[98] President Bush's statement is somewhat vague. Was he saying that the muzzling provision was unconstitutional and unenforceable? That conclusion would seem exaggerated. But how serious and explicit must a President's constitutional objections to muzzling laws be in order to justify constitutional excision? The question has no clear answer. However, given that there is no Supreme Court precedent interpreting the recommendation clause, President Bush might have considered it legally risky to do more than issue a warning to Congress about the OMB muzzle and hope that the provision would not appear in future appropriations bills.

But the law on legislative vetoes has been addressed directly by the Court in *INS v. Chadha*.[99] The subsequent paragraph of President

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95 Exec. Order No. 12,291, 3 C.F.R. 127 (1982); *see also* DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

96 *See* Sidak, *The Recommendation Clause*, *supra* note 14; Sidak, *How Congress Erodes the Power of the Presidency: The Appropriations Muzzle*, Wall St. J., Feb. 6, 1989, at A8, col. 3.

97 S. REP. No. 105, 101st Cong., 1st Sess. 57 (1989).

98 Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, 25 WEEKLY COMP. PRES. DOC. 1669, 1670 (Nov. 3, 1989) [hereinafter *Bush Signing Statement*]. L. Gordon Crovitz reads this statement (or perhaps the unreported actions accompanying it within the White House) as being more substantial than we admit; when President Bush ordered aides to ignore certain provisions of bills, he was "effectively line-item-vetoing restrictions such as a ban on studying alternatives to farm quotas." Crovitz, *'Met w/ Keating's S&L Senators. Again. End of Log.'*, Wall St. J., Jan. 24, 1990, at A15, col. 3.

99 462 U.S. 919 (1983).

Bush's November 3, 1989 signing statement made clear that he believed not only that he had the authority to direct executive branch officials to "implement the provisions" of appropriations riders "in a manner consistent with the Constitution,"[100] but also that he had the authority to sever plainly unconstitutional riders from the remainder of the appropriations bill. President Bush evidently recognized that the strongest possible form of Presidential shield veto is one with respect to an issue on which the Supreme Court already has rendered its opinion, as in the case of the legislative veto:

> In addition, numerous provisions of H.R. 2989 purport to condition my authority, and the authority of affected executive branch officials, to use funds otherwise appropriated by the Act on the approval of various committees of the House of Representatives and the Senate. These provisions constitute legislative veto devices of the kind declared unconstitutional in *INS v. Chadha* . . . . Accordingly, I will treat them as having no legal force or effect in this or any other legislation in which they appear. I direct agencies confronted with these devices to consult with the Attorney General to determine whether the grant of authority in question is severable from the unconstitutional condition. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-87 (1987).[101]

Indeed, President Bush might have added that the attempt by Congress to enact a legislative veto after *Chadha* displayed disrespect for the

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[100] *Bush Signing Statement, supra* note 98, at 1670.

[101] *Id.* Several weeks later, President Bush again excised language in an appropriations bill for fiscal year 1990 that contained a legislative veto provision. *See* Statement on Signing the Department of Defense Appropriations Act, 1990, *supra* note 47, at 1810. Again citing *Chadha*, President Bush stated that "constitutionally the Congress cannot require me to obtain its prior approval before obligating or expending appropriated funds . . . ." *Id.* "Accordingly," he said, "any such language has no legal force or effect." *Id.*

President Bush was not the first President to assert that a legislative veto appearing in a bill being signed into law was unconstitutional, nor is "divided government" the political prerequisite to such an assertion by a President. In 1941—more than 40 years before *Chadha*—President Franklin Roosevelt signed the Lend-Lease Act, which contained a legislative veto, and then took the unorthodox step of sending a memorandum to Attorney General Robert H. Jackson, explaining why he believed the provision to be "clearly unconstitutional." Memorandum for the Attorney General from President Franklin D. Roosevelt (Apr. 7, 1941), *reprinted in* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357 (1953). President Roosevelt wrote:

> In order that I may be on record as indicating my opinion that the foregoing provision of the so-called Lend-Lease Act is unconstitutional and in order that my approval of the bill, due to the existing exigencies of the world situation, may not be construed as a tacit acquiescence in any contrary view, I am requesting you to place this memorandum in the official files of the Department of Justice. I am desirous of having this done for the further reason that I should not wish my action in approving the bill which includes this invalid clause, to be used as a precedent for any future legislation comprising provisions of a similar nature.

Id. at 1358. Unlike President Bush confronting the arcane provisions of omnibus appropriations bills, President Roosevelt may not have wanted to draw public attention to the constitutional infirmity of a provision that appeared to constrain executive discretion in an endeavor that could be seen as drawing the United States ultimately closer to the war that it was compelled to enter eight months later. This was Justice (formerly Attorney General) Jackson's subsequent interpretation of President Roosevelt's motive. *Id.* at 1356-57.

Court's authority to interpret the Constitution. Again, on February 16, 1990, President Bush signed an authorization bill for the State Department, but stated that nine provisions in the bill constituted unconstitutional encroachments on his powers to conduct foreign policy, and that he would interpret those provisions as he deemed appropriate.[102]

It is clear from his signing statement of November 3, 1989—and subsequent actions on November 21, 1989 and February 16, 1990—that President Bush has already exercised one version of the item veto, even though he did not describe his actions as such. Although it remains to be seen how Congress and the Court will respond to this claim of executive authority under the Constitution, we conclude that because the Presidential shield veto is a narrower version of the putative power of constitutional excision, and because the unconstitutionality of the excised provision was predicated on the authority of the Supreme Court's decision six years earlier in *Chadha*, President Bush's November 3, 1989 signing statement typifies the most readily defensible species of item veto.

III. Complexities Affecting All Forms of Item Vetoes

All four variants of item veto raise certain common issues of constitutional interpretation. These common issues have significant implications for how lawmaking power would be distributed between Congress and the executive after the President had begun exercising an "inherent" item veto.

A. Must Congress Always Have the Opportunity to Override the President's Item Veto?

If indeed there is an item veto inherent in the chief executive's powers under the Constitution, the exercise of that power should be held in check by the two-thirds override that Congress has with respect to any bill vetoed in its entirety.[103] This point is perhaps clearest with respect to the line-item veto of appropriations measures: why, simply because the President might have the inherent power under the Constitution to reduce or eliminate an individual line of spending in an appropriations bill, should he have any power to do so without regard to the ten-day time limit and congressional override provisions contained in the presentment clause? When bundled legislation is unbundled by an item veto, there arises the possibility that the President would enact a law that Congress never would have presented to him individually—a result that would vio-

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102 Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 Weekly Comp. Pres. Doc. 266-68 (Feb. 16, 1990).

