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**Alternative Procedures  
Line Item Vetoes and  
Balanced Budget  
Amendments**

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# ALTERNATIVE PROCEDURES IN THEORY

## Balanced Budget Amendments

### I. FACTUAL BACKGROUND

#### A. The Role of a Balanced Budget Amendment in Federal Budget Policy

In order to understand the role that a balanced budget amendment (“BBA”) would play in federal budget policy, it is important to understand the impact that federal deficits and indebtedness have. Apparently, one of the most common arguments for a balanced budget amendment is to avoid national bankruptcy.<sup>1</sup> Furthermore, though the economics is more complex than will be addressed in this paper, persistent deficits are claimed to lower our standard of living, and (unconstitutionally) pass on fiscal burdens to future generations.<sup>2</sup> Moreover, deficits increase the need for government borrowing which in turn crowds out government spending on social programs as the governments makes interest payments rather than public benefit payments.<sup>3</sup>

While some assert that the reason some support a balanced budget amendment is derived from “anti-federalist” impulses to limit the size and power of the federal government,<sup>4</sup> generally speaking, a balanced budget amendment is regarded as a tool to “liquidate” the deficit and the

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<sup>1</sup> Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment that does what its Supposed to Do (and No More)*, 106 YALE L. J. 1449, 1458 (1997).

<sup>2</sup> See Alice M. Rivlin, *How to Balance a Budget*, BROOKINGS INSTITUTION (March 2004).

<sup>3</sup> See *id.* See also CHARLES J. WHALEN, FEDERAL BUDGET BALANCE - TONIC OR TOXIC – FISCAL IRRESPONSIBILITY: THE BALANCED BUDGET AMENDMENT OF “CONTRACT WITH AMERICA” (The Jerome Levy Economics Institute of Bard College, Working Paper No. 132, 1995) (“Simon’s concern about industrial investment is perhaps the economic point raised most often in discussion of the need for budget balance. As Federal Reserve chairman Alan Greenspan put it in a 1989 article, deficits have a “corrosive” effect on the economy because they dampen economic activity by triggering the following series of events: resources are pulled away from net private investment; the rate of growth the nation’s capital stock is reduced; productivity gains are less than would have otherwise been the case; and the growth of our standard of living is similarly impaired (Greenspan 1989)”).

<sup>4</sup> Seto, *supra* note 1, at 1454 – 1455.

problems inherent in a deficit economy.<sup>5</sup> Moreover, because as some have argued, “Congress has proved itself both unwilling and incapable of balancing the federal budget”<sup>6</sup> the duty of balancing the budget should not be left to Congress. Skeptics of the power of a statutory mandate hold the failure of the Gramm-Rudman-Hollings Act to control the deficit as a shining example of why a balanced budget requirement should take on constitutional status.<sup>7</sup> So in contrast to a congressionally dictated, relatively light-weight statutory mandate such as Balanced Budget Act of 1997,<sup>8</sup> a Balanced Budget Amendment to the Constitution would elevate the balanced budgeting policy beyond the immediate control of Congress. On one hand the heavy procedural weight of a constitutional mandate would prevent Congressional politicians from pandering budget policies to their constituents. On the other hand, a constitutional amendment might prevent Congress from quickly responding to fiscal fluctuations.

## **B. What Might a Balanced Budget Amendment Look Like?**

### ***1. Congressional Example of BBA***

Many state governments have managed to enact some form of balanced budget requirement.<sup>9</sup> In contrast, the federal government has made numerous attempts to pass a balanced budget amendment,<sup>10</sup> but each attempt has failed. Because Congress has yet to successfully pass a Balanced Budget Amendment it is unclear idea exactly what such an amendment would look like on the federal level. We can, however, glean from Congressional Balanced Budget Bills and state balanced budget how such an amendment might look. If, for

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<sup>5</sup> See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 26 (Brookings Institution) (2000).

<sup>6</sup> Whalen, *supra* note 3, at 7 (quoting House Republican Conference 1994b, 1).

<sup>7</sup> See *e.g.* Seto, *supra* note 1, at 1465.

<sup>8</sup> Or the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings I), the Balanced Budget Reaffirmation Act of 1987, and the Budget Enforcement Act of 1990.

<sup>9</sup> See *generally* Briffault, *infra* note 18.

<sup>10</sup> Balanced budget proposals were made in 1982, 1986, 1990, 1992, 1994, 1995, 1996, 1997, 2004

instance, the federal government were to model its own Balanced Budget Amendment after the Balanced Budget Constitutional Amendment Bill sponsored by joint resolution of the Senate in 1997 the amendment might mandate that:

- Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.<sup>11</sup>
- Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.<sup>12</sup>
- The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.<sup>13</sup>
- to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts.<sup>14</sup>
- The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect.<sup>15</sup>

Effectively this would be a rather strict amendment to adopt as it requires: a supermajority for changes, the President's *proposed* budget be balanced, the actual budget be balanced, severe constraints on issuing public debt, and a single wartime exception. But there are actually a host of other provisions that could be incorporated into a BBA such as requiring a non-formula based deficit reduction, direct budget participant accountability, and flexibility to respond to economic fluctuations and other emergency situations.<sup>16</sup>

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<sup>11</sup> Balanced Budget Amendment, S.J.Res. 1, 105<sup>th</sup> Cong. § 1 (1997).

<sup>12</sup> *Id.* § 7.

<sup>13</sup> *Id.* § 2.

<sup>14</sup> *Id.* § 3.

<sup>15</sup> *Id.* § 5.

<sup>16</sup> *See e.g.* Robert D. Reischauer, Director of the Congressional budget Office before the House of Representative's Committee on the Budget – June 3, 1992.

## ***2. State Examples of BBA***

Another model for a balanced budget amendment might be derived from the states – many of which, unlike the federal government, do indeed have constitutional provisions for a balanced budget:

“Some states merely require that the governor submit a balanced budget to the legislature. Idaho and Texas do not compel the governor to submit a balanced budget but do require the legislature to pass a balanced budget, though the final deal between the executive and legislature need not be balanced. Conversely, Kansas mandates that the governor and legislature both present balanced budgets, but does not impose a requirement that the final deal be balanced...

...Some states, such as Massachusetts, Alabama, Alaska, and North Carolina, require balanced budgets as a part of the constitutional charter, whereas Mississippi and Arkansas impose balanced budget requirements solely by statute. Further, some mechanisms are stronger than others. For example, Idaho's constitution requires a balanced budget, but apparently "there are no sanctions" for failing to balance the budget, as the legislature has over-appropriated budgets without successful challenge. New York and Virginia do not have balanced budget requirements with respect to bill passage, but rather impose a requirement on the executive not to spend more than actual revenues” [footnotes eliminated].<sup>17</sup>

Thus, there is truly a variety of combinations that a federal balanced budget amendment could take on – it could require both the executive and legislative branches to propose and pass balanced budgets/legislation; it might require the executive branch to propose a balanced budget it allowed the legislative branch to pass “unbalanced” legislation; or it might require the legislature to pass a balanced budget but not require the actual budget to be balanced, etc. In another twist, a balanced budget amendment might (or might not) allow the government to carry over deficits into the next fiscal year.<sup>18</sup> The actual stipulations of BBA at the federal level would ultimately depend on just how stringently the federal government wanted to ensure that the budget is indeed “balanced.”

