

Spring 1998

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### Recommended Citation

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# MISSOURI LAW REVIEW

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VOLUME 63

SPRING 1998

NUMBER 2

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## Missouri Constitution

### A Simple Suggestion for Overriding the Line-Item Veto

*Robert M. Lawless\**

#### I. INTRODUCTION

For 123 years, Missouri legislators, governors, judges, lawyers, and law professors appear to have assumed that the state constitution requires a two-thirds supermajority to override the governor's line-item veto.<sup>1</sup> In fact, nothing

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Alan Herzog of the University of Missouri-Columbia School of Law class of 1999, provided invaluable research assistance, including an all-day trip to the state archives to review the original records of the state constitutional convention. Without this help, it is doubtful the idea in this Article would have found its way into print. The University of Missouri Law Foundation provides the financial resources to make this sort of research assistance possible, and these resources were very appreciated. Many of my friends and colleagues listened to or read preliminary thoughts and drafts. Their feedback was invaluable. A special thanks to my wife, Patti Lawless, for tolerating my dinner conversations on the subject, and for her critical suggestions. Thanks also to Richard Briffault, Hank Chambers, Ken Dean, Jim Devine, Tracey George, Chris Guthrie, Steve Ross, and Jim Westbrook, all of whom were very helpful. Responsibility for any errors or omissions, of course, rests with the Author.

1. It is difficult to find direct statements to this effect, which I think is partly reflective of how ingrained this mistaken legal assumption has become. Many legal professionals undoubtedly believe it is unnecessary to state that line-item vetoes require a two-thirds supermajority override because they mistakenly believe the rule to be self-evident. Nevertheless, some examples can be found. The web site for the Missouri House of Representatives contains an overview of the legislative process stating that a line-item veto can be overridden only by a two-thirds vote in each chamber. See Missouri House of Representatives, *The Legislative Process in Missouri* (visited Feb. 12, 1998) <<http://www.house.state.mo.us/howbill.htm>>. Also, newspapers generally report

in the Missouri Constitution requires a supermajority override. This widely held misconception likely stems from an unfortunate parallel to the governor's general veto power where a two-thirds supermajority is required to override.<sup>2</sup> This Article argues that the state constitution does not require a supermajority to override the governor's line-item veto. Indeed, the text and history of Missouri's line-item veto suggest a simple majority override. Moreover, simple majority overrides are most consistent with the purposes of the line-item veto. Thus, although Missouri legal materials provide a platform from which to explore this issue, the Article's call for a simple majority override of a line-item veto has relevance to the line-item veto generally, at both the state and federal levels. Currently, simple majority overrides are the rule in five of the forty-four states that give their executives line-item authority.<sup>3</sup> The federal line-item veto requires a two-thirds supermajority to override.<sup>4</sup>

Absent a line-item veto, the legislature may package bills as it deems necessary for presentation to the executive.<sup>5</sup> The legislature can assemble a bill with many delicate compromises and give the executive the Hobson's choice of accepting the compromises together or rejecting the entire package. The line-item veto allows the executive to undo this packaging and veto isolated provisions, which may have the effect of destroying the delicate compromise crafted in the legislature. Most every jurisdiction limits the line-item veto to budgetary or appropriations bills, believing the goal of fiscal responsibility worth the risk of executive aggrandizement.<sup>6</sup> Nonetheless, the line-item veto substantially enhances the executive's bargaining leverage with the legislature,

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that the line-item veto requires a two-thirds override. *See, e.g.,* Kim Bell, *Veto Will Bring Legislature Back, Carnahan Also OKs Teacher Pension Bill*, ST. LOUIS POST-DISPATCH, June 1, 1995, at 2B; *Chances Dim for Overrides, Lawmakers Gather in Jefferson City for Annual Veto Session*, KAN. CITY STAR, Sept. 16, 1992, at C2. Also, a leading reference book on state government lists Missouri as requiring two-thirds override of line-item vetoes. *See* 31 BOOK OF THE STATES 22-23 (1996-97).

2. *See* MO. CONST. art. III, § 32.

3. *See* 31 BOOK OF THE STATES, *supra* note 1, at 22-23 (reporting that Alabama, Arkansas, Kentucky, Maine, and Tennessee require only a majority override of line-item vetoes); *see also infra* notes 43-45 and accompanying text (discussing constitutional language in these five states).

4. The federal line-item veto contemplates that each vetoed item can become a separate "disapproval bill" that becomes introduced in Congress as any other piece of new legislation. *See* 2 U.S.C.A § 691d(c) (West Supp. 1997). This "disapproval bill" is then subject to the regular presentment requirements for all federal legislation contained in U.S. CONST. art. I, § 7, which provides that vetoed bills are subject to a two-thirds supermajority override. *See also infra* note 33 (discussing federal line-item veto).

5. The requirement in many states that legislation contain no more than a single subject operates somewhat to limit the legislature's abilities to package legislative compromises in a single bill. *See, e.g.,* MO. CONST. art. III, § 23 ("No bill shall contain more than one subject which shall be clearly expressed in its title . . .").

6. *See* 31 BOOK OF THE STATES, *supra* note 1, at 22-23.

and there is no reason to believe that the executive will use this increased bargaining leverage in ways that a majority of the body politic will consider public regarding. For example, many critics have suggested President Clinton has used his line-item authority for political ends rather than fiscal restraint.<sup>7</sup>

The dangers of tipping the balance of power to the executive are more than academic. Consider the 1997 Missouri example of a threatened line-item veto of language denying state funds to Planned Parenthood because it performs abortions.<sup>8</sup> In the end, the governor did not exercise the line-item veto out of concerns that the state constitution might not allow the rejection of substantive language in an appropriations measure.<sup>9</sup> Nevertheless, the episode demonstrates how the line-item veto can transfer law-making authority from a multimember, popularly elected legislature to a single person serving as executive. Even if one generally agreed with the outcomes the governor hoped to achieve by threatening the veto (as the Author did), it was troubling to see the executive branch wield its constitutional line-item authority to upset what surely was a legislative compromise.

Later in the year, the governor's general veto of a bill banning partial-birth abortions was sustained by the margin of only one vote in the Missouri General Assembly,<sup>10</sup> suggesting that the governor may not have enjoyed majority

7. E.g., Paul Greenberg, *Line-item Games Begin*, THE COMMERCIAL APPEAL, Aug. 24, 1997, at B4, available in 1997 WL 11967589; David C. King, *Line Item Veto Nothing Short of Political Extortion*, HOUS. CHRON., Aug. 14, 1997, at 41, available in 1997 WL 1305639; *A Veto Is a Veto Is a Veto*, ST. LOUIS POST-DISPATCH, Feb. 15, 1998, at B2, available in 1998 WL 3320042.