103 *Cf.* Thirteenth Guam Legislative v. Bordallo, 430 F. Supp. 405, 412-14 (D. Guam App. Div. 1977) (finding implicit two-thirds override in statutory grant of item veto to Governor of Guam), *aff'd*, 588 F.2d 265 (9th Cir. 1978) (per curiam). Technically, an override only requires a two-thirds vote of a quorum of each house of Congress. Missouri Pac. Ry. v. Kansas, 248 U.S. 276, 284 (1919).

late bicameralism.[104]

Needless to say, the procedures relating to exercise of a line-item veto could be changed by a constitutional amendment. One proposed amendment would explicitly permit the President to veto an item of appropriation, but it would require only a simple majority to override the President's reduction.[105]

The cases of constitutional excision and the Presidential shield veto, however, seem to require a very different answer. The President's source of legitimacy for exercising these powers is not so much the presentment clause in article I as it is the duty to faithfully execute the laws contained in article II and the duty to defend the Constitution pursuant to the oaths of office contained in articles II and VI. If a piece of legislation violates the Constitution, then an override vote cannot remedy its constitutional defect. When the patent unconstitutionality of an item in an omnibus bill is the President's stated reason for excising the provision from the bill, Congress' sole recourse would seem to be to sue for a writ of mandamus to compel the President to enforce the excised provision. This scenario underscores the importance of a separate issue—judicial review—which we discuss later in Part III.

B. Contingent Lawmaking and the Significance of an Invalid Item Veto

The possibility that the President might exercise an item veto subsequently held to be invalid raises another issue for which the text of the Constitution provides no answer. The problem of an invalid item veto could arise in two situations. The first would occur when the President exercises an item veto for the first time, knowing that a test case might ensue. The second case (which might occur simultaneously with the

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104 We discuss the problem of severability in greater detail below. *See infra* text and notes following note 169.

105 H.R.J. Res. 422, 101st Cong., 1st Sess. (Oct. 18, 1989); *see also* H.R.J. Res. 110, 101st Cong., 1st Sess. (Jan. 31, 1989). H.R.J. Res. 422 would provide:

> The President may reduce or disapprove any item of appropriation in any Act or joint resolution, except any item of appropriation for the legislative branch of the Government. If an Act or joint resolution is approved by the President, any item of appropriation contained therein which is not reduced or disapproved shall become law. The President shall return with his objections any item of appropriation reduced or disapproved to the House in which the Act or joint resolution containing such item originated. The Congress may, in the manner prescribed under section 7 of the article I for Acts disapproved by the President, reconsider any item disapproved or reduced under this article, except that only a majority vote of each House shall be required to approve an item which has been disapproved or to restore an item which has been reduced by the President to the original amount contained in the Act or joint resolution.

Id. This kind of amendment—which specifies that a congressional override of a reduced or disapproved item of appropriation shall occur by a simple majority, rather than by the two-thirds supermajority otherwise required by the presentment clauses—was proposed throughout the 1980s. *See, e.g.*, S.J. Res. 26, 98th Cong., 1st Sess. (1983), *reprinted in 1984 Line-Item Veto Hearings*, *supra* note 40, at 5, 6.

first) would occur when the President exercises the power of constitutional excision or Presidential shield veto and later has his interpretation of the unconstitutionality of the excised item overruled by the Supreme Court.

The question posed by these events might be considered as one of severability. Suppose that the President exercises an item veto, saying that if it fails, he intends his act to constitute a veto of the whole bill. Would a court be required to give that intent effect? Lloyd Cutler has suggested to us that a court would not—that a veto message purporting to veto less than an entire bill would have the effect of vetoing the entire bill. One federal court has implied the same, stating in dicta that the Constitution "does not authorize the mechanism of the conditional veto"[106]—"[a] bill either becomes law, as a whole, or it is no law at all."[107] However, the Supreme Judicial Court of Massachusetts has ruled that the unlawful veto of an item enables the bill as a whole to become law: "[s]ince the disapproval of the condition was without effect, the general approval of the act gave it validity."[108]

Giving full veto effect to an item veto subsequently determined to be unlawful would have the effect of stretching out the presentment process far beyond the ten days envisioned in section 7 of article I. During the protracted period that parties were waiting to know whether a law had or had not been vetoed by the President, there would be uncertainty and perhaps detrimental reliance. Thus, allowing the President to have a "contingent veto" of the whole bill would seem contrary to the rule of law.[109]

Even if there were an unambiguous definition of a "bill," congressional use of the presentment process could become more sophisticated. For example, Congress might pass two separate bills but provide that they would only go into effect jointly.[110] Alternatively, for example, Congress could provide for a sunset provision in one bill that would be triggered by the President's item veto of a provision in an entirely separate bill. Whether such use of conditional enactments and repeals would be constitutional—or even justiciable—indicates the potential complexity of this separation of powers issue. Some commentators will feel that these complexities alone condemn the case for an item veto.

Our initial reaction is that conditional enactment or repeal of legislation raises due process problems because it would undermine prospec-

106 Doe v. Mathews, 420 F. Supp. 865, 869 (D.N.J. 1976).

107 *Id.*

108 *In re* Opinion of the Justices, 294 Mass. 616, 622, 2 N.E.2d 789, 791 (Mass. 1936). For a dated but useful survey of other state court decisions on this issue, see Beckman, *The Item Veto Power of the Executive*, 31 TEMP. L.Q. 27, 32-34 (1957).

109 *See* F. HAYEK, THE ROAD TO SERFDOM 72 (1944); J. RAWLS, A THEORY OF JUSTICE 238 (1971).

110 We owe this example to Daniel Farber.

tivity and notice in the lawmaking process (in the same manner as, but to a lesser degree than, ex post facto laws). We also question whether there is any power delegated to Congress by which it may contingently enact legislation (as opposed to its obvious power to enact legislation that addresses contingent situations).

C. The "Item Override"

Perhaps the President's assertion of the power to sever or disaggregate items in legislation might imply an additional, and as yet unclaimed, power arguably belonging to Congress in the presentment process. If the President may assert an item veto, may Congress assert an "item override"?[111] Suppose that the President vetoes an omnibus bill in its entirety, passing up the opportunity to assert an item veto over certain of its items. May Congress—agreeing with the President's view that an omnibus bill really consists of several bills—override the President's veto with respect to certain (but not all) items in the omnibus bill, thus protecting those items from being vetoed?