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<sup>17</sup> Robert Ward Shaw, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. Rev. 1195, 1227 – 1228 (2004).

<sup>18</sup> For a discussion of deficit carry over at the state level, see RICHARD BRIFFAULT, BALANCING ACTS: THE REALITY BEHIND STATE BALANCED BUDGET REQUIREMENTS 10 -11 (1996).

### 3. *Theoretical Considerations*

Theodore P. Seto,<sup>19</sup> an associate Professor at Loyola Law School, offers advice that might also be considered before Congress passes any balanced budget amendment:

“...[I]t should be drafted in language independent of a particular budget process. This is necessary to give Congress flexibility to change and improve its budgetary procedures over time. Unless we believe that the current process cannot be improved, an amendment that constitutionalizes that process and freezes it forever in its current form would be unnecessarily rigid and, in the end, self-defeating. Further, an amendment that invokes existing budgetary concepts brings with it unnecessary interpretive baggage.

...A second problem in structuring and interpreting a balanced budget amendment is that of defining the entities or programs to which it applies. To the extent that Congress has the ability to move receipts into, or outlays and debt out of, an amendment's computations, it may meet the technical requirements of the amendment simply by redefining what is included in the budget, without making any real changes to receipts, outlays, or debt.”

In light of the variety of federal, state, and theoretical examples of BBA, it is hard to pinpoint exactly what one might look like in practice – hence the title of this article: *Alternative Procedures in Theory*.

### C. Practice vs. Formal Requirements

Since there is no other point of reference, the state balanced budget practices stand as the sole example – or warning – about what might happen if the amendment were passed on the federal level. On the state level, it is hard to tell whether or not the states are “practicing what they preach” – i.e. whether or not they are really balancing their budgets. The problem lay in the fact that most states do not use the Generally Accepted Accounting Principals (GAAP) when accounting for their receipts and spending.<sup>20</sup>

*Bishop v. Governor of Maryland*<sup>21</sup> presents one example of a state that was faced with the question of whether its balanced budget practice actually conformed to the state’s formal balanced budget requirements. In *Bishop*, Maryland taxpayers challenged the state’s 1976 – 1977 budget claiming that it was only balanced because Maryland had relied on two “optimistic

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<sup>19</sup> Seto, *supra* note 1, at 1493-94.

<sup>20</sup> Briffault *supra* note 18, at 15.

<sup>21</sup> 281 Md. 521 (C.A.Md 1997).

contingencies:” revenue from the state lottery and the extension of a federal revenue sharing program. The plaintiffs argued that the budget was not balanced because it relied on revenues that had not been available. The trial court ruled in favor of the Maryland accounting practice noting that Maryland’s balanced budget requirement allowed for “estimated revenues.” When revenues can be “estimated” into or off of an accounting sheet, it is hard to tell what is going on with the government’s budgeting practices. Similarly, if a BBA were passed at the federal level, it would likely be difficult to tell if the federal government was “practicing what it preached.” In fact, as we have learned throughout this class, in the game of federal budget policy, the definitions of ‘budget,’ ‘balance,’ ‘receipts,’ ‘debts,’ ‘outlays’ are defined by politics rather than generally accepted accounting principals. There would be no reason to believe that it would be much different because of a Constitutional amendment.

## **II. EXISTING CRITIQUES**

Many people offer opinions about the prospect of Congress interpolating a balanced budget requirement into the Constitution. Most critics of a balanced budget amendment do not lay claims against the general idea of having a federal balanced budget amendment. Rather most existing critiques are moot -- as they were lodged against specific provisions of specific proposed amendments that have since been defeated anyway. Furthermore, interestingly enough, most of the critiques that I found about a BBA were not about the substantive economic effects of such an amendment (though some indeed were). Rather the critiques tended to center around whether or not an amendment would encourage deceptive accounting practices, whether Congress was likely to even pass an amendment, and how an amendment would tend to upset current distribution of budgeting power amongst the three branches.

## A. Anecdotal and Theoretical Critiques of Balanced Budget Policy

### *Critique 1: BBA Would Encourage Deceptive Practices*

Based on the disheartening experiences with the Balanced Budget and Emergency Deficit Control Act of 1985 and the Balanced Budget Reaffirmation Act of 1987, some members of Congress have cautioned against the negative effects of rigid budgeting laws such as a constitutional budgeting amendment. In 1992 the Director of the CBO paralleled a balanced budget amendment to past budgeting statutes and warned that similar to the “creative accounting” that ensued when the other budget statutes were enacted a balanced budget amendment “[w]ould lead to evasion and gimmicks on a titanic scale.”<sup>22</sup> In light of these past experiences, he added that an amendment might lead to “creative accounting..., changing definitions to affect the composition of the budget covered by an amendment..., myopic budgeting (forgoing current expenses even if they result in long-term savings), and shifting burdens and responsibilities to businesses or other governments...”<sup>23</sup> Moreover, the states’ longstanding pattern of engaging in practices that undermine their constitutionally based balanced budget mandates<sup>24</sup> suggests a dismal fate for any federal balanced budget requirement.

### *Critique # 2: BBA Tends to Shift Power to Executive and Judicial Branch*

Some see it as a virtue, others as a critique -- either way, as the argument goes another “problem” with having a Balanced Budget Amendment is that an amendment could strengthen the power of the Executive<sup>25</sup> and judicial branches vis-a-vis the power vested in the legislative

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<sup>22</sup> Reischauer, *supra* note 16.

<sup>23</sup> *See id.*

<sup>24</sup> *See* Seto, *supra* note 1, at 1470 – 1473.

<sup>25</sup> *But see id.* at 1508 – 1509 (describing how in passing a balanced budget amendment, Congress might explicitly limit the ability of the President to enforce the amendment. Namely, the article notes that in the 1995 Senate committee report for S.J. Res. 1 explicitly stated that “it is not the intent of the committee to grant the President any impoundment authority under S.J. Res. 1.” In fact, that draft of the amendment vested in Congress the power not only to define what a balanced budget was but also to take corrective action if Congress failed to voluntarily comply.)

branch. This has happened with some state governments<sup>26</sup> and tends to be one of the more controversial critiques of a balanced budget amendment.<sup>27</sup> In terms of increased Presidential authority, many worry that a balanced budget amendment would implicitly (and possibly explicit) vest in the President the authority to strike certain budgetary items if they would lead to imbalance. A more detailed discussion of these concerns is presented in the second section of this paper, *Line Item Vetoes*.