8. See Jo Mannies, *Planned Parenthood Threatens Suit*, ST. LOUIS POST-DISPATCH, May 24, 1997, at A12; Kevin Murphy, *Missouri Budget May Be Headed for Legal Showdown: At Issue Is Whether Planned Parenthood Funds Can Be Cut*, KAN. CITY STAR, May 24, 1997, at C3.

9. See Kim Bell, *Planned Parenthood Out of Spending Bill: Carnahan Puts His Hope in Federal Courts*, ST. LOUIS POST-DISPATCH, June 27, 1997, at 1A; Will Sentell, *Carnahan Reluctantly Signs Ban: Family-planning Measure Passed with Expectation Courts Will Nullify It*, KAN. CITY STAR, June 27, 1997, at A1; Nicole Ziegler, *A Tough Call: Planned Parenthood Funds Leave Carnahan in Bind*, ST. LOUIS POST-DISPATCH, June 17, 1997, at 4B. See also *supra* note 19 and accompanying text (discussing governor's power to line-item veto substantive language). The governor stated that he did not veto the bill because a constitutional fight over the scope of the line-item veto might tie up funding for Planned Parenthood, a funding ban he expected the federal courts would nullify almost immediately. Effectively, the governor relied on the federal courts to achieve the same result as would have occurred with a line-item veto. See Bell, *supra*, at 1A; Sentell, *supra*, at A1.

10. See Kim Bell & Virginia Young, *Abortion Procedure Survives as Senate Backs Carnahan: Missouri Senate One Vote Short in Attempt to Override Veto*, ST. LOUIS POST-DISPATCH, Sept. 11, 1997, at 1A; Will Sentell, *Senate Upholds Abortion Bill Veto: Several Missouri Legislators Switch Sides; Tally Comes up Just One Short for Override*, KAN. CITY STAR, Sept. 11, 1997, at A1.

legislative support on the related issue of denying funds to Planned Parenthood. Without the line-item veto, the governor would have had to accept zero funding for Planned Parenthood or veto the entire appropriations bill. With the line-item veto and a mistaken assumption that a two-thirds supermajority would be necessary to override the line-item veto, the executive gained the power to undo the compromise that denied state funds to Planned Parenthood. Whether this is a good result largely depends on one's opinions about the underlying issue of abortion, but, in the long-run, society is better off if these decisions are made in multimember legislatures and not in single-person executive offices.

In a close analysis of the executive's general veto power and the line-item veto, any parallel between the two executive powers breaks down. In fact, the general veto power and the line-item veto power serve separate purposes.<sup>11</sup> While the general veto power serves as a check on temporary majority factions, the line-item veto power, as currently implemented, is aimed at fiscal responsibility.<sup>12</sup> The line-item veto helps to ensure that majority legislative support exists for individual items of appropriation that might otherwise be pork-barrel gifts to narrow special interests. The word "veto" unfortunately masks two quite separate concepts. It would be better to rename the line item veto "the executive's call for majority support." The current conceptualization of the line-item veto unnecessarily aggrandizes executive power at the expense of a democratically elected legislature.

This Article will use Missouri's line-item veto to consider overrides of line-item vetoes. Neither the text, history, nor purpose of Missouri's line-item veto supports supermajority overrides. The Article will argue that the text and history of the Missouri line-item veto are at least ambiguous and probably compel simple majority overrides. Moreover, the Article will assess the reasons for a line-item veto and conclude a majority override would be the better result not only in Missouri but in all jurisdictions with a line-item veto. Thus, although the Article will focus on Missouri, its message is germane for the line-item veto generally at both the state and federal levels.

This Article's sole focus is on the legislative vote necessary to override a line-item veto. The Article does not take a position on whether line-item vetoes should exist at all. To the extent a line-item veto helps guard against fiscal irresponsibility, it obviously is a good idea. Given the actual application of the line-item veto, especially at the federal level, its fiscal benefits seem minimal.<sup>13</sup>

11. Cf. Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 390-94 (1992) (arguing constitutional history of general veto is not informative for public debate on federal line-item veto).

12. See *infra* notes 64-66 and accompanying text (discussing differences between general veto and line-item veto).

13. The president's use of the federal line-item veto resulted in 51 vetoed items from two appropriations bills, a savings of \$431 million or 0.2% of the total appropriations in the two bills. See Letter of Oct. 16, 1997, from Sen. John McCain to President Bill Clinton (visited Apr. 8, 1998) <<http://www.senate.gov>

The price of the line-item veto—namely, the political compromises between, and within, the executive and legislative branches—seems very high. The wisdom of a line-item veto generally is a subject beyond the scope of this Article,<sup>14</sup> and the Article should not be interpreted as advocating the adoption of line-item veto provisions. Rather, this Article argues that, where they exist, line-item vetoes should be subject to override by a simple legislative majority.

Part II of the Article explores the history of Missouri's line-item veto. Part II also reviews the arguments made by advocates of the line-item veto generally. The history and text of the Missouri line-item veto are reviewed in Part III, which concludes that neither support more than a majority override. Part III also considers why majority override is a good idea not only in Missouri but in any jurisdiction with a line-item veto. Part IV concludes the Article with some observations about how majority overrides can be implemented.

## II. BACKGROUND OF MISSOURI'S LINE-ITEM VETO

Like the governors of forty-three other states,<sup>15</sup> Missouri's governor has authority to veto "items of appropriation" in any bill presented to him.<sup>16</sup> Within this phrase are two limits on the governor's line-item authority. First, the veto's subject must be an "item," a term that has been the subject of much litigation in other states but has occupied the attention of few Missouri courts.<sup>17</sup> Obviously, an entire appropriations bill is not an "item," but where Missouri courts would delineate the other extreme is not clear. The governor often uses the line-item authority to reduce individual appropriations, instead of outright elimination of appropriations,<sup>18</sup> a practice that never has been challenged in Missouri although

/~mccain/prezliv.htm>. Commentary about President Clinton's minimal use of the line-item veto appears at Dan Coats, *Line Item Veto Not a Threat to Congress*, SEATTLE POST-INTELLIGENCER, Aug. 15, 1997, at A17, available in 1997 WL 3204531; *Trimming Fat from Budget Will Require Bold Strokes*, ATLANTA J., Oct. 16, 1997, at A18, available in 1997 WL 3997144.

14. Examples of papers discussing the line-item veto generally, especially at the federal level, include Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605 (1997); Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988); Stearns, *supra* note 11.

15. See 31 BOOK OF THE STATES, *supra* note 1, at 22-23.

16. See MO. CONST. art IV, § 26.

17. See also Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1181-98 (1993) (explaining case law on definitional issues of what is an "item"); Daniel S. Strouse, *The Structure of Appropriations Legislation and the Governor's Item Veto Power: The Arizona Experience*, 36 ARIZ. L. REV. 113, 146-52 (1994) (discussing "item litigation" in Arizona).

