Pro and Con Arguments on the Constitutional Amendments Before the Voters on the November 5, 1996 Ballot

The Gubernatorial Veto Amendment
The Victims' Rights Amendment
The Alternative Punishments Amendment

a report by the
North Carolina Center for Public Policy Research

Table of Contents

The Gubernatorial Veto Amendment

by Jack Betts, *former Editor of* North Carolina Insight *and now Associate Editor of* The Charlotte Observer

> **ve•to: Latin for *I forbid*, the first person singular present indicative of vetare, the word by which the Roman tribunes of the people opposed measures of the Senate or actions of the magistrates.**
>
> **-- *The Oxford English Dictionary***

Ever since the last of the Royal Governors was chased out of North Carolina, the legislature has kept the executive branch on a short leash. The state's governor lacked the right to succeed himself until 1977, and still is the only one of the country's 50 governors without veto power of any sort.

But that could change this year, if voters approve an amendment to the state constitution that would allow the governor to veto legislation passed by the two houses of the assembly.[1] That veto would kill legislation unless the legislature overrode it on a special vote.

The veto, says former Gov. James G. Martin, "is a just and proper role for a governor. On the tough issues of the day, courageous positions must be taken by legislators who stand alone under the pressure of opposition. With veto power, a governor must bear that pressure with you. A governor must take a position and explain that position."[2]

The Veto in North Carolina: A Brief History

Ironically, this issue might have been settled more than half a century ago. The 1933 General Assembly approved a constitutional revision that included veto for the governor, but through a legal technicality, the revision was never put to the voters. Had that issue gone to the voters as scheduled in 1934, it likely would have been approved. In the decade ending with the 1932 election, a majority (10 of 16) of the constitutional amendments put to the people were *rejected*; in the following decade, all 14 constitutional amendments put to the voters were *approved* by the people.

One other push for the gubernatorial veto occurred in the late 1960s, when Gov. Dan Moore urged the adoption of the veto as part of a constitutional revision. But Moore's request for the veto died in the legislature and was not part of the new constitution adopted by voters on Nov. 3, 1970 -- essentially the constitution under which we operate today.

Constitutions are not an easy thing to change. North Carolina has had but three constitutions in its more than 200-year history, and the federal Constitution has been amended only 16 times since the Bill of Rights was adopted as the first 10 amendments in 1791 -- 26 amendments in all. Two ways exist to amend the N.C. Constitution -- a state constitutional convention or legislative initiation.[3] The constitutional convention avenue may be the harder road to travel. Calling such a convention requires a two-thirds majority vote of the membership of each house of the legislature. The last such state convention was in 1875.

Yet legislative initiative is equally cumbersome. These constitutional amendments require a three-fifths majority of the membership of each house of the legislature (fewer than the two-thirds majority a convention requires) before they can be put on the ballot. Then a simple majority of the voters must approve -- or ratify, as it's called -- the amendment before it becomes part of the Constitution.

Once amendments are put on the ballot, they are likely to pass -- but there's no guarantee of that. Since 1868, 133 proposals have been put to the people; 98 have been approved, while 35 have been rejected, for a 74 percent approval rate. Since 1980, nine amendments have been

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[1] Senate Bill 3, 1995 General Assembly.

[2] Statement of Gov. James G. Martin to the N.C. Senate Committee on Constitutional Amendments, Feb. 2, 1989.

[3] North Carolina Constitution, Article XIII, Sections 1 and 4.

approved and five have been rejected -- a 64 percent success rate.[4] Many of these amendments have little to do with the structure of government, but authorized changes in state finance practices, for instance. Others directly change the way the state is governed -- such as the 1977 constitutional amendment that gave governors the right to run for another full term.

For many years, there were no major constitutional revisions affecting the governor or members of the General Assembly. Though a series of governors had supported allowing both governors and lieutenant governors to succeed themselves for a second four-year term in office, it was not until 1977 that a governor (James B. Hunt Jr.) had the clout to shepherd the issue through the General Assembly.[5]

The vote approving succession was a narrow one -- passing by fewer than 30,000 votes out of more than 585,000 cast -- a 53 percent majority. Despite this narrow margin, the voters since 1977 have not been particularly disposed to approve constitutional changes that would strengthen the legislature. The electorate voted against doubling the length of legislative terms from two to four years in 1982,[6] and in 1986 voted down a proposal to change the date of elections to odd years, a proposal that was perceived as a measure to help keep Democrats in office in the legislature and on the Council of State.[7] Another constitutional proposal, to repeal succession, was approved by the 1985 General Assembly but recalled by the 1986 session before it went to the people for a vote.[8]

What Kind of Veto?

Like most legal devices, vetoes come in a style, size, color, shape, and pattern to suit almost any taste. Stripped of the chrome plating and the tail fins, there are basically two types of vetoes: those that allow the veto of individual words or sections within a bill passed by the legislature and those that allow only the veto of the entire bill. The former is called an item veto, or line-item veto, and a nearly infinite variety of item vetoes can be designed: item vetoes for appropriations bills only, or tax and appropriations bills, or all bills, or all bills except for resolutions or constitutional amendments or redistricting plans or -- well, you name it.

Overall, 49 states provide some form of veto to the governor. Of those, 43 allow an item veto, while six states -- Indiana, Maine, Nevada, New Hampshire, Rhode Island, and Vermont -- allow a regular veto but not an item veto.

If that's not enough, there are also several different ways to design overrides -- those votes by which a veto may be overridden by the legislature. The congressional override requires a two-thirds majority of those present and voting. But on the state level, 24 states with item vetoes and two states with regular vetoes require an override of two-thirds of the number elected. Nine more states with an item veto require override votes of two-thirds of the legislators in the chamber, and so do two states with a regular veto. And five states with an item veto require a three-fifths majority of those elected to override a veto. The distinction between those elected, and those present, is an important one. It's easier to override a veto when the required majority is based on the number of members *present* rather than those *elected*, and an override by a simple majority of those present is somewhat easier still.

Five states with an item veto require only a simple majority of those elected for an override. Finally, one state (Rhode Island) with a regular veto requires a three-fifths majority of those present for an override, and one state with a regular veto (Indiana) requires only a simple majority for an override.

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[4] "Constitutional Propositions Voted on by the People since 1868," *North Carolina Manual 1991-92*, p. 657.

[5] Chapter 363 of the 1977 Session Laws. Ratified by the people on Nov. 8, 1977, on a 307,754 (53%) to 278,013 (47%) vote.

[6] Chapter 504 of the 1981 Session Laws. Rejected by the people on June 29, 1982, by a 163,058 (24%) to 522,181 (76%) vote.

[7] Chapter 768 of the 1985 Session Laws. Rejected by the people on May 6, 1986, by a 230,159 (30%) to 547,076 (70%) vote.

[8] Chapter 61 of the 1985 Session Laws, withdrawn before being put to a vote of the people by Chapter 1010 of the 1985 Session Laws (Second Session 1986).