Additionally, there is a concern over an undue increase of judicial influence. “[T]he presence of fiscal language in a constitution opens the door to judicial involvement in budgetary policymaking and politics. Fiscal constitutional provisions transform public finance into constitutional law.”<sup>28</sup> And as the argument follows, it is not, nor should it be the role of the courts to set our national budget. Beyond this normative issue of whether or not the courts should be involved in setting national budget policy, some commentators question whether the courts would even have the ability to evaluate and ferret through the complexities<sup>29</sup> of the federal budget process.<sup>30</sup>

Interestingly enough, the evidence from the states suggests that we would not have to fear the overreaching hands of judicial intervention in a federal balanced budget process. For one thing, well before resorting to the courts the states employ non-judicial mechanisms to close any

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<sup>26</sup> Briffault, *supra* note 18, at 31.

<sup>27</sup> See e.g. Robert Greenstein, Center on Budget and Policy Priorities, *If Everyone Agrees We Should Balance the Budget by 2002: What's the Problem with a Constitutional Amendment?* (Jan. 28, 1997), available at <http://www.cbpp.org/BBAIF.htm>.

<sup>28</sup> Briffault, *supra* note 18, at 41.

<sup>29</sup> But see James Bowen, *Enforcing the Balanced Budget Amendment* 35, 39, 58 (1993) (unpublished third year paper, Harvard Law School) (on file with Professor Howell Jackson) (arguing that the judiciary would be capable of ruling over a federal budget case seeing that it has presided over in many complex litigation cases and in addition, it routinely analyzes economic data in the contexts of antitrust, regulatory, bankruptcy, and business tort law. Moreover, Bowen, argues that the courts would not find a federal budget analysis qualitatively different from the taxation and spending cases that already rule over.)

<sup>30</sup> See Seto, *supra* note 1, at 1523 – 24.

budget gaps that may exist. Such measures include spending cuts and revenue increases, as expected; additionally states use interfund transfers, reduced pension contributions, personnel actions, deferred payments, and other actions<sup>31</sup> to avoid litigation. Furthermore, state evidence indicates that there actually has not been much litigation around balanced budgets. For example in 1996, when balanced budget debates had been on the table for decades, there had been relatively little balanced budget litigation in the states.<sup>32</sup> Up to that point, there was apparently no state case that had invalidated a state budget for failure to satisfy a constitutional balance budget requirement.<sup>33</sup> Moreover, of the cases that did exist, most tended to focus on the mechanisms that the states had used to balance their budgets e.g. employee wage freezes and failure to make payments to pension funds,<sup>34</sup> rather than *whether* there was balance. Overall the state judiciary seems reticent to engage in the politics of budgeting. Another more recent example of such judicial restraint can be found in *In the Matter of the Application of the Oklahoma Department of Transportation*,<sup>35</sup> the Oklahoma court stood firm in its traditional role as interpreters as the court decided whether the states issue of grant anticipation notes create a debt subject to the provisions of the Oklahoma Constitution.

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<sup>31</sup> See e.g. GAO Briefing Report to the Chairman, Committee of the Budget, House of Representatives, *Balanced Budget Requirements: State Experiences and Implications for the Federal Government* (1993) (reporting that the dollar value of budget balancing actions 25 states took to close gaps during enactment of current budgets was spending cuts (49%), revenue increases (32%), and other actions (19%). The breakdown of the “other actions” that states used to close budget gaps was: rainy day funds (15%), interfund transfers (20%), reduced pension contributions (7%), personnel actions (6%), deferred payments (16%), miscellaneous other actions (36%).

<sup>32</sup> See Briffault, *supra* note 18, at 36.

<sup>33</sup> *Id.* at 37.

<sup>34</sup> *Id.*

<sup>35</sup> 82 P.3d 1000 (Sup. Ct. Ok 2003)

What is more, despite some arguments that the courts *could* in fact handle the complexities of budget policy if they wanted to,<sup>36</sup> the evidence from the states<sup>37</sup> suggests that courts are (explicitly) reticent to get their hands dirtied with balanced budgeting matters. For instance, when the New Jersey court court in *Lance v. McGreevy*<sup>38</sup> was faced with the question of what constitutes revenue under the state constitution’s Appropriations Clause, they smoothly avoided becoming too entangled with invalidating state budget practices: “We also are satisfied that the legislative and executive branches acted in good faith, relying on the honest, albeit erroneous, belief that the budget properly was balanced under existing constitutional standards. For those reasons we are convinced that our holding should be given prospective effect only.” Had the court given the holding retroactive effect, it may have condemned itself (or the lower courts) to a messy (politically laden) task of deciding which expenditures had been unconstitutional. As it stands, the prospective application of the holding means that the future legislature, not the courts, will have to balance the budget problem. One answer to why the courts have been resistant to dabbling in balanced budget politics is the “political question

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<sup>36</sup> See generally Bowen, *supra* note 29.

<sup>37</sup> See e.g. GAO Briefing Report to the Chairman (1993), *supra* note 31, at 23 (“Few Court Cases Enforcing Cuts - In 16 of 49 responses, state budget officials said that there had been court decisions or attorney general opinions that affected balanced budget requirement interpretation.”)

<sup>38</sup> 180 N.J. 590 (Sup. Ct. N.J. 2004). For another example of a state court exercising restraint and recognizing its limited role with regard to balanced budget politics see *Guinn v. Legislature of the State of Nevada*, 71 P.3d. 1269, 1274 (S.C.Nev. 2003) (“Clearly this court has no authority to levy taxes or make appropriations. Only our Legislature has been given the constitutional mandate to make appropriations, levy taxes, and to balance the state’s budget. However, when constitutional provisions are incompatible with one another or are unworkable, or when the enforcement of one prevents the fulfillment of another, this court must exercise its judicial function of interpreting the Constitution and attempt to resolve the problem.”). Furthermore, although this NV court did in fact demand that the legislature appropriate funds for education, it did so only because the state had a “constitutionally mandated obligation” to fund education. *Id.* at 1273. Therefore, fears that the federal judiciary, when presented with an unbalance budget case, would involve itself in picking and choosing which federal programs should stay and which federal programs should be cut may be exaggerated. Yet another example of judicial restraint is found in *Chiles v. Children*, 589 So.2d 260, 269 (Sup.Ct. FL 1991) (arguing that if the court were to allow the legislature to delegate to the Governor the power to reapportion the state government, the court would “be arrogating to ourselves, not merely the power of the legislature to make laws, but the power of the people to change the constitution.”)

doctrine.” Founded on separation of powers ideology, the “political question” doctrine imposes a hortatory stricture on courts to avoid ruling on matters “more effectively resolved by the political branches.”<sup>39</sup>

So what does this mean for enforcement of a federal balance amendment? Well if the state courts are hesitant to get involved with the relatively meager budgets of their states, it seems unlikely that the federal courts would be willing to jump into the unwieldy, morass that is federal budget policy. Thus, the critiques in this regard may be unfounded.

