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**Eliminating Earmarks: Why the Congressional Line Item Vote Can Succeed Where the Presidential Line Item Veto Failed**

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ELIMINATING EARMARKS: WHY THE CONGRESSIONAL LINE ITEM VOTE CAN SUCCEED WHERE THE PRESIDENTIAL LINE ITEM VETO FAILED

Jason Iuliano*

INTRODUCTION .................................................................................................................. 948

I. THE CASE AGAINST EARMARKS ................................................................................. 952
   A. The Congressional Addiction to Earmarks ......................................................... 952
   B. The Need for Congressional Transparency ...................................................... 957

II. LINE ITEM VETO: PAST AND PRESENT .................................................................. 958
   A. Line Item Veto Act of 1996 ............................................................................... 959
   B. Congressional Accountability and Line Item Veto Act of 2009 ....................... 961

III. PRESIDENTIAL AND GUBERNATORIAL USE OF THE LINE ITEM VETO ........... 963
   A. The Federal Experiment ..................................................................................... 963
   B. The State Experience ......................................................................................... 969
      1. Failure to Reduce Expenditures ........................................................................ 970
      2. Use as a Partisan Weapon ............................................................................... 972

IV. CONGRESS: ADVANCING THE NATIONAL INTEREST ............................................ 974
   A. Presidential Parochiality ..................................................................................... 975
   B. Misplaced Congressional Support of the Line Item Veto ................................. 979

V. THE CONGRESSIONAL LINE ITEM VOTE ............................................................... 981
   A. The Mechanics .................................................................................................... 982
   B. An Example ....................................................................................................... 983
   C. Administrability .................................................................................................. 986
   D. The Median Legislator ...................................................................................... 989

CONCLUSION .................................................................................................................. 990

Congressional earmarking is an issue of growing concern in the United States. Although, at present, it only accounts for a small percentage of federal expenditures, recent trends indicate that such pork-barrel spending will soon be a significant contributor to the national debt. The federal government must work to control this problem before it becomes unmanageable. One recent attempt to reduce the number of earmarks was the Line Item Veto Act of 1996. However, on both constitutional grounds and in practice, this measure failed. Instead of acknowledging these shortcomings and crafting innovative solutions,

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lawmakers have repeatedly introduced bills that would once again grant the president the line item veto power. This Article, in contrast, develops an entirely new process — the congressional line item vote. This reform forces House members to vote on individual provisions of a bill. If implemented, the congressional line item vote would decrease the deficit, eliminate earmarks, reduce log-rolling, and increase congressional accountability.

INTRODUCTION

Seventeen trillion dollars. That is how high the United States national debt will be in 2019. Over the next ten years, America’s debt will more than triple, growing to 82% of GDP. Per capita, it will climb to $53,590. Worse yet, these estimates represent the best-case scenario.

Given these dire projections, it is no wonder that some members of Congress are demanding spending cuts. Their fear of a crushing debt, although justified, is certainly not new. Thomas Jefferson warned of the dangers of running large deficits when he wrote that “the principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale.” Regrettably, over the past twenty-five years, Congress has done little to maintain a balanced budget and prevent Jefferson’s bleak vision from occurring.

One rare attempt to promote fiscal responsibility was the Line Item Veto Act of 1996. Although well-intentioned, certain flaws, such as its dangerous shift in lawmaking power from Congress to the President, made the Act destined

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2 See id.
4 See CONG. BUDGET OFFICE, supra note 1, at 28 (projecting low inflation, GDP growth of 4.1% in 2010 and 2011, and a maximum unemployment rate of 9.4%, a number which has already been surpassed).
8 Pub. L. No. 104-130, 110 Stat. 1200 (This Act granted the President the power to cancel specific provisions of an appropriations bill without vetoing the entire bill. Like the regular veto, Congress could override the President’s decision with a two-thirds vote in both houses.).
to fail. Ultimately, in *Clinton v. City of New York*, the Supreme Court restored the balance of power between the legislature and the executive.\(^9\) Despite the Court’s finding that the Line Item Veto Act is unconstitutional, members of Congress have repeatedly introduced legislation that would once again give the President the line item veto power.\(^10\)

Supporters contend that these measures will eliminate pork-barrel spending and balance the budget.\(^11\) While minimizing earmarks and controlling the budget are worthy goals, it is idealistic to expect the President to achieve them through use of the line item veto. At both the state and federal levels, history has shown that this tool has no effect on the deficit and is generally used in a partisan manner.\(^12\)

The latest push for a line item veto came after the passage of two of the largest bills in U.S. history: the $787 billion\(^13\) American Recovery and Reinvestment Act of 2009\(^14\) and the $410 billion budget,\(^15\) the latter of which contained nearly 9,000 earmarks totaling $7.7 billion.\(^16\) Although something must be done to reduce this waste, a line item veto is not the solution. Given the President’s enthusiastic support for these bills,\(^17\) it is doubtful that he would have aggressively used the item veto to eliminate earmarks. In fact, if state governors’ use of the power is any indication, most presidents would use the line item veto as a sword against the opposition party.\(^18\) Instead of reducing pork-barrel spending, the line item veto would actually make Congress more fiscally irresponsible.

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\(^11\) H.R. Conf. Rep. 104-491, at 15 (1996) (Describing the line item veto as a “measure to ensure greater fiscal accountability in Washington . . . by enhancing the President's ability to eliminate wasteful spending and to cancel special tax breaks.”).

\(^12\) See infra Part III for a review of item veto use at the state and federal levels.


\(^16\) Id.

\(^17\) See Barack Obama, *The Action Americans Need*, THE WASH. POST, Feb. 5, 2009, at A17 (warning that without the stimulus, “we may not be able to reverse” the economic decline).

\(^18\) See infra Part III.
The most recent bill attempting to grant the President a type of line item veto was introduced by Senator John McCain, Senator Russ Feingold, and Representative Paul Ryan.\(^19\) Although this new bill skirts the technical holding in Clinton, its purpose is the same as the Line Item Veto Act of 1996 — allow the President to reject specific provisions that were already approved by both chambers of Congress.\(^20\)

In addition to the possibility of being exploited for partisan gains, all line item veto proposals have one serious limitation. They can, with few exceptions, only be used to strike spending in appropriations bills,\(^21\) giving the President no power over the largest part of the budget, entitlement programs.\(^22\) The line item veto also fails to allow the President to block congressional riders\(^23\) that do not create new spending but nonetheless undermine the national interest. Given the recent increase in the number of such riders,\(^24\) any proposal should address this concern.

One viable solution that overcomes the line item veto’s flaws is the congressional line item vote. Under this system, all bills would be disaggregated into their constituent parts before any vote in the House of Representatives. House members would cast an up or down vote on each discrete provision. Any items not earning majority approval would be removed from the bill. The House would then hold another round of voting on the remaining provisions. Once again, any sections that fail would be struck from the bill, and a new vote would take place. This process would continue until every provision in a given round passed or until all the line items failed. The resulting legislation would then be forwarded to the Senate, and each senator would cast one vote for or against the whole package. Finally, the President would accept or veto the bill in its entirety.

The congressional line item vote has the potential to reduce earmarks and riders while also avoiding the problems found in a presidential line item veto. First, it does not distort the delicate balance of power between the legisla-


\(^{20}\) There are some differences between a traditional line item veto and expedited rescission that make the latter more inefficient. See infra Part II for a detailed exploration.


\(^{23}\) In an effort to secure passage for their pet projects, lawmakers often attach them to popular, unrelated bills. These additional, and generally controversial, provisions are known as riders.

\(^{24}\) See Peter C. List, Environmental Ethics and Forestry 231 (2000) (“Congressional riders are being used ever more frequently to avoid judicial review by concerned publics. . . .”).
ture and the executive. Congress retains all lawmaking power, and the President is limited to accepting or vetoing the final legislative bundle.25

Second, the line item vote will not be limited to appropriations bills but rather will apply to all proposed legislation. In addition to reducing pork, this will discourage members of Congress from attaching unrelated riders.26

Third, and perhaps most importantly, the line item vote vests responsibility in individual members of Congress. By requiring a separate vote on each measure, this system forces lawmakers to actually read and understand their legislation.27 Additionally, these politicians will no longer be able to claim that they were forced to vote for a $223 million “Bridge to Nowhere” because it was part of a necessary appropriations bill. Under the reformed system, lawmakers can preserve the integrity of their legislation by voting to strike offending provisions.

To set the framework for this discussion, Part I will recount the history of earmarks in the United States and explore the American people’s desire for governmental transparency. This section will find that the lawmaking process must be changed to eliminate earmarks and increase congressional accountability. Part II will examine the Line Item Veto Act of 1996 — one measure that attempted, but failed, to solve the pork-barrel spending problem. This section will focus on the flaws that led the Supreme Court to find the 1996 line item veto unconstitutional. Next, the Article will compare the original Act to the 2009 proposal and determine that, although the new bill sidesteps the narrow

25 George Washington appreciated this necessary balance when he noted that the President must “either approve all the parts of a Bill, or reject it in toto.” Clinton v. City of N.Y., 524 U.S. 417, 440 (1998) (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)).

26 See Jeffrey H. Birnbaum, Earmark — It’s $$$, Not Body Art, THE WASH. POST, Feb. 3, 2006, at A17 (noting that “[e]armarks are regularly slipped into legislation at the very end of the process”).

27 See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 1004 (1989) (noting that when large appropriations bills are passed, members of the Appropriations Committee are likely the only ones who know what the bill contains).

28 See H.R. 3058, 109th Cong. (2006) (passing the Senate by roll call vote with 93 Ayes and 1 Nay). For a history of the “Bridge to Nowhere,” see Associated Press, Alaska Abandons ‘Bridge to Nowhere’ Project, FOX NEWS, Sept. 22, 2007, http://www.foxnews.com/story/0,2933,297698,00.html (The “Bridge to Nowhere” refers to the proposed Gravina Island Bridge in Alaska. It sparked a national controversy in 2005, serving as a symbol of congressional fiscal irresponsibility. An earmark in the 2006 National Appropriations Bill was set to provide the funding for this bridge. At a cost of more than $200 million to federal taxpayers, the bridge would connect the town of Ketchikan (population 8,900) to the nearby airport on Gravina Island (population 50). The project was introduced in response to residents’ complaints about having to wait fifteen minutes for the ferry ride. The earmark’s primary congressional supporters were Senator Ted Stevens and Representative Don Young.); Senator Tom Coburn introduced an amendment that would divert the “Bridge to Nowhere” funds from Alaska to post-Hurricane Katrina New Orleans. This amendment was defeated 82–15. U.S. Senate Roll Call Votes 109th Congress — 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00262 (last visited Mar. 9, 2010).
holding in *Clinton*, it is unconstitutional on other grounds. Part III will then illustrate why, even if some version of the line item veto passes constitutional muster, it is an undesirable tool. First, by reviewing presidential and gubernatorial use of the line item veto, it will show that the line item veto fails to eliminate earmarks or reduce the deficit. Then, by examining state governors’ partisan use of the line item veto, this section will explain how conferring such a significant power on the President undermines democratic legitimacy.

In an effort to determine which branch should be charged with remedying the problem of earmarks, Part IV will explore why Congress is better suited than the President at crafting legislation that advances the national interest. Finally, in Part V, this paper will argue that a congressional line item vote is the best method for eliminating earmarks, decreasing the deficit, reducing riders, and increasing congressional accountability. Because the congressional line item vote holds legislators accountable for each provision in every bill, it will force members of Congress to place the preferences of their constituents first.

**I. THE CASE AGAINST EARMARKS**

**A. *The Congressional Addiction to Earmarks***

Although many lawmakers want the public to believe that pork-barrel spending is part of the American political tradition, it is actually a recent phenomenon. The Founding Fathers certainly did not favor this practice. In fact, for much of America’s history, politicians believed that earmarks were unconstitutional.