The veto bill that passed in the 1995 N.C. General Assembly is the basic, no-frills, generic veto with a moderately easy override feature requiring a vote of three-fifths of those present and voting. Because a quorum (one-half of those elected plus one) required for a veto vote in the N.C. Senate would be 26 members, a three-fifths majority of those present and voting could be as few as 16 senators. Likewise, in the 120-member House, a three-fifths override majority could be as few as 37 Representatives. In actual practice, however, it's far more likely that the vast majority of the members will be present and voting on any override attempt.

More than half a century ago, an esteemed journalist named Clarence Poe, editor of the *Progressive Farmer*, expressed his personal ambivalence about the veto. Giving the governor outright power to nullify a legislative act would get "too far away from the sound principle of trusting the common sense of the most," but at least a veto with a simple majority override provision would give the governor "the power to sound a general alarm" about dubious legislation and thus make the legislature reconsider its vote before affirming it. "With such a veto power, the governor could turn the powerful spotlight of statewide publicity upon any measure that he believes should not have been passed and thus render many an invaluable service to our people," Poe wrote in 1932.[9]

Should the governor have such a searchlight to turn on legislation? Or would that tilt too much power toward the executive branch and make the legislature subservient to an all-powerful chief executive -- the sort that legislators have feared since the days of the Royal Governors?

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[9] "Alternative Suggestions as to Gubernatorial Veto," Report of the Constitutional Commission, November 1932, p. 46.

PRO

by Ran Coble, *Executive Director of the North Carolina Center for Public Policy Research*

Two hundred fourteen years ago, colonists knew what they wanted -- a form of government as far away from the Royal Governor model as possible. From 1730 through 1775, Royal Governors enjoyed such prerogatives as the power to summon and dissolve the legislature, to enforce British trade laws, to appoint judges who served not for fixed terms but "during pleasure" of the governor, and to veto laws.[10]

Because the Royal Governors' powers were virtually unchecked by the legislature or the judiciary, the colonists rejected the idea of giving veto power to the governor once statehood was achieved in 1776. But in his 1985 testimony to an N.C. House of Representatives' committee hearing on veto power, then-Gov. James G. Martin reminded the solons of one key fact: "I understand the 18th century concern about Royal Governors," he said, "and how that carried over into the early 19th century. It is now nearing the end of the 20th century: they are not coming back. We have not had a Royal Governor for 209 years. We won!"[11]

Veto power is an issue that transcends partisan squabbles. It is an instrument that, if adopted, will alter fundamentally the balance of power between the legislative and executive branches. And it is also an idea whose time has come.

Arguments for Veto Power

There are five arguments why veto power is needed for North Carolina governors -- of all parties: (1) veto power is needed in order to make the governor a full partner in the legislative process; (2) veto power can serve as a check against passage of legislation which has been rushed through the General Assembly without full deliberation or which is not in the public interest; (3) it can be used to negate unconstitutional legislation; (4) it will restore a proper balance of power between the executive and legislative branches; and (5) it has worked well in practice at the federal level and in all other states.

1. Veto power is needed in order to make the governor a full partner in the legislative process. Former Gov. Terry Sanford (1961-65) explains this argument best. He says the veto power forces the governor to take a stand on crucial policies and share political controversies with legislators. By withholding veto power, Sanford says, "The legislature seems to think it is protecting its own power, but in fact, it is shielding the governor from political exposure."[12]

Thus, the possibility of a veto would make the governor and legislature work more closely together. Knowing that a veto is possible, legislators must consult the governor in drafting legislation and as a bill moves through the legislative process. Knowing that every bill will eventually arrive on his or her desk for signing or for a veto, the governor must monitor every bill introduced and evaluate its benefits and liabilities. Veto power would make the governor less an interested observer and more an informed player who will be held accountable for what happens in the legislature. It means the legislature cannot ignore the governor's views, but it also means the governor cannot stand on the sidelines and choose to take all the credit and none of the blame for legislation which passes.

Gov. James B. Hunt, Jr. (1977-85 and 1993-present) summarizes how veto power will work in practice. "The fact that the legislature has knowledge that the governor has a veto will make the governor more involved in the legislative process. It will lead to more cooperation between the

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[10] Hugh T. Lefler and Albert R. Newsome, *North Carolina: The History of a Southern State*, University of North Carolina Press, 3rd edition (Chapel Hill, NC: 1973), pp. 149-150.

[11] Former Gov. James G. Martin, remarks to the N.C. House of Representatives Constitutional Amendments Committee, public hearing, April 18, 1985, p. 2.

[12] Sanford's response to a survey of former governors, as reported in Alva W. Stewart and Phung Nguyen, "Will North Carolina's Governor Ever Get the Veto Power?," *National Civic Review*, Vol. 73, No. 11 (December 1984), p. 567.

governor and the legislature; and it will fix the responsibility" for legislation which passes.[13]

2. Veto power can serve as a check against passage of legislation which has been rushed through the General Assembly without full deliberation or which is not in the public interest. The veto can serve as sort of a traffic cop at the end of the legislative process. Because only 5.5 percent of the bills passed by legislatures in the U.S. are vetoed by governors, the traffic cop governor with veto power shows the legislature a green light almost 95 percent of the time.[14] The point is that governors exercise vetoes very cautiously.

So why is there a need for the veto at the legislative traffic intersection? Because in a small number of cases, legislators make three kinds of mistakes that a veto can help correct -- mistakes when too many bills are passed during the frantic final days of a session, mistakes when legislation is not really in the public interest, and mistakes when unconstitutional legislation is passed.

The first mistake can occur when an unusually large number of bills are passed in the final weeks of the session. In 1983, the average number of bills ratified per day was seven. During the last week of the session, however, the average was 27 per day. In 1987, the average number of bills ratified per day was 15. Again during the last week, the average was 40 per day. In 1995, the average number of bills ratified per day was five, but during the last week of the session, the average was 16 per day.[15]

Veto power can help correct situations where legislators are tired, pass something, and then have to come back and repeal something they approved last session. Two examples here are (a) the comparable worth study passed as a special provision in the 1984 appropriations bill[16] and (b) the discovery law enacted in 1983, which required prosecutors to notify defense attorneys of any oral statement attributed to the defendant prior to trial.[17] In both cases, these laws were passed late in one session and then efforts made to change them *the very next session.*[18]

Former state Sen. Capus Waynick supported veto power for this same reason. He said it provided "a recooking process for legislation jerked from the griddle raw."[19] Several years ago, one weary committee voted unanimously on the last day of the session in favor of bill number 1425 -- only to discover later it had just approved the committee room number, not a proposed bill.[20]

Veto power also can serve as a check against a second kind of legislative mistake -- legislation which is not in the public interest. Former Govs. Robert W. Scott (1969-73) and Dan K. Moore (1965-69) each have offered examples of bills they would have vetoed as not in the public interest. In response to a questionnaire sent in 1983 to all former governors by two researchers at N.C. A&T State University, Scott said he would have vetoed the 1969 Legislative Retirement Act because it set up a retirement system for legislators that was better than the retirement system for state employees. He thought this was unfair and served a special interest of legislators, rather than the general public interest.

Similarly, former Governor Moore said he would have vetoed the bill which created the school of medicine at what is now East Carolina University. Moore said the creation of this school "might well have been more properly planned and carried out if it had been delayed and reconsidered due

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[13] Gov. James B. Hunt, Jr., remarks to the N.C. Senate Committee on Constitutional Amendments, public hearing, Feb. 2, 1989.