This theory has the appeal of symmetry. If the President can disaggregate omnibus bills, why should Congress not have the same power? The "item override" proposition, however, does not necessarily follow as a natural consequence of the item veto that we explore here. If the President has the power to disaggregate omnibus bills (or even exercise a line-item veto), that power would appear to be a consequence of the legislative power vested in the Presidency by virtue of article I, section 7 of the Constitution. One could argue that Congress does not share the President's putative power to sever or disaggregate items and must override vetoes in the form the President returns to it. Under this view, the President's judgment as to what is the appropriate object of his veto (and consequently of a possible veto override) would be final.

This interpretation would not tie Congress' hands, for it may simply pass a new bill containing the preferred items and present it to the President, overriding his veto of the whole of *that* package by a two-thirds vote if necessary. Although this might seem a formalistic distinction, it is one that would appear to come at low marginal cost to the legislative process and thus would seem unlikely to produce a substantively different legislative bargain among proponents and opponents of the preferred items. Thus, the asymmetry of the power to itemize in the presentment process would not necessarily diminish the powers of Congress. There is, however, a respectable counterargument. If the President has the power to decide what part of a piece of legislation is a bill, then he does so by virtue of a legislative power. This is suggested by, among other things, the placement of the veto clause in article I, which addresses legislative power, rather than article II, which addresses executive power. If the

[111] Professor Farber also posed this intriguing question to us.

President can reach a legislative conclusion that Congress in fact has presented him with many bills disguised as one bill, it may be that Congress can decide that the President has presented it with many vetoes of many bills, and that it will override only some of them.[112] In both cases, it would be a matter of one branch with legislative power using that power to react to the legislative act of a co-equal branch.

The functional significance of an item override derives chiefly from the fact that a bill, once its veto is overridden, becomes law without further executive review. This possibility—that an item override might exist if an item veto does—ought to provoke sober reflection among those who see the item veto merely as a way to augment Presidential power. Suppose, for example, that Congress passed an omnibus measure that contained a dozen measures, any one of which was "veto bait," and that the President then vetoed the entire omnibus measure, having already asserted with respect to an earlier bill the power to item veto. If the President may be viewed as having separately vetoed each and every bill embedded in the omnibus measure, Congress might be able to override the veto with respect to any one or more of the dozen objectionable bills. It might even override the veto with respect to some package smaller than that vetoed by the President, but larger than a single bill.

As a general matter, this might mean that Congress could enact into law whatever parts of an omnibus bill were sufficiently favored to get the support of the necessary two-thirds majority. The item veto could backfire from the President's point of view if it provided a basis for Congress to claim that any "tidied up" version of a vetoed omnibus bill (or what Congress claimed was really an omnibus bill) passed by two-thirds of both houses became law without any further threat of veto. Although it is not even clear that this process would be any worse than what we have now, it does not seem consistent with the intent of the Constitution, which in our view calls for a bill-by-bill process of presentment, veto, and override.

From a practical political standpoint, moreover, this suggests that the President should be certain that Congress would not or could not assert a reciprocal item override power before he asserts an item veto power. Otherwise, there might arise a "battle of the bills"—analogous to the "battle of the forms" in contract law[113]—from which it is far from clear that the Presidency would emerge the victor. Whether the judici-

112 In a related vein, Professor Tribe offers (though does not necessarily endorse) the following argument: "if a severability clause is read as a legislative mandate that the two provisions should be regarded as two distinct laws, the President's failure to veto the entire measure, or its passage over his veto, may be treated as satisfying the presentment requirement as to each provision separately regarded." Tribe, *The Legislative Veto Decision: A Law by any Other Name?*, 21 HARV. J. ON LEGIS. 1, 23 (1984) [hereinafter Tribe, *The Legislative Veto Decision*].

113 *See, e.g.*, J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-2, at 24-39 (2d ed. 1980).

ary should intervene in such a struggle or remain aloof on political question doctrine grounds is in itself a difficult and intriguing question. However, one federal court, critical of the idea of an item veto, stated summarily in dicta that the Constitution "does not extend to the President the authority to veto one or more items in an appropriations law, or to the Congress the authority to override the veto of one or more such items."[114]

D. Political Questions and the Judiciary's Role

If the President were to claim an inherent item veto power, the ultimate attributes and confines of that power would depend in large part on which of the three branches had the last word in attempting to answer questions—like those addressed above—for which there are few, if any, clues in the text, history, and structure of the Constitution. Perhaps it is in recognition of this problem of interpretation that Professors Tribe and Kurland, and other opponents of the implied item veto, base their argument on custom—namely, that the item veto must not exist implicitly in the Constitution because no President has ever made the claim. Tribe and Kurland observe that "[m]ore than one dozen Presidents since Ulysses S. Grant have sought constitutional amendments granting [the line-item veto]; and no President has attempted to exercise a line-item veto. All have shared the view that such lawmaking power is beyond the reach of the executive branch."[115] Similarly, Charles Cooper argues:

> Those who argue that the Constitution, specifically Article I, Section 7, Clause 3, provides the President with an item veto—indeed, a line-item veto—are met first with the question: Why has no President in 200 years noticed this fact? Indeed, why have Presidents uniformly taken precisely the contrary view, beginning with President Washington, who said: "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto"? For that matter, why has no one, save Stephen Glazier, Professor Forrest McDonald, and the *The Wall Street Journal*, ever noticed this presidential power before now?[116]

This argument is, however, overstated. Obviously, some textual provisions in the Constitution—such as the second and tenth amendments, and the contract and takings clauses—have been lost despite being explicit. Other doctrines, such as the right to privacy, or the dormant commerce clause, have been discovered, despite their lack of any textual anchor in the Constitution.

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114 Doe v. Mathews, 420 F. Supp. 865, 868-69 (D.N.J. 1976).

115 *Tribe-Kurland Response*, *supra* note 1, at S14,387.

116 Cooper, *supra* note 6, in PORK BARRELS, *supra* note 6, at 29 (quoting Letter from George Washington to Edmund Pendleton (Sept. 23, 1793), *reprinted in* 33 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 94, 96 (J. Fitzpatrick ed. 1940)). Washington's remark was not part of any focused analysis of the veto power; rather, it was part of a letter that principally discussed an upcoming congressional investigation of Secretary of the Treasury Alexander Hamilton.