18. Examples of the governor's line-item veto practices can be found in the annual session laws. Many of these are vetoes reducing appropriations instead of outright vetoes. A few examples are Appropriations: Department of Social Services, 1996 Mo.

it is open to question.<sup>19</sup> Following the law of most states, an "item" is essentially a separate line in the appropriations bill. In the vast mine-run of cases, what constitutes an "item" will be self-evident. The second limit is that the item vetoed be an "appropriation," the authorization of the state to spend money. The line-item veto authority generally does not allow the governor to reject substantive provisions in an appropriations measure.<sup>20</sup>

After the governor exercises the line-item veto, the appropriations bill becomes law, but the items to which the governor objects do not take effect.<sup>21</sup> Instead, the items are returned to the legislative chamber in which they originated and are "reconsidered separately."<sup>22</sup> What it means for the items to be "reconsidered separately" is the subject of this Article. Most have assumed the phrase means that the items do not go into effect unless two-thirds of the entire legislature vote to the contrary.<sup>23</sup> This Article demonstrates that the two-thirds rule is a misunderstanding of the text, history, and purpose of the line-item veto provision and that only a majority vote of the legislature is required to override the governor's line-item veto.

Missouri first adopted the line-item veto in its 1875 constitution, and in 1877 Governor John S. Phelps first used it when he reduced a \$70,000 appropriation for the St. Louis County asylum.<sup>24</sup> A constitutional convention in 1922-23 recommended changes to, but not replacement of, the 1875 constitution. Among these recommendations was a proposal that the line-item veto be dropped in favor of a more direct gubernatorial role in the state budget process.<sup>25</sup>

Laws 119, 126 (\$251,379 veto in appropriation); Appropriations: Department of Revenue and the Department of Highways and Transportation, 1996 Mo. Laws 23, 24 (\$15,655 veto in appropriation); Appropriations: Department of Agriculture, Department of Conservation and Department of Natural Resources, 1993 Mo. Laws 57, 65 (\$7000 veto in appropriation).

19. Many state courts have allowed the governor only to exercise "negative" line-item vetoes but not ones that operate "affirmatively." In practice, this means the governor can use the line-item veto to completely negate sections but not to rewrite sections and create new legislation. See Briffault, *supra* note 17, at 1185-89; Strouse, *supra* note 17, at 152-53. Some states have limited the ability of the governor to reduce items of appropriation. Compare *Karcher v. Kean*, 479 A.2d 403 (N.J. 1984) (reduction allowed) with *Wood v. State Admin. Bd.*, 238 N.W. 16 (Mich. 1931) (no reduction). The issue appears not to have arisen yet in Missouri.

20. See *State ex rel. Cason v. Bond*, 495 S.W.2d 385 (Mo. 1973) (governor may not strike words of purpose in appropriations bill unless money appropriated therein is vetoed). The *Cason* decision is the only reported decision regarding the scope of the governor's line-item veto authority from the 1945 Missouri Constitution.

21. See MO. CONST. art. IV, § 26.

22. See MO. CONST. art. IV, § 26.

23. See *supra* note 1.

24. See ROBERT F. KARSCH, THE GOVERNMENT OF MISSOURI 109 (10th ed. 1968).

25. See MARTIN L. FAUST, MANUAL ON THE EXECUTIVE ARTICLE FOR THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943, at 52 (1943) (manual prepared to instruct

Missouri did not adopt this recommendation, and the line-item veto survived to be carried over into the present 1945 constitution. The current version of the line-item veto varies little from its 1875 progenitor.<sup>26</sup> This Article later will discuss more specifically the development of the line-item veto provision in the state constitutional conventions.<sup>27</sup>

Presently, the line-item veto authority can be found in article IV of the Missouri Constitution of 1945, amidst other provisions outlining and delimiting the authority of Missouri's executive branch. Thus, in between provisions creating the various executive offices and stating the governor's duties, one learns that the governor also possesses a line-item veto. Specifically, the line-item veto is found in that portion of article IV entitled "Revenue," a subpart that establishes the Department of Revenue and details the governor's role in developing the state budget.

The locus of the line-item veto is more than idle pedantry. The framers of the Missouri Constitution saw the line-item veto as an executive function, part of the governor's role in the state budgetary process. The general veto authority is in article III, among provisions setting forth the legislative process. This organization was no accident. At the constitutional convention, both the legislative-branch and executive-branch committees drafted substantially identical line-item authority, but the convention chose the executive provision as the most logical place to encompass that authority.<sup>28</sup> That the line-item veto is separate from the general veto authority becomes important to the thesis of this Article, which argues that the line-item veto presents considerations distinctly different from those presented by the governor's general veto authority. This thesis is hard-wired into the very structure of the state constitution.

As noted above, Missouri joins forty-three other states that give their governors a line-item veto authority. Missouri's provisions are typical. Most every state limits the line-item veto to budgetary or appropriations matters.<sup>29</sup> Ten states allow the governor to reduce an appropriations measure instead of striking it altogether.<sup>30</sup> Five states—Alabama, Arkansas, Louisiana, Maine, and Tennessee—provide that the legislature may override a line-item veto by a simple majority vote.<sup>31</sup>

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delegates to the state constitutional convention and now available in the Missouri State Archives); *see also* MARTIN L. FAUST, CONSTITUTION MAKING IN MISSOURI: THE CONVENTION OF 1943-1944, at 2-3 (1971) (discussing 1922-1923 convention generally) [hereinafter FAUST, CONSTITUTION MAKING].

26. *See infra* notes 57-59 and accompanying text.

27. *See infra* Part III.B.

28. *See infra* notes 48-53 and accompanying text.

29. *See* BOOK OF THE STATES, *supra* note 1, at 22-23; Briffault, *supra* note 17, at 1175-78; *see also infra* notes 43-45 and accompanying text (discussing the veto provisions of these five states in more detail).

30. *See* Briffault, *supra* note 17, at 1176.

31. *See* BOOK OF THE STATES, *supra* note 1, at 22-23; Briffault, *supra* note 17, at



The state line-item veto provisions should be sharply contrasted with the recently adopted federal line-item veto. State line-item vetoes can be found in the various state constitutions, while the federal line-item veto is a creature of statute.<sup>32</sup> More to the point, the federal veto is a convoluted process in which Congress can consider a single appropriation item three separate times.<sup>33</sup> It is clear that under the federal line-item veto, a two-thirds congressional vote is

1176 n.18.

32. See 2 U.S.C.A. §§ 691-692 (West Supp. 1997).

33. After passage of a bill, the president has five days to convey to Congress a special message disapproving particular items containing discretionary federal spending, new direct spending, or a federal tax break. See 2 U.S.C.A. § 691 (West Supp. 1997). The special message acts as a line-item veto, canceling the item to which the president has objected. See 2 U.S.C.A. § 691 (West Supp. 1997). The president can exercise the line-item veto only if he finds that it will reduce the federal budget deficit, not impair any essential government function, and not harm the national interest. See 2 U.S.C.A. § 691(a) (West Supp. 1997). This means that the president's line-item veto authority does not apply if the budget is balanced because in this case it will be impossible to reduce a federal budget *deficit*.