The first national controversy involving pork did not occur until 1817, more than forty years after this country’s birth. During that year’s congressional session, John C. Calhoun tried to appropriate federal funds for local interests. His proposal, the Bonus Bill of 1817, attempted to use the earnings bonus from the Second Bank of the United States to fund the construction of a highway that would lead westward. Even though the highway would benefit several states, President James Madison promptly vetoed the bill, denouncing it and earmarks,

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29. See Julie Kesselman, *A History of Earmarks (or Rather, the Lack Thereof)*, AMERICANS FOR PROSPERITY, http://www.americansforprosperity.org/history-earmarks-or-rather-lack-thereof (last visited Mar. 9, 2010) (Senate Majority Leader Harry Reid said that earmarkng “has been going on since we were a country,” and former Speaker of the House Dennis Hastert described earmarks as “what members do.”).


31. See id. (“There is no lost Article of the Constitution or missing Federalist Paper that gives Members of Congress a blank check to fund any project they desire.”).

32. See Kesselman, *supra* note 29.
in general, as unconstitutional expansions of power under the Necessary and Proper Clause:

Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them — the terms “common defense and general welfare” embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress.\(^{33}\)

If James Madison thought that earmarks were unconstitutional, there must be some merit to the argument. After all, who could better interpret the Constitution than its principal author?

It turns out that Madison was not alone in his belief. In 1830, President Andrew Jackson took a stand against earmarks by vetoing a bill that would fund the construction of a road in Kentucky.\(^{34}\) Like Madison, he opposed earmarks on the ground that it would be unconstitutional to use federal money to further purely local interests.\(^{35}\)

\(^{33}\) James Madison, *Message of the President, Transmitting to the House of Representatives his Objections to the [above] Bank Bonus Bill, in The Debates on the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787: Vol. IV 468, 468–69* (Jonathan Elliot ed. 1891). President Madison also emphasized the following reasons for the earmark's unconstitutionality:

> I am constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States to return it with that objection to the House of Representatives, in which it originated. The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation with the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.

*Id.*

\(^{34}\) See *Maysville Road Veto*, *BLACKWELL ONLINE*, http://www.blackwellreference.com/public/lucene?d=g9781577180999_chunk_g9781577180999.915.ss1-96 (last visited Feb. 8, 2010) (“[T]he veto was in the spirit of strict constructionism and the tradition of the veto of the Bonus Bill of 1817. The veto strengthened the principle that federal funds should only be used for interstate transportation projects or harbors serving foreign trade, not intrastate public works.”).

\(^{35}\) See Andrew Jackson, *Veto of the Maysville Road Bill (1830) [selections]*, in *Classics of American Political and Constitutional Thought: Origins through the Civil War 894, 895* (Scott J. Hammond, Kevin R. Hardwick, & Howard L. Lubert eds., 2007) (“[S]uch grants have always been professedly under the control of the general principle that the works which might be thus aided should be ‘of a general, not local, national, nor State,’ character. A disregard
Over time, the federal government became less committed to this strict constructionist interpretation of the Constitution. However, even as recently as 1970, earmarks were rare. It was not until late in that decade that the “modern practice of lobbying for earmarks began.” 36 Over the past thirty years, pork has become a staple in the political diet, and since 1991, the number of earmarks has increased more than tenfold. 37 For the 2009 fiscal year, there were more than 11,000 earmarks totaling $19.9 billion. 38

Many people have argued that the amount of pork-barrel spending in the budget is trivial. 39 They claim that, because earmarks account for such a small percentage of federal expenditures, removing all of them would not even begin to dent the budget. 40

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of this distinction would of necessity lead to the subversion of the federal system.”). More than half a century later, President Grover Cleveland held a similar view of earmarks.

Cleveland vigorously pursued a policy barring special favors to any economic group. Vetoing a bill to appropriate $10,000 to distribute seed grain among drought-stricken farmers in Texas, he wrote: “Federal aid in such cases encourages the expectation of paternal care on the part of the Government and weakens the sturdiness of our national character . . . .”


39 See, e.g., Robert C. Byrd, The Control of the Purse and the Line Item Veto Act, 35 HARV. J. ON LEGIS. 297, 315 (1998) (claiming that “[e]ven if this ‘pork’ could be identified and surgically removed by some form of budgetary liposuction, federal spending levels would be virtually unchanged”) (internal citations omitted).

40 Mandatory Spending Has Increased Five Times Faster Than Discretionary Spending, THE HERITAGE FOUND., http://www.heritage.org/research/features/budgetchartbook/mandatory-spending-increased-faster-than-discretionary-spending.aspx (last visited Mar. 9, 2010). Federal spending is split into three categories: (1) mandatory spending (including entitlement programs such as Medicare, Medicaid, and Social Security), (2) interest on the national debt, and (3) discre-
Even today, this argument has some merit. The approximately twenty billion dollars in earmarks during 2009 is only one-half of one percent of federal spending.\(^4\) However, Americans must be forward-looking in their assessment of earmarks. Although pork-barrel spending currently represents a small percentage of total expenditures, its elimination is nonetheless a desirable goal.

By ending the earmarking problem now, the government can control the situation before it becomes unmanageable. Because the earmarking process has started a cycle that feeds into itself, the recent surge in the amount of pork-barrel spending is troubling. As Congress increases the number of earmarks, more lobbyists come to ask for favors. With more lobbyists requesting special accommodations, lawmakers feel the need to hand out even more earmarks.\(^5\) The recent trend indicates that this cycle will continue and pork will soon become a significant portion of government expenditures.

However, even if pork-barrel spending fails to continue its exponential climb, small excesses will still add up in the long run. Given the projected increases in the national debt\(^6\) and the ever-growing interest payments,\(^7\) trimming the margins can lead to substantial budgetary savings. By cutting all earmarks, the government can save trillions of dollars over the next fifty years.\(^8\)

Noting this problem, some members of Congress attempted to minimize earmarks by granting the President a line item veto. For this tool to have been effective, the President would have had to play the role of an overbearing parent and catch every lawmaker's untoward decisions. A more efficient change would be to reform the bill-making process. If legislators are forced to vote on individual measures — as the congressional line item vote provides — they will have an incentive to support only meritorious provisions. Powerful senators and representatives will no longer be able to attach their pet projects to must-pass legislation.\(^9\) This increased accountability will force lawmakers to answer for their back room deals to support bills that do not benefit their constituents.

\(^4\) See CONG. BUDGET OFFICE, supra note 1, at 2 (CBO's baseline budget for 2009 is $3.9 trillion.).


\(^6\) See supra notes 1–4 and accompanying text.

\(^7\) See Treasury Direct, Interest Expense on the Debt Outstanding, Mar. 3, 2010, http://www.treasurydirect.gov/govt/reports/ir/ir_expense.htm (showing that interest payments on the U.S. debt have more than doubled since 1988).

\(^8\) This figure modestly assumes that both the interest rate on the national debt and the annual spending on earmarks remain at current levels throughout the entire period.

\(^9\) See Taxpayers for Common Sense, supra note 38 (finding that “less populous states represented by powerful Senate appropriators dominate the per capita state earmark lists. An interesting trend that has developed recently is less powerful House lawmakers jumping on the
In 2007, Congress attempted to bring some transparency to the process by passing the Honest Leadership and Open Government Act.\(^\text{37}\) It altered the system by requiring all members of Congress to disclose their earmark requests. Unfortunately, this type of transparency does not translate to accountability.\(^\text{48}\)

By focusing the spotlight on the legislators who request earmarks, the Act is perversely creating a system that rewards this behavior. Lawmakers routinely brag about their earmarking prowess,\(^\text{49}\) and citizens prefer to be represented by politicians who can bring home the pork.\(^\text{50}\) Reasonably, however, voters dislike when pork is funneled to other districts at their expense.

Reporting earmarks in this manner only serves to anger citizens outside of the pork-laden districts. On the other hand, the voters inside those districts — and the only people who can remove these “earmark kings”\(^\text{51}\) from office — will be more likely to support their senators and representatives.

Essentially, earmarking is an addictive drug for politicians. Once legislators try a little bit, they keep coming back for more. However, if a mechanism can be instituted that cuts out the enablers, the politicians will not be able to get their fix. In this context, the enablers are other members of Congress who provide the necessary votes for the earmarks to become law. The real emphasis needs to be placed on these politicians. If the American people see that the people representing them are supporting pork in other districts, they will respond by voting these enablers out of office. As it stands, the Honest Leadership and Open Government Act of 2007 is a clever misdirect that provides no real transparency.\(^\text{52}\)

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\(^{48}\) See Taxpayers for Common Sense, supra note 38 (“[T]ransparency on its own does not guarantee accountability or wise expenditure of limited tax dollars.”).


\(^{50}\) See id. (Rep. Murtha won landslide victories in recent election. “Part of his support, no doubt, is self-interest: Voters know that no freshman challenger can match Mr. Murtha’s ability to bring home bacon.”).


\(^{52}\) For a discussion of how many members of Congress fail to follow the law and report their earmarks, see Ryan Grimm, Seventy-One Lawmakers Fail to Disclose Earmarks by Deadline, THE HUFFINGTON POST, Apr. 7, 2009, http://www.huffingtonpost.com/2009/04/07/71-lawmakers-fail-to-disc_n_184150.html; Paul Singer, House Orders up Three Elite Jets, ROLL CALL, Aug. 5, 2009, http://www.rollcall.com/media/37552-1.html (The House approved nearly $200 million to buy aircraft for use by representatives, but because it “viewed the additional aircraft as an expansion of an existing Defense Department program, it did not treat the money for two more planes as an
This leads to another reason that pork should be eliminated. Earmarking encourages people outside of those pork-laden districts to lose faith in the system and feel like they are not getting their fair share. As the American people's distrust of Congress rises, they begin to see the entire institution as corrupt. This sentiment manifests itself in low congressional approval ratings. Ultimately, Americans' lack of faith in Congress stymies legislative action.

Politicians should be doing more than wasting federal money in an effort to further their own self-interests. Since the system is fundamentally flawed and promotes this type of behavior, it is time for a change. Fortunately, the congressional line item vote is the type of measure that can actually reform the system.

B. The Need for Congressional Transparency

The overwhelming majority of Americans disapprove of Congress. At times, approval ratings have fallen to single digits. On top of that, nearly half of Americans think that most members of Congress are corrupt, and more than one-third believe their own representative is corrupt. This widespread disapproval is the same whether Democrats or Republicans are in control.

cemark, and the legislation does not disclose which Member had requested the additional money.

53 See Blackwell, supra note 37 ("The American people have had it with earmarks. Polls show that one of the reasons driving Congress's near record-low poll numbers is their out of control spending.").

54 See, e.g., National Job Approval: Congress (2008 – Present), http://www.pollster.com/polls/us/jobapproval-congress.php (last visited Mar. 9, 2010) (Note that the average disapproval has climbed as high as eighty percent and has never fallen below fifty-five percent.).

55 See id. (The Reuters/Zogby poll from 11/13/08 – 11/15/08 and the Rasmussen polls from 12/17/08 – 12/18/08 and 9/9/08 all show Congressional approval ratings of nine percent).


Given the public's negative opinion of Congress, it is not surprising that three-quarters of Americans distrust the government. People lack faith in Congress because “it is inefficient, wastes money, and spends money on the wrong things.” Americans also understand that self-serving politicians who place their own welfare above the good of their constituents cause these problems.

Unfortunately, the current system not only permits lawmakers to act in self-interested ways, it encourages them to do so. Unless new procedures are instituted, some members of Congress will continue to pay lip service to their constituents while supporting wasteful riders and earmarks that work against the good of the nation. The line item vote will limit these corrupt practices and bring about the congressional accountability that Americans both need and desire.

II. LINE ITEM VETO: PAST AND PRESENT

Over the past thirty years, Congress has entertained three distinct types of line item veto bills. The earliest incarnation is separate enrollment. This

in-congress.html (charting Congressional approval and disapproval by party from 1998–2007; note that disapproval is far more likely than approval to go above 50 percent).

59 See Joseph S. Nye, Jr., Introduction: The Decline of Confidence in Government, in WHY PEOPLE DON’T TRUST THE GOVERNMENT I (Joseph S. Nye, Jr., Philip D. Zelikow, & David C. King eds., 1997) (noting the following:

Confidence in government has declined. In 1964, three-quarters of the American public said that they trusted the federal government to do the right thing most of the time. Today only a quarter of Americans admit to such trust.

Some polls show even lower levels. A 1995 poll showed a confidence rate of 15 percent at the federal level.