The textual anchor for an implied item veto is the word "bill." If the judiciary were to intervene in a controversy between the President and Congress over the item veto, it seems likely the definition of the term "bill" would be the key legal issue. Should Congress, the maker of "bills," have primacy to define that term? Or does the Constitution empower the President, as recipient of "Every Bill" in the presentment process, to interpret this undefined term? Professor Rotunda believes that Congress has the power (though whether that power is plenary is unclear) to define a bill and could set out the rules for this definition in a statute.[117] On the other hand, Sen. Alan Dixon doubts that Congress even has the constitutional authority to enact a statute defining a "bill" for purposes of presentment under the Constitution.[118] Professor Eugene Gressman shares this concern.[119]

It may be that what constitutes a "bill" is a classic political question that courts would decline to resolve. There is some authority for this proposition. In the 1897 case *Twin City Bank v. Nebeker*, the Supreme Court specifically declined to provide "a full discussion as to the meaning of the words in the constitution, 'bills for raising revenue.' "[120] Although written before the full development of the political question doctrine, the Court's opinion hints at Bickelian abstention: "[w]hat bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."[121]

IV. WHAT IS A "BILL"?

Professors Tribe and Kurland dismiss the notion that the President might have item veto power in any form, apparently assuming that no veto is legitimate except of legislation in the form presented to the President by Congress. Indeed, in the revised edition of his treatise on constitutional law, Professor Tribe states that

> the President may wield his veto on the legislative product *only* in the form in which Congress chooses to send it to the White House: be the bill small or large, its concerns focused or diffuse, its form particular or omnibus, the President must accept or reject the entire thing, swallowing the bitter with the sweet.[122]

This kind of analysis is implicit in Tribe and Kurland's letter to Sen. Kennedy. Evidently, they believe that there are *no* constitutional limits

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117 Rotunda, *supra* note 12, at 16.

118 *1984 Line-Item Veto Hearing*, *supra* note 40, at 14 (remarks of Sen. Dixon).

119 Gressman, *Is the Item Veto Constitutional?*, 64 N.C.L. REV. 819 (1986).

120 167 U.S. 196, 202 (1897).

121 *Id.*

122 L. TRIBE, *supra* note 54, § 4-13, at 265 (emphasis in original); *accord* Devins, *Appropriations* Redux: *A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 406-07 [hereinafter Devins, *Appropriations* Redux]. Professor Gressman advances a similar proposition: "[b]y long usage and plain meaning, 'Bill' means any singular, entire piece of legislation in the form

on the degree to which Congress may diminish the effectiveness of the President's veto power by wrapping bills together in large packages.[123] Their conclusion leaves the President no realistic way, broad or narrow, to respond to Congress' bundling of legislation. This premise is understandably popular with members of Congress, but its validity is not unassailable in light of the history, text, and structure of the Constitution.

Our hypothesis is that the Constitution envisions some limit to the size and scope of a bill, for as Congress bundles more and more proposed laws into a single "bill," it diminishes the President's ability to exercise the veto power to a degree that we think must be inconsistent with the constitutional order contemplated by the framers. In the extreme case, Congress could take an entire session's work (including appropriations legislation) and package it in a single piece of omnibus legislation.[124]

This possibility was recognized by constitutional scholars long before interest in the item veto surfaced again in the 1980s.[125] Simply by virtue of its size and complexity, a bill comprising an entire session's work would, to extend the logic of *Edwards v. United States*, contradict the "fundamental purpose" of the ten-day presentment period—namely, "to provide appropriate opportunity for the President to consider the bills presented to him."[126] If there were enough votes to override a veto

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in which it was approved by the two Houses." Gressman, *supra* note 119, at 819. He does not, however, cite any examples of this "long usage," perhaps because he regards them as commonplace.

123 Tribe and Kurland could strengthen their argument by noting that making a bill harder to veto is not the same as evading the presentment process. As Akhil Amar has pointed out to us, political parties, in their exercise of extra-legal discipline and negotiation, would be unconstitutional if the relevant question were whether or not Congress can make it costlier for the President to exercise his veto power (or easier for Congress to summon enough votes for an override). The counterargument, however, is that frustration of the veto power is a matter of degree. At some point, the power becomes completely vitiated—a result that ceases to be a merely political question.

124 This practice can affect the freedoms of individual citizens. In News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988), noted civil liberties lawyer Burt Neuborne briefed and argued the constitutionality of bundling under the presentment clause on behalf of Rupert Murdoch's newspaper and broadcasting company. The court decided the case on first amendment grounds and consequently did not address the merits of Professor Neuborne's separation of powers argument. *Id.* at 804 n.8.

125 In 1966, Professor William Clineburg wrote:

> [I]f that word ["Bill"] encompasses any single instrument of legislation, the preservation or destruction of the veto power rests entirely within the domain of congressional discretion. The President's veto power is preserved intact only if bills are limited to one subject; it is destroyed completely if a session of Congress incorporates all of its legislative program in a single instrument. In *every* instance where a legislative document embracing congressional treatment of more than one subject is submitted to the President, his veto power is frustrated if he agrees with the congressional treatment of one such subject and disagrees with its treatment of another subject, but is required to approve or reject the document in its entirety. To concede that, at its discretion, Congress thus may preserve or destroy the veto power by varying the number and variety of the subject it includes for treatment in a bill, is to concede to Congress the authority to negate a power expressly awarded to the President by the Constitution. The fallacy of the view that the President may not veto non-germane riders thus is laid bare.

Clineburg, *supra* note 52, at 753 (emphasis in original).

126 286 U.S. 482, 493 (1932). The Court stated:

> No possible reason, either suggested by constitutional theory or based upon supposed policy,

of such a "bill," Congress could reduce the President's role in the lawmaking process to the merest formality. The President would be unable to veto a bill because of the importance of certain items contained in it, and he would be unable even to digest the document during the ten days afforded him by the presentment clause. Such a stratagem, to borrow Hamilton's warnings in *The Federalist* No. 73 regarding the veto power, would leave the President "stripped of his authorities . . . by a single vote."[127] The Constitution should be read to avoid this absurdity, if possible.

Professors Tribe and Kurland cannot legitimately overlook or assume away the underlying constitutional question of whether Congress has really presented the President with a single "bill" when it presents omnibus legislation.[128] Indeed, one intriguing possibility—particularly in the case of excessively bundled legislation—is that the President could refuse Congress' tender of what it called a bill. He could refrain from returning this legislative product to the house in which it originated and simply issue a public statement asserting that the product was not a bill, order, resolution, or vote that had started the presentment process. Thus, the President would assert, no response from him to Congress was required—let alone one within ten days—and Congress would have no power to enact the legislative product by override, since no veto had issued. The counterargument, of course, would be that Congress in fact did present the President a "bill," and that, by not acting upon it within ten days, the President permitted the "bill" to become law without his signature. It is conceivable that many private parties would have standing to sue under this scenario, since private rights could be harmed by whether or not the substantive provisions contained in the "bill" in fact had become law. The irony of this Presidential strategy is that by refraining from claiming the existence of an inherent line-item or subject veto under the Constitution, and by instead relying on a theory of defective tender, the President, if successful, could magnify the veto power as it is currently understood, causing its effect to resemble more closely the "absolute negative" that the framers disfavored.

