Power Ink

How widely—and how deeply—may a governor wield her veto pen?

In 2003, that question so vexed some Arizona legislators that they took Gov. Janet Napolitano to court. There, they challenged almost a dozen of her line-item vetoes, claiming they improperly expanded the power of the executive.

In December, the Arizona Supreme Court unanimously said they disagreed. The vetoes withstood the challenge.

But did the Court's opinion adequately address the heart of the matter? In the pages that follow, Jim Drake, the Rules Attorney for the Arizona House of Representatives, emphatically says "No." But Tim Nelson of the Governor's Office says the Court was right on target.

What do you think? Send your own opinions to Tim.Eigo@staff.azbar.org.

The other side of the debate begins on page 36.

A Stunning Blow to the Arizona Constitution's Concept of Coequal Branches and the Necessity of Judicial Redress

BY JIM DRAKE

On July 15, 2003, the President of the Arizona Senate, the Speaker of the House of Representatives and the two majority leaders from both chambers brought a special action in the Arizona Supreme Court challenging the governor's use of the line-item veto.[1] In this action, the legislator petitioners asserted that the governor exceeded her constitutional line-item veto authority in 12 instances, but they ultimately challenged only 11 vetoes.[2] The Arizona Supreme Court heard oral argument on Sept. 9, 2003.

On Dec. 4, 2003, the Arizona Supreme Court published an opinion that failed to address the merits of the case, after wrongly concluding that the legislators lacked standing and improperly allowing an issue not before the Court—the single-subject requirement—to influence its holding.

The *Bennett* opinion dealt a blow to balance of power among the three governmental branches. It also left a big question as to what avenue might be open to the legislature to enforce the constitutional limits on the governor's line-item veto power.

Background

During the second week of June, the Arizona legislature adopted the state's operating budget for 2004. The legislature transmitted the following four bills to the governor:

- the general appropriations act or "feed" bill, House Bill 2531
- the education omnibus reconciliation bill (ORB), House Bill 2534
- the health and welfare ORB, House Bill 2535
- the public finances ORB, House Bill 2533.

Gov. Janet Napolitano timely used her line-item veto to strike 35 provisions of the budget package and sent a message to the legislature outlining the rationale underlying her vetoes.[3] After receiving the veto messages, the legislature adjourned *sine die* on June 19, 2003, without taking any action to override the line-item vetoes.

A. Power of the Governor's Line-Item Veto

"It is essential that a sharp separation of powers be carefully preserved by the courts so that one branch of government not be permitted to encroach upon functions properly belonging to another" in violation of Article III.[4]

The power to appropriate funds is the quintessential legislative power and rests solely within the legislature's purview.[5] However, this power is tempered by both the bill veto and the appropriation line-item veto.[6] In fact, it is recognized that "the legislature's plenary power to determine the objects and level of support to which the public revenues may be put does not mean that the executive branch has no role in the appropriations process."[7] The governor has veto power

over appropriations.[8]

Until the outcome in *Bennett,* the Arizona Supreme Court recognized the limits of this important check on the legislative appropriation power and the court's role in preventing the executive item veto power from being used to create "affirmative legislation without even the concurrence of the legislature."[9]

B. Line-Item Vetoes Challenged by the Legislature

The legislature challenged nine provisions of the general appropriations act and one provision in each of the health and welfare ORB and the education ORB.

1. The General Appropriations Act—Lump-Sum Reductions

On request, the legislature made appropriations to five separate departments with a line item labeled "lump sum reduction." The express reductions followed that agency's operating appropriation and other specifically enumerated appropriations, if applicable.[10] The lump-sum reduction provisions were crafted for the Department of Administration, the Department of Agriculture, the Department of Economic Security, the Department of Health Services and the State Land Department.

Collectively, the lump sum reductions gave the governor greater discretion to allocate the spending reductions of $4,755,300.[11] The governor line-item vetoed all of the lump sum reductions, and the petitioners challenged that action because the legislature never appropriated the higher spending amounts for the agencies.[12]

2. The General Appropriations Act—Other Line-Item Vetoes

The governor exercised her line-item veto power four more times in the general appropriations act.

First, the governor took action on the budget of the Department of Health Services by vetoing $10 million labeled "offset for receipts."[13]

Second, the governor struck $14,906,000 in the Department of Economic Security that the legislature intended to be a reduction for "federal match rate savings."[14]

Third, the legislature, through session law, provided for a contingent reduction to the Department of Health Services if the department received certain federal monies for vaccines; the governor vetoed this contingent reduction.[15]

Fourth, and most troubling, the governor line-item vetoed the Arts Commission Funding.[16] In this instance, the governor line-item vetoed the source of the funding but not the funding itself. In her veto message, she said that this change would necessitate the appropriation of general fund dollars instead of the source approved by the legislature.[17]

The Arts Commission veto is so troubling because it contravenes a long line of cases beginning in 1915 with *Callaghan v. Boyce,*[18] which held that a line-item veto is ineffective if used to disapprove an item inseparable from the item of appropriation itself.[19] The governor's line-item veto power can only act in the negative, and, by designating a funding source, the legislature expressly stated that the general fund was not to be used to fund the commission.