60 See id. at 1, 6 (Noting that “[e]ighty-one percent say government is wasteful and inefficient, and 79 percent say it spends money on the wrong things . . . .”).

61 See JOHN R. Hibbing & ELIZABETH Theiss-Morse, Stealth Democracy: American’s Beliefs about How Government Should Work 85 (2002) (stating that the American people want lawmakers “to be unable to make [political decisions] on the basis of selfish motivations. People are amazingly attuned, hypersensitive even, to the possibility that decision makers will attempt to improve themselves at the expense of everyone else.”).


63 George Washington, George Washington’s Farewell Address to the People of the United States (Sept. 26, 1796), available at http://www.earlyamerica.com/earlyamerica/milestones/farewell/text.html. George Washington knew that government transparency is necessary. He urged, “[p]romote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.” Id.

64 See Gelak, supra note 62 (noting that “[c]itizens have proved that they value unfiltered access to the legislative process.”).
method requires all bills, after passing through both houses, to be disaggregated into distinct “items.” Because each “item” would be given its own bill number and independently require the President's signature in order to become law, the President would be entitled to veto individual provisions. Although not technically a line item veto, separate enrollment achieves the same result.

A newer version of the line item veto was dubbed enhanced rescission. This is the approach employed by the Line Item Veto Act of 1996. It is almost identical to the separate enrollment bill except that it does not require the disaggregation of bills. Instead of building upon the President's traditional veto power, this method simply grants the President the ability to veto individual provisions. To override the President's item veto, both chambers of Congress would have to pass a “disapproval bill.” Because any “disapproval bill” would be subject to the traditional veto, it requires a two-thirds majority in the House and Senate.

The final type of line item veto is expedited rescission. Although both houses would be required to vote on the President's proposed rescissions, a simple majority in either chamber could override the veto. This version grants less power to the President than either enhanced rescission or separate enrollment. Expedited rescission was most recently proposed in the Congressional Accountability and Line Item Veto Act of 2009 and will be fully explored in Part II.B of this Article.

A. Line Item Veto Act of 1996

Signed into law on April 9, 1996, the Line Item Veto Act gave President Clinton the ability to “cancel in whole (1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.” Congress set forth minimal guidelines for the President by providing that he could only use the line item veto if doing so would “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest . . . .”

The Act required the President to notify Congress of any cancellations “within five calendar days (excluding Sundays) after the enactment of the law.” If Congress disapproved of these cancellations, it could vote to reject them. However, because the President was authorized to veto Congress’s rejection, a two-thirds majority in both chambers was needed to override his cancellations.

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67 Id. § 691(a)(3)(B).
Since this process is identical to the traditional veto's override procedure, some comparisons can be made. Of the 2562 times that Presidents have used the regular veto, Congress has overridden it only 110 times. This is a trivial 4.3% success rate. Because the line item veto permits the President to reject specific provisions, the sections singled out are likely to have less congressional support than the bill as a whole. Therefore, one can expect the percentage of line item vetoes that are overridden to be even lower. This enhanced veto power essentially gives the President the final say on any provision. Senator Robert Byrd claimed that the Line Item Veto Act should have been renamed the “President Always-Wins Bill.” On a more serious note, Justice Kennedy wrote that such an “accumulation of all powers . . . may justly be pronounced the very definition of tyranny.”

The judicial history of the item veto started off rocky. In Raines v. Byrd, six members of Congress, who — like Justice Kennedy — felt the line item veto unconstitutionally increased the President's power, sued to have the Act invalidated. The District Court granted them summary judgment, but the Supreme Court dismissed the case for lack of standing. Fortunately, opponents of the bill did not have to wait long for their day in court.

In Clinton v. City of New York, a mere year after Raines was decided, the question of the Line Item Veto Act’s constitutionality again came before the Court. After determining that these appellees had standing, the Court turned to the merits of the case. Although the District Court held that the Act violated both the Constitution’s Presentment Clause and the separation of powers doctrine, Justice Stevens, writing for the majority, constrained his analysis to the issue of presentment.

The Court differentiated the traditional veto from the line item veto on the grounds that “[t]he constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law.” This distinction in chronology is important because “[a]lthough the Constitution ex-
pressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.\textsuperscript{80} A review of “the great debates and compromises that produced the Constitution” led Justice Stevens to conclude that “[t]here are powerful reasons for construing constitutional silence . . . as equivalent to an express prohibition.”\textsuperscript{81}

Justice Scalia rejected the Court’s analysis, arguing that the requirements of the Presentment Clause had been fulfilled.\textsuperscript{82} The President was not empowered with a line item veto; rather, Congress gave him the option to decline to spend certain appropriations.\textsuperscript{83} In exercising this choice, the President was merely following the law. Justice Scalia was disappointed that “[t]he title of the Line Item Veto Act . . . succeeded in faking out the Supreme Court.”\textsuperscript{84}

Justice Breyer wrapped up the dissenters’ objections by arguing that the Act did not violate the separation of powers doctrine.\textsuperscript{85} Because the item veto was limited to the budget, it could not be said to “agrandize[]” the Presidential office.\textsuperscript{86} Additionally, he felt this power “resemble[s] those the President has exercised in the past on other occasions.”\textsuperscript{87} In the end, these arguments failed to carry the day, and the presidential line item veto was struck down.

B. \textit{Congressional Accountability and Line Item Veto Act of 2009}

Although the line item veto ended up being a short-lived experiment, Congress had been trying to pass it for a long time. Since the first bill calling for the federal item veto was introduced in 1876, it has been on the congressional docket, in some form, more than 150 times.\textsuperscript{88} Therefore, it is not surprising that Congress has continued to introduce item veto proposals even after the Line Item Veto Act was declared unconstitutional.

The latest incarnation is known as expedited rescission.\textsuperscript{89} This method differs from the traditional line item veto in one important respect. Instead of permitting the President to unilaterally cancel provisions, expedited rescission

\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 418–19.
\textsuperscript{82} \textit{See id.} at 468–69 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{83} \textit{See id.}
\textsuperscript{84} Clinton \textit{v.} City of N.Y., 524 U.S. 417, 469 (1998) (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{85} \textit{See id.} at 482–84 (Breyer, J., dissenting).
\textsuperscript{86} \textit{Id.} at 483.
\textsuperscript{87} \textit{Id.}
\textsuperscript{89} The Senate and House both introduced bills in 2009 regarding expedited rescission. However, due to the similarity of the bills and for the sake of brevity, discussion will be confined to the House proposal.
merely allows the President to submit a proposal asking Congress to repeal the measures. The President can only present this request after he has signed a bill into law. This process ensures that expedited rescission satisfies the requirements of bicameralism and presentment that allowed the Supreme Court to strike down the Line Item Veto Act.

In short, because it does not give the President any cancellation powers, the Congressional Accountability and Line Item Veto Act of 2009 is a misnomer; expedited rescission is not truly a line item veto. Since the “vetoed” provision would only be repealed if Congress passed a new bill approving the President’s proposal, the measure is more akin to a line item request.

Although expedited rescission survives the strict holding in Clinton, it is not without its own constitutional violations. First, the act allows the President to force Congress to vote on specific proposals. The Constitution, however, does not grant the President any power over the congressional docket. Each house of Congress is permitted to devise its own procedures and change them at any time. This freedom would extend to the statutory rule requiring Congress to vote on presidential proposals. No court would force either chamber to comply with the expedited rescission act; therefore, Congress would be free to disregard the President’s requests.

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90 H.R. 1294, 111th Cong. § 2(b)(1)(a) (2009) (“The President may transmit to the Congress a special message proposing to repeal any congressional earmarks or to cancel any limited tariff benefits or targeted tax benefits.”). Also note that, like its predecessor, expedited rescission limits Presidential action to three specific types of provisions.

91 See supra Part II.A. for a full discussion of the Line Item Veto Act’s constitutional problems.

92 While discussing a similar 2007 Senate proposal, Senator Judd Gregg addressed the constitutionality of an expedited rescission act as it relates to the holding in Clinton. See 153 CONG. REC. S793 (daily ed. Jan. 22, 2007) (statement of Sen. Gregg):

This language does not [violate the presentment clause] because it retains to the Senate and to the House absolute authority over spending. It simply asks them, through the Executive, to take a second look at an item that might otherwise — and, in fact, for all practical purposes — never get a clear vote.

Id.


94 See Aaron-Andrew P. Bruhl, The New Line Item Veto Proposal: This Time It’s Constitutional (Mostly), 116 YALE L.J. POCKET PART 84, 88 (2006) (“[N]o court would force [Congress] to comply because the case would present a nonjusticiable political question.”).


The sentiment that . . . Congress may not impair its rules power by statute — finds overwhelming support in past parliamentary practice. For while statutes regulating internal procedures have a long history, so too does Congress’s belief that it may ignore them . . . [B]oth chambers of Congress appear to have come quite firmly to believe that the Constitution grants them the prerogative
However, because Congress could, at its discretion, vote on the proposal, expedited rescission shifts the true power from the President to the congressional leaders. As the gatekeepers of all legislation, the leaders of Congress would get to decide which rescission proposals are worthy of a vote.

This is not to say that most expedited rescission requests would be ignored. The leadership may allow many votes to take place, either because it agrees with the President’s request that the earmark be eliminated or because it wants to appear fiscally responsible. Many other times, however, Congressional leaders will protect their party by preventing rescission proposals from reaching a vote if they target favored legislation. It is unlikely these leaders will be as kind to the opposition party.

This favoritism presents two main problems. First, the expedited rescission act may become a weapon against the minority party. Second, because the proposal must be passed by both houses to become law, it is easy to envision a scenario in which the expedited rescission power is useless. When different parties control the House and the Senate, it will be very hard for any of the President’s proposals to reach a vote in both chambers. If the President vetoes a Democratic earmark, the Democratic chamber is likely to block the vote. Likewise, the Republican chamber would rescue any of its party’s earmarks.

Not only is the Congressional Accountability and Line Item Veto Act of 2009 constitutionally unenforceable, it is also a useless tool for the President. Congressional leaders will be the beneficiaries of the new power. At best, expedited rescission will have no effect; at worst, it will be used in a partisan manner. Now that the Article has discussed the constitutional issues raised by the main forms of the line item veto, it will examine the real world use of the traditional item veto in the context of both the federal and state governments.

III. PRESIDENTIAL AND GUBERNATORIAL USE OF THE LINE ITEM VETO

A. The Federal Experiment

Although President Clinton only had use of the line item veto for one year, he managed to invoke it 82 times. If he held this power for his entire to abrogate by unilateral action any statutory provision that concerns internal affairs within the purview of the rules power.

Id. at 366–69.

96 See Bruhl, supra note 94, at 89 (noting that expedited rescission procedures should be followed “most of the time . . . either because the legislators genuinely wish that the bill they passed was not so larded with pork or because, politically, they need to appear budget-conscious.”).

97 See id. at 90 (“[C]ongressional leaders in each house will be most likely to follow the expedited procedures when the President’s rescissions target members of that house’s minority party.”).

98 Even though the bill was signed into law on April 9, 1996, and not declared unconstitutional until June 25, 1998, President Clinton was effectively limited to using the power to the time between the Supreme Court’s dismissal of Raines and the district court’s ruling in Clinton.
eight-year presidency and used it in a similarly unrestrained manner, the President would have accrued a staggering 656 line item vetoes. In contrast, he made just 36 traditional vetoes over the course of both terms.100

The Founders first warned against aggressive use of the veto. Alexander Hamilton wrote that it should be exerted only “in a case of manifest propriety, or extreme necessity.”101 Adhering to this sentiment, the first nine presidents combined invoked the veto a mere thirteen times.102

Hamilton also cautioned that “without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory.”103 A decrease of the veto power would render the President helpless against a belligerent Congress. Likewise, an increase would permit the President to dominate the legislative process.104

Given these admonitions, it should come as no surprise that the President’s policy objectives governed his use of the line item veto.105 Notably, “fiscal concerns, measured at a variety of levels, [had] no direct bearing on the President’s decision rule.”106

The real power shift, however, comes from the silent threat107 of the line item veto.108 One commentator insightfully likened the power to “an iceberg.”