### ***Critique # 3: Congress Would Never Even Pass a BBA***

#### *Public Choice Doubts BBA Will Pass*

“Constitutional Politics and Balanced Budgets,”<sup>40</sup> written by public choice theorist, Professor Nancy Staudt notes another critique that could be laid against a federal balanced budget amendment. Beyond the normative question of whether or not we should constitutionally codify balanced budget policies, Professor Staudt argues that it is not even likely that politicians would pass such an amendment because politicians are loath to bind themselves in ways that might prevent them in the future from appeasing their constituencies.<sup>41</sup>

As noted earlier, Congress has tried and failed numerous times to pass this amendment. In fact, when amendment discussions recently reemerged in the halls of Congress, even some Republicans (who are traditionally the main proponents of Balanced Budget Amendments)

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<sup>39</sup> Bowen, *supra* note 29, at 49 – 50.

<sup>40</sup> Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. Ill. L. Rev. 1105 (1998).

<sup>41</sup> *See id.* at 1109.

admitted that “their hearts were not in it.”<sup>42</sup> “We can limit deficits on our own,” is what was said.<sup>43</sup> Thus, it seems that the public choice arguments may, in fact, be on point.

*BBA is Unnecessary at Best, Economically Detrimental at Worst*

Then the question arises: is “balance” really desirable.<sup>44</sup> Of course most of the world has been trained to believe that debt and “unbalance” is bad.<sup>45</sup> Interestingly enough, however, there do exist many convincing arguments against the balanced budget amendment specifically for the reason that, there may be a “healthy level of national debt,”<sup>46</sup> and thus no need for a balanced budget amendment.

“An important CBO analysis issued in 1996 projects that if deficits through 2030 are held to about 1.5 percent of the Gross Domestic Product — about \$110 billion in 1996 terms — total income per person will grow 41 percent between now and 2030. In other words, with moderate deficits of this size, the U.S. economy will continue growing and living standards will rise appreciably. Furthermore, the same CBO analysis projects that if the budget is balanced every year through 2030, income per person will rise by 43 percent during this period, virtually the same amount.

In short, CBO finds that there would be little difference in living standards over the next 35 years under a balanced budget requirement and under a policy of moderate deficits. As a result

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<sup>42</sup> Jonathan Weisman, *The GOP Drops Work on Balanced Budget*, WASHINGTON POST, September 30, 2004.

<sup>43</sup> *Id.*

<sup>44</sup> There are also those who argue the other side of the coin: that balance budget does not go far enough; that instead we should strive for surplus economies, *see e.g. id.* (“If we believe that the debt is at unhealthy levels, the rationale implies that we should run surpluses to reduce the debt, not merely balance the budget”).

<sup>45</sup> *See e.g.* Seto, *supra* note 1, at 1459 (arguing that national bankruptcy can lead to a country’s loss of sovereignty as international entities set their conditions of assistance).

<sup>46</sup> *See id.* at 1460 (stating that “there is no consensus as to what constitutes a healthy level of national debt”).

of this finding, CBO has stated that ‘sustainable policies do not require balanced budgets’ if deficits are kept to moderate levels.”<sup>47</sup>

As if to buttress the CBO finding, it has been argued that the dearth of state cases “construing and enforcing balanced budget requirements raises a serious question about the importance of such provisions in compelling” a balanced budget.<sup>48</sup> From the mouths of state officials themselves, the states have made clear that a balanced budget requirement alone is not what motivated them to maintain balance.<sup>49</sup> If anything, a balanced budget requirement is only one of a host of motivating factors including “enforcement provisions and sanctions, court decisions, the tradition or expectation of balance, bond ratings, and other motivators.”<sup>50</sup>

The argument reaches further. Not only do critics argue that there is *no need* for a federal balanced budget amendment, they also argue that a balanced budget requirement could be *detrimental* to our economy. Namely, during times of recession and weak economies, a balanced budget mandate would force spending cuts or tax increases which would tend to exacerbate the recession.<sup>51</sup> “One of the key reasons we have had no depression and few severe recessions during the past 60 years is that what economists call the "automatic stabilizers" — reductions in tax collections and increases in unemployment insurance benefits and means-tested entitlement benefits — automatically kick in when the economy weakens and unemployment climbs. This helps to break the economy’s slide. The balanced budget amendment would not only undermine the automatic stabilizing function the federal government plays but would push in the opposite

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<sup>47</sup> Richard Kogan and Robert Greenstein, Center on Budget and Policy Priorities, *Legacy of Debt? The Balanced Budget Amendment and the Next Generation* (Jan. 6, 1997), available at <http://www.cbpp.org/BBALEGAC.htm>.

<sup>48</sup> Briffault, *supra* note 18, at 41.

<sup>49</sup> GAO Briefing Report to the Chairman (1993), *supra* note 31, at 39.

<sup>50</sup> *Id.*

<sup>51</sup> Of course, this might be offset if the amendment required a certain level of saving during times of economic surplus as has been proposed by the GAO. See Statement of David M. Walker, Comptroller General of the United States, GAO Report – Moving from Balancing the Budget to Balancing Fiscal Risk (February 2001)

direction by requiring greater retrenchment when the economy falters.”<sup>52</sup> In addition, some fear that having the amendment would pose a risk to the U.S. banking system because the government might be prevented from making deposit insurance payments if such payments would undermine the budget balance.<sup>53</sup>

### *Critique # 5: State Anecdotes*<sup>54</sup>

The critiques of a balanced budget amendment are not just critiques based in theory. Having imposed a very stringent Balanced Budget Amendment in their constitution,<sup>55</sup> North

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<sup>52</sup> Greenstein, *supra* note 27.

<sup>53</sup> Of course, the point might be overstated. Congress might in fact consider systemic bank failure a sufficient enough “emergency” situation to fall into the exceptions of the balance requirements. Moreover, if ever such an amendment were to pass, Congress could explicitly exempt deposit insurance payments during times of endemic bank failure.

<sup>54</sup> Some have warned that any comparison between state balanced budget requirements and implementation at the federal level be taken with a grain of salt. In its 1993 report of the implications of state balanced budget policy for the federal government, the GAO noted “[t]he state experience with balanced budget requirements may not transfer to the federal budget for the following reasons: i) the role of the federal government (for example, stabilizing the economy) may not always be compatible with achieving a balanced budget; ii) the balance of powers is different at the state and federal levels (for example, many governors can cut budgets during the year without legislative approval); iii) other factors motivating state efforts to balance budgets (for example, bond ratings) have not been strong enough at the federal level to maintain a balanced budget; iv) some balanced budget requirements provide enough flexibility for states to carry over deficits if necessary.” GAO Briefing Report to the Chairman (1993), *supra* note 31, at 40.