3. Line-Item Vetoes Challenged in the ORBs

In the education ORB, the legislature mandated a 50 percent reduction in the amount of "rapid decline" funding for school districts. In the health and welfare ORB, the legislature eliminated a provision that concerned adult emergency dental care coverage under the Arizona Health Care Cost Containment System.[20] The governor line-item vetoed both provisions.

The petitioners challenged both of these line-item vetoes because they were "policy" changes and did not fit the definition of an "item of appropriation" and therefore were not eligible for a "line-item" veto. The line-item veto is limited to "items of appropriation,"

which has been judicially defined to be (1) a specification of a certain sum of money, (2) for a specified object, and (3) that creates the authority to spend the money.[21]

Standing

Standing by legislators in this type of action against a governor was an issue of first impression in Arizona. Quite simply, the Arizona Supreme Court got the issue wrong.

The Court found that "Four members who bring the action without the benefit of legislative authorization should not, except in the most exceptional circumstances, be accorded standing to obtain relief on behalf of the legislature."[22] The Arizona Supreme Court found several federal cases illustrative, but it failed to even mention or distinguish *Silver v. Pataki*[23]—though merely persuasive authority, it is absolutely on point.[24]

In *Silver,* Speaker Sheldon Silver challenged the line-item veto power of New York's governor when he exercised that power on "non-appropriation" bills that were part of the budget process.[25] Indeed, the *Silver* case relied on the same federal cases cited by the Arizona Supreme Court,[26] but *Silver* came to a different and far more logical conclusion. Namely, the high court in New York held that the Speaker of the New York Assembly, as a mere member of that legislative body, has standing to sue on a line-item veto challenge.[27]

As *Silver* explained, "Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power. Only circumstances presented by the latter two categories confer legislator standing."[28]

In *Bennett*, all four legislators voted in favor of all the measures in which the gubernatorial action was challenged.[29] To quote *Silver*, "As a member of the assembly who voted in favor of the budget legislation, plaintiff undoubtedly has suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote sufficient to confer standing."[30]

In deciding *Bennett*, the Arizona Supreme Court erroneously relied on *Raines v. Byrd*, but *Raines* is wholly inapplicable because the six congressmen in that case voted against the act that they later sought to challenge, so their votes were not nullified. In *Raines*, the four senators and two congressmen voted against the Line Item Veto Act and then challenged the constitutionality of the act the day after it became effective.[31] In sum, *Raines* was a case that involved a lost political battle, but *Bennett v. Napolitano* is a case of vote nullification because all parties voted "aye." The Arizona Supreme Court should have granted the four legislator petitioners standing.

The *Bennett* case could have and should have been decided on the merits without delving into arguments on issues not raised by the litigants.

Also, the holding on standing in *Bennett* is not consistent with earlier statements by the Arizona Supreme Court. In *Bennett*, the Supreme Court cited *Sears v. Hull*[32] in support of its reluctance to grant standing.[33] But in *Sears*, at footnote 11, the Court agreed with *Management Council of the Wyoming Legislature v. Geringer*,[34] which held that legislators or the legislative council had standing to challenge the Wyoming governor's veto authority.[35]

The issues in *Silver* are still wending their way through the judicial system of New York. On Dec. 11, 2003, the New York Supreme Court, Appellate Division, noted:

> In our tripartite form of government, it is the judicial branch that has the constitutional obligation and duty, by interpreting the intent of the framers, to define the respective powers of the legislative branches in the budget process. Courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of government.[36]

Arizona's courts similarly should "always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of government."