101 THE FEDERALIST NO. 73, at 460 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) (noting how King George III rarely used his veto power). All further citations to The Federalist are to the Henry Cabot Lodge edition.
102 Presidential Vetoes, supra note 100. George Washington used the veto twice. “Later presidents from Adams through Taylor [also] exercised the veto with restraint; eight of them never used the veto.” Jong R. Lee, Presidential Vetoes from Washington to Nixon, 37 J. OF POL. 522, 526 (1975).
103 THE FEDERALIST NO. 73, supra note 101, at 456.
104 The Founders did not intend for the President to be more powerful than Congress. In fact, the framers of the Constitution “wanted it clear that Congress was to be first among equals of the three branches . . . when push comes to shove . . . Congress can trump the other two branches . . . .” THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 14 (2006).
105 See M. V. Hood III, et al., Penny Pinching or Politics? The Line Item Veto and Military Construction Appropriations, 52 Pol. Res. Q. 753, 765 (1999) (“[T]here is little doubt that Presidents would have used this new authority to achieve their own policy goals.”).
106 Id. at 763.
107 See THE FEDERALIST NO. 73, supra note 101, at 461 (“A power of this nature in the Executive, will often have a silent and unperceived, though forcible, operation.”).
108 See generally, Glen O. Robinson, Public Choice Speculations on the Item Veto, 74 Va. L. Rev. 403, 416–19 (1988). The author examines how the item veto affects Congressional bargaining and argues that important lawmakers would be able to withstand a presidential veto threat; whereas “[t]hose who have reason for concern . . . are congressmen who are essentially powerless to retaliate in kind.” Id. at 418.
noting that “most of the impact of the line item veto may be beneath the water-
line; that is, invisible.” It seems probable that many members of Congress
will be wary of criticizing the President for fear that he will use the item veto to
target their favored earmarks. Not only will senators and representatives be
unable to voice their opposition, many will be forced to court the President in
order to save their pet projects. This severe weakening of Congress supports
the conclusion that “the line-item veto ‘disrupt[s] the existing system of checks
and balances.’”

Since this new power makes the President the gatekeeper to discretionary spending, it seems logical that he would aggressively cut appropriations
favored by the opposition party while letting his own party’s earmarks slip
through. Such partisan usage has been extensively demonstrated on the state
level, and some of the most prominent supporters of the item veto complained
of its occurrence on the national-level, “criticiz[ing President Clinton’s] cancella-
tions as ‘unduly influenced by political considerations.’”

Although governors aggressively use the item veto for partisan ends in
the states, such use was less salient in the federal government. An analysis
regarding defense appropriations shows that President Clinton was only five per-
centage points more likely to line item veto spending in Republican districts
than in Democratic ones.

Will It Do?, 57 PUB. ADMIN. REV. 95, 100 (1997).

110 See Byrd, supra note 39, at 330 (noting that “the threat of a veto may be a big enough stick
to discourage members from deviating too far from the President’s budget. In politics, as in nu-
clear deterrence, the threat of power — however unlikely its actual use may be — is often enough
to achieve one’s objectives.”).

111 See id. at 327–28. Senator Byrd tells of two such incidents:
Senator Joseph L. Lieberman (D-Conn.), upon learning on October 8, 1997,
that an $18 million research grant he favored might be cut from the fiscal year
1998 Department of Defense appropriations bill, launched an intensive effort
to save the grant... The project survived and is now law. Similarly, Repre-
sentative Scotty Baesler (D-Ky.) is reported to have lobbied Rahm Emanuel,
[President Clinton’s] senior policy advisor, to ensure that a $25 million appro-
priation that benefited a company in his district would not be item-vetoed.
Representative Baesler’s project was subsequently “removed from the veto
list.”

112 Hood, supra note 105, at 765 (quoting Thomas E. Cronin & Jeffrey J. Weill, An Item Veto
for the President?, 12 CONGRESS AND THE PRESIDENCY 127 (1985)).

113 See Joyce & Reischauer, supra note 109, at 100 (“The president could also use his veto
power in a partisan fashion; that is, direct it disproportionately against the opposition party’s pork
while ignoring the scraps of bacon added by his own party.”).

114 See infra Part III.B.2.

115 Byrd, supra note 39, at 326.

116 See Hood, supra note 105, at 761 (showing a veto rate of 31.6% for Republican districts vs.
26.5% for Democratic districts).
Nonetheless, there are several reasons to explain President Clinton’s relatively evenhanded use of the power. First, at the time, Republicans held a majority of seats in both houses of Congress. To accomplish anything on his agenda, President Clinton needed the support of at least some Republicans. Therefore, aggressively targeting their favored spending was not a realistic option. The President’s desire to stay on good terms with Republicans is seen by his reluctance to veto projects in congressional leaders’ home states. President Clinton was fifty percent more likely to veto spending in states that were not home to these leaders than in states that were. If this is not startling enough, it is important to note that proportionally more projects were added to benefit these home states. This means that the favoritism toward congressional leadership was even stronger.

Second, whereas most Democrats opposed giving their own President the line item veto power, almost all Republicans supported the legislation. The fact that Republicans ushered the bill through Congress likely weakened any inclination the President might have had to use the item veto in a partisan fashion.

Another reason for President Clinton’s relatively impartial use of the item veto is his history as a moderate Democrat. He campaigned as a centrist during both presidential runs and was committed to preserving that image.

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117 See U.S. House of Representatives, Office of the Clerk, Party Divisions of the House of Representatives (1789 to Present), http://clerk.house.gov/art_history/house_history/partyDiv.html (last visited Feb. 8, 2010). In the House of Representatives (105th Congress), Republicans held 228 seats; Democrats held 206. Id.; see also U.S. Senate, Party Division in the Senate (1789–Present) http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Feb. 8, 2010). In the Senate (105th Congress), Republicans held 55 seats; Democrats held 45. Id.

118 See Hood, supra note 105, at 761. Spending in home states of Congressional leaders had a 24.3% likelihood of being vetoes, whereas spending in other states were vetoed at a rate of 36.2%. Id.; see also John M. Broder, Clinton Gently Vetoes $144 Million in Military Budget Items, N.Y. TIMES, Oct. 15, 1997, at A12 (noting that President Clinton failed to veto more than $1 billion in appropriations benefiting Senate Majority Leader Trent Lott and Speaker of the House Newt Gingrich).


120 See Mark Hertsgaard, The Eagle’s Shadow: Why America Fascinates and Infuriates the World 170 (Picador 2003) (calling President Clinton a “Southern moderate” who “governed like a Republican in many respects”); John Clifford Green, Financing the 1996 Election 45 (M.E. Sharpe 1999) (“Clinton had governed as a centrist Democrat and coopted GOP issues.”).

Using the item veto as a sword against Republicans would conflict with his public persona as a moderate.

Given these factors and the long history of abuse of the item veto by state governors, it seems probable that future presidents, if granted the opportunity, would be more likely to use it in a partisan manner. In perhaps the worst case scenario, a President whose party controlled Congress would have little reason to temper his use of the line item veto.

Although the line item veto changes the political landscape in several respects, it fails to reduce the deficit. Even some supporters of the line item veto acknowledge its ineffectiveness. Senator Judd Gregg, a sponsor of a 2007 line item veto amendment, said that its passage “would be a ‘political victory’ that would not address long-term problems posed by growing entitlement programs. . . . It would have ‘very little impact’ on the budget deficit.” If the measure’s sponsor does not believe in its efficacy, how can others place their faith in it?

Additionally, why should Americans take a gamble on a proposal that might “fundamentally erode . . . the division of powers between the legislative branch and the executive branch” when history has shown that it is possible to maintain a balanced budget without a line item veto? In the span of eight years, President Clinton took the country from a deficit of $290 billion to a

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122 See infra Part III.B.
123 Humorously, the expedited rescission act discussed supra in Part II.B purports to guard against partisan use by adding an anti-bullying clause. See H.R. 1294, 111th Cong. § 4 (2009):

   It is the sense of Congress no President or any executive branch official should condition the inclusion or exclusion or threaten to condition the inclusion of exclusion of any proposed repeal or cancellation in any special message under this section upon any vote cast or to be cast by any Member of either House of Congress.

124 See Bruhl, supra note 94, at 90 (“We have every reason to conclude that the pork [the President] is most likely to target is pork sponsored by his political opposition.”).
125 See infra Part III.B.1.
127 Id.
128 See John Steele Gordon, A Short History of the National Debt, WALL ST. J., Feb. 18, 2009, at A17 (discussing Andrew Jackson’s ability to run budget surpluses and pay off the national debt).
surplus of $236 billion.\textsuperscript{130} This shift was due to a growing economy and military spending cuts, not skillful use of the line item veto.\textsuperscript{131}

Many supporters of the line item veto hoped that President Clinton would use the power to cut a huge chunk out of the federal budget by stripping away all the pork-barrel spending. This, however, was not the reality. The total spending of the 82 projects President Clinton item vetoed added up to just $1.3 billion, and that savings was spread over five years.\textsuperscript{132} Although this is a sizable amount of money to any individual, it truly is pocket change to Congress. During the same period, federal spending totaled $9 trillion.\textsuperscript{133} This means that the President’s cuts accounted for a miniscule $236 million of $1% of congressional spending.

The findings of the nonpartisan Congressional Research Service (CRS) also support the contention that a line item veto would do little to reduce the deficit. The CRS concluded that if President Reagan had the item veto power from 1984–1989, he would have only achieved a budgetary savings of “$2–3 billion . . . and probably less.”\textsuperscript{134} Although any reduction in the amount of pork-barrel spending is worthwhile, should Congress really cede such a large portion of its power to the President just to achieve this trivial savings?

Given his moderate beliefs and relative success in balancing the budget, President Clinton was likely the best candidate to test drive the line item veto. Unfortunately, even he employed it inappropriately. Senator Robert Byrd, a member of the President's own party, condemned “President Clinton’s use of the item veto” as evincing a “desire to: (1) achieve minimal and largely symbolic savings, while (2) demonstrating to Congress that the Executive is now master of the national purse.”\textsuperscript{135} Since, even in the hands of a fiscally responsible pres-


\textsuperscript{132} See Byrd, supra note 39, at 322 (noting that because Congress overrode some of the vetoes, actual savings were even less).


\textsuperscript{134} VIRGINIA A. MCMURTRY, \textit{ITEM VETO: BUDGETARY SAVINGS 3} (Cong. Research Serv. 2005).

\textsuperscript{135} Byrd, supra note 39, at 319.
ident, the line item veto failed to achieve its goal of deficit reduction, \(^{136}\) it is clear that Congress should not grant another president this powerful weapon. \(^{137}\)

In the end, any line item veto will serve to undermine the Founders’ carefully-crafted separation of powers. \(^{138}\) Rather than cutting federal expenditures, the traditional item veto merely redirects spending “from activities preferred by the Congress to activities preferred by the President.”\(^{139}\) As will be seen in the following section, these dangers — only briefly experienced by the federal government — have been burdening state governments for decades.

B. The State Experience

Although the federal experiment only lasted a year, the line item veto has had a long history in the states. In 1865, Georgia became the first to adopt it,\(^{140}\) and since then, a majority of states have followed suit. At present, forty-three governors have some form of item veto power. \(^{141}\) In each case, this authority is provided for in the state’s constitution. Therefore, unlike the federal item veto, there are no issues regarding constitutionality.

Aside from the difference of legality, the gubernatorial and presidential item vetoes are quite analogous. Most state constitutions employ language similar to the Line Item Veto Act.\(^{142}\) Nevertheless, some commentators have sug-

\(^{136}\) See Hood, supra note 105, at 763–65. The President failed to use the item veto in a fiscally responsible manner. “None of the variables designed to measure fiscal influence had any discernible effect . . . . It is clearly programmatic factors that dominated the political dynamics of the President’s use of the item veto.” Id.

\(^{137}\) See 141 CONG. REC. H1270 (daily ed. Feb. 6, 1995) (statement of Rep. Engel) (“Congress makes a huge mistake if on the basis of mythology it disturbs the traditional balance of power between the elected branches . . . .”).

\(^{138}\) THE FEDERALIST NO. 47, at 300 (James Madison) (“[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.”); THE FEDERALIST NO. 51, at 324 (Alexander Hamilton or James Madison) (“[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other.”).