One cannot infer from their letter to Sen. Kennedy how Tribe and Kurland would support their preferred definition of "bill." To shed any real light on the boundary between conflicting executive and legislative powers—and thus to begin to articulate a limiting principle in the presentment process—one must face the question of what the Constitution

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appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills . . . . No public interest would be conserved by the requirement of hurried and inconsiderate examination of bills . . . .

Id.; *see also* Eber Bros. Wine & Liquor Corp. v. United States, 337 F.2d 624, 629 (Ct. Cl. 1964) (citing *Edwards*), *cert. denied*, 380 U.S. 950 (1965).

127 THE FEDERALIST No. 73, at 492, 494 (A. Hamilton) (J. Cooke ed. 1961).

128 *See* Robinson, *supra* note 14, at 406.

means by "bill" and bring that definition to bear on all the relevant evidence.

A. Use and Misuse of History

Neither the Constitution, the debates from the Constitutional Convention, nor *The Federalist* define "bill," perhaps because it is such an elemental concept. Tribe and Kurland imply that Congress' custom of presenting the President with bundles of nongermane legislation tends to establish the constitutional permissibility of the practice.[129] Similarly, Paul R.Q. Wolfson argues in his *Yale Law Journal* Note that the framers must have known and approved of bundling in appropriations bills because this was a common practice in the colonial legislatures before the American Revolution.[130] Since they were aware of the practice and did not specifically forbid it in the Constitution, Wolfson argues, the framers must have approved of the practice as a necessary check on executive power.

This argument, however, has several problems. The question is not whether the framers thought Congress had, as an inherent part of the legislative power, the authority to bundle legislation. There is, in fact, some evidence that they did.[131] The question, instead, is whether the framers *also* thought that the exercise of an item veto in *some* form was (or would be) a constitutionally appropriate response to such bundling.[132] Indeed, if they thought bundling was permissible, it might have been because they thought the abuse of this power would, in the end, provoke a concomitant exercise of the presidential veto power—since the framers were clear that the first function of the veto was to protect the President from legislative encroachments.[133] The same constitutional silence that sanctions the bundling of bills may *also* sanction their veto on something other than an all-or-nothing basis. The Supreme Court has

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129 They rely on the research of Louis Fisher, a specialist on separation of powers on the staff of the Congressional Research Service. Fisher, *The Presidential Veto: Constitutional Development*, in PORK BARRELS, *supra* note 6, at 17, 22 (claiming that the first appropriations bill passed by Congress on Sept. 29, 1789 was an omnibus bill).

130 Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 842-44 (1987) (by Paul R.Q. Wolfson).

131 This evidence apparently influenced the Department of Justice to opine late in the Reagan administration years that the President did not have an inherent constitutional right to assert a line-item veto. *See* Cooper, *supra* note 6, in PORK BARRELS, *supra* note 6, at 34 (article by former Assistant Attorney General in charge of the Office of Legal Counsel) ("while failure to limit the contents of a bill may restrict the efficacy of the President's veto power, there is no persuasive historical evidence that the Constitution authorizes the President to exercise an item veto").

132 We recognize, but do not attempt to resolve here, the distinction between interpretivism and originalism as models of textual interpretation. *See* R. BORK, *supra* note 12, at 133-60; Lawson, *In Praise of Woodeness*, 11 GEO. MASON L. REV. 21, 22 n.8 (1988); Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

133 *See supra* note 37.

said that the veto is a *legislative* power vested in the President.[134] If the framers' conception of legislative power was sufficiently broad to allow Congress to bundle legislation, then it may also allow the President to unbundle them. If the rule is "a bill is whatever the party exercising legislative power says it is," then the President, in exercising the legislative power of the veto, may decide that a bundle of legislation is actually many distinct bills. It therefore appears that Tribe, Kurland, and other opponents of the item veto must do more than demonstrate the existence of a historical practice of bundling legislation. They must demonstrate, in one way or another, the impermissibility of the item veto as a response to this practice.

The first attempt at such an attack on the item veto is likely to be historical. Tribe and Kurland's use of history to oppose the item veto is incomplete, as assuredly it may have to be in a short letter. Contrary to their suggestion, however, American Presidents started complaining about legislative bundling long before the Reagan years. President Hayes argued in 1879 that "the true principle of legislation . . . requires that every measure shall stand or fall according to its own merits," and he urged the House of Representatives to "return to the wise and wholesome usage of the earlier days of the Republic, which excluded from appropriations bills all irrelevant legislation."[135]

Moreover, Tribe and Kurland do not take into account general important historical considerations. The Constitution was, first, a repudiation of the Articles of Confederation as a document for national governance. The framers were frustrated with the inability of the Confederation Congress to carry out executive functions—particularly in the area of national defense.[136] Their response was to devise a unitary executive instilled with energy, power, and independence from the legislature.[137] The colonial practice relating to the bundling of legislation (or, more to the point, the failure of colonial and confederation era governors to exercise item vetoes) does not, therefore, seem particularly relevant to interpreting the Constitution, which established an entirely new and

134 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (Black, J.); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).

135 *Hayes Veto Message*, *supra* note 49, at 529, 532.

136 R. MORRIS, THE FORGING OF THE UNION, 1781-1789, at 196 (1987) ("Of all postwar problems confronting the Confederation, the most exigent stemmed from differing interpretations of the Definitive Treaty on the part of the United States and Great Britain."); *see also* 1 J. FLEXNER, GEORGE WASHINGTON AND THE NEW NATION, 1783-1793, at 73, 78 (1969); F. MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1986); C. RITCHESON, AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES, 1781-1795, at 49, 141-43, 151-63 (1969); J. WRIGHT, BRITAIN AND THE AMERICAN FRONTIER, 1783-1815 (1975); *cf.* THE FEDERALIST No. 25, at 158 (A. Hamilton) (J. Cooke ed. 1961).