[14] *The Book of the States 1994-95*, The Council of State Governments, Lexington, Ky., pp. 148-150.

[15] Based on original research by Ran Coble and Jim Bryan, N.C. Center for Public Policy Research, April 17, 1985; Jack Betts on April 12, 1989; and Mebane Rash Whitman on September 17, 1996. Raw data supplied by the Institute of Government at the University of North Carolina at Chapel Hill.

[16] Chapter 1034 (HB 80) of the 1983 Session Laws (2nd Session, 1984), section 146(c).

[17] Chapter 759 (HB 1143) of the 1983 Session Laws.

[18] The comparable worth study was repealed in Chapter 142 (HB 236) of the 1985 Session Laws. Part of the discovery law was modified in Chapter 6 (HB 2) of the 1983 Session Laws (Extra Session 1983) in a special session on Aug. 26, 1983, called to deal with the discovery law.

[19] Stewart and Nguyen, see note 12 above, p. 561.

[20] As reported in "Time for the Veto," *Greensboro Daily News* editorial, Aug. 3, 1983, p. 10A.

to a veto." Moore questioned the need for a fourth medical school in the state and the high cost of operating an accredited school.[21]

Reasonable persons may disagree as to whether these four policy decisions -- a pay equity study, a criminal defense discovery law, a legislative retirement system, and a new medical school -- were policy decisions in the public interest. Arguably, at least two of the four decisions were in the public interest, but in any event, a veto would have sent these pieces of rushed and rather "raw" legislation back to the legislative cooks until the product was more well done.

One of the authors of the U.S. Constitution, Alexander Hamilton, came to a similar conclusion. Hamilton argued in *The Federalist Papers*, "It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight. . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." He concluded that one of the main arguments for veto power was that it would "increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."[22]

3. Veto power can serve as a check on unconstitutional legislation. Sometimes -- though not often -- the legislature can get so caught up in the fervor of a political issue that it is willing to sacrifice the constitutional rights of a minority to the wishes of a majority -- the third type of legislative mistake. No state and no legislature is immune to this possibility, particularly as evidenced by legislative enactments depriving African-American citizens of their constitutional guarantees. For example, it was as late as 1989 that the legislature voted to have North Carolina join the states ratifying the 24th Amendment to the U.S. Constitution. That amendment, ratified nationally in 1964, outlawed poll taxes used to deny African Americans the right to vote.[23]

But perhaps the best example of a bill that should have been vetoed -- and would have been, according to former Governor Sanford -- was the Speaker Ban Law. This 1963 law prohibited any person who "(1) Is a known member of the Communist Party; (2) Is known to advocate the overthrow of the Constitution of the United States or the State of North Carolina; [or] (3) Has pleaded the Fifth Amendment. . . in refusing to answer any question, with respect to Communist or subversive connections. . ." from speaking on any state-supported college campus. Legislators argued that their constituents favored the act and that its opponents were soft on communism. The Speaker Ban Law, though it was rendered ineffective by a 1968 federal court decision, remained on the books until 1995.[24] Former Governor Sanford has said repeatedly that he would have vetoed the act if he had had veto power at the time.[25]

More recently, the General Assembly placed legislators on the Environmental Management Commission and 37 other boards and commissions in the executive branch until the N.C. Supreme Court ruled such practices unconstitutional in 1982.[26] Thus, veto power can be used to correct three kinds of legislative mistakes -- legislation passed in a rush, legislation which is not in the public interest, and legislation which is popular but unconstitutional.

4. Veto power will restore the proper balance of power between the executive and legislative branches. The major argument given by the country's founders for veto power for the President of the United States was to enable the executive "to defend himself" against the

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[21] Scott and Moore's responses to N.C. A&T University survey in Stewart and Nguyen, see note 12 above, pp. 564-565.

[22] Alexander Hamilton, *The Federalist Papers*, No. 73, Mentor Books edition, The New American Library, Inc. (New York: 1961), pp. 443-444.

[23] Chapter 84 (HB 109) of the 1989 Session Laws. The amendment to the U.S. Constitution was ratified 25 years earlier, on Feb. 4, 1964.

[24] N.C.G.S. 116-199, declared unconstitutional in *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968). Repealed by Chapter 379 (SB 56) of the 1995 Session Laws.

[25] Sanford submitted a statement to this effect to the N.C. Senate Committee on Constitutional Amendments, Feb. 2, 1989.

[26] *Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982). See the Center's 1985 report on *Boards, Commissions, and Councils in the Executive Branch of North Carolina State Government*, pp. 41-63, for more on this issue.

legislative branch. Hamilton worried about the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments" and guarded "the necessity of furnishing each [branch] with constitutional arms for its own defense. . . ."[27] Veto power was to be the executive's defense shield, while the power to impeach the executive was to be the legislature's escutcheon.

Several national studies have rated our governor among the weakest in the United States, and Tar Heel government observers have used those evaluations to argue that veto power will help restore a proper balance of power between the legislative, judicial, and executive branches. UNC-Chapel Hill political science professor Thad Beyle, known as one of the foremost authorities in the country on the office of the governor, lists six institutional indicators of gubernatorial power: (1) tenure, or limits on the number of terms that may be served; (2) the power of gubernatorial appointments; (3) the number of separately elected officials with executive branch responsibilities; (4) budget authority of the governor; (5) veto power; and (6) the congruence of political party control of the executive and legislative branches of government.

The North Carolina governor has had the right of succession since 1977. The governor's appointive powers, however, have been diluted by a legislature which appoints the Board of Governors for the University of North Carolina and which confirms the governor's nominees to the N.C. Utilities Commission and 11 of 13 nominees to the State Board of Education. The governor also must share organizational powers with nine other officials elected statewide. And although the governor in North Carolina has full responsibility for developing the budget, the General Assembly has virtually unlimited power to alter it. The governor of North Carolina is the only governor in the nation without any type of veto power. Lastly, the powersplit resulting from the 1994 elections -- when the Republicans gained control of the House of Representatives in North Carolina while the Democrats retained control of the state Senate -- decreased the institutional power of Governor Hunt because he is a Democrat. Overall, Beyle concludes, North Carolina's governorship ranks very weak.[28]

In 1987, the National Governors' Association (NGA) conducted a similar evaluation of the institutional powers of all governors over a 20-year period, 1965-85. The NGA concluded that Tar Heel governors were among the four weakest in the country, and a January 1990 update of that research pegs the North Carolina governor as among the three weakest.[29]

This is not to say our governors are powerless. The records of almost all recent governors would belie that assertion. It is to say, however, that our governors are less powerful than those in almost all other states and that they need veto power to do the things we elect them to do. *The N.C. governor should have a regular veto, but not a line item veto.*

5. Veto power has worked well in practice at the federal level and in all other states. The argument most often used in favor of veto power in North Carolina is "How can 49 other states and the federal system be wrong and we be right?" To which veto opponents drag out the cliché, "If it ain't broke, don't fix it." Neither argument is very powerful: the former argument would have the citizens of North Carolina jump off a legislative cliff just because everyone else is doing it; while the latter argument would have the citizens steadfastly refuse to move out of a deep legislative rut -- even if it means avoiding getting hit by a truck.