<sup>55</sup> See N.C. Const. art. V, §3(1). The relevant provisions of the North Carolina constitution read as follows:

(1) Authorized purposes; two-thirds limitation. The General Assembly shall have no power to contract debts secured by a pledge of the faith and credit of the State, unless approved by a majority of the qualified voters of the State who vote thereon, except for the following purposes:

- (a) To fund or refund a valid existing debt;
- (b) to supply an unforeseen deficiency in the revenue;
- (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
- (d) to suppress riots or insurrections, or to repel invasions;
- (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;

Carolina is itself now dealing with the ramifications of its balanced budget amendment. According to sources, budgeting decisions in North Carolina have been extremely difficult and stilted as: 1) obligations to public education increased as a result of new state constitution interpretations 2) the obligations to former and current state employees has increased, and 3) the state fights a devastating recession.<sup>56</sup> A similar fate could easily befall the federal government if a similar amendment were added to the federal constitution. In fact, given the extra layers of review, scrutiny and interested parties, a federal amendment might pose even more severe constraints.

## **B. Empirical Stories on Balanced Budget Policies**

Rather than a critique, the empirical data seem to speak in favor of balanced budget policy. According to a paper published in the *National Tax Journal* in 1998, several state based studies of balanced budget requirements (BBR) have found that strong BBRs<sup>57</sup> have large effects on the size of state budget deficits and on states' propensities to run deficits.<sup>58</sup> According to the paper, studies have found that i) states subject to BBRs eliminate deficits more quickly; ii) that states with particularly strong BBRs make larger reductions in expenditures in response to short-run deficits; that iii) there is a strong correlation between the strength of the BBR and the states'

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(f) for any other lawful purpose, to the extent of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium.

<sup>56</sup> Shaw, *supra* note 17, at 1197-1198.

<sup>57</sup> Where the "strength" of the BBR is determined by assessing whether: 1) the governor has to submit a balanced budget; (2) the legislature has to pass a balanced budget, (3) the state may carry over a deficit but must correct it in the next fiscal year; (4) the state may not carry over a deficit into the next budget period (often two years long); and (5) the state may not carry over a deficit into the next fiscal year. See 51Nat'l Tax J. 715, 715 – 732 (December 1998).

<sup>58</sup> Id.

primary budget surplus; and that iv) preventing states from carrying budgets into the next fiscal year leads to greater surpluses and less deficits.<sup>59</sup>

Of course there are many key differences between state and federal government that would lead to questions about how similarly BBRs would affect the national economy, as discussed in footnote 54 of this paper.

### **C. Reform Proposals for Federal Balanced Budget Policy**

One interesting reform proposal comes from a Canadian critique of the way that the United States federal government defines its budget balance.<sup>60</sup> Taking issue with our narrow definition of budget, the author suggests that in order to more accurately calculate budget balance, we should calculate cash revenues less total liabilities (both cash and non-cash) incurred during the year – rather than our current system of cash revenues minus cash expenditures.<sup>61</sup> It is not clear how such a change would affect the intricacies of a balanced budget amendment. Presumably, however, since the definition tends to increase the deficit (so to speak) and thus making it harder to spend, and harder to reach “balance,” it is less likely a balanced budget amendment would pass using this definition of budget.

There also exists another budget reform proposal that is not directly related to BBAs, but which might nevertheless affect the way that we think about a federal balanced budget amendment. In order to reduce the time spent on budgeting matters, some have proposed that the

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<sup>59</sup> See id.

<sup>60</sup> For a similar argument, see Howell Jackson, *Accounting for Social Security and Its Reform*, 41 Harv. J. Leg 59 (2004) (arguing for an accrual based federal accounting system).

<sup>61</sup> See David A. Dodge, *Balanced Budget v. Social Responsibility*, 9 Experience 14, 16 (Fall 1998).

federal government move to a biennial budgeting calendar.<sup>62</sup> Though it is not clear how, it is clear that such a reform might tend to alter the course of BBA discussions.

## Line Item Vetoes

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### 1. The Line Item Veto Act, Pub. L. No. 104-130 (1996)

President Clinton signed the Act in April of 1996. *Clinton v. City of New York*<sup>63</sup> found the Act unconstitutional in June of 1998. In the intervening 25 months, President Clinton exercised his power under the Act eighty-two times in 11 laws, with Congress overriding 38 of the vetoes.<sup>64</sup> The White House estimated \$2 billion was saved through these vetoes.<sup>65</sup>

The Act operated as followed, and was sunset to expire Jan. 1, 2005:<sup>66</sup>

1. Congress passes a bill containing an appropriations item, <sup>67</sup> new direct spending, or a “limited tax benefit.” (Limited tax benefits were “[R]evenue measures providing benefits to one hundred or fewer taxpayers.”)
2. The President signs the measure, as any other bill. The measure is enacted into law. Steps 3 through 5 do not apply if a bill becomes law without the president’s signature.
3. Within 5 days after signing the measure, the president notifies Congress that he has cancelled “whole” dollar amounts of discretionary budget authority, an item of direct spending, or a limited tax benefit. The president may not cancel legislative language in an appropriations bill.
4. Within 30 days, Congress may pass legislation disapproving the President’s cancellation. If it fails to do so, the canceled provision ceases to have legal force or effect. Disapproval legislation would be considered under expedited procedures.
5. Congress may override the President’s veto by a two-thirds vote

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<sup>62</sup> For the in-depth discussion of biennial budgeting see GAO Report, “Biennial Budgeting – Three States’ Experiences” (October 2000).

<sup>63</sup> 524 U.S. 417 (1998).

<sup>64</sup> WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 342 (3d ed. 2001).

<sup>65</sup> Schick, *supra* note 5, at 96.

<sup>66</sup> This chart is partially quoted from, and was inspired by, Schick, *supra* note 5, at 97 Box 5-5.

<sup>67</sup> Budget authority, not outlays.

## 2. Alternative Proposals

### a. Amendments to rescission authority<sup>68</sup>

One of the most prominent alternatives based on the President's rescission authority is "Expedited Rescission Authority." The House passed a bill embodying this reform three times in the early-90's. It would force either house of Congress to vote on the President's proposed rescissions,<sup>69</sup> on the theory that Congress would rather acquiesce than go on record supporting outlandish spending items. For an example of an expedited rescission bill, see H.R. 1321 (1997).

Another popular plan is to give the President "Expanded Rescission Authority." Under this method, Congressional inaction following the President's proposed rescissions would result in the rescissions taking effect. A disapproval resolution would be subject to the bicameralism and presentment requirements of Art. I, § 7, effectively requiring two-thirds of both houses cancel the President's rescission.<sup>70</sup> Commentators believe enhanced rescission authority would function similarly to a LIV, with the added flexibility of allowing reductions in funding and more targeting.<sup>71</sup>

### b. Additional Proposals

In the 1980s, some briefly argued that the President's inherent authority gave him power to use a LIV. The OLC, AG, and White House Counsel found no basis for such a power, convincing President Bush in 1992.<sup>72</sup>

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<sup>68</sup> Under the Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332, the President can propose not to spend all or a portion of the funds Congress has appropriated for a particular project. If Congress does not approve the rescission within 45 days, the President must spend the money.

<sup>69</sup> Louis Fisher, Congressional Research Service, *A Presidential Item Veto* 2 – 3 (2004)

<sup>70</sup> *See id.* at 3.