137 *See* THE FEDERALIST No. 70, at 471 (A. Hamilton) (J. Cooke ed. 1961). For a further articulation of this theme, see Hamilton's earlier discussion in Letter from Alexander Hamilton to James Duane, Sept. 3, 1780, *reprinted in* 1 THE WORKS OF ALEXANDER HAMILTON 213, 219-20 (H. Lodge ed. 1904).

more powerful genre of national executive power. Indeed, Madison argued in *The Federalist* No. 47, when explaining the principle of the separation of powers and surveying its treatment under the various state constitutions, that the constitutions of Rhode Island and Connecticut were irrelevant "because they were formed prior to the revolution; and even before the principle under examination had become an object of political attention."[138]

It also may be that the existence of germaneness requirements on legislation at the state level[139] made the exercise of item vetoes by governors unnecessary. If state constitutions lacked these restrictions on state legislatures and state executives still felt bound to exercise veto power on an all-or-nothing basis, then *that* circumstance might say something against the existence of an item veto.

We also can safely say that the framers probably did not contemplate legislative bundling on the scale that Congress indulges in today, notwithstanding Tribe and Kurland's claim that the first appropriations bill enacted by the First Congress in 1789 was an omnibus bill.[140] That first appropriations bill could be printed in its entirety on a single double-spaced typewritten page. It listed only four items of expenditures: salaries and contingencies for the entire federal government; expenses of the Department of War stemming from the Revolution; payments for unsatisfied treasury warrants; and pension payments to invalids.[141] In its entirety, this "omnibus" act read:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids.[142]

The bill contained no riders legislating new provisions of substantive law.

Today, appropriations bills can be measured more easily in pounds than in words or number of subjects addressed, particularly if one in-

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138 THE FEDERALIST No. 47, at 323, 328 (J. Madison) (J. Cooke ed. 1961).

139 *See supra* note 50 and accompanying text.

140 *See supra* note 129 and accompanying text.

141 1 Stat. 95 (Sept. 29, 1789).

142 *Id.* (italics in original); *see also* L. WILMERDING, THE SPENDING POWER 20 (1943). Subsequent appropriations bills in the First Congress, although longer than this first bill, displayed the same element of brevity and the same disinclination to legislate substantive riders. *See* 1 Stat. at 214 (Mar. 3, 1791); *id.* at 190 (Feb. 11, 1791); *id.* at 185 (Aug. 12, 1790); *id.* at 104 (Mar. 26, 1790).

cludes the accompanying committee reports. We 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."[143] Indeed, as late as 1916, former President Taft characterized "[i]nstances of abuse of this sort by Congress . . . as exceptional."[144] Like President Hayes, President Taft feared the broader strategic implication of appropriations riders: "[t]his use by Congress of riders upon appropriation bills to force a President to consent to legislation which he disapproves shows a spirit of destructive factionalism and a lack of a sense of responsibility for the maintenance of the government."[145] Taft thought appropriations riders threatened the ability of the federal government to "remain a going concern," yet, based on his belief that they were "exceptional," he dismissed the idea of creating a line-item veto to countervail them as a quixotic attempt "to pump patriotism into public officers by force."[146]

B. Does the Scope of the Veto Power Expand and Contract Concomitantly with the Definition of a Bill?

The framers might have agreed that, if Congress claims that a "bill" is everything it produces in a session, then the President may with equal justice (and more common sense) treat as separate bills those parts of this legislative potpourri that address a single subject. Writing in 1966, Professor William Clineburg argued:

> The long-unchallenged view has been that [the presentment clause] affords the President with but two alternatives: either to approve the "Bill" or to return it. But this view rests on the assumed premise that any legislative instrument passed by the Congress is a "Bill" *if so entitled*—whether it treats of one subject or of many, unrelated subjects. This assumption is, at best, a tenuous one, and such validity as can be ascribed to it must derive from the notion that a baseless assumption achieves a degree of invulnerability with age and repetition. But no deference is required to be given the fact that the rote of practice, custom and belief has it that the President is without the power to veto non-germane riders, for in *Edwards v. United States* the Supreme Court held that the President has the power to sign bills subsequent to the adjournment of the Congress, *long-established practice,*

143 *Hayes Veto Message, supra* note 49, at 528; *see also* Dixon, *The Case for the Line-Item Veto*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 207, 221-22 (1985); Ross & Schwengel, *An Item Veto for the President?*, 12 PRES. STUD. Q. 66, 100 (1982).

144 W. TAFT, *supra* note 5, at 28.

145 *Id.* at 27-28.

146 *Id.* at 28. On the other hand, President Franklin D. Roosevelt, who also deplored appropriations riders, thought an item veto would be beneficial. *See* E. CORWIN, *supra* note 71, at 504-05 n.55.

custom and belief to the contrary notwithstanding.[147]

Thus, perhaps it is the case that a "bill" about the proper weight of turkey parts, military salaries, and a thousand other subjects is really many bills, however Congress styles it.[148]

The text of the Constitution and the structure of the framers' design about the proper meaning of "bill" provides some support for this inference. The presentment clause speaks of "Every Bill" being presented to the President.[149] This phrase presupposes that the President's approval would be sought and required on numerous proposed laws, rather than one big law. Elsewhere, the Constitution is considerably more specific when a task is to be performed only once (or infrequently) over an extended interval of time. For example, "Congress shall assemble at least once in every Year,"[150] and "from time to time" each house shall publish a journal of its proceedings[151] and there shall be made (whether by Congress, the President, or both is unclear) "a regular Statement and Account of the Receipts and Expenditures of all public Money."[152]

But the presentment clause does not similarly say that Congress "at least once every year" or "from time to time" shall send bills to the President. To the contrary, the phrase "Every Bill" is more consistent with an expectation of sequential, periodic, contemporaneous action being taken by Congress to present legislation to the President. Indeed, the plain meaning of "every" contemplates as much, for it is a word "[u]sed to express distributively the sense that is expressed collectively by *all*."[153] It means "[e]ach, or every one, *of* (several persons or things)."[154] Given this subtle distinction between "every" and "all," it might be significant that the origination clause provides that "*All* Bills" for raising revenues may be amended by the Senate,[155] whereas the presentment clause provides that "*Every* Bill" and "*Every* Order, Resolution, or Vote" shall be presented to the President.[156] There is a logical difference between the Senate having a prerogative that it might exercise in any case, and Congress having a duty that it must discharge in every case.

Historically, we also know that to the limited extent that the fram-

147 Clineburg, *supra* note 52, at 751-52 (citing Edwards v. United States, 286 U.S. 482 (1932)) (emphasis in original).

148 The most extensive example of such bundling in recent memory is the Continuing Resolution for fiscal year 1988. Continuing Appropriations, Fiscal Year 1988: Joint Resolution Making Further Continuing Appropriations for the Fiscal Year 1988, and for Other Purposes, Pub. L. No. 100-202, 101 Stat. 1329 (1987); *see also* Devins, *Appropriations* Redux, *supra* note 122.