It is the *experience* of the 49 other states and the federal government that tells us that veto power will not turn our governors into executive bullies or nay-saying ogres. Over four decades, the rate of gubernatorial vetoes has remained relatively low and constant. In 1947, all governors combined vetoed only 5 percent of all bills, and 6 percent of those vetoes were overridden by the

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[27] *The Federalist Papers*, see note 22 above, pp. 442-443.

[28] Thad Beyle, "The Formal Powers of the Governor in North Carolina: Very Weak Compared to Other States," *North Carolina Focus*, September 1996, pp. 267-275.

[29] "The Institutional Powers of the Governorship, 1965-1985," *State Services Management Note*, National Governors' Association, Washington, D.C., June 1987. A 1990 update of the NGA study places North Carolina third from the bottom. See Thad Beyle, "Governors," in Virginia Gray, Herbert Jacob, and Robert B. Albritton, joint editors, *Politics in the American States*, 5th edition, Boston, Mass., 1990.

legislature.[30] In 1977-78, governors were still vetoing only 5.2 percent of all bills, with 8.6 percent then passed into law by a legislative override. In 1986-87, the veto rate was still around 5 percent and the override rate was 3.5 percent. In 1992-93, the veto rate was 5.5 percent and the override rate was 3.5 percent.[31] At the federal level in 1989, 103 of 1,419 non-pocket vetoes (the proposal on the ballot in North Carolina would not give the governor a pocket veto, while the president has such powers), or 7.3 percent, were overridden by Congress.[32] Thus, it is safe to predict that the veto power would be exercised with caution by North Carolina governors, because about 95 percent of all legislation at the state level is signed into law by governors. And overriding a governor's veto is not easy, but it can be done. The federal framers of the constitution called this system of a veto with the possibility of an override "a qualified negative."

Some argue that to look only at statistics on overrides of vetoes ignores the more frequently mentioned fear of the threat of a veto. This is a very real fear among legislators, and it often can lead to negotiations between the executive and the legislature.

But frequent use of vetoes or threats were not the dangers feared by the constitutional framers. Hamilton worried that "there would be greater danger of his not using his power when necessary, than of using it too often, or too much."[33]

And one outgoing governor in the 1980s advised newly elected governors to "avoid threatening to veto a bill. You just relieve the legislature of responsibility for sound legislation."[34] History has proved that Hamilton was a wise seer in terms of the use of veto power and that governors are still aware of limiting its use.

One final note: Former Governor Martin says his polls showed 65 percent of the state's voters favored veto power for the governor. A poll in 1995 showed that 64 percent of the electorate would vote for veto power. Now it's time for the ultimate poll. North Carolinians should vote "FOR" the constitutional amendment granting veto power to the governor on November 5, 1996.

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[30] Thad L. Beyle, "The Governor As Chief Legislator," in Beyle and Lynn R. Muchmore, editors, *Being Governor: The Views from the Office*, Duke University Press, (Durham: 1983), pp. 138-139.

[31] *The Book of the States 1988-89* and *1994-95*, The Council of State Governments, Lexington, Ky., pp. 116-118 and 148-150, respectively.

[32] Calvin Bellamy, "Item Veto: Dangerous Constitutional Tinkering," *Public Administration Review*, January/February 1989, p. 48.

[33] *The Federalist Papers*, see note 22 above, pp. 444-445.

[34] Thad L. Beyle and Robert Huefner, "Quips and Quotes from Old Governors to New," *Public Administration Review*, May/June 1983, pp. 268-269.

CON

by J. Allen Adams and Abraham Holtzman

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> **"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."**
> *-- Declaration of Rights, N.C. Constitution, Article I, Section 6*

> **"The legislative power of the State shall be vested in the General Assembly. . . ."**
> *-- N.C. Constitution, Article II, Section 1*

Why is North Carolina even considering a violation of her historic separation of powers doctrine by means of a gubernatorial veto?[35] Will it enhance the quality of our state government? Doubtful. Will it transfer legislative power from the General Assembly to the governor? Definitely. Will it exacerbate relations between the executive and legislative branches of our state government? Obviously. Do we need to amend our constitution in this manner? Decidedly not.

The answers to these questions rest firmly on two basic premises: (1) North Carolina does not need a gubernatorial veto. (2) A gubernatorial veto has decidedly negative consequences for state politics and policies.

North Carolina Does Not Need a Gubernatorial Veto

North Carolina traditionally has honored the maxim, "If it ain't broke, don't fix it." North Carolina's government is not "broke." It operates on a balanced budget which reflects the tough decisions that our legislators have to make on expenditures. It has been, with rare exception, scandal-free. In a state of relatively modest means, it has produced excellent institutions of higher education and has been a leader of all the states in community colleges. Our people have been blessed with a comparatively well-protected environment and a low tax burden. Almost alone in our region, our government reacted responsibly amidst the hysteria generated by racial desegregation decisions, and we long have been considered one of the most progressive governments in the South. We have rated consistently as one of the most attractive states for business expansion and as a location for retirement.

At least some of our blessings may be attributed to North Carolina's good government, and all in the absence of a gubernatorial veto throughout our history. Why, therefore, engage in a radical change at this time if "it ain't broke" just because other states, where "it is broke" in many instances, adopted the veto at some previous time in their history?

Our former governors as well as the incumbent have urged the General Assembly to propose a gubernatorial veto amendment to our constitution.[36] They reason this way: (1) The governor is really weak and the legislature inordinately strong. Therefore, the veto is needed to overcome the imbalance of power. (2) Because chief executives in all the other states and the national government have the veto, North Carolina should adopt the veto as well. (3) The veto power will force the governor to take a position on bills that the General Assembly adopts, to accept or reject them, and he will therefore be more responsible to the people.

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[35] During the 1984 gubernatorial campaign, then-U.S. Rep. James G. Martin told *The Fayetteville Times* on Oct. 31, 1984, "It is the power of the General Assembly to make the laws, but the power of the governor to enforce and implement these laws. I feel it would be a violation of the separation of powers doctrine for the governor to have veto power over the legislature."

[36] Testimony of former Govs. Terry Sanford, Robert W. Scott, James E. Holshouser Jr., and James B. Hunt, Jr., and of then-incumbent Gov. James G. Martin, at a public hearing of the Senate Constitutional Amendments Committee, Feb. 2, 1989.

That these North Carolina governors advocate the veto makes sense, *from their point of view.* The veto expands the governor's power tremendously, while it diminishes that of the General Assembly, the governor's occasional rival and frequent partner.

Is There an Imbalance of Power?