Once the president has communicated his special message, any member of Congress can introduce a disapproval bill that will receive expedited consideration if introduction occurs shortly after the president's message. See 2 U.S.C.A. § 691 (West Supp. 1997). The "disapproval bill" states only that Congress disapproves of the president's line-item veto and reinstates the vetoed provision. The "disapproval bill" then proceeds as any other federal legislation, through Congress if it can muster majority support and then back to the president's desk. Having line-item vetoed the same legislation once, the president presumably will do so again. The "disapproval bill" then returns to Congress for an attempted override by a two-thirds supermajority. See U.S. CONST. art. I, § 7.

Supporters of the federal line-item veto lacked the political will or capital to get it written into the federal Constitution. This convoluted process is the result. The idea is to satisfy the presentment requirements of the federal Constitution. Whether this will be successful is open to debate. A federal district court initially struck down the federal line-item veto statute, a ruling that the Supreme Court threw out based on a lack of standing for the congressional members who had brought the suit. See *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C.), *rev'd on other grounds*, 117 S. Ct. 2312 (1997). In the event of a challenge to its constitutionality, the statute provides for a direct appeal from the federal district court to the Supreme Court. See 2 U.S.C.A. § 692 (West Supp. 1997). Recently, a set of aggrieved private plaintiffs brought another suit challenging the federal line item veto's constitutional and were again successful before the district court. See *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998). The Supreme Court has granted certiorari, see *Clinton v. City of New York*, 118 S. Ct. 1123 (1998), and likely will decide the case as this Article goes to press.

The unique background of the federal line-item veto renders it unilluminating to the question of simple versus supermajority overrides. The convoluted federal procedure does provide for supermajority overrides in the end, but that result was determined more by the practical political reality of trying to draft a statutory line-item veto that could pass constitutional muster than by the legal principles discussed in the text.

necessary to override, but that result is mandated by the federal government's statutory approach. Fearing they could not muster the political capital necessary to amend the federal Constitution, supporters of the federal line-item veto had to adopt a procedure to satisfy the presentment requirements of Article I, Section 7 of the federal Constitution.

### III. INTERPRETATION

#### A. Text

The Missouri Constitution does not specify how the legislature is to override a line-item veto. Indeed, to the extent the text says anything at all, it appears to provide for a simple majority override.

Article IV, section 26 of the constitution authorizes the line-item veto:

The governor may *object* to one or more items or portions of items of appropriation of money in any bill presented to him, while approving other portions of the bill. On signing it he shall append to the bill a statement of the items or portions of items to which he objects and such items or portions shall not take effect. If the general assembly be in session he shall transmit to the house in which the bill originated a copy of the statement, and *the items or portions objected to shall be reconsidered separately*. If it be not in session he shall transmit the bill within forty-five days to the office of the secretary of state with his approval or reasons for disapproval. The governor shall not reduce any appropriation for free public schools, or for the payment of principal and interest on the public debt.<sup>34</sup>

The text contains three relevant conditions, granting the governor the power to “object” to “items of appropriation” which shall then “be reconsidered separately” by the legislature. Other than directing the General Assembly to reconsider separately any items to which the governor objects, the text does not instruct the legislature how to override a line-item veto.

The section of the constitution providing procedures to override the governor's veto generally also provides no guidance. Article III, section 32, which sets out the general veto override procedure, does not apply on its face to line-item vetoes:

Every *bill* presented to the governor and returned with his objections shall stand as reconsidered in the house to which it is returned. . . . The objections of the governor shall be entered upon the journal and the house shall proceed to consider the question pending, which shall be in this form: “Shall the *bill* pass, the objections of the governor thereto notwithstanding?” The vote upon this question shall be taken by yeas and nays and if two-thirds of the elected members of the house vote in the affirmative the presiding

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34. MO. CONST. art. IV, § 26 (emphasis added).

officer shall certify that fact . . . . The *bill* thus certified . . . shall become a law.<sup>35</sup>

Thus, the general override provision applies to “bills,” but the line-item veto provision applies only to “items of appropriation.” Because the general override provision speaks only of “bills,” it cannot govern the override of “items of appropriation.”

The distinction between “bills” and “items” is more than semantic. In the line-item veto provision, the constitution carefully uses the language “items of appropriation” because this language limits the governor’s power to exercise a line-item veto. “Items of appropriation” are given a constitutionally separate status under the Missouri Constitution and the constitutions of other states.<sup>36</sup> Many lawyers and judges have spent many hours pondering what constitutes a separate “item” subject to a line-item veto from non-“items” that may not be vetoed separately from the bill.

Moreover, the general veto override frames the question for the general assembly in a manner that makes little sense if it is to apply to line-item vetoes. Specifically, the general veto override provision directs the general assembly to consider: “Shall the *bill* pass, the objections of the governor thereto notwithstanding?”<sup>37</sup> Again, the bill-item distinction suggests the provision does not apply to line-item vetoes, but also the question’s wording raises something more fundamental. Under the line-item veto provision, the governor signs the appropriations bill and then objects to particular items.<sup>38</sup> Thus, the appropriations bill becomes “law,” and the constitution provides only that the items of appropriations objected to “shall not take effect.”<sup>39</sup> After a line-item veto, it makes little sense to ask whether the entire appropriations bill becomes “law” because, by operation of the constitution, it already has.<sup>40</sup>

After rejecting the general override provision as guidance, there is nowhere else to turn. No other provision of the Missouri Constitution might provide a procedure for overrides of a line-item veto. The only textual guidance is in the line-item veto provision itself in which the constitution provides that “items of appropriation” to which the governor objects shall be “reconsidered separately.”

35. MO. CONST. art. III, § 32 (emphasis added).

36. See *State ex rel. Cason v. Bond*, 495 S.W.2d 385 (Mo. 1973) (governor may not use line-item veto to strike out words of purpose in appropriations bill unless the money appropriated is also vetoed). See generally Briffault, *supra* note 17, at 1181-98 (explaining approaches of various state courts to definition of an “item”).

37. MO. CONST. art. III, § 32 (emphasis added).

38. See MO. CONST. art. IV, § 26 (“such items or portions shall not take effect”); see also *id.* art III, § 31 (“If the bill be approved by the governor it shall become a law.”).

39. MO. CONST. art. IV, § 26.

40. MO. CONST. art. III, § 31 (“If the bill be approved by the governor it shall become a law.”).

Standing by itself, the command that vetoed items shall be reconsidered separately provides no real guidance. Without going beyond the text's words, one could not fairly read a supermajority override procedure into the simple command "reconsider separately." Based on the words "reconsider separately," what is the appropriate supermajority: two-thirds; three-fifths, as provided in five state constitutions;<sup>41</sup> or perhaps another number? The words "reconsider separately" are too empty a vessel to fill with a specific numerical supermajority. The only textual anchor to provide any answer would be the general default rule that, unless otherwise provided, legislation passes if approved by a simple majority.<sup>42</sup> Thus, staying within the four corners of the Missouri Constitution, the text appears to provide only for simple majority overrides of line-item vetoes.