149 U.S. CONST. art. I, § 7, cl. 2.

150 *Id.* at art. I, § 4, cl. 2.

151 *Id.* at art. I, § 5, cl. 3.

152 *Id.* at art. I, § 9, cl. 7.

153 5 OXFORD ENGLISH DICTIONARY 465 (2d ed. 1989) (emphasis in original).

154 *Id.* at 466 (emphasis in original); *see also* WEBSTER'S NEW WORLD DICTIONARY 471 (3d College ed. 1988) (defining "every" to mean "each, individually and separately").

155 U.S. CONST. art. I, § 7, cl. 1 (emphasis added).

156 *Id.* at art. I, § 7, cls. 2, 3 (emphasis added).

ers addressed legislative bundling, they recognized its potential for coercion. They feared that the House might abuse its power to originate money bills through just this process. In what historian Gordon Wood calls the "long wrangle in the Convention involving the Senate's authority over money bills,"[157] James Wilson of Pennsylvania warned: "The House of Reps. will insert other things in money bills, and by making them conditions of each other, destroy the deliberative liberty of the Senate."[158] Similarly, George Mason of Virginia was concerned that the House would adopt "the practice of tacking foreign matters into money bills."[159]

If the framers were concerned that legislative bundling might compromise bicameralism and permit the House to coerce the Senate, it follows a fortiori that they would oppose the kind of legislative bundling we see today—a bundling whose evident purpose is to eviscerate the presentment process and thus permit the legislature to subjugate the executive. Surely the independence and equality of the legislative, executive, and judicial branches of government were at least as fundamental to the framers' vision of the structure and logic of the Constitution as was the bicameral composition of the federal legislature. It seems possible that the framers thought the executive branch, sharing as it does in the legislative power through its veto and recommendation functions, would respond in kind to such legislative self-aggrandizement, exercising its power to interpret what the Constitution means by "bill," and exercising the veto power appropriately.[160]

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157 G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 555 (1969); *see also id.* at 241-44.

158 J. MADISON, *supra* note 14, at 444. One might argue on this basis that the case for a veto of substantive riders of appropriations bills is stronger than that for the veto of nongermane provisions more broadly.

159 *Id.* at 443.

160 *Cf.* Best, *The Item Veto: Would the Founders Approve?*, 14 PRES. STUD. Q. 183, 183 (1984) ("were they with us today, the Founders would favor the item veto"). The decision early in the Constitutional Convention to create a veto override—the result of a debate cast in rather archaic language as the choice between an "absolute negative" and a "qualified negative"—reflected an analogous concern about the relative bargaining power of Congress and the President in the lawmaking process. Benjamin Franklin strongly favored a congressional override and issued a warning about excessive bargaining power—a warning that sounds surprisingly like the converse of contemporary complaints about pork barrel legislation that the President is compelled to accept in order to secure the enactment of legislation he deems to be essential (or at least highly desirable). On June 4, 1787, Franklin said to the delegates:

> The [absolute] negative of the Governor [of Pennsylvania] was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter. When the Indians were scalping the western people, and notice of it arrived, the concurrence of the Governor in the means of self-defence could not'be got, till it was agreed that his Estate should be

C. Congressional Machinations in the Presentment Process: The Residual Presentment Clause

There is further textual evidence that the framers worried not only about the frequency of the President's involvement in the lawmaking process, but also about Congress' ability to circumvent the presentment process entirely in certain circumstances. At the Constitutional Convention on August 15, 1787, James Madison proposed adding clause 3 to article I, section 7 in order to extend the President's veto power to address ingenious packagings of legislative proposals that might otherwise escape veto under clause 2.[161] Madison's concern was that Congress could give a bill a different name and thereby escape entirely the obligation of presenting the legislation to the President. He noted that "if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes, &c . . . ."[162] Madison's original proposal was rejected "after a short and rather confused conversation on the subject" that culminated in an 8-3 vote shortly before the delegates adjourned for the day.[163] The following morning, however, Edmund Jennings Randolph revived the proposal as the first item of discussion, "having thrown into a new form the motion, putting votes, Resolutions &c. on a footing with *Bills* . . . ."[164] In particular, Randolph's motion provided that "[e]very order resolution or vote, to which the concurrence of the Senate & House of Reps. may be necessary . . . shall be presented to the President for his revision . . . ."[165] The only recorded debate on the motion was by Roger Sherman, who "thought it unnecessary, except as to votes taking money out of the Treasury which might be provided for in another place."[166] Despite the absence of further debate, the motion passed this time, 9-1, with New Jersey dissenting and Massachusetts not present.[167]

Bolstering the requirement in clause 2 that "Every Bill" be presented to the President, clause 3 of section 7 subjects to the President's veto "Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary . . . ." The addition of clause 3 revealed a concern on the part of the framers

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exempted from taxation: so that the people were to fight for the security of his property, whilst he was to bear no share of the burden.

J. MADISON, *supra* note 14, at 62 (Benjamin Franklin). The same day, ten states unanimously rejected a proposal to give the executive "an absolute negative" and "a question for enabling *two thirds* of each branch of the Legislative to overrule the revisionary check . . . passed in the affirmative sub silentio." *Id.* at 66 (emphasis in original).

161 J. MADISON, *supra* note 14, at 465, 466.

162 *Id.* at 465 (emphasis in original).

163 *Id.* Massachusetts, Delaware, and North Carolina supported the motion. *Id.*

164 *Id.* at 466 (emphasis in original).

165 *Id.*

166 *Id.*

167 *Id.* Massachusetts, of course, had supported Madison's proposal the day before. *Id.* at 465.

about evasion of the presentment process. Clearly, the framers disapproved generally of legislative machinations that would allow bills—however styled—to evade the veto power and erode the accountability and diffusion of power created by the presentment process. Their response was not to forbid such legislative maneuvering—surely a hopeless task—but to make clear that the presentment requirement and the veto power applied to all bicameral measures produced by Congress purporting to have the force of law.[168] Congressional bundling, however, does not seem far removed from calling a bill a resolution in order to avoid presentment. Both are ways to vitiate the veto power—one of the two legislative powers expressly vested in the chief executive. As Stephen Glazier has argued, "Randolph had found the broadest possible formula in the language of the day to describe the 'etceteras' of 'form and name,' as not yet invented or described, that Madison feared."[169]

D. Reconsidering Severability—by Courts and Presidents

Although the President might have the ability to sever a nongermane part of a larger piece of legislation pursuant to the legislative authority inherent in his veto power, we concede that the idea that the definition of a bill is an exclusively congressional prerogative has some intuitive appeal. Having criticized the unstated premise of the Tribe-Kurland letter that a bill is inviolably whatever Congress calls a bill, we retreat somewhat and ask whether this premise might have more profound implications for the veto power than is generally recognized.