Research turns up no objective analysis that concludes that a serious imbalance exists between executive and legislative power in North Carolina. Listen to Milton S. Heath Jr., an expert on the subject at the Institute of Government at UNC-Chapel Hill. "Has the legislative branch grown so disproportionately as to jeopardize the balance of power? There is undoubtedly a feeling . . . in North Carolina that this is the case but *it is not clear the facts support this sentiment.*"[37]

In 1981, Thad Beyle, a political science professor at UNC-Chapel Hill and a strong supporter of the veto, used five categories to examine the institutional powers of our governor.[38] They were (1) tenure, in which he ranked North Carolina *strong*, (2) appointment powers, in which he ranked North Carolina *very strong*, (3) budget-making power, in which he ranked North Carolina moderate because the Advisory Budget Commission controlled the overall executive budget presented to the General Assembly, (4) a category called "organization power," in which he ranked North Carolina weak, and (5) veto power, in which North Carolina received zero points.

In a revision of his rankings in 1990, Professor Beyle continued to find our governor *strong* as to tenure, and at that time *strong* as to appointment power and *very strong* in his budgetary powers.[39] The organizational power category was dropped from his analysis and instead three categories were added: power to remove other officials, power of the legislature to change the governor's budget, and, what appears to be a strange institutional power, the control of the legislature by a party other than that of the governor. In all three of these new categories, Beyle ranked North Carolina's governor weak or very weak. Interestingly, if you tabulated only the categories used in the 1981 analysis, North Carolina would have scored 3.25, putting its governor in the moderately powerful category shared by 38 other states. However, by adding the three new categories, Professor Beyle was able again to rank North Carolina as weak in gubernatorial power.

Now, in 1996, Professor Beyle has updated his analysis again, dropping the categories of the power of the legislature to change the governor's budget and power to remove other officials, and adding as a category the "number of separately elected officials" in which he ranks North Carolina very weak.[40] The appointment power which he rated very strong in 1981 and strong in 1990 is ranked only moderate in 1996. Beyle had just written in 1990 that "[b]ecause the Governor shares a large measure of executive branch responsibility with the nine-member Council of State elected on a statewide basis . . . much of the power that in other states is concentrated in the office of the governor lies in the hands of other officials in North Carolina. Were it not for this broad sharing of powers, North Carolina's governor would rank very strong in appointive power."[41] Also, budget power which was ranked very strong in 1990 now has been reduced to moderate.

If Professor Beyle in 1996 had used only the categories used in the 1981 rankings and used the same analysis he used then, North Carolina's governor would score a 3.0 or moderate -- a ranking much higher than the very weak ranking designated for North Carolina. In any event, it is clear that our governor has very strong budgetary and appointive powers. And with the apparent impending re-election of Governor Hunt to a fourth term, the state should be ranked even higher as to tenure. It is obvious when you look at the formal powers that really count, it can not be conceded that our governor is weak as to those powers.

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[37] Milton S. Heath Jr., "The Separation of Powers in North Carolina," *Popular Government*, Vol. 48, No. 2, Fall 1982, p. 21 (emphasis added).

[38] Thad L. Beyle, "How Powerful is the North Carolina Governor?" *N.C. Insight*, Vol. 4, No. 4, December 1981, p. 3.

[39] Thad L. Beyle, "The Powers of the Governor in North Carolina," *North Carolina Insight*, Vol. 12, No. 2, March 1990, p. 27.

[40] Beyle, see note 28 above.

[41] Beyle, see note 39 above, p. 32.

One portion of Professor Beyle's analysis, however, has remained consistent and that is his perceptive analysis of the North Carolina governor's strong informal powers. Beyle writes, "A media-wise governor can . . . dominate a state's political and policy agenda. . . . Some of the informal powers available to the North Carolina governor outweigh many of the constraints on his institutional powers. A strong political base and popularity with the media provides the governor with a major vehicle to command the public's attention. Because no large urban area dominates the state's politics, there are no other highly visible political leaders with which the governor has to compete. . . . In North Carolina, the wide range of informal powers available to the governor tends to balance weak formal, institutional powers."[42]

The decided predominance of television as the public's source of information has greatly increased the actual power of the executive branch. In soap-opera-like TV coverage of politics, the executive plays the role of the leading man.[43] Coverage of legislative branch activity becomes the saga of how the hero is affected and his reaction thereto: "Bush's choice thwarted by Senate" or "Martin's proposal rejected by General Assembly" or Reagan's budget passes Congress" or "Hunt's Safe Roads Program delayed by legislative bickering" or "Clinton's health care plan derailed by Congress." Any criticism or questioning of the executive by the legislature, or even the print media, is resented.[44]

If the governor is so strong as a result of his formal and informal powers combined, what justifies making him super strong and the legislature weak by giving him the veto power? As ten-term Representative "B" Holt recently noted, "I can say without hesitation -- after serving as a legislator through administrations of both parties -- that the Governor of North Carolina is a mighty power. The veto will cause another shift in power from the legislative to executive branch of government -- a very, very dramatic and frightening shift both politically and institutionally."

The Veto Does Not Make the Executive Branch More Responsible

A reasonable question can even be raised as to whether forcing a governor to accept or reject all the bills that the legislature adopts necessarily makes a governor more responsible. Certainly it is a responsibility that a chief executive can shed easily at times. Consider the experience with President Ronald Reagan. Not once did he propose a balanced budget to Congress and he *signed* the budget bills as passed by Congress, yet he denied all responsibility for the large unbalanced budgets of the national government and the immense debt that accrued from the high deficits. On the contrary, he insisted that the blame lay entirely on Congress. Governors, too, can avoid responsibility for bills that they sign into law by transferring blame to the legislatures.

In allowing the executive to sign a measure, the veto system would enable him to take credit for legislation in whose passage he may not have played any role. The legislation becomes his, and the hapless legislators who sweated and bled to secure its passage are lucky if the TV camera flashes to them as they might happen to receive one of the imperial pens.[45] There is no evidence that the veto system would on balance add useful information to the woefully under-informed

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[42] Beyle, see note 28 above, p. 271 and 274.

[43] Hedrick Smith, *The Power Game*, Random House (New York: 1988), pp. 399-400. See also Mark Hertsgaard, *On Bended Knee, The Press and the Reagan Presidency*, Farrar Straus Giroux, (New York: 1988), Chapter 6, "Jelly Bean Journalism," p. 119: "True to its origin in the entertainment business, television news in particular was fascinated not by the pros and cons of President Reagan's program but by the spectacle of getting it passed on Capitol Hill."

[44] Ferrel Guillory, "The Imperial Executive Gains Acceptance," *The News & Observer*, Raleigh, N.C., March 8, 1985, Editorial Page. "Instead of accepting debate and disagreement as vital to the functioning of a democracy, [many Americans] call for submission to the executive branch. 'Why don't you be quiet,' they tell lawmakers and the press and other critics, 'and fall in line with President Reagan and Governor Martin?'" See also Thomas P. "Tip" O'Neill, *Man of the House*, Random House (New York: 1987), p. 351, for similar sentiments expressed to the ex-speaker of the U.S. House. "Leave the president alone, you fat bastard," spat one citizen.

[45] However, if the legislator has displeased the chief executive, such as then-U.S. Sen. J. Danforth Quayle (R-Indiana) did in his shepherding of the Job Training Partnership Act through the Congress in 1983, he may not even be invited to the royal ratification of his efforts.

electorate. On the contrary, it will inevitably add to the overwhelming public relations imbalance now enjoyed by the executive and provide him with another opportunity to verbally whip up on the legislature.