<sup>71</sup> *See* Allen Schick, *Proposed Budget Reforms: A Critical Analysis* 47 (Cong. Res. Ser. 1987)

<sup>72</sup> *See* Fisher, *supra* note 69, at 2.

Another alternative, separate enrollment, was actually proposed by the Senate in 1995 as an alternative to the LIVA.<sup>73</sup> After a bill otherwise subject to the LIV passed both houses, a clerk would “break the bill into unnumbered paragraphs (containing dollar amounts) and numbered sections (containing provisos or conditions), with each part made into a bill and presented to the President. ... [T]he ‘mini-bills’ would first be sent back to each chamber and voted on en bloc.”<sup>74</sup> This procedure could be modified to apply only to items in dispute between Congress and the President.<sup>75</sup> Note that under either version, separate enrollment would not allow the President to cancel programs itemized at the Committee-report level, as he was able to do under the LIVA.<sup>76</sup>

Louis Fisher of the Congressional Research Service has suggested two additional statutory options that could be employed to give the President greater power over expenditures. First, “Congress may pass lump-sum appropriations that provide funds ‘not exceeding’ amounts specified in the statute.”<sup>77</sup> This would allow the President, for any given appropriation, to spend less than the amount appropriated, including nothing at all. Secondly, Congress can appropriate funds with certain conditions and delegate the determination of whether the conditions are satisfied to the President.<sup>78</sup>

The Bush administration included in its FY06 budget a proposal to give the President a “constitutional line-item veto.” According to the budget, this veto would be linked to deficit

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<sup>73</sup> See S.4, reprinted at 141 Cong. Rec. 8941 (1995).

<sup>74</sup> See Fisher, *supra* note 69, at 4.

<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.*

reduction — money saved through vetoes “would be used for deficit reduction, and could not be used to augment other spending.”<sup>79</sup>

B. \_\_\_\_\_  
The states, unencumbered by Article I, § 7, have had significantly more success creating line-item veto like procedures. Whether this success in creating institutions has translated into success in advancing the functional rationales for the institutions is a question that will be discussed later. For now, a brief overview of the LIV in the states will be provided. For a state-by-state analysis on a couple of crucial issues, see the Appendix.

One of the most significant axes along which state LIVs range is the power they grant to the chief executive. 41 states allow the governor to veto “items” in appropriations bills. Of those, 9 allow the governor to choose to reduce the amount appropriated to an item instead of eliminating it entirely. 24 of the 41 states allow the governor to veto *language* in appropriations bills. Washington, in an amazing grant of power to the executive, allows its governor to veto language in any bill.<sup>80</sup>

The states also vary in the level of legislative support necessary to override a LIV by the governor. Obviously, the higher the portion of the legislature required to override, the more powerful the governor’s LIV will be. Alaska requires three-quarters of the legislature to override, the highest. 32 states require two-thirds. 4 require three-fifths, and 4 require a bare majority.

The last major dimension state LIVs vary upon is the treatment they receive in the state courts. Unlike the federal LIV, which was merely statutory, state LIVS are found in state

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<sup>79</sup> *The Nation’s Fiscal Outlook, from The President’s FY2006 Proposed Budget* (27) (2005).

<sup>80</sup> Eskridge et al., *supra* note 64, at 335.

constitutions.<sup>81</sup> Of course, this heightens the mast-tying power of state LIVs. State supreme courts have often been called upon to determine the scope of a governor's LIV power when the legislature has employed various devices to insulate certain funding and language from the veto. Courts have struggled to adjudicate these highly political and sometimes indeterminate cases, wrestling with questions of what constitutes an "item" and how to deal with conditions. Consequently, much of how a LIV functions in any given state depends on how the judicial branch construes it. Louis Fisher and Richard Briffault have written thorough accounts of state courts wrestling with these difficult questions.<sup>82</sup>

These major axes of state variation would translate differently into the federal sphere. Federal proposals, like the states, differ as to the precise level of power they give the executive. While none of the major proposals give the President the power to veto language in bills, there is dispute as to whether the President should have the option of reducing an appropriation, rather than eliminating it entirely. Most of the federal LIV proposals adopt art. I, § 7's two-thirds requirement for veto-override, producing less variation than among the states. It seems likely though, that if a federal LIV were passed, the federal courts would have to confront many of the same difficult questions state courts have faced when adjudicating heavily political disputes between the President and Congress. Recourse to the Court's political question doctrine would not likely be a way out, since the validity of Presidential LIVs, and with them, the status of funding for agencies, could turn, for example, on how precisely an "item" is defined.

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<sup>81</sup> Virginia A. McNurty, *Item Veto and Expanded Impoundment Proposals*, 5 (Cong. Res. Ser. 2001)

<sup>82</sup> See Louis Fisher, *Line Item Veto Act of 1996: Lessons from the States* (Cong. Res. Serv. 1996) (describing state legislative techniques to circumvent gubernatorial LIV power and judicial responses); Richard Briffault, *The Item Veto in State Courts*, 66 Temple L. Rev. 1171 (1993) (describing the history and form of the item veto, and examining court responses to some of complex problems posed by it).

## A. Empirical Studies of State Experimentation

One of the dominant strains of literature dealing with LIVs is empirical study of what, if any, effects LIVs have had in the states. With 41 states possessing some variety of a LIV, there is an ample sample that has attracted a number of political scientists. These empirical studies are not relevant solely for academic purposes — their results have heavily influenced debate over whether the federal government should expand executive veto authority.

Discussion of empirical studies should begin with discussion of the work of Glenn Abney and Thomas Lauth, who together are the most prolific and most referred to scholars on this subject. Interestingly, Abney and Lauth's views of the effects of state LIVs have changed over time. Abney and Lauth surveyed state legislative budget officials for their 1985 article, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or Partnership?*.<sup>83</sup> Based on the responses, Abney and Lauth concluded that the LIV is used as a tool of partisan political power more than it is used to promote fiscal responsibility. As discussion of the theoretical literature will show, this finding made a lasting impression. A little less than a decade later, Abney and Lauth again conducted a survey, this time included budget officials from the executive branch as well as the legislative. In a significant shift, they found that the LIV does increase fiscal responsibility *when* the Governor has the power to reduce appropriations and delete language.<sup>84</sup> Further parsing the survey results, the authors wrote a year later that the LIV is not related to perceptions of gubernatorial influence, except when governors have the power to reduce, as well as eliminate, items. Governors having the power to delete language were also perceived as more

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<sup>83</sup> Glenn Abney & Thomas Lauth, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or Partnership?*, 45 Pub. Admin. Rev. 372 (1985).

<sup>84</sup> Glenn Abney & Thomas P. Lauth, *The Item Veto and Fiscal Responsibility*, 59 J Pol. 882 (1997).

influential.<sup>85</sup> When considering this last study, it seems significant that the perceptions reported were those of budget officials.