Single-Subject Issue Was Not Properly Before the Court

In *Bennett*, the Court's decision was predicated, in part, on the "single subject" rule of the Arizona Constitution, but the Court noted that the parties conspicuously avoided this issue in the dispute.[37] The single-subject provision requires that acts passed by the legislature shall "embrace but one subject and matters properly connected therewith."[38] This provision is designed to prevent "logrolling" or the "combining of disparate minorities into a majority through combination of unrelated legislative goals in a single bill."[39] In *Bennett*, the single-subject issue was only raised by an *amicus* filing, and the underlying issue addressed by the *amicus* was withdrawn by the plaintiffs prior to oral argument.[40]

All legislative acts carry with them the presumption of constitutionality,[41] and the party challenging the constitutionality of an act "bears the burden of establishing that the legislation is unconstitutional; any doubts are resolved to the contrary."[42] Indeed, earlier in the *Bennett* opinion itself, the Arizona Supreme Court quotes *Rios v. Symington*,[43] noting that because none of the parties raised the issue of standing "and, because courts traditionally do not address issues not properly raised, we declined, albeit reluctantly, to address potential standing issues."[44] In *Bennett*, none of the parties challenged the constitutionality of the measure under the single-subject mandate, so the issue was not properly before the Court. At the very least, no matter how strongly the justices felt about the single-subject issue, they should have addressed the merits in *Bennett* "albeit reluctantly" because the parties did not raise the single-subject issue.[45]

Last, to quote the Arizona Supreme Court on *amicus* briefs, "Some matters have been raised and argued which were not addressed by the parties. As to these, it is the rule that amici curiae are not permitted to create, extend, or enlarge those raised and argued by the parties. (citations omitted) This Court will only decide issues raised and argued by the parties."[46] Because of the weighty constitutional question before the court, the *Bennett* case could have and should have been decided on the merits without delving into arguments on issues not raised by the litigants.

Avenue for Judicial Redress

The Supreme Court "attached significance to the legislature's failure to exercise available political means by seeking to override the governor's vetoes."[47] The logic in denying standing, absent a veto override attempt, clearly invites the risk of a Catch-22.[48]

If the legislature attempts an override, it acknowledges the political nature of the issue and its preference for a political remedy. However, if the override attempt fails, the Court need not grant a judicial remedy because courts should not review failed political questions.[49] If the legislature chooses the override avenue and the override succeeds, then any need for judicial review is completely eliminated.

Due to this flawed logic, *Bennett* effectively stands for the proposition that the Arizona Supreme Court will no longer entertain legislative challenges to line-item vetoes, which is an untenable situation for

all Arizonans. Unfortunately, the justices in *Bennett* seemed predisposed to classify this dispute as political when the legislature is controlled by one party and the governor is of a different party.

This poorly decided opinion raises a greater institutional question that will plague us for quite some time: If not the Arizona Supreme Court, then what is the appropriate arena for the review of line-item veto disputes between the executive and legislative branches?

A Final Response

It is true that the *Rios* case doesn't have a big role to play in my analysis of the lack of decision in *Bennett*, because the facts surrounding the line-item vetoes in *Rios* do not remotely resemble those presented in *Bennett*.[50] Indeed, as noted by counsel at oral argument, *Rios* is factually different and therefore inapplicable. My quote of the *Rios* case relates to its only relevant part: standing.[51]

HB 2533, the public finances ORB, was raised by Mr. Nelson as an example of egregious log rolling. However, not a single line-item veto was challenged in this measure, so it should have played no part in the litigation or the decision. However, the Supreme Court also felt the need to comment on a matter not properly before the justices.[52]

Finally, and perhaps most troubling, is the misunderstanding regarding holdings and the current status of the *Silver* case.[53] There is no "final result" in *Silver* because *Silver* is not yet over. Briefs were filed with the high court in New York as recently as the last week of March. In the ongoing *Silver* litigation, the trial court, on remand, declined to decide the item veto issue, not out of judicial restraint, but because it decided on the merits that the vetoed items were unconstitutionally adopted by the legislature in the first place.[54] There has been no change as to the original holding by the high court in New York granting standing to legislators.[55] The *Silver* trial court holding is not the same as the result in *Bennett*. In *Silver*, the governor won on the merits; in *Bennett*, the governor won because the Supreme Court avoided the merits.[56]

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endnotes

1. The case caption in *Bennett v. Napolitano*, 414 Ariz. Adv. Rep. 3 (Dec. 16, 2003) is rather lengthy because many state agency directors were named as defendants. But the named petitioners were the presiding officers and members of both bodies, Ken Bennett, President of the Arizona State Senate, and Franklin "Jake" Flake, Speaker of the Arizona House of Representatives; and Tim Bee, majority leader of the Senate, and Eddie Farnsworth, majority leader of the House of Representatives.
2. On Sept. 4, 2003, petitioners conceded that section 10 of the Education omnibus reconciliation bill (ORB) was a proper line-item veto under *Rios v. Symington*, 833 P.2d 20 (Ariz. 1992), leaving only 11 separate vetoes before the Court.
3. ARIZ. CONST. art. V, § 7 reads, in relevant part: "If any bill presented to the governor contains several items of appropriations of money, he may object to one or more of such items, while approving other portions of the bill. In such case he shall append to the bill at the time of signing it, a statement of the item or items which he declines to approve, together with his reasons therefore."
4. *State v. Jones*, 689 P.2d 561, 563 (Ariz. Ct. App. 1984); ARIZ. CONST. art. III.
5. *See* ARIZ. CONST. art. IV, part 2, § 20; *Rios*, 833 P.2d at 22–23.
6. *See generally* ARIZ. CONST. art. V, § 7.
7. *Colorado Gen. Assembly v. Lamm*, 700 P.2d 508, 520 (Colo. 1985).
8. *Id.*
9. *See Black & White Taxicab Co. v. Standard Oil Co.*, 218 P. 139, 147 (Ariz. 1923); *Fairfield v. Foster*, 214 P. 319, 322 (Ariz. 1923).
10. By way of example, the State Land Department's budget, after use of the line-item veto (which appears as double strikethrough and underlined text), appears as follows:

    Sec. 54

STATE LAND DEPARTMENT	2003-04
FTE positions	174.4
Operating lump sum appropriation	$13,406,600
Natural resource conservation districts	490,000
Environmental county grants	125,000
~~*Lump sum reduction*~~	~~*(125,000)*~~
Total appropriation State Land Department	$13,896,600
Fund sources:	
State general fund	$13,406,600
Environmental special plate fund	490,000

11. *See* Laws 2003, Ch. 262, §§ 4, 6, 29, 44 & 56.
12. *Id.*
13. Laws 2003, Ch. 262, § 44.
14. Laws 2003, Ch. 262, § 29.
15. Laws 2003, Ch. 262, § 44, was vetoed in relevant part, as follows:

    ~~If the department receives more than $1,188,000 in federal 317 monies for vaccines purchase for state fiscal year 2003-2004, the state general fund amount of the state fiscal year 2003-2004 appropriation for the vaccines special line item equal to the amount by which the federal monies exceed $1,188,000 up to $576,600 shall revert to the state general fund.~~
16. Laws 2003, Ch. 262, § 9.
17. The Arts Commission budget reads, after exercising the item veto, as follows:

    Sec. 9.

ARIZONA COMMISSION ON THE ARTS	2003-04
FTE positions	11.5
Operating lump sum appropriation	$536,900
Community Service Projects	1,263,100
Total appropriation—Arizona Commission on the Arts	$1,800,000
~~Fund sources:~~	
~~Heritage fund~~	~~$1,800,000~~

    In her veto message, the Governor opined, "As a result of this veto, the $1.8 million appropriated from the Arts Commission will now be funded by the general fund, rather than the Heritage Fund."

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A Victory for Judicial Restraint

BY TIM NELSON

The Supreme Court's unanimous opinion in *Bennett v. Napolitano*[1] was neither "stunning" nor a blow to the "concept of co-equal branches" of government, as Jim Drake suggests.

Rather, the result in *Bennett* was foretold by the Court's opinion 11 years earlier in *Rios v. Symington*,[2] a victory for the separation of powers doctrine, and a reflection of the very sort of appropriate judicial restraint many of the opinion's critics have been calling for in other matters.

Rios Laid the Groundwork

To understand *Bennett*, one must read it in the context of *Rios*, the Court's most recent opinion regarding line-item vetoes. In *Rios*, the Court reluctantly accepted special action jurisdiction over a dispute between Sen. Pete Rios and Gov. Fife Symington challenging several line-item vetoes. In doing so, the Court wrote:

> While we accepted jurisdiction to provide future guidance to the Executive and the Legislature, we caution that we did not do so lightly. We agree with the words of the Florida Supreme Court speaking in a similar case:
>
> "[I]t would be a serious mistake to interpret our acceptance of jurisdiction in this cause as a general willingness to thrust the Court into the political arena and referee on a biennial [in Arizona, annual] basis the assertions of the power of the executive and legislative branches in their appropriations act … . [F]uture attempts to invoke this Court's jurisdiction on similar grounds will be viewed with great circumspection."[3]

Significantly, the *Rios* Court specifically noted that neither the governor nor any other respondent had challenged Senator Rios' standing to bring the case.[4] Nor did the *Rios* Court elect to address the standing issue *sua sponte*.[5] But by forewarning future litigants of the "great circumspection" with which future cases of this nature would be viewed, the Court plainly set the stage for its ruling in *Bennett*.

Vetoes in Arizona

Bennett involved a challenge by four Republican legislators to 12 of Governor Napolitano's 35 line-item vetoes spread across four of the five bills that comprise the fiscal year 2004 budget.

In this regard, a brief recap of the budget process and, in particular, the 2004 budget process, is in order. Article IV, part 2, § 20 of the Arizona Constitution provides:

> The general appropriation bill shall embrace nothing but appropriations for the different departments of the State, for State institutions, for public schools, and for interest in the public debt. All other appropriations shall be made by separate bills, each embracing but one subject.