\(^{139}\) Byrd, supra note 39, at 327 (internal citations omitted); see THE FEDERALIST NO. 51, at 324 (noting that a too-powerful veto “might be perfidiously abused”); see infra Part III.

\(^{140}\) Thomas P. Lauth, Georgia: Shared Power and Fiscal Conservatism, in BUDGETING IN THE STATES: INSTITUTIONS, PROCESSES, AND POLITICS 33, 46 (Edward J. Clynch & Thomas P. Lauth eds., 2006).

\(^{141}\) See Nat’l Conference of State Legislatures, Gubernatorial Veto Authority with Respect to Major Budget Bill(s) (2008), http://www.ncsl.org/IssuesResearch/BudgetTax/GubernatorialVetoAuthoritywithRespecttoMajor/tabid/12640/Default.aspx (containing a detailed table listing the extent of the line item veto in each state). The seven states which do not grant item veto power to the governor are Indiana, Maryland, Nevada, New Hampshire, North Carolina, Rhode Island, and Vermont. Id.

\(^{142}\) For a representative provision, see IOWA CONST. art. III, § 16, granting the governor the line item veto:

The governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of an appropriation bill disapproved by the governor
suggested that balanced budget amendments in many state constitutions make it difficult to compare federal and state use of the line item veto. However, because state governments routinely ignore such debt limits, valuable comparisons can be made. This unwillingness to adhere to the law is evidenced by the fact that California and New Jersey — two of the states with the most stringent balanced budget requirements — rank among the top five states with the largest debts.

Due to the item veto’s extensive history in the states, numerous studies have been undertaken to determine the effects of the veto and what motivates a governor to invoke the power. In answering these questions, two common threads have emerged: (1) the item veto does not reduce state expenditures, and (2) it is used as a partisan weapon. Throughout the following sections, both of these points will be examined in detail.

1. Failure to Reduce Expenditures

The literature regarding the line item veto’s effect on state spending is extensive. From case studies to state surveys to regional analyses to national studies...
tionwide empirical studies, the research points to the same conclusion. Quite simply, the item veto does not reduce expenditures.

Case studies in California, Georgia, Texas, New York, and Wisconsin all agree that the line item veto is not a useful tool for fiscal restraint. While explaining how the power fails to help the governor curb spending, the author of the Wisconsin study noted surprisingly that, over the course of thirteen years, “72.1 percent of the item vetoes had no fiscal effect at all.”

Although the individual state studies are useful, the broader analyses are even more telling. One nationwide study compared spending in the forty-three states that have the item veto with expenditures in the seven states that lack the item veto. The author found that in states where the governor does not have the power, “state and combined state/local spending per capita... is no higher, and may be lower, than in states with some form of item veto.” Another cross-sectional study similarly reported that all of the statistically significant relationships between the item veto and state expenditures were positive. Not only does the item veto fail to reduce the deficit, but, somehow, its existence is correlated with higher levels of spending. This led one author to conclude that “[e]ither the item veto is ineffective... or it encourages the state legislatures to behave in ways even more irresponsible than would otherwise be the case.”

Some readers are likely to point out that correlation does not equal causation and that other factors may be able to explain these results. Perhaps the states with the item veto originally had much higher levels of spending, and

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152 See, e.g., Abrams & Dougan, supra note 147, at 112–13.


157 See Gosling, supra note 149, at 298.

158 Id. at 295.

159 See Benjamin Zycher, Institutional and Mechanical Control of Federal Spending, 35 PROC. OF THE ACAD. OF POL. SCI., No. 4, 137, 137 (1985).

160 Id. at 144 (emphasis added).

161 See David C. Nice, The Item Veto and Expenditure Restraint, 50 J. POL. 487, 496–97 (1988) (“Examination of a variety of measures of item veto provisions... failed to produce a single instance of a significant negative relationship between item veto powers and government spending... [T]he few significant relationships were in the wrong direction.”).

162 Zycher, supra note 159, at 143.
their governors used the power to bring expenditures in line with more fiscally conservative states. Standing alone, this is a reasonable interpretation. However, numerous other studies have proven that this is simply not the case.

In fact, instead of reducing spending, the line item veto seems to encourage fiscal irresponsibility. Data for one nationwide study provided evidence for the claim that “the presence of the [item] veto discourages legislative discipline.”\textsuperscript{163} Yet another study illustrating the line item veto’s inefficacy found that it does not lower state borrowing.\textsuperscript{164}

Proponents of the item veto vigorously argue that it will eliminate earmarks, thereby reducing wasteful spending.\textsuperscript{165} However, history has shown that governors do not use the item veto in this manner. “[Line item] vetoes tend not to be cast more often in states having legislatures with a tendency to use pork barrel.”\textsuperscript{166}

Over the past century and a half, governors in forty-three states have failed to use the item veto to reduce expenditures. Why should anyone believe that a president will transcend this long history of misuse and invoke the power for the good of the nation?

2. Use as a Partisan Weapon

Since vetoing appropriations fails to reduce spending, what are the precise effects of the item veto? It turns out that governors actually use the power as a partisan weapon to further their own policy goals. Because “legislatures seldom override line-item vetoes,”\textsuperscript{167} the instrument essentially grants governors a carte blanche to substitute their policy preferences for those of the state house. It is disappointing to note that governors have enthusiastically taken advantage of the item veto in just this manner.\textsuperscript{168}

A review of ten southern states found that, in seven of these states, “the majority of line item vetoes were used for policy reasons . . . .”\textsuperscript{169} Unsurprising-

\textsuperscript{163} Abney & Lauth, supra note 148, at 375.


\textsuperscript{166} Abney & Lauth, supra note 148, at 374.

\textsuperscript{167} Reese, supra note 151, at 512.

\textsuperscript{168} See Dearden, supra note 164, at 721 (concluding that the line item veto “is most effective [at allowing the governor to construct the final budget] in states where the legislature is dominated by the governor’s opposition political party, but is short of the votes required to override the governor’s item veto.”).

\textsuperscript{169} Reese, supra note 151, at 512.
ly, other researchers found that the item veto is used much more aggressively in states where the governor and a legislative majority are from opposing parties.170 One author even concluded that “divided partisan control” is “the most important contextual factor in shaping item veto use.”171 Illustrating more of the line item veto’s flaws, an extensive case study determined that “Wisconsin governors have disproportionately used the item veto to modify state law... presumably to bring it more in line with their views of acceptable policy.”172

Because the governors’ policy interests are more naturally aligned with the views of their own parties,173 such usage means that the item veto is necessarily a partisan weapon.174 Indeed, upon extrapolating their findings to the federal level, authors of one study warned that the line item veto “would enhance the president’s ability to deal with the Congress on matters of a partisan nature, but it is not likely to have much impact on such fiscal matters as the size of the deficit.”175 Another researcher similarly concluded that “[t]here is no reason to expect that the line item veto would be useful at the federal level to control general expenditures when it has not been useful in this regard at the state level.”176 Despite claims of supporters to the contrary,177 “[t]he literature suggests that line item vetoes are used primarily as instruments of policy or partisanship rather than fiscal restraint.”178

Although the item veto is a partisan weapon, it does have one bipartisan aspect. Whether Democrats or Republicans are in control, the tool fails to reduce spending.179

Thus far, this Article has argued that the line item veto changes the composition of state expenditures to mirror the preferences of the executive. At the federal level, if the President is better than Congress at allocating funds, granting him the item veto may produce beneficial changes. Unfortunately, this

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170 Abney & Lauth, supra note 148, at 376 (“Where control of both executive and legislative branches is in the province of the same party, the veto is used much less frequently than in states with divided control.”).
171 Nice, supra note 161, at 490.
172 Gosling, supra note 149, at 296.
173 Nice, supra note 161, at 490 (arguing that “[u]nified partisan control may lead the legislature to produce appropriations bills which are more acceptable to the governor and may lead the governor to be somewhat more tolerant of legislative decisions.”).
174 See Abney & Lauth, supra note 148, at 377 (calling the item veto a “partisan instrument”).
175 Id.
176 Reese, supra note 151, at 515.
177 President Ronald Reagan, State of the Union Address (Feb. 4, 1986), available at http://www.presidency.ucsb.edu/ws/index.php?pid=36646 (telling Congress that the line item veto “would not give me any monopoly power, but simply prevent spending measures from sneaking through that could not pass on their own merit.”).
178 Reese, supra note 151, at 512 (citing Abney & Lauth, supra note 148).
179 Douglas Holtz-Eakin, Forget the Line-Item Veto, N.Y. TIMES, Feb. 10, 1988, at A31 (noting that “in the hands of Republicans and Democrats alike, the line-item veto fails to cut spending.”).
is not the case. The following section will explore why Congress is better than the President at crafting legislation that enhances the welfare of the nation.

IV. CONGRESS: ADVANCING THE NATIONAL INTEREST

Now that it is clear that both the President and the governors failed to use the line item veto as a tool for deficit reduction, it is time to search for a new instrument that can reduce pork and other congressional riders. First, however, it is important to look at whether the executive or the legislature is better equipped to wield such a tool. Since this power, distilled to its most basic form, would simply be a method for advancing the national interests, this section will examine whether the policy preferences of the President or Congress more closely align with American sentiment.

Since the President is the only official (aside from the vice president) elected by the entire nation, common belief holds that he must put the interests of the nation first.180 lest he lose the popular support necessary for reelection. The theory goes that members of Congress, at the expense of the nation, seek to craft legislation that benefits their individual districts.181 Because lawmakers are only accountable to a specific area, they are less concerned with what transpires beyond those borders.

Although this is true of individual legislators, such a simplified representation fails to account for the fact that Congress is a diverse group composed of two chambers and 535 people.182 Additionally, presenting an idealized vision of the President as someone removed from parochial influences ignores the reality that all politicians are rationally self-interested individuals.183 In fact, it is this rational self-interest that allows Congress to craft national legislation but


181 See id. at 78 (arguing that individual lawmakers will vote against the national interest if it allows them to slice off a larger part of the pie for their constituencies).

Every member of Congress has an incentive, to some degree, to tax the whole nation and to funnel the proceeds back to their district . . . . Every member of Congress finds himself agreeing to higher and higher levels of spending and taxation in the hope that a disproportionate share of the nation’s wealth, or a future, presently disenfranchised, generation’s wealth, will be funnelled [sic] back to his district or state.

Id.

182 See Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. Rev. 1217, 1221 (2005) (“The fact that individual legislators may have parochial and unstable preferences does not necessarily imply that the collective preferences of Congress will also be parochial and unstable.”).

183 See, e.g., Thomas O. Sargentich, The Future of the Item Veto, 83 Iowa L. Rev. 79, 128 (1997) (“All public policymaking needs to be examined, at least partly, in terms of the rational pursuit of self-interest by the involved official and nonofficial actors.”).
forces the President to follow the preferences of a few electorally important states. This Article will first dispel the myth that the President is primarily concerned with setting policy that maximizes the nation’s welfare.\textsuperscript{184} Then it will examine why, despite belonging to the more nationalist body, some members of Congress support a line item veto.

A. Presidential Parochiality

This vision of the President as a guardian of the national interest is a relatively recent creation. The Founding Fathers believed that Congress, because of its broad-based membership, would be particularly well-suited to thoughtful deliberation and, therefore, better able to craft legislation that benefits the entire country.\textsuperscript{185} They thought that the House of Representatives was the most nationally representative body precisely because it is closest to the people and directly elected by them.\textsuperscript{186} In contrast, the Founders believed that the President’s advantage lie in his ability to act quickly when emergencies prevent extensive debate.\textsuperscript{187}

When the President does have the opportunity to guide legislation, history has shown that parochial considerations often underlie the executive agenda. If we understand the President as a rationally self-interested individual who desires re-election, then this should not be surprising. Every election, there are a handful of states that determine the victor.\textsuperscript{188} These swing states receive disprop

\textsuperscript{184} This myth is so pervasive that even the Supreme Court has adopted it, albeit in a qualified manner. See INS v. Chadha, 462 U.S. 919, 948 (1983) (quoting Myers v. United States, 272 U.S. 52, 123 (1926)):

The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the people elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . .

\textit{Id.}

\textsuperscript{185} See The Federalist No. 70, at 440 (Alexander Hamilton) (“The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.”).