The Veto Does Not Fit with the Long Ballot

One aspect of North Carolina's government that proponents of the veto never even consider is its relationship to our other constitutional state executives: the secretary of state, the auditor, the treasurer, the superintendent of public instruction, the attorney general, and the commissioners of agriculture, of labor, and of insurance.[46] Like the governor, they too are elected on a statewide basis, and they too are responsible for administering major parts of the executive branch and for proposing policies. As independent, elected executives, should they too not have the veto power? If they propose and shepherd legislation through the General Assembly, does the governor have to consult or even listen to them if he intends to veto their legislation? Or should they be given a veto over the governor's veto?

The Real Potential Imbalance of Power

Before North Carolina legislators and citizens act on a constitutional amendment proposing a gubernatorial veto, they should fully understand that the veto is strictly a power mechanism. It will transfer enormous power -- explicit and implicit -- to the governor and thereby weaken the legislative branch. If in our history, our General Assemblies had been corrupt, inattentive to the problems of our state, indifferent to the wishes and needs of our people, or composed of stupid, ill-advised members who consistently drafted improperly prepared legislation, a veto proposal could have merit. It also could have merit if our governors had been inordinately weak and our General Assemblies had abused their power arrogantly. But none of these conclusions have characterized the legislatures or the governors of North Carolina.

Negative Effects of a Veto

North Carolina legislators and citizens also must recognize that the veto undoubtedly will have negative side effects.

* *A veto will have a potentially radical effect on campaign financing.* Individuals and corporations that donate the $4,000 maximum contribution to the governor's campaign already have a good deal of influence on the governor's agenda, and they will be even more powerful if the governor has veto power. The present tendency of large contributors to concentrate on the governor's race will be greatly heightened if the governor also has power over legislation.

* *It will inevitably increase conflict and bitterness between the governor and the legislature.* Each exercise of the veto is a slap in the face of legislative majorities in the House and the Senate that have considered bills in committees and on the floor and that have allowed interested individuals and groups to participate in the open legislative decision-making process. At the same time, every veto is an assertion that the governor, who does not operate through an open decision-making process in the executive branch, epitomizes a higher wisdom as to legislation than that of the legislature itself.

Not satisfied with the veto's usurpation of legislative judgment, some advocates[47] advance the argument that the chief executive must have a veto to exercise *judicial* powers; to decide, in the place of the courts, the constitutionality of a legislative enactment. Why do they presume that the governor has access to better legal advice than does the legislature?

In turn, the majorities in the legislature that initially passed the legislation frequently find institutional, political, and policy reasons to attempt to override the vetoes. In almost all such cases, however, the cards will be stacked in favor of the governor if a super-majority is required for a legislative override, especially if it is based on the total membership of each chamber. It takes only a minority in either the House or the Senate to join with the governor in thwarting the will and

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[46] North Carolina Constitution, Article III, Section 7.

[47] Stewart and Nguyen, see note 12 above, p. 563.

wisdom of overwhelming majorities in both chambers. Conflict can lead to bad feelings and may make it difficult for the governor and the legislature to cooperate on legislation that may be important to our state.

* *The veto reduces the need for the governor to rely on persuasion and logic in dealing with the legislature.* Because the negative veto decision is almost always bound to prevail over the votes of the legislature, the governor has less of an inducement to rely on persuasion. With the blunt instrument of the veto at his fingertips and the likely success in sustaining the veto, the chief executive is less likely to rely on negotiations and logic in trying to induce the legislature to follow his leadership.

Without the veto, North Carolina governors have traditionally had to reach out to legislators, to be as persuasive and convincing as possible to secure the adoption of their programs or stop that which they opposed. In effect, they have had to act as creative forces in the legislature. This approach enhances mutual understanding of the unique problems of the legislature and the executive, and leads to the creative fashioning of compromises that reflect the give and take of both branches and a realization that each has something to offer. Our governors have not been exactly helpless in this process. They have a range of political Green Stamps and sanctions that they can bring to such bargaining relations.

The history of gubernatorial vetoes in the 49 other states demonstrates that North Carolina governors inevitably will rely on the veto to blackjack the legislature one way or another in the knowledge that these efforts will almost always succeed. Research on vetoes shows that only 3.5 percent of such vetoes were overridden in 1986-87 and 1992-93.[48] This means that more than 96 percent of the time (every time in 36 of the states) the governor won in a veto fight. This demonstrates that the veto, when exercised, for all intents and purposes gives the governor ultimate legislative power.

* *A hidden or covert veto underlies the granting of the regular veto to a governor, further maximizing his power over the legislature.* It is true that, on the average, only 5.5 percent of all legislation is vetoed by the governors. What the data do not reveal is that governors successfully use the threat of a veto to accomplish their objectives regarding other bills. A governor can trade a prospective veto over any piece of legislation for support of his own pet proposals. Since the legislators are aware that the overwhelming majority of vetoes prevail, a veto threat is a very effective way of bullying legislators to support a governor's proposal if their own is not to be killed in future executive action.

A covert veto can also have two additional effects. It can force a legislator to change a bill -- to the governor's satisfaction -- in order to avoid a veto and it can sometimes kill a bill when its sponsor decides that he would lose anyway in a veto fight. A potential for executive blackmail over the process and policies of the General Assembly underlies, therefore, the proposal to grant the North Carolina governor the veto power.

If North Carolina citizens grant their governor veto powers, he will not only be one of the highest paid governors in the United States,[49] but also one of the most powerful of these governors. With his new veto powers added to his existing powers, and his ability to meet in secret with his advisors in executive session to determine when to exercise his veto, together with his ability to manipulate the media and overwhelmingly dominate its coverage, the chief executive of North Carolina also will become the chief legislator of North Carolina -- and our North Carolina system of separation of powers will be irretrievably torn asunder.

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[48] *The Book of the States 1988-89* and *1994-95*, The Council of State Governments, Lexington, Ky., pp. 116-118 and 148-150, respectively.

[49] *The Book of the States 1994-95*, The Council of State Governments, Lexington, Ky., pp. 40. The Governor of North Carolina is the 16th highest paid governor in the country.

The Gubernatorial Veto Amendment: A Summary of the Arguments

PRO	CON
Veto power is needed in order to make the governor a full partner in the legislative process.	Veto power would create an all-powerful governor and weaken the legislature as a co-equal branch of government.
Veto power could serve as a check against passage of legislation which has been rushed through the General Assembly without full deliberation or which is not in the public interest.	Veto power would increase conflict and bitterness between the governor and the legislature and would reduce the need for the governor to rely on persuasion and logic in dealing with the legislature.
Veto power could serve as a check on unconstitutional legislation.	Veto power would diminish the separation of powers among the three branches of government. Deciding the constitutionality of statutes passed by the legislature is a judicial function.
Veto power would restore the proper balance of power between the executive and legislative branches.	A serious imbalance does not exist between executive and legislative power because the wide range of informal powers available to the governor tends to balance the structural weaknesses.
Veto power has worked well in practice at the federal level and in all 49 other states.	If the system ain't broke, don't fix it. North Carolina has a reputation for good government, and change is risky.

The Question on the Ballot on November 5, 1996

Constitutional amendments granting veto power to the Governor.