Similarly, art. IV, part 2, § 13 (the "single subject rule") provides, "Every act [of the legislature] shall embrace but one subject and matters properly connected therewith." These provisions, coupled with the line-item veto power of art. V, § 7, were designed to give the governor a say on each appropriation approved by the Legislature.

Legislative Budget Action—and Inaction

The governor is also required by statute to submit a budget to the legislature within five days of the convening of the regular session.[6] Pursuant to this requirement, Governor Napolitano submitted a 2004 budget to the legislature in January 2003, five days after the legislature's opening session. At no point during the winter or spring of 2003 did the legislature attempt to negotiate a budget with the governor. Instead, on June 12, 2003—fewer than three weeks before the 2004 fiscal year was to begin—the legislature passed a budget that it had never even discussed with the governor.

The budget bills consisted of one general appropriations bill and four omnibus reconciliation bills, known as ORBs. Collectively, they encompassed nearly 300 single-spaced pages. Pursuant to article IV of the Arizona Constitution, the governor had five days in which to sign them into law, allow them to pass into law without her signature, or veto them in whole or in part.[7]

Despite the single-subject rule,[8] each of the four ORBs encompassed a variety of subjects. For example, House Bill 2533, the public finance ORB, tied together such diverse subjects as abstinence funding, the *Ladewig* tax class-action settlement, and incentive grants for diesel vehicles—to name just a few.[9] Except where she could ascertain discrete "items of appropriation," which would be subject to the line-item veto, the governor otherwise was forced to decide whether to accept or reject these ORBs in their entirety.

On June 17, 2003, the Governor signed the budget bills into law, subject to 35 line-item vetoes of individual appropriations. One of the vetoes struck a $75 million appropriation to fund the *Ladewig* settlement (payments for which were not due until fiscal year 2005). The remaining vetoes had the effect of either canceling fund transfers or restoring appropriations the legislature had attempted to cut. In all, the governor's vetoes had the net effect of reducing spending in the 2004 budget by nearly $11 million.

No Overrides, Just a Lawsuit

After receiving the governor's veto messages on June 17, 2003, the legislature had the option of attempting to override one or more of the vetoes before fiscal year 2004 began on July 1, 2003. It chose not to attempt a single override of the budget vetoes and instead adjourned *sine die* on June 19, 2003.[10] In accordance with state law, the state began spending money pursuant to the budget, as

line-item vetoed, on July 1, 2003.

On July 15, 2003—two weeks into the new fiscal year and nearly a month after the governor's vetoes—four legislators who had not sought approval from the body as a whole filed a special action in the Arizona Supreme Court seeking to overturn 12 (later 11) of the governor's vetoes.[11]

The petitioners challenged the governor's vetoes of five "lump sum reduction" line items, two other agency-wide cuts that operated as lump-sum reductions, one attempted transfer of funding from the Heritage Fund to the Arts Commission,[12] and four (later three) spending items from the ORBs.

The Court Rules

Consistent with *Rios*, the *Bennett* Court accepted special action jurisdiction but denied the relief requested in its entirety. Without addressing the merits of any of the challenged vetoes, the Court concluded that the four legislators lacked standing to challenge the governor's vetoes, and that because of prudential concerns, it would be inappropriate for the judicial branch to intervene.[13]

With respect to standing, the Court concluded that the legislators had "shown no injury to a private right or to themselves personally" and that, like the plaintiffs in *Raines v. Byrd*,[14] any injury alleged was "'wholly abstract and widely dispersed' and as such, is not sufficient to establish individual standing."[15]

Nor did the four legislators have standing to bring the case on behalf of the Legislature as a whole: "Four members who bring the action without the benefit of legislative authorization should not, except perhaps in the most exceptional circumstances, be accorded standing to obtain relief on behalf of the legislature."[16]

The Court also denied relief on a variety of prudential concerns.

1. The Court concluded that the dispute was political in nature, a conclusion highlighted by the fact that only four legislators brought the action.[17] The Court expressed concern over the legislature's failure even to attempt an override, noting, "We ought not prematurely enter 'the political arena [to] referee … the assertions of the power of the executive and legislative

branches.'"[18]

2. The Court noted that the legislature could have avoided many of the governor's vetoes simply by structuring the budget differently.[19] The lump-sum reduction vetoes in particular could have been avoided if the legislature had simply decided which specific programs it wanted to have less funding.