The textual issue becomes no clearer by reference to constitutional language in the five states that currently use simple majority overrides for line-item vetoes. In each of the five states, the state constitution expressly states that a simple majority of the legislature is required to override a line-item veto. In four of these states—Alabama, Arkansas, Kentucky, and Tennessee—simple majorities are needed to override all gubernatorial vetoes, line-item or general.<sup>43</sup> In Maine, the constitution makes the distinction proposed here, with a two-thirds supermajority override for general vetoes and a simple majority override for line-item vetoes.<sup>44</sup> Again, however, the Maine constitution is abundantly clear in

41. The constitutions of Delaware, Illinois, Maryland, Nebraska, and Ohio expressly provide for a three-fifths override of line-item vetoes. *See* 31 BOOK OF THE STATES, *supra* note 1, at 22-23.

42. *See* MO. CONST. art. III, §§ 30, 31 (providing that no bill shall become a law unless it is first "passed" by the house of representatives and the senate); *see also* HENRY M. ROBERTS, ROBERTS' RULES OF ORDER REVISED FOR DELIBERATIVE ASSEMBLIES, § 46, at 191 (1915).

43. *See* ALA. CONST. art. V, § 126 ("The governor shall have power to approve or disapprove any item or items of any appropriation bill . . . and the item or items disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of bills over the executive veto . . ."); ARK. CONST. art. VI, § 17 ("The Governor shall have power to disapprove any item or items of any bill making appropriation of money, . . . and the item or items of appropriations disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto."); KY. CONST. § 88 ("The Governor shall have the power to disapprove any part or parts of appropriation bills embracing distinct items, and the part or parts disapproved shall not become a law unless reconsidered and passed, as in case of a bill."); TENN. CONST. art. III, § 18 ("Any such items or parts of items so disapproved or reduced shall be restored to the bill in the original amount and become law if repassed by the General Assembly according to the rules and limitations prescribed for the passage of other bills over the executive veto."); *see also* ALA. CONST. art. V, § 125 (prescribing simple majority override for general gubernatorial vetoes); ARK. CONST. art. VI, § 15 (same); KY. CONST. § 88 (same); TENN. CONST. art. III, § 18 (same).

44. In 1995, Maine voters added a line-item veto to their state constitution. In relevant part, that provision states:

requiring this result. The constitutions of these other states provide no interpretive help for the Missouri situation because these constitutions simply do not contain any similar textual ambiguity.<sup>45</sup>

### *B. The Line-Item Veto in the State Constitutional Conventions*

Delegates to the 1943-44 state constitutional convention drafted the current Missouri Constitution.<sup>46</sup> There were two delegates from each of the state's thirty-four senatorial districts plus fifteen at large delegates.<sup>47</sup> Any delegate had the right to introduce a "proposal," a document analogous to a bill in a legislative proceeding. The proposal was then referred to one of twenty-six standing committees for review. Each committee issued a report to the full convention. The reports contained the committee's specific recommendations for the new constitution. If approved by the full convention, the Committee on Phraseology received each committee's report and improved the wording of the report without changing its substance. If the full convention approved the wording as revised by the Committee on Phraseology, the report was sent back to the

The dollar amounts in an appropriation or allocation that have been disapproved become law as revised by the Governor, unless passed over the Governor's veto by the Legislature as the dollar amounts originally appeared in the enacted bill as presented to the Governor; except that, notwithstanding any other provision of this Constitution for dollar amounts vetoed pursuant to this section, a majority of all the elected members in each House is sufficient to override the veto, and each dollar amount vetoed must be voted on separately to override the veto.

ME. CONST. art. IV, pt. III, § 2-A (emphasis added).

The general veto provision clearly requires a two-thirds supermajority to override. *See id.* § 2 (After a general veto, the bill is returned to the house in which it originated and if "2/3 of that House shall agree to pass it, it shall be sent together with the objections, to the other House, by which it shall be reconsidered, and, if approved by 2/3 of that House, it shall have the same effect as if it had been signed by the Governor.").

45. The previous two footnotes quote the constitutional texts from these other states. In four of the states, each state constitution provides that the legislature may override line-item vetoes according to the procedures for the override of general vetoes. The state constitution then specifies that the general veto override procedure is a simple majority. *See supra* note 43. In Maine, the line-item veto provision itself provides for simple majority override. *See supra* note 44.

46. Many of the details about the 1943-1944 convention are necessarily omitted from this short article. A general account of the workings of the 1943-1944 convention, the politics that led up to it, and the ratification process can be found at FAUST, *supra* note 25, *passim*.

47. The account of the procedures used at the 1943-1944 state constitutional convention is taken from Missouri State Archives, *Missouri Constitutional Convention 1943-1944, Preliminary Inventory* (Dec. 1981). Further information is available at FAUST, CONSTITUTION MAKING, *supra* note 25, at 12-23, 40-44.

committee for engrossment and incorporation into the draft constitution. After engrossment, the full convention then would vote a third time to approve the report.

The Missouri State Archives hold the official and complete records of the 1943-44 and previous state constitutional conventions. Primarily, these records consist of official committee reports, minutes and summaries of proceedings. The state constitutional records provide outcomes but offer little insight into the motives of convention participants. Nevertheless, the records do show the path the line-item veto took through the constitutional convention.

Both the Committee on the Executive Department and the Committee on State Finance<sup>48</sup> reported a line-item veto to the full constitutional convention.<sup>49</sup> The Committee on the Legislative Department did not include a line-item veto in its report although it did draft the provision covering the governor's general veto power.<sup>50</sup> This division of labor emphasizes that the convention delegates did not consider the line-item veto a legislative matter and conceptualized it as distinct from the governor's general veto power.

When the reports reached the Committee on Phraseology, the committee chose the line-item veto provision drafted by the Committee on State Finance.<sup>51</sup> There is no explanation in the convention records as to why the committee preferred one version to the other. With the stroke of a pen, the Committee on Phraseology's report crossed out manually the line-item veto provision of the Committee on the Executive Department. At the bottom of the page is an unsigned note, "This section transferred to Phraseology sections 3 and 5 of File No. 14."<sup>52</sup> File number 14 was the report of the Committee on State Finance. The current line-item veto reflects the Committee on State Finance's wording

48. The full name of this committee was the Committee on Finance (except Taxation)-Expenditures, Public Indebtedness and Restrictions Thereon. See FAUST, CONSTITUTION MAKING, *supra* note 25, at 24.