\textsuperscript{186} See The Federalist No. 39, at 237 (James Madison) (The House of Representatives is “national, not federal” because it “will derive its power from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State.”); see also The Federalist No. 52, at 329 (Alexander Hamilton or James Madison) (The House’s proximity to the people is a desirable feature: “it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people”).

\textsuperscript{187} See The Federalist No. 70, supra note 185, at 440 (“[T]hose qualities in the Executive which are the most necessary ingredients in its composition [are] vigor and expedition . . . .”).

\textsuperscript{188} See, e.g., David Gringer, Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College, 108 Colum. L. Rev. 182, 222 (2008) (The nation is divided into “so-called
portionate attention from the candidates. \(^{189}\) In an effort to secure the presidency, nominees are also more likely to make campaign promises to these battleground states. \(^{190}\) Because most states are predictably Democratic or Republican strongholds, presidential candidates have no incentive to campaign in them. \(^{191}\) Thus, the winning strategy involves focusing on a “tiny number of swing states while disregarding the needs of the rest of the nation.” \(^{192}\)

This favoritism towards battleground states continues even after the contest is over. Because the group of potential swing states remains relatively constant from election to election, the President has an incentive to uphold his campaign pledges to these states. To further bolster his appeal among voters in swing states, the President is also more likely to support legislation that benefits them, even at the expense of the rest of the country. A review of past federal spending shows that this is precisely the strategy that presidents employ.

President Franklin Roosevelt's New Deal is perhaps the most egregious example of spending targeted at swing states. Numerous studies indicate that funds were not directed towards states hit hardest by the Great Depression: those with the highest unemployment levels \(^{193}\) or largest declines in personal

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\(^{189}\) See Fair Vote, Presidential Elections Reform Program, Who Picks the President?, http://www.fairvote.org/presidential/?page=1677 (last visited Feb. 28, 2010) (“More money was spent on television advertising in Florida during the [2004 peak campaign season] than in 45 states and the District of Columbia combined.”).


\(^{191}\) See Brandon H. Robb, Comment, Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote, 54 LOY. L. REV. 419, 445 (2008) (discussing the 2004 election).

Due to the relatively comfortable polling leads the two major party candidates enjoyed during the campaign in the remaining thirty-four states, neither candidate had an incentive to spend time addressing the concerns of citizens in those states. Rather, each candidate tailored his message to appeal to the public in the so-called “swing states” where the election outcome was in doubt.


\(^{193}\) See Don C. Reading, New Deal Activity and the States, 1933 to 1939, 33 J. ECON. HIST. 792, 800 (1973) (“[P]ercent unemployment[ ] did not exert a statistically significant influence on the direction of flow of New Deal lending programs.”).
income. Instead, President Roosevelt funneled resources to the electorally important swing states.\footnote{See Gavin Wright, The Political Economy of New Deal Spending: An Econometric Analysis, 56 REV. ECON. & STAT. 30, 34 (1974) ("[V]ariables reflecting economic 'distress': the fall in income from 1929 to 1932... and unemployment... have virtually no effect" on New Deal spending.).}

Additionally, researchers have found that congressional leadership generally did not affect the allocation of New Deal funds.\footnote{See id. at 33 (finding that this "'political' model explains between 58.7% and 79.6% of the variance in per capita spending over the whole period!").} President Roosevelt was truly the guiding force behind this targeted spending. This strategy worked, boosting his popularity in battleground states. One author noted that "Roosevelt might well have lost the [1940] election without these votes."\footnote{See John J. Wallis, The Political Economy of New Deal Spending Revisited, Again: With and Without Nevada, 35 EXPLORATIONS IN ECON. HIST. 140, 150 (1998) ("House leadership is not important and Senate leadership is important only under certain conditions.").}

More recent presidents have also favored swing states. In 1992, to garner support in the critical state of Florida, President George H. W. Bush requested funds to rebuild Homestead Air Force Base.\footnote{See Eric Pianin, Hill Votes $11 Billion for Hurricane Relief, THE WASH. POST, Sept. 19, 1992, at A3 ("Bush, whose reelection fortunes partly hinge on carrying Florida, requested $480.6 million to rebuild Homestead."); see also Mark Seidenfeld, A Big Picture Approach to Presidential Influence on Agency Policy-Making, 80 IOWA L. REV. 1, 21 (1994–1995) (calling the move "a thinly veiled attempt to garner increased voter support in Florida during the 1992 presidential campaign").} That same year, the President backed a bill providing $517 million for an atom-smasher in the must-win state of Texas.\footnote{See William E. Clayton, Jr., Collider Bill OK'd by Bush: Signing May Help Campaign Chances, HOUS. CHRON., Oct. 3, 1992, at A7 (noting that "the televised sight of Bush's signing the bill for the huge Texas project could help his tight contest with Democrat Bill Clinton in the Lone Star State.").} Just a month before the election, President Bush approved the sale of F-15 jet fighters to Saudi Arabia in order to save jobs in the swing state of Missouri.\footnote{See Thomas L. Friedman, Selling Arms to Keep Jobs: The Signals It Sends Abroad, N.Y. TIMES, Sept. 20, 1992, at E4 ("[T]his [sale] appears to have been driven exclusively by an effort to secure jobs and votes at home. It is part and parcel of the pork-barrel diplomacy instituted by the Bush Administration as it scrambles for a second term."
Friedman goes on to write that "[p]assing out goodies in the election season to win votes is a tradition long honored by both Republicans and Democrats.").}

President Clinton is guilty of pandering to battleground states, too. Prior to the 1996 election, he forced the Mexican government to increase tomato prices, helping tomato growers in the electorally important state of Florida.\footnote{See David E. Sanger, President Wins Tomato Accord for Floridians, N.Y. TIMES, Oct. 12, 1996, at 1 ("The math was pretty simple," another official said. 'Florida has 25 electoral votes, and Mexico doesn't.'); see also Nzelibe, supra note 182, at 1240 (claiming that President Clinton acted "in violation of the North American Free Trade Agreement").}
In the critical state of California, he pledged to keep open an air force base which had been slated for closure.

Following the lead of his predecessors, President George W. Bush also let the interests of swing states dominate many of his decisions. In the run-up to the 2004 election, he imposed tariffs on steel to help the economy in the politically important states of West Virginia, Ohio, and Pennsylvania.

This time the political maneuvering created global fallout, with the WTO ruling that such tariffs violated international trade laws. In retaliation, the European Union threatened to tax goods from other states that would be important to President Bush’s reelection bid, including oranges from Florida, apples from Washington, and textiles from North and South Carolina.

Not only did these tariffs restrict free trade and anger the international community, they hurt the U.S. economy by driving up the price of steel. The tariffs caused every state in the union, even the “steel belt” states, to suffer net job losses. In 2002 alone, 200,000 Americans lost their jobs due to the steel tariffs. This is more than the number of people employed by the entire U.S. steel industry.

These results indicate that President Bush was willing to harm the nation as a whole in order to be popular among important constituents in swing states. Given the extensive history of such presidential actions, it is hard to believe that the line item veto would not be used in a similar fashion.

Although the President is elected by the entire nation, he is certainly not concerned with the policy preferences of voters in every state. Because certain states are unwinnable, he will not expend political capital to further their interests. Likewise, there are a number of loyal states that will support his reelection

202 See Richard L. Berke, Dole’s Advisers Debate Strategy Over California, N.Y. TIMES, Oct. 3, 1996, at A1 (“California has long been viewed as a must-win for Mr. Clinton . . . .”)

203 See Eric Schmitt, Pork Over the Pentagon, N.Y. TIMES, Jul. 9, 1995, at 42 (noting that keeping the military base open will allow President Clinton to save “political face . . . in a state with 54 electoral votes that is crucial to his re-election hopes.”)

204 See Richard W. Stevenson, Bush, in West Virginia, Says He Kept His Promise to Steel Industry, N.Y. TIMES, Aug. 30, 2004, at P9 (The measure was also intended to sway “voters in other industrial swing states like neighboring Ohio and Pennsylvania, where job losses, foreign competition and the legacy of the long slide in American manufacturing strength have left Mr. Bush vulnerable.”); see also Elizabeth Shogren, Kerry, Bush Vie for Coal States, L.A. TIMES, Aug. 15, 2004, at 27 (To further help the coal belt, President Bush has also “eased regulations for extracting coal from Appalachia’s mountaintops and made it easier to modify or renovate older coal-fired power plants without installing expensive pollution controls.”)


206 Id.


208 Id.
bid no matter what. Even though his sympathies may lie with these states that solidly backed him in the last election cycle, the President has no reason to favor them at the expense of swing states.

The present electoral system forces the President to categorize states into three distinct groups and assign them very different priorities. Although there are some deeper considerations, the presidential calculus is essentially reduced to the following questions: (1) Will this policy help swing states, even at the expense of the rest of the country; (2) Will this policy help loyal states, even at the expense of unwinnable states; (3) Will this policy help unwinnable states, without harming states in the other categories?

B. Misplaced Congressional Support of the Line Item Veto

Douglas Holtz-Eakin, Senator McCain’s chief economic policy adviser for the 2008 presidential campaign,²⁰⁹ concluded that “the line item veto does not appear to significantly alter, on average, the outcomes of the budgetary process.”²¹⁰ The item veto failed in the federal government. It failed in the states, and now, even the top economic strategist of one of the item vetoes most outspoken supporter believes “[i]t doesn’t work.”²¹¹

Since countless studies have shown that the line item veto is ineffective, why do some lawmakers keep pushing for its passage? There are two main reasons. First and foremost, the line item veto is a symbol.²¹² Its passage would allow politicians to show a commitment to fiscal responsibility without actually solving any budgetary problems.

The second reason some legislators support the item veto is that it alters the political landscape. In the new system, everyone wins, except for the American people. Members of Congress are able to pass pork-laden bills and feed their constituencies war stories of how they managed to force the earmarks through at all costs. The President will subsequently item veto these very same projects and claim credit for trimming a bloated federal budget. Lawmakers can then raise their hands in feigned indignation and say, “I did everything in my power, but the President did not think the people of [congressional district X]

²⁰⁹ Holtz-Eakin is also the former director of the Congressional Budget Office.
²¹¹ Holtz-Eakin, supra note 179 (“My analysis of state government budgets since 1960 shows that, with a few exceptions, simply granting the governor a line-item veto has little or no effect on spending over the long term . . . .”).
²¹² See Glenn Kessler, Analysis — ‘Symbolic’ Veto Law Filled With Loopholes, SEATTLE TIMES, Apr. 10, 1996, available at http://community.seattletimes.nwsource.com/archive/?date=19960410&slug=2323495 (quoting Robert Reischauer, former head of the Congressional Budget Office, calling the line item veto “largely a symbolic gesture”); see also Byrd, supra note 39, at 323 (noting “that [i]n purely fiscal terms, the item veto is more a symbol than anything else.” (internal quotations omitted)).
were important enough to benefit from [pork-barrel project Y].”\textsuperscript{213} Anyone who discounts this reasoning need only look at the nationwide study which determined that legislatures in item veto states are “more prone to use pork barrel and less likely to use information on efficiency.”\textsuperscript{214} In other words, the line item veto promotes fiscal irresponsibility.

The relection process explains this odd desire to push through earmarks that are certain to be line item vetoed. Given the high relection rates for incumbents,\textsuperscript{215} maintaining any position has more to do with failing to anger one’s constituents\textsuperscript{216} than actually passing good legislation. The line item veto is the perfect tool to minimize that anger or at least redirect it towards the President.\textsuperscript{217} Knowing that the President can just veto appropriations at a later time, congressional committees will be more likely to allow legislators to attach pork to a bill. Under this system, the committees can readily trade earmarks for votes, and individual lawmakers can easily placate their constituents and special interest groups. In the end, the item veto is just “politics-as-usual.”\textsuperscript{218}

After spending so much time lauding Congress for its ability to pass useful national legislation, it may seem counterintuitive to point out that indi-

\textsuperscript{213} See AARON B. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 80–81 (1984) (discussing the “I’d love to help you but…” strategy). For an argument that people will see through this process, see, e.g., Calabresi, supra note 180, at 80 (“Sooner or later, the folks back home begin to realize that they are being conned and that their member of Congress is wasting time on activities that do not really bring home the pork.”) First, such an argument fails to recognize that state legislators have successfully employed this practice for years. Second, because lawmakers will still push through a large amount of pork, voters will be unlikely to sort out the good-faith efforts from the political maneuvering. These earmarks that are not item vetoed will allow the legislators to credibly portray the intentional failures as “almost successes” rather than “self-interested grandstanding.” \textit{Id.}

\textsuperscript{214} Abney & Lauth, supra note 148, at 375.