   Instead, the legislature made specific appropriations for a variety of programs in certain lines of the general appropriations bill and then tried to take away from those appropriations with lump-sum reduction line items at the end of each agency's budget. By doing so, the legislature was effectively trying to shift the political heat for underfunding these agencies from themselves to the governor, because the governor alone would have to decide which specific programs should be cut to accommodate the "lump sum" reductions. Given Governor Napolitano's prior commitment to fully fund these agencies (as expressed in her January 2003 budget), this legislative practice invited the very response it received.
3. The Court denied relief in part because of concerns that the ORBs violated the single-subject rule.[20] This may be the most significant aspect of the *Bennett* opinion because it sends a clear message to the legislature that multi-subject ORBs will be viewed with great skepticism in the future.

Single-Subject Rule and Separation of Powers

The Court's reasoning in regard to the single-subject rule is also the key to understanding why *Bennett* is a victory for the separation of powers doctrine. As the Court explained, the rule is "intended to prevent the pernicious practice of 'log rolling,'" or forcing individual legislators (and ultimately the governor) to endorse policies they disapprove "in order to secure the enactment of [matters they consider] the most important."[21]

The governor's veto of one item in the Education ORB[22] amply illustrates this point.

In May 2003, the legislature passed HB 2012, a bill to reduce funding for school building renewal by altering the building renewal funding formula. When presented to the governor as a single subject, the governor vetoed the entire bill. In the Education ORB, however, the legislature reinserted verbatim the text of HB 2012[23] but accompanied it with a host of other education spending items that the governor supported. In the absence of the ability to line-item veto the funding reduction, the governor would have been "log rolled" or forced to accept a bill she had previously vetoed simply to secure other funding she deemed more important.

Disallowing the veto would have seriously diminished the governor's veto power while unduly empowering the legislature. It also would have eviscerated the single-subject rule.

Had the governor's veto of the building renewal formula change been disallowed, the legislature would have been free in the future to effectively override gubernatorial vetoes with only a simple majority, rather than the two-thirds majority required by the Constitution, simply by reattaching the vetoed bill into a multisubject ORB containing other measures the governor deems more important. Such a result would have seriously diminished the governor's veto power while unduly empowering the legislature.[24] It also would have eviscerated the single-subject rule.

Judicial Restraint at Its Best

In the end, the *Bennett* decision should be remembered as a model of judicial restraint. The Court explained, "We understand that failure to adhere to the single subject rule does not validate improper use of the governor's veto power. But at the least, we are also reluctant to confront the parameters of that power in a case in which there are also legitimate questions about whether the ORBs themselves are constitutional."[25]

This result is consistent with the final result of *Silver v. Pataki*,[26] a case cited frequently by Mr. Drake. Although in *Silver*, a divided court initially ruled that the Speaker of the New York State Assembly had individual standing to challenge 55 gubernatorial line-item vetoes,[27] the Court ultimately declined to decide the merits of the vetoes when it determined that, as was true in *Bennett*, the legislature had improperly inserted multiple appropriations into a "non appropriations" bill.[28]

In light of the New York State Assembly's failure to abide by that state's constitutional provisions regarding appropriation bills,[29] the same court that had split on the standing issue unanimously concluded that to rule on the merits of Governor Pataki's vetoes "would have constituted an improper advisory opinion."[30]

Bennett Doesn't Undermine Coequal Branches

Despite the restraint shown in *Bennett* and *Silver*, neither case forecloses future legislative challenges to line-item vetoes. Special action jurisdiction remains discretionary in Arizona. If the legislature passes properly drafted bills, avails itself of its constitutional right to attempt an override, and authorizes one or more of its members to file a lawsuit on behalf of the institution, there is nothing in *Bennett* that would preclude a challenge to a future veto.

But to have struck one of Governor Napolitano's vetoes in this case would have opened the door to routine judicial involvement in the budget process. It would have signaled that the "great circumspection" warned of in *Rios* was meaningless, and that even in the face of (1) a challenge to standing, (2) the petitioners' failure to gain approval of the leg-

islature as a whole and (3) their failure to attempt an override, the Court is willing to intervene. It also would have resulted in a 2004 budget that no one in the legislature voted for and that the governor had not approved. Only the Supreme Court would have approved the final 2004 budget.

Such a result would truly have been judicial activism, and the *Bennett* Court's avoidance of it was entirely proper.