[ ]FOR
[ ]AGAINST

The Victims' Rights Amendment

This amendment would add to Article I of the Constitution of North Carolina a list of basic rights for victims of crime. Advocates for victims' rights want victims to have equal status in the state constitution with criminals. Opponents think that the rights of victims can be adequately protected by state statutes. Failure of the state to observe the rights created by the amendment does not create a claim for money damages.

The proposed amendment would guarantee victims of crime as prescribed by law:

- *the right to be informed of and to be present at court proceedings;*
- *the right to be heard at sentencing;*
- *the right to receive restitution;*
- *the right to information about the crime, the criminal justice system, the rights of victims, and services for victims;*
- *the right to information about the conviction, final disposition, and sentence of the accused;*
- *the right to be notified of escape, release, proposed parole or pardon, or commutation of the sentence;*
- *the right to present their views and concerns to the Governor or agency considering the release of the accused; and*
- *the right to confer with the prosecution.*

PRO

by Catherine Gallagher Smith, *Executive Director of the NC Victim Assistance Network*, 505 Oberlin Road, Suite 151, Raleigh, N.C. 27605. Telephone: (919) 831-2857.

Article I of the Constitution of North Carolina is entitled Declaration of Rights and it specifically enumerates the rights of the people in our state, including the rights afforded to those accused and convicted of a crime. Unfortunately, it is silent, as is the rest of the constitution, about the rights of violent crime victims.

The victims' rights amendment will create a new section in Article I that would outline the rights of violent crime victims, and for the first time in our state's history, give victims specific constitutional recognition. In essence, the amendment provides a victim with the right to be informed of, and to be present at all hearings related to their case, the right to be heard at sentencing, the right to communicate with the prosecution, and the right to receive restitution. Very basic rights.

As it stands today in North Carolina, no court has expressly recognized what should have been obvious: Crime victims have the right to justice and due process. Because constitutions are the highest laws of the land, they have had a profound impact not only on our state's system of justice, but on the way we think about crime and justice as a state. Our amendment and its placement in the North Carolina Constitution is designed to correct this failure.

While both the federal and state constitutions protect every person's rights to due process of law, it has become necessary to clearly and affirmatively extend these rights to crime victims. Due process essentially provides for notice and an opportunity to be heard. For victims of crime this will mean rights of notice, and participation at all critical stages of a criminal case, including pretrial motions, trial, sentencing, and post-arrest release hearings.

The victims' rights amendment has meaningful and practical effects for citizens. First, it provides crime victims with the essential right of participation. Second, it increases the victims' access to the criminal justice system by granting them an opportunity to see and hear how their cases are handled and to have their concerns heard by decision-makers. Third, it provides a secure base for victims' rights by removing these protections from the political arena, granting victims constitutional recognition while retaining the flexibility necessary to operate an efficient justice system.

A Brief History of Victims' Rights

It is important to bring a historical perspective to the issue of victims' rights because the need for a constitutional amendment for victims arises from the same type of circumstances that prompted our founding fathers to author the original Bill of Rights.

In colonial times, a person suspected of a crime was at the mercy of a system that was weighted heavily in favor of the Crown. Many of the protections in the Bill of Rights were the founding father's response to the oppressive system that citizens had been subjected to under British rule. Among the offenses charged against the King in the Declaration of Independence was depriving us in many cases of the benefits of "Trial by Jury."

In response, the framers of the constitution provided for a right to jury trial. The fourth, fifth, sixth, seventh, and eight amendments to the United States Constitution ensure that a citizen accused of a crime will receive fair and reasonable treatment throughout the criminal justice investigation, prosecution and sentencing processes. The drafters of the Constitution believed that individuals accused of committing crimes often had been mistreated and abused under the authority of the Crown. Our founding fathers wanted to ensure that the evils experienced by many innocent citizens at the hands of the English would cease.

In many cases the treatment experienced by present-day victims echoes the same lack of concern for their integrity and the sanctity of the person -- impositions that were once inflicted on those accused of crimes. However, our forefathers could not possibly have foreseen 20th century America as we know it today, with the insidious nature in which violence plagues our highways, communities, streets, and homes. If our forefathers were alive today and could see that the shield they created to protect people's basic rights was being used as a sword against crime victims, I believe they would be ashamed. And they would quickly move to amend the Constitution to address such inequities.

The Administration of Justice

It also is important to review the basic fundamental ideals and principles for which our system of justice was created. *Webster's Dictionary* defines *justice* as the "administration of law," "the quality of being just, impartial, or fair," and "to treat all fairly or adequately." Within our current system of justice, however, the term "administration of law" and the words "equality, impartial, and fair" are words generally applied to the accused -- *not* to victims of a crime.

The word *equality* is interpreted to mean that all persons are equal under the law, but unfortunately that's not true when you consider that the accused is granted constitutional rights, and we give no regard to the victim. Is fair treatment meant only for those who commit crime? Our federal and state constitutions grant that "all men are created equal." If this is true, then crime victims should expect to be treated equally. The accused's past criminal history is protected. Rarely does the jury know that the person before them has committed similar crimes in the past. Yet, many skeletons in the victim's closet can be aired before the jury and the public, often to the victim's embarrassment, in an effort to *prove the innocence* of the accused. Is this equality? I think not.

Impartial is defined as treating or affecting all equally. If our system is to be impartial, how can a judge or a jury be impartial when only half the facts are told? Does impartiality, like equality, apply only to the defense? If the victim is not informed of his right to be heard at the time of sentencing, or if a victim impact statement is not presented to the judge for consideration, is the judge impartial when he imposes punishment on the guilty? Frequently, judges hear the toils and virtues of the accused, no matter how heinous the crime; however, they receive little or no information regarding the impact of the crime on those who were injured.

Ask yourself: Whom does justice serve? Whom should justice serve? The defendant? The state of North Carolina? The citizens of this state? The victim? Justice is served to those who believe that their best interests have been served by the investigation of a crime, the prosecution of the criminal, and the punishment that is rendered. Survivors of crime will tell you that they are not served by our system of justice. And, likewise, the vast majority of the citizens of this state feel that the lack of victim participation creates a void in the very system that was created to protect the innocent.

Victims' Constitutional Rights Subject of Unfounded Criticism

Amending the state constitution in North Carolina has been the subject of much debate and frankly, much unfounded or exaggerated criticism. It has been argued that constitutional rights for crime victims are not necessary because North Carolina has a law granting a Bill of Rights to victims. I disagree. And to prove my point, I ask you to consider the following questions:

1) *How comfortable would you be if your right to free speech, right to free press, or right to assemble peaceably were protected by statutes subject to changing legislatures and changing courts?* When the right to vote was granted to women and African Americans, that right was not put in a statute, it was put in the constitution. That's because it's an issue of a basic, essential right of the people. And just as the right to vote is a basic right, we need to protect the basic rights of individuals if they become a crime victim today, tomorrow, or a hundred years from now. Victims' rights are too important not to be included in our state constitution.