\textsuperscript{215} See OpenSecrets.Org, Center for Responsive Politics, Relection Rates Over the Years, http://www.opensecrets.org/bigpicture/reelect.php (last visited Feb. 28, 2010) (charting the relection rates for the House and Senate from 1964–2008). The House never fell below 85% and has remained over 90% for the last decade. \textit{Id.} Over the past twenty years, the Senate relection rate has ranged from 79% to 96%. \textit{Id.} On both the federal and state levels, incumbents are relected at extremely high rates. From 1990 through 2000, relection rates were 94.1% in the House of Representatives, 89.3% in the Senate, 85.1% in Statehouses, and 84.1% for state supreme courts. Melinda Gann Hall & Chris W. Bonneau, Does Quality Matter? Challengers in State Supreme Court Elections, 50 AM. J. POL. SCI. 20, 21 (2006).

\textsuperscript{216} Many times this is not even a necessary condition. See, e.g., John Murtha Calls Western Pa. “Redneck”, THE PITTSBURGH CHANNEL, Oct. 20, 2008, http://www.thepittsburghchannel.com/politics/17764334/detail.html (Rep. John Murtha was relected after both calling his district “a racist area” and issuing an apology in which he said many of his constituents are “rednecks.”).

\textsuperscript{217} The President is well-equipped to absorb this anger. As previously noted, he is primarily concerned with his image in a handful of battleground states. So long as the President does not item veto projects that would benefit voters in these states, his relection chances will not be harmed. In fact, the President can actually increase his popularity among swing state voters by item vetoing pork that benefits non-battleground states. This will make him appear fiscally responsible to voters in the electorally important states.

\textsuperscript{218} Holtz-Eakin, supra note 179.
individual representatives are more concerned with cultivating an image of success than actually enacting successful legislation.\textsuperscript{219} However, this paradox can be reconciled.

Perhaps Confucius best explained the situation more than 2500 years ago when he asked, “How can a man serve the [public]? When out of office, his sole object is to attain it; and when he has attained it, his only anxiety is to keep it. In his unprincipled dread of losing his place, he will readily go all lengths.”\textsuperscript{220} It is precisely because members of Congress are always worried about reelection\textsuperscript{221} that they promote some policies favoring their districts. This anxiety gives rise to the success of the median legislator hypothesis\textsuperscript{222} and consequently causes Congress to produce bills that generally advance the entire country’s interests.

Although Congress is far better at crafting national legislation than the President, its methods are still imperfect. Increasing transparency through the implementation of a line item vote would greatly improve the lawmaking process. So long as legislators can pass convoluted omnibus bills that allow them to take credit for any successes and deflect blame for any failures, the system will be flawed. If such bills are broken up and representatives are forced to vote on individual parts, legislators will no longer be able to hide the true intentions of their votes. Because representatives will need to voice an opinion on each individual provision, they will be more directly accountable to their constituents.

The following section will explain why the line item vote is an effective way to increase congressional accountability and make the entire lawmaking process more efficient. The congressional line item vote will ensure that the vast majority of laws benefit the nation, not special interests.

\textbf{V. THE CONGRESSIONAL LINE ITEM VOTE}

This part will first detail the procedures of the line item vote. The next section will provide an example of the line item vote in action. The third section will examine the line item vote’s administrability, and finally, the Article will briefly explore the line item vote from the perspective of the median legislator theorem.

\textsuperscript{219} The public is aware of this predilection. See Roger H. Davidson, Congress and Public Trust: Is Congress its Own Worst Enemy?, in Congress and the Decline of Public Trust 65 (Joseph Cooper ed. 1999) (“When asked whether most members of Congress spend more time trying to make the country better or trying to make themselves look better, the public voted four to one in favor of members’ self-promotion.”).


\textsuperscript{221} See id. (“In one sense, every politician is always running for the next election.”).

\textsuperscript{222} See infra Part V.D. for a discussion of the median legislator hypothesis.
A. The Mechanics

The line item vote is a surprisingly simple change that has the potential to restructure the entire political landscape. By forcing House members to carefully consider each line of every bill, this procedure will prevent all members of Congress from attaching wasteful and unrelated earmarks to must-pass legislation.

In the Senate, all of the lawmaking stages will stay the same. A bill will be introduced, referred to the appropriate committee(s), debated on the floor, and then voted on. As for the House, although the basic steps will remain unchanged, the traditional voting process will be replaced by the congressional line item vote.

Under this new system, before any bill is presented for a vote in the House, it must be disaggregated into its constituent parts. The Separate Enrollment and Line Item Veto Act of 2006 proposed a disaggregation process that can serve as a model for the line item vote. The Clerk of the House of Representatives shall be tasked with disaggregating the bill. Each numbered section or unnumbered paragraph shall constitute a unique line item. Additionally, any allocation or suballocation of an appropriation contained within a numbered section or unnumbered paragraph will be considered a distinct line item. This is done to ensure that members of Congress cannot hide earmarks in oversized paragraphs. Although the Separate Enrollment Act restricts disaggregation to discretionary spending, direct spending, and targeted tax benefits, there shall be no such limitation for the line item vote. This procedure shall apply to both budgetary and substantive provisions.

Once the bill is disaggregated, representatives cast a separate vote on each line item. If all the provisions pass, the bill is repackaged and forwarded to the Senate. If, however, any line items fail, those provisions are removed from the bill, and a new round of voting occurs. These subsequent rounds are necessary to ensure that the bill retains the intent of Congress. This cycle continues until all the line items in a given round of voting pass or until all the line items in a given round fail. If provisions manage to survive these cuts, the resulting legislation is sent to the Senate.

When the Senate approves the same bill as the House, the legislation is forwarded to the President. He can choose to sign or veto the bill in its entirety. Alternatively, if the Senate passes an amended bill, a conference committee

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225 Once voting begins, members of the House cannot make any amendments to the bill.
composed of members of both bodies of Congress is formed to resolve the discrepancies. The final package that is negotiated in the conference committee is sent to the House for a new line item vote. At this point, no amendments can be made by either chamber. At the conclusion of the House’s line item voting process, the successful parts of the bill are repackaged and sent to the Senate. Because Senators may not make any amendments at this stage, if the proposal comes to a vote, the Senate must approve or reject the exact bill that was passed in the House. In addition to making the congressional line item vote more easily administrable, these procedures ensure that the lawmaking process satisfies the bicameralism and presentment requirements of the Constitution. The following example will help clarify this system.

B. An Example

Assume that a bill is introduced in the House that would prohibit anyone from keeping a wild pig as a pet; the proposal also imposes a fine for any violation.\textsuperscript{226} The bill reads as follows: “It is illegal to keep a wild pig as a pet. Anyone in violation of this law shall be fined $1,000.” In the hypothetical, most representatives favor the measure, so it is expected to pass.

The bill proceeds to the appropriate committee and, some weeks later, emerges with an amendment. The amendment provides that all of the money raised from those fines shall be allocated to the Wild Pig Research Foundation in Nebraska. Rep. Pork, the hypothetical congressman from Nebraska who added this measure, saw that the bill, standing alone, was virtually guaranteed to pass and wanted to nab a piece of the pie for his district.

Under the traditional system, the measures would be debated and the entire bill would be voted on at once. This means that the representatives have to weigh the bill as a single entity. If one provision is meritorious and another is wasteful, a lawmaker will be unable to throw his support behind just a portion of the bill. It is an all-or-nothing vote.

Under this system, one of two outcomes occurs. First, some of the representatives who favored the ban on wild pig ownership might be put off by the allocation of funds and decide not to support the bill. In this scenario, the pig ban that has majority approval ends up not passing.

In the alternative scenario, a majority of representatives may find that even though they dislike part of the bill, the pig ban is too important to forego. They grudgingly vote for the entire bill, and the congressman from Nebraska is able to bring home the pork to his constituents. Social welfare is not maximized in either of these cases.

Now let us see how this process would play out if the House had a line item vote. The bill leaves committee with the same amendment. This time around, however, it is disaggregated into three line items. They read as follows:

\textsuperscript{226} Because most pork is a joke, it is only fitting to use a lighthearted example.
(1) It is illegal to keep a wild pig as a pet; (2) Anyone in violation of this law shall be fined $1,000; (3) The money accrued from these fines shall be allocated to the Wild Pig Foundation.

With the line item vote, House members will vote on each of these distinct provisions rather than one larger bill. This has the advantage of letting representatives support the meritorious measures while still being able to vote against any provisions that are contrary to their constituents’ interests. Thus, line items one and two pass, and the funding for the Wild Pig Research Foundation is rejected.

The process is not yet over. Because one of the provisions failed, a new round of voting must take place. This is done to ensure that the surviving provisions retain the intent of the House and maintain a logical consistency. In this instance, representatives cast two new votes, one for each remaining line item. Both pass. The bill is then repackaged and sent to the Senate.

Because the Senate does not have the power of the line item vote, the bill goes through all of the regular channels. If the Senate passes the exact bill that was approved in the House, it will be sent to the President for his signature.

If, however, there are differences between the Senate and the House versions, they will be referred to a conference committee. This is not unlike the present system. Senators and representatives on the committee will try to negotiate a bill that is agreeable to both chambers. In the traditional system, this is the stage during which many earmarks are inserted. Under the new process, lawmakers will still be free to attach their pet projects; however, the power of the line item vote will remove this pork in the following step. Additionally,

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227 Once the first round of voting begins, members of the House may not add any amendments to the bill.

228 If a new round of voting does not occur, nonsensical legislation may be passed. In the given example, this situation could arise if there are representatives who support the Wild Pig Foundation but also think that wild pigs are great pets. The line item vote will enable them to vote against the ban but support the funding. If the ban and fine fail and the funding passes, the resulting legislation reads, “The money accrued from these fines shall be allocated to the Wild Pig Foundation.” However, because there are no fines, this provision is meaningless.

As can be seen, subsequent rounds of voting are necessary to ensure that nonsensical legislation fails to pass. House members who supported the funding on the contingency that there would be fines can vote against the allocation in the second round.


Earmarks are often slipped into conference committee reports after the differing bills have passed one of the two legislative chambers. This is an even more secretive course of action than the insertion of earmarks during the regular committee process. Because the conference version of a bill cannot be challenged by amendment on the floor, the inclusion of an earmark at this stage usually guarantees its passage with no debate and little publicity or oversight.

Id.
once the bill leaves the conference committee, neither the House nor the Senate will be able to make any further amendments.

Now, let us return to our wild pig legislation. Assume that most senators favor the ban, but they are unwilling to expend much political capital to ensure its passage. Several powerful senators on the conference committee, however, deplore the legislation. Having received a significant portion of their campaign funds from the organization Wild Pigs as Pets, these senators fear losing future donations if the pig prohibition passes. In an attempt to derail the bill, they insert a provision that reads as follows: “States shall not ban smoking in restaurants.” Since this measure is so contentious, if Congress were still operating under the traditional system, the provision would drag down the whole wild pig bill. However, with the line item vote, House members can preserve the integrity of the original bill.

The legislation leaves the conference committee and heads to the House. Once again, there are three line items: (1) It is illegal to keep a wild pig as a pet; (2) Anyone in violation of this law shall be fined $1,000; (3) States shall not ban smoking in restaurants. The representatives cast a vote in favor or against each individual line item. The smoking measure is struck down, but the pig ban and fine pass. A second round of voting is held for these two surviving measures. Both pass, and the two provisions are recombined. This package becomes the final version of the bill, and it is presented to the Senate on a take-it-or-leave-it basis.

This example illustrates another reason why the congressional line item vote is superior to the presidential line item veto. Whereas the line item veto can only be wielded against narrowly defined measures, the line item vote is applicable to all provisions. If a substantive measure is introduced, such as the previously discussed smoking rider, the presidential line item veto would be useless. Representatives, however, can use the congressional line item vote to strike it down.