49. See REPORT OF THE COMMITTEE ON THE EXECUTIVE DEPARTMENT, 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 16), § 11 (on file at Missouri State Archives); REPORT OF THE COMMITTEE ON STATE FINANCE, 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 14), § 5 (on file at Missouri State Archives).

50. See REPORT OF THE COMMITTEE ON THE LEGISLATIVE DEPARTMENT, 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 17), § 34 (on file at Missouri State Archives).

51. See REPORT OF COMMITTEE ON PHRASEOLOGY, ARRANGEMENT & ENGROSSMENT 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 16), § 11 (on file at Missouri State Archives); REPORT OF COMMITTEE ON PHRASEOLOGY, ARRANGEMENT & ENGROSSMENT, 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 14), § 5 (on file at Missouri State Archives).

52. See REPORT OF COMMITTEE ON PHRASEOLOGY, ARRANGEMENT & ENGROSSMENT 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 16), § 11 (on file at Missouri State Archives).

with minor stylistic alterations by the Committee on Phraseology.<sup>53</sup> Neither version of the line-item veto contained specific language about override procedures.

According to the convention procedures, the delegates, as a whole, would have voted on the line-item veto provision three separate times. In floor debates, delegates made only a few passing references to the line-item veto. None of these references, however, explore the line-item veto in any detail and certainly do not offer any insights into the override procedure anticipated for line-item vetoes.

The convention records reveal that specific language authorizing a two-thirds supermajority override might have been considered at the committee level and rejected. A comprehensive proposal for the executive branch article included a line-item veto that specified:

If any bill presented to the governor contain several items of appropriations of money, he may object to one or more of such items while approving of the other portion of the bill. . . . [T]he items objected to shall be

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53. As it emerged from the Committee on Phraseology, the wording of the line-item veto is identical to that in the present-day constitution. See REPORT OF COMMITTEE ON PHRASEOLOGY, ARRANGEMENT & ENGROSSMENT, 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 14), § 5 (on file at Missouri State Archives). The version offered by the Committee on the Executive Department and rejected by the Committee on Phraseology provide:

Not later than thirty days after the convening of the general assembly in each biennial session, the governor shall submit a budget showing estimated available revenues of the state for the ensuing biennium and recommending a complete plan of expenditures. All recommended expenditures and appropriations shall be itemized together with an explanation and recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures. If any bill presented to the governor contain several items of appropriation of money, he may object to one or more items or portions of items while approving other portions of the bill. In such case, he shall append to the bill, at the time of signing it, a statement of the items, or portions of items, to which he objects, and the appropriations, or portions thereof, objected to shall not take effect. If the general assembly be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items or portions thereof objected to shall be separately reconsidered. If it be not in session, then he shall transmit the same within forty-five days to the office of the secretary of state, with his approval or reasons for disapproval. Nothing herein contained shall be construed as authorizing the governor to reduce any appropriation for free public school purposes, nor for the payment of principal and interest on the public debt.

REPORT OF THE COMMITTEE ON THE EXECUTIVE DEPARTMENT, 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (FILE NO. 16), § 11 (on file at Missouri State Archives).

separately reconsidered. If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law, notwithstanding the objections of the governor.<sup>54</sup>

The proposal's directive that the item be "separately reconsidered" is merely a syntactical switch of the current constitutional language that the item be "reconsidered separately." Yet, in the proposal, the phrase "separately reconsidered" did not include the concept of a supermajority override, or it would not have been necessary to specify the two-thirds requirement. Also, the proposal's line-item veto provision appeared just after its general veto provision, and, despite the proximity, the proposal did not assume that the general veto provision would apply.

The convention referred this proposal to the Committee on the Executive Department.<sup>55</sup> When that committee's report emerged, the phrase "separately reconsidered" appeared in its line-item veto provision, but the language specifying a supermajority override had disappeared.<sup>56</sup> One conclusion that could be drawn is that the committee considered and rejected a supermajority override of a line-item veto. Lacking records of the committee debates, the real reason for the change in language cannot be known with certainty. At the least, the history negates any argument that the convention delegates meant for the phrase "separately reconsidered" to automatically incorporate the general veto override procedures.

The 1943-44 delegates carried over the language for the item veto from the 1875 constitution.<sup>57</sup> The records of that earlier convention tell a story similar to

54. See Proposal No. 197, § 6 in *Proposals: The 1943-1944 Constitutional Convention of Missouri* (available at the Missouri State Archives).

55. See REPORT OF THE COMMITTEE ON THE EXECUTIVE DEPARTMENT, 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI (File No. 16), at 1 (reporting that Committee on the Executive Department had considered Proposal No. 197 and other proposals and offering a committee substitute) (on file at Missouri State Archives).

56. See *supra* note 53 (containing full text of line-item veto as reported by Committee on the Executive Department).

57. The line-item veto in the 1875 constitution read:

If any bill presented to the Governor contains several items of appropriation of money, he may object to one or more items while approving other portions of the bill. In such case, he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and the appropriations so objected to shall not take effect. If the General Assembly be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered

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MO. CONST. OF 1875, art. V, § 13.

A leading account of the 1943-1944 constitutional convention simply notes: "The governor's item veto and his power to reduce items were retained." See FAUST, CONSTITUTION MAKING, *supra* note 25, at 88. The remainder of the book makes no other



that of the line-item veto proposal in the 1943-44 convention. An early draft of the 1875 constitution contained a line-item veto with a specific requirement of a two-thirds override.<sup>58</sup> In this early draft, the line-item veto was coupled with the general veto provision which also required a two-thirds override. Later in the 1875 convention, delegates separated the line-item veto into its own section and removed the specific requirement of a supermajority override.<sup>59</sup> In its place was the cryptic command that the line-item veto be "separately reconsidered." From 1875, through 1943, to the present, the question remains: What was meant by "separately reconsidered?"

Drawing conclusions from the history of any deliberative body is tricky business. We can no more pretend to know the intent of Missouri's constitutional conventions than we can the present-day legislature. The delegates to the constitutional convention cast their votes for many different reasons, making the question of collective "intent" a problematic inquiry. Indeed, it probably is certain that few of the delegates actually pondered the specifics of the line-item veto. More to the point, because the 1944 voters of the state of Missouri ratified the constitution, any historical inquiry would have to include their state of mind as well, and it is likely that few of them considered the line-item veto in casting their vote. Therefore, one must be careful not to oversell the historical evidence.

Nonetheless, useful statements still can be made. There is evidence that both the 1875 and 1943-44 constitutional conventions considered and rejected specific language that would have required supermajority overrides. In its place, the delegates left the ambiguous command that vetoed items be "reconsidered separately." From this evidence, one inference is that the delegates intended "reconsidered separately" to mean simple majority overrides. At the least, however, the delegates certainly were not of one mind that "reconsidered separately" necessarily included the supermajority procedures of the general veto.