Abney and Lauth have not occupied the field of empirical studies of state LIVs. In 1988, David Nice conducted a cross-sectional empirical analysis of the LIV in the states, finding no statistically significant relationship between a LIV provision and reduced government spending, in either unitary or divided state governments.<sup>86</sup> A 1988 working paper by Douglas Holtz-Eakin conducted an econometric analysis of how LIVs affect the state budgeting practices in the states.<sup>87</sup> The author found that “long-run budgetary behavior is not significantly affected by the power of a line item veto.”<sup>88</sup> However the authors also found that the presence of the LIV can significantly affect the outcome of short-term budget conflicts. The degree of effect depends on whether government is divided and the degree of support the Governor has in the legislature.<sup>89</sup> Partisanship affects how the LIV is employed — Democratic and Republican governors target different types of spending.<sup>90</sup>

#### B. Theoretical Arguments Pre-*Clinton v. City of New York*

Before the *Clinton v. City of New York* decision, both before and after the LIVA, debate seemed to focus on whether a LIV would actually increase federal fiscal responsibility. Most assessments of the LIV’s potential effect on fiscal accountability were skeptical. The most positive assessment came from the (then) General Accounting Office, which in 1992 estimated

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<sup>85</sup> Glenn Abney & Thomas P. Lauth, *The End of Executive Dominance in State Appropriations*, 58 Pub. Admn. Rev. 388, 39–91 (1998).

<sup>86</sup> David C. Nice, *The Item Veto and Expenditure Restraint*, 50 J. Pol. 487, 496-97 (1988).

<sup>87</sup> Douglas Holtz-Eakin, *The Line Item Veto and Public Sector Budgets: Evidence from the States*, National Bureau of Economic Research Working Paper No. 2531 (1988).

<sup>88</sup> *Id.* at 24.

<sup>89</sup> *Id.* at 24-25.

<sup>90</sup> *Id.* at 25.

the cost savings from a LIV using Statements of Administration Policy (SAPs), “detailed statements about administration objections to specific items in appropriations bills that are sent to Congress [by OMB] while the bills are still under consideration.” If the President had LIVED all amounts to which a SAP was issued from 1984 to 1989 about \$70 billion would have been saved, about 6.7% of total spending.<sup>91</sup> The report also discusses the areas from which the cuts would have been made. While these are clearly significant savings, it seems likely that the political and institutional forces affecting the decision whether to LIV a provision would differ from those affecting a decision send a SAP. Another positive account, published in 1988, argued for expanded rescission powers for the President, through either expedited or enhanced rescission.<sup>92</sup> Although the authors opposed the LIV chiefly because they saw rescission authority as a more effective tool that could be implemented sooner (assuming LIV would require a constitutional amendment), the arguments they advance suggest a belief that increased Presidential power over budgeting will enhance fiscal responsibility.<sup>93</sup>

Some of the most prominent budget scholars took an agnostic position on the likely effectiveness of the LIV. Daniel Shaviro provides a thorough if brief treatment of the issue in his 1997 book, *Do Deficits Matter?*. He first summarizes the arguments advanced for and against the veto.<sup>94</sup> The “simple” case for the LIV’s efficacy is that net spending is reduced whenever the President vetoes an appropriation. According to Shaviro, this ignores the strategic interaction between Congress and the President — the presence of the line item veto power may affect the make-up of the legislation passed by Congress. For example, Congress may spend more in the

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<sup>91</sup> General Accounting Office, *Line Item Veto: Estimating Potential Savings* (1992)

<sup>92</sup> PENNER & A. ABRAMSON, *BROKEN PURSE STRINGS* 120 – 22 (1988).

<sup>93</sup> *Id.*

<sup>94</sup> Daniel Shaviro, *Do Deficits Matter?* 289 – 93 (1997).

hopes more will survive the veto, or the President may exact higher spending levels as the price for not vetoing legislators' favored expenditures. There is, however, a "sophisticated" argument for the LIV's efficacy: The LIV makes legislative log-rolling more difficult because the president can disrupt bargains. Further, "effectively shifting a quantum of legislative power to a unitary institution (the presidency) ostensibly reduces the overall legislative tendency to distribute particularized benefits to groups."<sup>95</sup> However, Shaviro reports that econometric studies of states with the LIV have reached mixed results. Some have found no change in spending level. Others have found a reduction, either when there is divided government, or when the governor can reduce, as well as eliminate, appropriations.

Shaviro then presents further theoretical critiques against the LIV: Rather than using the LIV to disrupt log-rolling, the President will use it to increase his power and share in the log-rolling. When determining the LIV's marginal addition to presidential power, one should consider the array of means the President already has to influence legislators. (Shaviro does think the LIV would be a significant addition though, because it is more targeted.). Congress may respond to the LIV by increasing spending so that more will be left over after the President exercises LIVs. Congressional spending may increase because Congress would feel less fiscal responsibility since it would no longer be "the last actor." Congress may choose to increasingly use the tax code and other devices to funnel spending to favored groups. There is reason to doubt the President would simply use the LIV more to respond to these practices, to the degree one believes the President (along with other actors) is primarily concerned with "claiming credit" for fiscal responsibility. Shaviro also presents his own assessment, that the veto will only tend to make deficits smaller when the President prefers a smaller deficit relative to Congress and has

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<sup>95</sup> *Id.* at 291.

enough legislative support to sustain vetoes, but not enough to dictate initial outcomes. Shaviro does not think the veto will “accomplish very much” even in those circumstances, and concludes “the line-item veto should not be expected to yield significant reductions in government spending or the size of government.”<sup>96</sup>

Another prominent budget scholar, Allen Schick, had similarly modest expectations for the LIV. In a publication by the Congressional Research Service,<sup>97</sup> Schick describes in detail some of the choices that would determine the scope of the LIV’s power. First, there are a number of options for the level of generality at which the LIV could be applied — only to appropriation accounts (one account often covers an entire agency), or to programs or projects discussed in the account.<sup>98</sup> Another important variable affecting the LIV’s power is whether the President can use it to reduce, rather than eliminate, funding for a given item or account — “spending disputes ... almost always relate to the level of appropriation.”<sup>99</sup> A third variable affecting the LIV’s power is whether it can be used to remove substantive language from bills.<sup>100</sup> Presenting his assessment of an LIV’s likely effect, Schick thought that the LIV might function most effectively as a deterrent to Congressional “add-ons.” While recognizing arguments that the LIV would increase spending by giving the President more chips at the log-rolling table, he notes that these types of bargains can occur at present.<sup>101</sup> Schick does make an argument for expanded rescission authority, discussed above, suggesting that it has some significant advantages over a LIV. Rescissions would allow funds to be reduced, could reach more specific

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<sup>96</sup> *Id.*

<sup>97</sup> Allen Schick, *Proposed Budget Reforms: A Critical Analysis* (Cong. Res. Serv. 1987)

<sup>98</sup> *Id.* at 44-46.

<sup>99</sup> *Id.* at 45.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 46.

items than a LIV, but would likely require only a majority of Congress to over-ride, even with expanded Presidential authority.<sup>102</sup> However, like the LIV, the main function of expanded rescission authority would be to increase Presidential powers relative to Congress.<sup>103</sup> (40 – 41).