Tim Nelson is General Counsel to Arizona Governor Janet Napolitano. *The author wishes to acknowledge, and express significant gratitude for the assistance of, Nicole Davis, Deputy General Counsel to Governor Napolitano, and our co-counsels in the* Bennett *case, Scott Bales and Kimberly Demarchi of Lewis and Roca LLP.*

endnotes

1. 414 Ariz. Adv. Rep. 3 (Dec. 16, 2003), 81 P.3d 311 (2003).
2. 833 P.2d 20 (Ariz. 1992).
3. *Id.* at 22 (ellipses in original), *quoting Brown v. Firestone*, 382 So.2d 654, 671 (Fla. 1980).
4. *Id.* at n.2. Indeed, Governor Symington's lawyer in *Rios* urged the Court to accept jurisdiction.
5. *Id.*
6. A.R.S. § 35-111.
7. ARIZ. CONST. art. V, § 7.
8. *Id.* art. IV, pt. 2 § 13.
9. *See also Bennett*, 81 P.3d at 319 n.9 (describing the various subjects covered by the ORBs).
10. One of the petitioners, Senator Tim Bee, did move to override the governor's veto of a different, non-budget bill (HB 2378), before the legislature adjourned. That effort failed in the Senate. Neither Senator Bee nor any other legislator moved to override the governor's line-item vetoes of the budget bills.
11. On Sept. 4, 2003, the legislators voluntarily dismissed one of their challenges. *Bennett*, 81 P.3d at 313.
12. The general appropriations bill appropriated $1.8 million to the Arizona Commission on the Arts as follows:

    "Total appropriation – Arizona commission on the arts (sic) $1,800,000
    Fund Sources
    Heritage Fund $1,800,000"

Thus, the bill effectively attempted to transfer $1.8 million from the voter-enacted Heritage Fund to the Arts Commission. Contrary to Mr. Drake's suggestion, nothing in the bill provided that the "Total appropriation" and the "Fund Sources" were inseparable. By vetoing the appropriation out of the Heritage Fund, the $1.8 million appropria-

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tion to the Arts Commission was funded by default by the State's general fund. *See McDonald v. Frohmiller*, 163 P.2d 671, 675 (Ariz. 1945) (holding that statutory appropriation without a designated fund source was to be funded by the general fund).

13. *Bennett*, 81 P.3d at 315.
14. 521 U.S. 811 (1997).
15. *Bennett*, 81 P.3d at 317-18.
16. *Id.* at 318. The Court also rejected the legislators' belated claim of standing as taxpayers. *Id.*
17. *Id.*
18. *Id.* at 319 (ellipses in original), *quoting Brown v. Firestone*, 382 So.2d at 671. Mr. Drake's assumption that any legislative attempt to override before bringing suit would somehow create a "Catch-22" scenario is mistaken. If the override fails, the veto could still be challenged on its constitutional merits and the issue will be ripe for judicial review because all remaining constitutional and political avenues for redress will have been exhausted. Of course, as Mr. Drake acknowledges, if the override succeeds, the need for judicial review would be moot. *See also Washington State Legislature v. Lowry*, 931 P.2d 885, 897 & n.16 (Wash. 1997) (declining to overturn governor's vetoes where legislature failed to try to override them).
19. *Bennett*, 81 P.3d at 319.
20. *Id.*
21. *Id., quoting Kerby v. Luhrs*, 36 P.2d 549, 551-52 (Ariz. 1934).
22. HB 2534 (2003).
23. HB 2534 § 10 at 24-27 (2003).
24. The lump-sum reductions are another example where in the absence of the Court's ruling, the governor would have been log rolled. If a governor could not line-item veto a lump-sum reduction, the legislature could creatively insert "lump sum reductions" to protect other items of appropriation from vetoes. For example, assume an agency ordinarily had a $2 million budget, with $1 million line item for salaries and $1 million line item for office overhead and equipment. The legislature could theoretically add a $2 million pork barrel project to the agency's budget and protect the project from a line-item veto, by listing it as a $5 million line item in the budget bill and then imposing a $3 million "lump sum reduction." Assuming the governor wanted the agency continued, in the absence of authority to veto the lump-sum reduction, the governor could not line-item veto the pork barrel project because to do so would leave a $3 million lump-sum reduction to be applied against a $2 million agency. The governor would therefore be forced to retain the $5 million line item and apply the $3 million lump-sum reduction to it—effectively giving the legislature the $2 million pork barrel item it wanted.
25. *Bennett*, 81 P.3d at 320.
26. 769 N.Y.S.2d 518 (2003).
27. *Silver v. Pataki*, 730 N.Y.S. 2d 482 (2001).
28. *Id.* at 523.
29. N.Y. CONST. art. VII § 4.
30. *Silver*, 769 N.Y.S.2d at 523.