### C. Purpose

The line-item veto's purpose is the most compelling reason to adopt simple majority overrides. As discussed above, the constitution's text certainly does not command more and indeed suggests a simple majority rule. History provides some evidence to support a textual reading of simple majority overrides, although history's lessons are not necessarily compelling. The structure of the

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reference to the item veto.

58. See 2 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 149 (Isidor Loeb & Floyd C. Shoemaker eds., 1932) [hereinafter DEBATES OF 1875]. The executive branch proposal in the 1943-1944 convention, discussed earlier, was virtually identical to this early draft of the 1875 constitution.

59. See 12 DEBATES OF 1875, *supra* note 58, at 367.

line-item veto, however, tips the balance and completes the case for simple majority overrides. To understand how the purpose of the line-item veto leads to majority overrides, one first must contrast the line-item veto with the executive's general veto power.

The executive veto has British roots, originating with the power of the monarch to disapprove legislation. In the colonies, royal governors exercised the veto power to control local legislative bodies.<sup>60</sup> Given its roots, early federalists were deeply suspicious of the executive veto. At the federal constitutional convention, delegates rejected an absolute veto for the chief executive in favor of a veto that could be overridden by a two-thirds vote in Congress.<sup>61</sup>

James Madison defended the veto as a check on the temporary passions of an elected legislature.<sup>62</sup> Madison and his followers favored a republic dominated by an elected legislature, but they also saw dangers in this governmental form. Majorities could coalesce quickly around particular issues—"factions" in the Madisonian vernacular—and oppress the minority. These majorities would disappear quickly and others would appear in their place.<sup>63</sup> The Madisonians feared the federal legislature would quickly degenerate into a never-ending cycle of wealth distribution and redistribution.

Modern public-choice theory has recast these Madisonian ideas and arrived at the same conclusion. Public-choice theory conceptualizes legislation as a package of costs and benefits that may be "purchased" in the legislature. On any particular legislative issue, the most stable coalition is one more vote than is necessary to win, typically one vote more than a simple majority.<sup>64</sup> Because members of the coalition should prefer to exclude unnecessary members and capture the benefits of the legislation for themselves, any votes unnecessary to success threaten to destabilize an otherwise winning coalition.<sup>65</sup> This theory of "minimum winning coalitions" does not defend legislative majorities as socially positive but, like the Madisonians, sees them as possibly no more than a series of wealth redistributions.

Whether the problem is conceptualized in Madisonian or public-choice terms, the executive veto provides a partial solution. Because the executive veto

60. A review of the veto's historical development can be found at EDWARD C. MASON, *THE VETO POWER: ITS ORIGIN, DEVELOPMENT, AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES (1789-1889)*, at §§ 1-11 (1891).

61. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION*, 256-58 (1996).

62. See *THE FEDERALIST* NO. 51 (James Madison).

63. A general outline of Madison's views can be found at Chapter III of RAKOVE, *supra* note 61. Of course, Madison's classic statement on factions can be found at *THE FEDERALIST* NO. 10 and, to a lesser extent, at *THE FEDERALIST* NO. 51.

64. See WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962); see also Stearns, *supra* note 11, at 408-09 (discussing Riker's theory of minimum winning coalitions).

65. See RIKER, *supra* note 64, at 43-46.

requires a supermajority override, it can help to assure more than minimum winning coalitions. The executive veto works with the other legislative chokepoints (e.g., committee chairs, procedural rules) to require strong support of successful legislation. This, in turn, ensures that legislation reflects more than temporary majority passions. Defended on these grounds, the supermajority override for the general executive veto makes sense. A supermajority is a good idea because, by definition, it is an indication of more than fleeting majority support. Moreover, the threat of the general veto allows the executive to participate and bargain in the legislative process. The actual exercise of the general veto often is unnecessary because the mere possibility of its use causes supermajority coalitions to form in the first instance.

The line-item veto shares a name with the general veto but little else. The unfortunate similarity in terminology masks an important difference in the two procedures. The line-item veto would be conceptualized better as a "call for majority support."

In the forty-four states where it exists, and at the federal level, the line-item veto is a tool of fiscal responsibility. Although some states permit other uses of a line-item veto, it is aimed at appropriations bills where the executive is expected to use the line-item veto to excise pork-barrel riders.<sup>66</sup> The legislature is believed to lack the discipline otherwise necessary to make this occur. The fear is that vote-trading or logrolling will occur between individual legislators, leading to unnecessary and wasteful spending. In this view of the world, legislators often vote for appropriations bills in a compromise with other legislators. The legislators trade votes, pork for pork. The pork-barrel items find their way into the appropriations bill not because a majority of the legislature supports them on the merits but because a majority of the legislature is willing to tolerate the pork as a compromise to obtain other benefits.

The line-item veto responds to these concerns by allowing the executive to veto the offending items.<sup>67</sup> Without a line-item veto, the legislature controls the packaging of legislation.<sup>68</sup> Compromise often occurs because legislators package together legislation that appeals to different interests and vote for the package as a whole. The legislature then presents the package to the executive, who has the choice of accepting or rejecting the legislation in its entirety. Essentially, the line-item veto allows the executive to unpackage the legislation and to undo the legislative compromises that lie within.

The line-item veto's proponents argue that the executive's power to unpackage legislation is especially needed for appropriations measures. The

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66. In the 44 states with a line-item veto, it is limited to budgetary, appropriations, and other fiscal matters. See 31 BOOK OF THE STATES, *supra* note 6, at 22-23.

67. See Strouse, *supra* note 17, at 126.

68. In many state jurisdictions, rules requiring bills to embrace only a single subject work with the line-item veto to prevent unnecessary riders. See, e.g., MO. CONST. art. III, § 23; see also Briffault, *supra* note 17, at 1177-79 (discussing how single-subject rules work with line-item veto provisions to prevent logrolling).

concerns are that a home district water project, buried in the back pages of a lengthy bill, is enough to sway a legislator's vote in favor of an entire appropriations measure. A \$1 million water project here and a \$1 million water project there, and pretty soon some real money is involved.<sup>69</sup> By exercising the line-item veto, the executive is seen as encouraging fiscal restraint and striking such wasteful spending. Even more than the actual exercise of the line-item veto, the executive's threat of a line-item veto ensures that wasteful measures are not placed in appropriations bills in the first instance.

Thus, in its classical conception, the line-item veto increases the executive's power to interfere in the legislative bargaining process. It intrudes into the traditional legislative prerogative to package legislation for presentation to the executive. Whether this intrusion is worth its benefits is an empirical question. Because a legislature represents diverse constituencies with widely varying interests, bargaining and compromise must occur for legislation to emerge. Although the executive's authority to approve legislation allows her to intrude in the bargaining and compromise, the question is how much participation is optimal. The legislative branch, with its numerous points for popular input, is usually better situated to strike the bargain most appropriate to the affected citizenry.