Commentators taking similarly cautious approaches to the LIV included the CBO and Calvin Bellamy. The latter surveyed the history of the Presidential veto power, compared it with state equivalents, and urged caution about LIVs until the policy was more clearly defined.<sup>104</sup> The CBO drafted a memorandum one year after the LIVA was passed.<sup>105</sup> It provides an in-depth summary of procedures under the act and a systematic review of actions taken by the President and Congress under the Act.<sup>106</sup> The CBO also gives preliminary, if hesitant, assessments on what it views to be the crucial issues facing the LIV: (1) the Act's effectiveness (difficult to determine, only small visible gains); (2) the effect of budget surpluses (uncertain whether the LIV can be used when the budget has a projected surplus); (3) balance of power (evidence inconclusive, but the importance of the President's proposed budget seems to have increased); (4) defining which provisions may be cancelled (finding ambiguity in the Act could cause problems down the road).

These lukewarm sentiments are a departure from remarks made by the CBO's director concerning the LIV in 1992, well before the Act was adopted.<sup>107</sup> In this testimony on the likely effect of the LIV (or similar alternatives) on the federal budget, Director Reischauer opposes the LIV. He argues that because the LIV only would apply to discretionary spending, it would be of

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<sup>102</sup> *Id.* at 47.

<sup>103</sup> *Id.* at 40–41.

<sup>104</sup> Calvin Bellamy, *Item Veto: Dangerous Constitutional Tinkering*, 49 *Pub. Admn. Rev.* 46 (1989).

<sup>105</sup> CBO Memorandum, *The Line Item Veto Act After One Year* (1998).

<sup>106</sup> *Id.* at 1-23.

<sup>107</sup> Statement of Robert D. Reischauer, Director of CBO, before the Subcommittee on the Legislative Process, Committee on the Rules, U.S. House of Representatives, Sept. 25, 1992.

limited utility in reducing the deficit.<sup>108</sup> He also argues that empirical evidence shows it has not decreased spending in the states.<sup>109</sup> Further, he asserts that a LIV would only reduce the deficit when the incumbent President valued reducing spending overall more than his or her own spending priorities.<sup>110</sup> Further LIV skepticism can be found in an economic study by John R. Carter and David Schap.<sup>111</sup> The authors formally model the LIV in the budget process, finding “logical inconsistencies ... in popular veto discourse.” They find that LIV only has the effect on budget dynamics commonly attributed to it in limited settings.

### C. Theoretical Arguments Post-*Clinton v. City of New York*

After the *Clinton* decision, most commentators seem even more opposed to the idea of a LIV or similar mechanism. Louis Fisher argues against any attempt to grant LIV authority because it would undermine financial accountability, subject legislators to new pressures, and introduce new conflicts and calculations to the budget process.<sup>112</sup> Dan L. Crippen, then CBO Director, argues that the current rescission process has “very little impact on the overall budget,” and reviews four proposals to give the President greater power over spending: a constitutional amendment granting LIV power, separate enrollment, and expedited and enhanced rescission.<sup>113</sup> He suggests that separate enrollment could greatly affect the legislative process by reducing incentives to compromise, and might require the President to sign hundreds of bills.<sup>114</sup> Further,

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<sup>108</sup> *Id.* at 2-3.

<sup>109</sup> *Id.* at 3-5.

<sup>110</sup> *Id.* at 5-8.

<sup>111</sup> John R. Carter & David Schap, *Line-Item Veto: Where Is Thy Sting?*, 4 J. Econ. Persp. 103 (1990).

<sup>112</sup> Louis Fisher, Congressional Research Services, *A Presidential Item Veto* 6 (2004)

<sup>113</sup> Statement of Dan L. Crippen, Director of CBO, before the Subcommittee on Legislative and Budget Process, Committee on Rules, U.S. House of Representatives, July 30, 1999.

<sup>114</sup> *Id.* at 13.

he points out that in recent years, rescissions have been used to offset new spending.<sup>115</sup>

Professor Elizabeth Garrett finds a LIV's effects uncertain, and concludes that LIVA is likely “not worth the effort. The relative ease of circumvention would undermine any benefits of disclosure, particularly because some methods of avoidance would reduce transparency and accountability rather than enhance them.”<sup>116</sup>

The most favorable commentary on LIV alternatives came from the CBO, in a 2003 report, *The Budget and Economic Outlook: Fiscal Years 2004 – 2013*.<sup>117</sup> In a section discussing budgeting options as the Budget Enforcement Act was set to expire, the CBO discussed two proposals to implement a LIV within the *Clinton v. City of New York* confines — separate enrollment and expedited rescission.<sup>118</sup> The CBO thought it was uncertain whether reforms would ultimately reduce spending or just shift power.<sup>119</sup> It seems that in the aftermath of *Clinton*, scholarly interest in LIV alternatives has diminished, even if the possibility of one remains an occasional tool of political rhetoric. While the late-nineties work of Abney and Lauth suggests that a LIV can reduce gross spending when the executive can both reduce spending and delete appropriations language, it may be that Congress would never be willing to give such a large degree of budget power to the Presidency.

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<sup>115</sup> *Id.* at 4.

<sup>116</sup> Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 *Cardozo L. Rev.* 871, 937 (1999).

<sup>117</sup> CBO, *The Budget and Economic Outlook: Fiscal Years 2004 – 2013*, (2003)

<sup>118</sup> *Id.* at 120.

<sup>119</sup> *Id.*

Appendix: The LIV in the States —

	Governor's LIV			Override Number			
	Veto \$\$ items	Veto Lang.	Reduce Items	3/4	2/3	3/5	Maj.
Alabama							
Alaska	*		*	*			
Arizona	*				*		
Arkansas	*	*					*
California	*		*		*		
Colorado	*	*			*		
Connecticut	*				*		
Delaware	*	*				*	
Florida	*	*			*		
Georgia	*				*		
Hawaii	*		*		*		
Idaho	*	*			*		
Illinois	*		*				*
Indiana							
Iowa							
Kansas	*				*		
Kentucky	*						*
Louisiana	*	*			*		
Maine							
Maryland	*	*				*	
Massachusetts	*	*	*		*		
Michigan	*	*			*		
Minnesota	*				*		
Mississippi	*	*			*		
Missouri	*				*		
Montana	*	*			*		
Nebraska	*					*	
Nevada							
New Hampshire							
New Jersey	*		*		*		
New Mexico	*	*			*		
New York	*				*		
North Carolina							
North Dakota	*	*			*		
Ohio	*	*				*	
Oklahoma	*	*			*		
Oregon	*	*			*		
Pennsylvania	*	*			*		
Rhode Island							
South Carolina	*	*			*		
South Dakota	*	*			*		
Tennessee	*		*				*
Texas	*				*		
Utah	*				*		
Vermont							
Virginia	*	*			*		
Washington	*	*			*		
West Virginia	*	*	*		*		
Wisconsin	*	*	*		*		
Wyoming	*	*			*		

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