Consider the claim that the imbalance among the three branches of the federal government results not merely from the President's diminished discretion to exercise the veto power, but also from the judiciary's ability to preserve bills that contain unconstitutional provisions by severing such provisions in the course of judicial review. The relevance of judicial severability to the debate over the item veto may not be immediately apparent. However, if the doctrine of judicial severability were discarded, our jurisprudence on the separation of powers might promote a more felicitous relationship among the co-equal branches. This is because if the courts could not sever unconstitutional measures from legislation (absent an explicit severability provision in the legislation under review), Congress would have a strong incentive to include language that stated whether and to what extent particular parts of legislation could be severed. Where Congress included severability provisions, there would be a more persuasive argument that the President could veto an unconstitutional measure in that legislation, so long as this item veto was consistent with the severability language in the bill. Through this language

168 Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 456 n.128 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983); *see also* Black, *On Article I, Section 7, Clause 3—and the Amendment of the Constitution*, 87 YALE L.J. 896 (1978).

169 Glazier, *Line-Item Veto*, *supra* note 42, in PORK BARRELS, *supra* note 6, at 10.

Congress would define the seams along which the various bills in an omnibus measure were sewn together. Courts would follow these instructions as well in severing unconstitutional measures. In this way, explicit congressional intent, rather than second-guessing by the other branches, would determine what Congress would have passed as separable legislation, and the legislative powers of all three branches would be brought into a better balance.

Under this proposal, the executive and the judiciary would treat as a single bill whatever Congress had defined as such—a desirable result if it can be attained without undermining the veto power. Congress could, if it chose, attempt to insulate a constitutionally questionable piece of legislation from review by attaching it to a larger package of measures that contained no severability provision. The President would then be in the position in which he now often finds himself: he could either veto the entire "bill" or sign it into law, obnoxious rider and all. But Congress would be taking the risk that the entire package to which the rider was attached would fall before judicial review. For example, the entire continuing resolution appropriating funds for the federal government for fiscal year 1988 would have fallen had the Court of Appeals in *News America Publishing, Inc. v. FCC*[170] not severed a rider that violated the first amendment. The judicial branch, relatively insulated as it is from political pressure, is much better positioned to "veto" legislative packages because of unconstitutional infirmities in riders than is the President, who must be more concerned about the short-term political costs of exercising such a power.

To avoid the risk of large packages of legislation being toppled by the courts, Congress—in the absence of judicial severability—would probably include explicit severability language in all omnibus bills and in most large pieces of legislation. Consequently, dubious riders would be exposed to Presidential veto, but on terms that Congress would set. If a "bill" is defined as whatever Congress would have passed on its own, then the severability provisions crafted by Congress in the legal regime we hypothesize here would be relevant to what parts of omnibus legislation amounted to separate bills. For the only principle on which judicial severability may be based, so far as we can tell, is a judgment that a legislative package would have been passed by Congress even without the provisions to be severed. Judgments of this kind, to be more than convenient fictions, ought to be based on explicit expressions of congressional intent.

The attractiveness of this regime depends, we acknowledge, on the implausibility of a federal court's power to sever unconstitutional provisions from the legislation of which it is a part, a topic that is beyond the scope of this Article. The doctrine of judicial severability, however, has

[170] 844 F.2d 800 (D.C. Cir. 1988).

often been recognized as constitutionally troubling. Professor Tribe astutely noted in 1984 the irony that in *INS v. Chadha*, a case about the presentment clause, the Supreme Court did not pause to consider the validity of the judicial power to sever the legislative veto from the remainder of the statute at issue.[171] Judicial severing of legislation, he noted, has the same constitutional infirmity as the legislative veto: "[t]he constitutional safeguards of bicameralism and presentment are thereby abandoned, and a new law is created by judicial fiat."[172]

Judicial severability, the legislative veto, and legislative bundling all may be forms of the same corruption of the legislative process mandated by the Constitution, a process which demands both bicameral consideration and exposure to the President's revisionary check. These constitutional infirmities might require a comprehensive solution.

V. CONCLUSION

In discussing the veto power shortly after Watergate, Professor Charles Black asked the following question: To what state could Congress, without violating the Constitution, reduce the President?[173] He could envision Congress taking away the President's power until it came down to the veto:

> I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer mail; that is where one appropriations bill could put him, at the beginning of a new term. I saw this man as negotiating closely with the Senate, and from a position of weakness, on every appointment, and as conducting diplomatic relations with those countries where Congress would pay for an embassy. But he was still vetoing bills.[174]

We find it ironic that Professor Tribe quotes this same passage in his treatise as an illustration of "the importance of the presidential veto in the constitutional scheme of separated powers."[175] Our anxiety in this essay has obviously been that Tribe, Kurland, and other critics of the item veto care little if the Presidency is further enervated by sapping the veto power as well. Critics of the item veto apparently would have us believe that, if Congress can come up with any way not specifically anticipated by the framers to evade the veto power, the President must simply put up with it. But if one were to take this approach to the powers of Congress with respect to privacy rights or a dozen other favored positions, one can imagine the outrage and scorn that would issue from our constitutional scholars. We think this view is shortsighted. Watergate, Vietnam, and the Iran-Contra imbroglio notwithstanding, we think the preservation of the President's proper role in the framers' scheme of bal-

171 Tribe, *The Legislative Veto Decision*, *supra* note 112, at 22-23.

172 *Id.* at 22 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-27, at 717-18 (1978)).

173 Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 89 (Spring 1976).

174 *Id.*

175 L. TRIBE, *supra* note 54, § 4-13, at 262 & n.3.

anced and separated powers is at least as important to the protection of our liberties as are the constitutional doctrines—such as due process and equal protection—on which constitutional scholars usually focus their admiration.

When one searches for a constitutional principle that affirmatively permits Congress to attempt to undermine the veto but forbids the President to respond, one begins to suspect that this project is at least as difficult as defending the item veto we discuss. It is quite possible that the President lacks the implied power under the Constitution to exercise any of the versions of the item veto. But Professors Tribe and Kurland overstate their case when they declare that the exercise of such a veto "would clearly be unconstitutional." It is because the question is so unclear, and because the current operation of the presentment process seems so out of whack, that the question is generating some serious thought and has evidently caused President Bush to consider whether the issue is worth deciding once and for all.