Although pork-barrel spending bears the brunt of the American people’s anger, non-germane riders that fail to create new spending are also a serious problem. Members of Congress routinely exploit the amendment process by adding entire bills — many of which are controversial — to unrelated, but widely supported, legislation. The line item vote will limit this practice.

Now that we have seen an example of the congressional line item vote, it may be helpful to recap the process:


231 See I. Nelson Rose, Enforcing a Stupid Law, 12 Gaming L. Rev. & Econ. 547, 547–48 (2008) (discussing how a senator, motivated by personal gain, attached the Unlawful Internet Gambling Enforcement Act to the SAFE Port Act, a piece of legislation dealing with port security).
<table>
<thead>
<tr>
<th>Step</th>
<th>Procedure</th>
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<tbody>
<tr>
<td>1</td>
<td>The Clerk of the House of Representatives disaggregates every bill into its constituent line items.</td>
</tr>
<tr>
<td>2</td>
<td>Representatives cast a separate vote for each individual line item.</td>
</tr>
<tr>
<td>3</td>
<td>If every line item passes, send the bill to the Senate. If even one line item fails, proceed to step 4.</td>
</tr>
<tr>
<td>4</td>
<td>Remove all the failed line items from the bill.</td>
</tr>
<tr>
<td>5</td>
<td>Hold a new round of voting. Every representative casts a separate vote for each of the remaining line items.</td>
</tr>
<tr>
<td>6</td>
<td>Repeat step 4–5 until every line item in a given voting round passes or until every line item fails.</td>
</tr>
<tr>
<td>7</td>
<td>Send the resulting bill to the Senate.</td>
</tr>
</tbody>
</table>

C. Administrability

Although the congressional line item vote is a conceptually straightforward change, its implementation would upend the current legislative system. Naturally, this raises concerns regarding the measure’s administrability. Will the procedure upset the balance of power between the House and Senate? How will representatives have time to vote on so many line items? Will the line item vote slow down the legislative process? This section attempts to address each of these issues.

To begin, there is both a practical and historical reason for limiting this procedural change to the House of Representatives. Because the House and Senate must approve the exact same bill, allowing the two bodies to use the line item voting process would make the system unworkable. It would be extremely rare for both chambers to pass the same bundle of line items. This would create a standstill, with very little legislation ever reaching the President’s desk.

By only giving the line item vote to one chamber, this problem is averted. The House takes a reductionist approach, examining the individual provisions, whereas the Senate views the bill in a holistic manner, voting on the entire bundle of legislation. The two bodies now complement each other.

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232 See U.S. CONST. art. I, § 7, cl. 2. “Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . .” Id. This bicameralism and presentment clause mandates that identical bills must pass both chambers before being presented to the President. See also The White House, The Legislative Branch, http://www.whitehouse.gov/our-government/legislative-branch (last visited Mar. 7, 2010) (explaining that “both the House and the Senate must pass the same bill by majority vote”).
The historical reason is derived from the Founders’ original view of each chamber. They envisioned the House as the stronger arm of Congress.233 The Senate, on the other hand, would play more of an advisory role and prevent the House from making rash decisions.234

Even before the Constitution was ratified, many worried that the Senate would become too powerful.235 Throughout American history, many commentators have expressed similar fears.236 Over the past two hundred years, as the Senate has gained more power at the expense of the House, this concern has been validated. Today, the distribution of power between the two chambers of Congress as envisioned by the Founders has “been tossed on its head.”237 The Senate now has significantly more power than the House.238

By requiring the House to vote on each provision, the line item vote will ensure that the House is no longer forced to rubber stamp legislation that is drafted by Senate-controlled conference committees.239 Ultimately, the line item vote will strengthen the House and restore the allocation of power intended by the framers.

Another potential problem involves the sheer number of voting rounds that would be required to create a final piece of legislation. Although this will increase the amount of time lawmakers spend voting, Congress is capable of

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233 This is why representatives serve shorter terms than senators. See THE FEDERALIST NO. 52 (James Madison) (“It is a received and well-founded maxim, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and, conversely, the smaller the power, the more safely may its duration be protracted.”).

234 See James Madison, In Committee of the Whole on the Propositions of Mr. Patterson and Mr. Randolph, in CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS THROUGH THE CIVIL WAR 398, 401 (Scott J. Hammond, Kevin R. Hardwick, & Howard L. Lurbert eds., 2007) (Alexander Hamilton wanted Senators to hold office for life so they could serve as a check against the “turbulence of the democratic spirit” to which the House is susceptible.).

235 See Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 MICH. L. REV. 545, 619 (2004) (During the state ratification conventions, “[t]here was also debate over whether the Senate would be too powerful. Gilbert Livingston complained, for example, that ‘too much is put in their hands’ and that there was ‘little or no check’ on the Senate.” (footnote omitted)); Earl F. Martin, America’s Anti-Standing Army and the Separate Community Doctrine, 76 MISS. L.J. 135, 163 n.124 (2006) (noting that fear of a too-powerful Senate partly caused George Mason to leave the Constitutional Convention).


237 Ezra Klein, The Neglected House, THE WASH. POST, Nov. 30, 2009, available at http://voices.washingtonpost.com/ezra-klein/2009/11/the_neglected_house.html (“[T]he Founders meant for Congress to be more powerful than the president and the House to be more powerful than the Senate . . . . But that hierarchy has been tossed on its head.”).

238 Id. (“For all practical purposes, the House is less powerful than the modern Senate . . . .”) Id.

adapting to the change for several reasons. First, as previously mentioned, electronic voting will hasten the process. Second, although members of Congress have packed schedules, they spend a significant amount of time on activities that do not benefit their constituents. Principally, I refer to their efforts at raising campaign funds. If lawmakers are unable to attend votes because they are busy meeting with potential donors, the representatives’ constituents will take notice.

However, since the desire to raise money is not going to be substantially reduced, a second adaptation will likely occur. Congressional leaders will attempt to minimize voting rounds. This will not undermine the line item vote’s goals, but rather the effects will be felt at an earlier stage. Currently, the votes for important legislation are tallied before an official vote is actually held in the House or Senate. Instead of counting votes for entire pieces of legislation, House members will now keep track of support for individual provisions. Additionally, House leaders will not bring a bill to the floor for a vote unless most of the line items are likely to pass. The actual line item voting process will serve to refine a bill or strip a handful of miscellaneous provisions, not promote wholesale revision. The force of the line item vote will be felt in the drafting stage. By acting as a deterrent, the procedure will discourage lawmakers from even attempting to hide unpopular earmarks in legislation. In turn, this will minimize the number of voting rounds that needs to take place.

Even though the number of votes will not be unwieldy, the legislative process will slow down. This, however, is desirable. A common complaint regarding the current system is that many members of Congress fail to read important bills. The line item vote cannot force lawmakers to read legislation. In fact, it would be naïve to think representatives will suddenly begin poring over every bill. Nonetheless, the line item vote will indirectly solve this prob-

See STRAUSS, supra note 224.

See generally DAN CLAWSON, ALAN NEUSTADTL, & MARK WELLER, DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY (1998) (discussing the corporate lobbying process and the sheer magnitude of time that members of Congress spend raising money); see Lagan Sebert, Durbin: Time Spent Fundraising “Nothing Short of Amazing”, AM. NEWS PROJECT, Mar. 31, 2009, http://americannewsproject.com/videos/durbin-time-spent-fundraising-nothing-short-amazing (In the accompanying video, Senator Dick Durbin states, “if you only knew how much time we spend either raising money or talking about raising money or begging people to take national trips to raise money, it’s just nothing short of amazing.”).

See, e.g., Shailagh Murray & Lori Montgomery, Deal on Health Bill is Reached, THE WASH. POST, Dec. 20, 2009, at A1. With regard to the well known health care legislation, “Majority Leader Harry M. Reid (D-Nev.) secured the pivotal 60th vote after acceding to the demands of Sen. Ben Nelson (D-Neb.) . . ..” Id. These sixty votes were tallied before the bill came to a vote in the Senate. Id.

See, e.g., Brian Baird, We Need to Read the Bills, THE WASH. POST, Nov. 27, 2004, at A31; Radley Balko, Congress Should Read Bills Before Voting, FOX NEWS, Dec. 2, 2004, http://www.foxnews.com/story/0,2933,140204,00.html (“[M]ost members don’t even read the laws they pass. Neither do their staffs. Instead, they more often than not rely on summaries prepared by the bill’s authors, or by interest groups whose judgment they trust.”).
lem by ensuring that representatives are held accountable for their votes on specific provisions. This makes it necessary for House members to understand the details of a bill instead of simply casting their votes based on the overall legislation. To meet these demands, members of Congress will rely on their staffs to weigh the costs and benefits of individual provisions. This process will ensure that House members are better informed.

The congressional line item vote will have many ancillary effects. As with any significant change, it will take time for lawmakers to adapt to the new process, but in the end, this voting process will force Congress to produce superior legislation.

D. The Median Legislator

To see why the line item vote will encourage Congress to pass bills that provide a net benefit to the entire nation, we need only look to the median legislator theorem. The median legislator is that hypothetical congressman who stands in the exact center of the political continuum. He is the deciding vote on all provisions that come before Congress. Therefore, the line items that pass in the House will reflect his policy preferences. To earn the median legislator’s vote, at least half of the congressional districts must favor the measure. Only provisions that advance the national interest are likely to garner such widespread support.

Because the line item vote will reduce the ability of committee members to engage in back room deals, they will no longer be able to buy votes with the promise of earmarks. Pork-barrel spending will stop tempting lawmakers to vote for a bill that is loaded with other provisions that harm their districts. This will cause part of the legislative process to come to a halt. Because earmarks that only help a single district or a small region are unlikely to gain the support of the median legislator, these provisions will rarely be approved. Therefore, Congress’s role at the local and state levels will be diminished. Members of Congress will now have to focus their time on national level legislation, as many of the Founders intended.

244 For a discussion of the “Median Legislator Hypothesis,” see KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 263 (1992).

245 Although the median legislator is the deciding vote, it is still the entire chamber that is guiding policy. This collection of diverse representatives helps to ensure nationalist legislation. See Nzelibe, supra note 182, at 1248. (“[T]he collective nature of Congress’s decisionmaking may actually encourage members of Congress to produce policy outcomes that are more nationalist than those produced by any single elected official.”).

246 See PATRICK CUDMORE, THE CIVIL GOVERNMENT OF THE STATES, AND THE CONSTITUTIONAL HISTORY OF THE UNITED STATES (1875) 81 (2008): Jefferson held that state-rights were a necessary check on the federal government. “I believe the states can best govern our home concerns, and the general government our foreign ones. I wish . . . never to see all offices transferred to
In the context of this national legislation, representatives will only approve line items that help — or at the very least, fail to harm — their districts. This leads to a positive result for the country; only measures that benefit a majority of the people will pass. Under the line item voting system, bills will actually mirror the preferences of the nation instead of serving the interests of a select few.\textsuperscript{247}

CONCLUSION

The national debt is growing at an unprecedented rate, and pork-barrel spending is at an all-time high. Americans, frustrated with congressional corruption, are demanding greater transparency. Lawmakers are aware of these concerns but have not developed a reasonable solution. Instead, they keep supporting various forms of the line item veto. Members of Congress ignore the fact that this measure has failed on both the state and federal levels. More than a hundred years of data show that it has increased partisanship and promoted fiscal irresponsibility. Despite this evidence, the line item veto is a dream come true for legislators. By supporting the procedure, they can look tough on spending while actually increasing wasteful earmarks. Members of Congress win. Special interests win. The only loser is the American taxpayer.

Lawmakers who actually want to fix the process should be backing a plan that has the potential to change the system. The congressional line item vote is one such reform. By forcing House members to vote on each individual provision, this procedure can singlehandedly decrease the deficit, eliminate earmarks, reduce log-rolling, and increase congressional accountability. Where the presidential line item veto failed, the congressional line item vote can succeed.

\textsuperscript{247} For a fuller discussion of the median legislator hypothesis, see Nzelibe, supra note 182, at 1229–39.