A supermajority override exacerbates the executive's opportunity for legislative intrusion and unnecessarily aggrandizes the executive's power beyond that necessary to achieve the item veto's purpose. A show of a simple majority support demonstrates that a vetoed item can stand on its own. Although the majority support might itself be the result of vote trading—*i.e.*, "I'll vote for your override, if you'll vote for mine"—this would be nothing more than normal legislative compromise. The line-item veto should identify appropriations items that could not get majority support even with this type of routine legislative bargaining. For these reasons, the line-item veto can better be characterized as "a call for majority support" from the legislature.

The Madisonian defense of the general veto also does not justify supermajority overrides of line-item vetoes. It is likely that the Madisonian fear—fleeting majority factions—can form around appropriations measures as easily as other types of legislation. This fear however, can be addressed by the executive's general power to veto an entire appropriations bill. Allowing the executive to require supermajority support for each item of an appropriations bill might better address the Madisonian fear, but it comes with a price. A line-item veto gives the executive the ability to call for *super*majority support but increases the executive's already troublesome ability to interfere in the legislative bargaining and packaging of bills. There is no reason to believe that the executive branch will wield such increased bargaining leverage better than

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69. "A billion here, a billion there, and pretty soon you're talking about real money," is attributed to Senator Everett McKinley Dirksen in JOHN BARTLETT, *FAMILIAR QUOTATIONS*, 694 (Justin Kaplan ed., 16th ed. 1992).

the legislature. One person's pork is another person's social necessity. In other words, there is no reason to expect the executive can make this distinction better than the legislature.<sup>70</sup> The inherent dangers undermine a Madisonian justification for supermajority overrides of line-item vetoes.

Examining the purpose of the line-item veto makes a compelling case that it ought to be subject to simple majority override. The text of the Missouri Constitution suggests this result, which also is consistent with the text's history. To the extent other jurisdictions adopt a line-item veto, they too should be subject to simple majority overrides. Five states have explicit language providing for simple majority overrides of line-item vetoes. In four of those states, the legislature has the power to override all gubernatorial vetoes by a simple majority. The experience of Maine, the fifth state, is most instructive. The Maine constitution explicitly provides for two-thirds override of general vetoes and simple majority overrides of line-item vetoes.<sup>71</sup> When Maine voters adopted the line-item veto in 1995, popular debate included the concern that the line-item veto enhanced gubernatorial power at the expense of the more democratically responsive state legislature. The answer was that simple majority override would allay the concerns of unnecessary executive power.<sup>72</sup> Thus, in a recent context, the popular debate seized on the intuition of the ideas expressed here. The concerns of unnecessary aggrandizement of executive power are not just abstract academic theory but the stuff of popular political debate.

#### IV. OBSERVATIONS

The better reading of Missouri law concludes that line-item vetoes are subject to simple majority overrides. The constitutional text suggests this result and certainly provides no procedure specifying a supermajority override.

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70. See Devins, *supra* note 14, at 1619 (arguing against a federal line-item veto because, inter alia, "[a]n energetic president, through the threatened use of his veto power, may take advantage of high stakes omnibus legislation to enhance his bargaining position.").

71. See ME. CONST. art. IV, pt. III, §§ 2, 2-A; see also Doug Kesseli, *Line Item Veto Gets OK, Mainers Protect Retirement Fund*, BANGOR DAILY NEWS, Nov. 8, 1995, available in 1995 WL 10898438.

72. For example, one editorial writer defended the Maine proposal as "responsible" and argued that the simple majority override "is an adequate check against the governor gaining too much power through the veto." See *Yes on Question 7*, BANGOR DAILY NEWS, Nov. 1, 1995, available in 1995 WL 10897938. Similarly, Maine Governor Angus King cited the simple majority override as indicative of the line-item veto's "moderate" approach and commented that, with the simple majority override, "[t]he Governor can single out excessive spending and then throw it back to the legislature and say, 'Are you sure you want to do this.'" See John Hale, *Mainers to Decide on Line-Item Veto, King Sees Option as Tool to Stem Expenses*, BANGOR DAILY NEWS, Oct. 14, 1995, available in 1995 WL 10896771.

History is more ambiguous but is certainly consistent with simple majority overrides. The records of the state constitutional conventions reveal that the delegates did not assume the current constitutional language compelled supermajority overrides. Combined with the line-item veto's purpose, the simple majority result becomes compelling. Given the evidence, it is possible that this result was commonly accepted in the Missouri legal culture at the time of the line-item veto's 1875 adoption, and the rule has permutated with the passage of time.

The supermajority rule certainly has become ingrained in modern Missouri legal culture. Custom and practice are the strongest supports for continuing supermajority overrides, but when text, history, and purpose point in the opposite direction, custom and practice are a weak foundation upon which to base a legal rule.

If Missouri is to adopt simple majority overrides, the most likely source will be a court decision. A well-positioned and influential legislator could initiate an attempt to override a line-item veto. If the override attempt gained majority support, but less than two-thirds, a legislator or potential recipient of the vetoed funds could bring suit to enforce the appropriation. The battle would play out in the courts within the context of a charged political debate. The merits of the simple versus supermajority debate would be inextricably tied to the underlying dispute and likely lost in the shuffle. For example, the abortion debate swamped a 1997 dispute over the governor's constitutional authority to line-item veto substantive language in an appropriations bill that would have barred Planned Parenthood from receiving state funds because it provided abortions.<sup>73</sup>

Regardless of whether simple majority overrides become the rule in Missouri, it would be best if the debate did not play out within a particular political context. Rather, state leaders should draft a constitutional amendment with explicit language clarifying the line-item veto override procedure. The best result would be an amendment authorizing simple majority overrides. The worst result would be a continuation of the current legal fog.

An interesting question is how 123 years of Missouri history could pass without the fog lifting. Although a complete answer is beyond the scope of this Article, I suspect we have arrived at this situation partly because of the dearth of formal legal training in state constitutional law lawyers receive. My observation is not based on hard empirical data but on what I suspect is common experience among many lawyers. In law school, federal constitutional law receives vast amounts of attention, ranging from first-year courses in civil and criminal procedure, through a survey course often called Constitutional Law, and to upper-level electives in free speech and civil liberties. In contrast, state constitutional law might get a passing reference, perhaps in an upper-level elective.<sup>74</sup> Continuing legal education courses seem rarely to cover state

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73. See *supra* notes 8-9 and accompanying text.

74. Perhaps the trend is starting to change. For example, beginning with the class

constitutional law. Perhaps this Article contains a hidden lesson for the legal profession to take state constitutional law more seriously.

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of 1999 the University of Missouri-Columbia School of Law has reinstated a required course in legislation. The course includes a review of legislative procedures and the state constitutional provisions governing the legislative process. An elective course in state constitutional law also will be offered. The Author's anecdotal evidence suggests other law schools also have returned to required courses in legislation or statutory interpretation.