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18. 153 P. 773, 783 (Ariz. 1915).
19. *Id.*
20. Laws 2003, Ch. 264, § 40 and Laws 2003, Ch. 265, § 21.
21. *See Hunt v. Callaghan*, 257 P. 648, 649 (Ariz. 1927); *Rios*, 833 P. 2d at 24.
22. *Bennett*, 414 Ariz. Adv. Rep. at 6.
23. *Silver v. Pataki*, 755 N.E.2d 842 (N.Y. 2001).
24. According to *Bennett*, the federal case that was instructive to the Arizona Supreme Court was *Raines v. Byrd*, 521 U.S. 811 (1997), which distinguished a prior federal legislative standing case, *Coleman v. Miller*, 307 U.S. 403 (1939).
25. "Non-appropriation" bills are New York's version of Arizona's omnibus reconciliation bills (ORBs), and they "contain programmatic provisions and commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to legislative enactment." *Silver*, 755 N.E.2d at 844.
26. *See supra* note 24.
27. *Silver*, 755 N.E.2d at 846.
28. *Id.* at 849. *Silver* relied on *Coleman v. Miller*, 307 U.S. at 403 (vote nullification); *Dodak v. State Admin. Bd.*, 441 Mich. 547 (1993) (usurpation of power belonging to a legislative body); *Raines*, 521 U.S. at 811 (no standing to challenge lost vote); *Matter of Posner v. Rockefeller*, 26 N.Y.2d 970 (1970) (same).
29. Senators Bennett and Bee voted in favor of HB 2531, HB 2534 and HB 2535 on June 6, 2003, and Representatives Flake and Farnsworth voted in favor, on final passage, of HB 2531, HB 2534 and HB 2535 on June 11, 2003.
30. *Silver*, 755 N.E.2d at 847–48.
31. *Raines*, 521 U.S. at 811. Senators Robert Byrd, Carl Levin, Daniel Moynihan and Mark Hatfield voted "nay" on Mar. 27, 1996, and Congressmen David Skaggs and Henry Waxman voted "nay" on Mar. 28, 1996. The President signed the act, which went into effect on Jan. 1, 1997; the six congressmen filed suit the next day, alleging that the act was unconstitutional.
32. 961 P.2d 1013 (Ariz. 1998).
33. *Bennett*, 414 Ariz. Adv. Rep. at 4 (*quoting Sears*, 961 P.2d at 1013).
34. 953 P.2d 839 (Wyo. 1998).
35. In responding to the second certified question, "Do individual legislators or the Management Council of the Legislature have legal standing to sue the Governor regarding the exercise of his partial veto power under Article V, Section 9 of the Wyoming Constitution?" the court answered "yes." *Id.* at 846.
36. *Pataki v. Silver*, 769 N.Y.S.2d 518 (2003) (internal citation omitted), *relying on Saxton v. Carey*, 44 N.Y.2d 545, 551 (1978).
37. *Bennett*, 414 Ariz. Adv. Rep. at 6. The single-subject mandate appears in art. IV, part 2, § 13, ARIZ. CONST.
38. ARIZ. CONST. art. IV, part 2, § 13.
39. *Litchfield Elementary v. Babbitt*, 608 P.2d 792, 800-01 (Ariz. Ct. App. 1980).
40. *See supra* note 3, relating to conceding point on section 10 of the education ORB.
41. *Chevron Chem. Co. v. Superior Court*, 641 P.2d 1275, 1282 (Ariz. 1982).
42. *Department of Public Safety v. Superior Court*, 949 P.2d 983, 987 (Ariz. Ct. App. 1997), *quoting McClead v. Pima County*, 849 P.2d 1378, 1382 (Ariz. Ct. App. 1992).
43. 833 P.2d 20 (1992).
44. *Id. at* 22 n.2.
45. In *Bennett*, the Court discussed the issue of standing in relation to *Rios*, but it noted that the court in *Rios* was indeed able to review the merits of the controversy "albeit reluctantly" given that the standing issue had not been raised by the parties. *Bennett*, 414 Ariz. Adv. Rep. at 5.
46. *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1330 (Ariz. 1981), *quoting City of Tempe v. Prudential Ins. Co. of America*, 510 P.2d 745 (Ariz. 1973).
47. *Bennett*, 414 Ariz. Adv. Rep. at 6, *citing* art. V, § 7, ARIZ. CONST.
48. Joseph Heller's novel describes the travails of Captain Joseph Yossarian, a WWII bombardier. The Catch-22 dictates that you cannot fly missions if you are crazy, but in order to fly combat missions one must be crazy.
49. *See supra* "standing" discussion and note 28.
50. *Rios*, 833 P.2d at 120; *Bennett*, 414 Ariz. Adv. Rep. at 3.
51. *Id.*
52. *Bennett*, 414 Ariz. Adv. Rep. at 3, n.9.
53. *Silver*, 755 N.E.2d at 842.
54. *Pataki*, 769 N.Y.2d at 518.
55. *Silver*, 755 N.E.2d at 842.
56. *Pataki*, 769 N.Y.2d at 518; *Bennett*, 414 Ariz. Adv. Rep. at 3.