2) *Who would dare stand before us today and say that a defendant's rights to a lawyer, to confront his accuser, or his right to due process are adequately protected by the statutes, not important enough to be included in the constitution?* Such a stance would rightfully be ridiculed, I'm sure. Yet, that is what opponents of a constitutional amendment for victims' rights are saying. It is because constitutions are hard to change that they are able to protect the basic rights of our citizens. The entire history of our country teaches us that constitutions are needed to protect the basic rights of the people. And elevating the status of victims' rights to a constitutional level sends a powerful message. The amendment's passage will signify the intent of the people to afford victims basic rights and due dignity that shall not be diminished by legislative or judicial action.

Vote FOR the Victims' Rights Amendment

Multiplied over the past *few years alone*, the number of crime victims is staggering. In North Carolina, a violent crime occurs every 11 minutes. Everyday, two people are murdered. Every three hours, a North Carolinian is forcibly raped. This is not an issue that affects just a few, but rather, hundreds of thousands who reside in North Carolina. By voting for a constitutional amendment granting victims' rights, this state can take pride in the fact that prosecutors, the judiciary, defense attorneys, the defendant, and *crime victims* will all play a crucial and pivotal role in making certain that our legal system works for the public good.

It is time for justice to serve all of the people. It is time for North Carolina to strengthen its commitment to meaningful victim involvement in the criminal justice system. The integrity of our criminal justice system and the fundamental rights of victims mandate nothing less. As the Reverend Martin Luther King noted, "Injustice anywhere is a threat to justice everywhere." Our state constitution must be amended to include the survivors of violent crime. Failure to do so is a travesty of justice.

CON

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On November 5, 1996, the citizens of North Carolina will vote whether to add a "Rights of Victims of Crime" Amendment to the North Carolina Constitution.[1] We are concerned that the proposed amendment will distract needed resources from more beneficial remedies for victims and, worse yet, that the political forces fueling the drive for the amendment may actually aggravate the healing process for many and distort justice. In evaluating the proposed amendment, we begin with some observations about the victims' rights movement.

Like any large movement, the victims' rights movement has many motivations. However, the most basic of those is the frustration crime victims, particularly victims of violent crime, have with the apparently uncaring court system. This feeling begins with the normal difficulty of dealing with a bureaucracy such as the court system. But the frustrations are compounded for victims because of the trauma many of them are experiencing.

The most central, understandable, and positive component of the victims' rights movement is thus the demand to be treated with respect and dignity by the court system. Fortunately, the proposed North Carolina victims' rights amendment is principally focused on recognizing and enhancing the respect and dignity afforded to victims.

Unfortunately, the victims' rights movement is missing the voice of those most often victimized. There is no dispute that poor communities are victimized at significantly higher rates than more affluent communities. Similarly, racial and ethnic minorities are disproportionately victims of criminal conduct. Historically, however, the leaders, staff, and those who receive the services of victims' assistance networks are not reflective of the racial or economic diversity of the communities victimized by crime. Similarly, the victims' rights movement has been slow to develop links between policies to raise the stature of victims in the court system and strategies geared towards violence prevention.

The Victims' Rights Amendment

The proposed amendment has eight components, all of which are limited in their exercise by the term "as prescribed by law." The amendment would accord victims the right: (1) to be informed of and to be present at court proceedings of the accused; (2) to be heard at sentencing; (3) to receive restitution; (4) to be given information about the crime, the workings of the criminal justice system, the rights of victims, and the availability of services for victims; (5) to receive information about the disposition of the case and the sentence of the accused; (6) to notice of escape, release, or proposed pardon or parole of the defendant; (7) to present their views to the Governor or any agency considering the defendant's release before the action becomes effective; and (8) to confer with the prosecution.

As this list shows, the proposed amendment is principally about giving notice to and consulting with victims. The one clear exception is the right to be heard at sentencing, which we believe for capital sentencing is a very problematic right that can bring excessive emotion and potentially racial bias into the proceedings.[2] Because each of the rights is limited by the term "as prescribed by law," the proposed amendment is symbolic. No rights are conferred directly by the amendment; they must await and can be limited by legislation. Moreover, nothing in this set of rights requires a constitutional amendment; everything therein could be accomplished by legislation.

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[1] This vote is authorized by Senate Bill 6, 1995 General Assembly.

[2] In non capital cases, which make up more than 99% of all criminal cases, the right to be heard at sentencing would be the right to be heard by the sentencing judge. On the other hand, the right to be heard at a capital sentencing procedure must be the right to be heard by the sentencing jury. While we could have reasonable confidence that a professional jurist could put a victim's wishes in the proper context, the ability of the twelve person capital sentencing jury to do this is open to serious question.

Vote AGAINST the Victims' Rights Amendment

Whether the amendment is a good idea first depends upon one's view of the proper role of constitutional amendments. We believe that constitutional amendments are needed to protect the basic rights of the politically unpopular from the immediate desires of an angry public, not to give symbolic support to a popular movement. Thus, we question the wisdom of this constitutional amendment.

What is lacking in current public policy responses to crime is a serious commitment to violence prevention strategies. Indeed, efforts to dismantle the social safety net available to poor and distressed communities are enjoying renewed popularity. To the extent that the commitment of resources necessary to pass the proposed amendment takes away from resources that could go to crime prevention, our state loses. By expanding the voices of all victims, the movement will have its greatest opportunity to provide healing.

Ultimately, the chief reason to vote against the victims' rights amendment is where it may lead. Many other versions of victims' rights amendments have the goal of affecting trial outcomes. However, it is only after a fair trial that we know whether the victim is truly a victim and whether the defendant is responsible for the victim's suffering. Provisions that "put a finger on the scales of justice" to achieve more guilty verdicts should not be adopted in the name of victims' rights. At least this proposed amendment only lightly places a finger on the scales of justice.

The Victims' Rights Amendment: A Summary of the Arguments

PRO	CON
The amendment would affirm the public policy of North Carolina regarding victims' rights, guiding decisions by the General Assembly and the judiciary in the future.	The amendment is merely symbolic since the rights are modified by the phrase "as prescribed by law" -- which means the legislature really will define the rights.
Basic rights should be protected by the state's constitution. A statutory bill of rights is inadequate because statutes are subject to changing legislatures and changing courts.	A constitutional amendment is unnecessary; all of the rights afforded by the amendment could be enacted into statutes. Constitutions should be amended only when absolutely necessary because they derive their importance from their permanence.
The justice system should protect and serve the rights of victims.	A criminal case is brought by the state on behalf of the citizens of North Carolina, not the victim. Victims have remedies in civil courts to protect them.
The costs of this amendment have only been estimated. Even if it will raise the costs of the criminal justice system, the purpose of the system is to protect citizen's rights. The costs, therefore, should not matter.	The cost of this amendment has been estimated at up to $10 million. Such resources would be better spent on crime reduction and prevention.
Victims should have a right to be heard at sentencing.	Allowing victims to testify at sentencing or to present victim impact statements will prejudice the sentencing process if sentences imposed are based only on sympathy for the victims.
The rights of those accused and convicted are protected by the constitution. Victims should have equal status with criminals in the constitution.	Constitutional guarantees to victims may override constitutional provisions designed to protect those accused from a deprivation of their life or liberty, which is fundamental to our system of justice.

The Question on the Ballot on November 5, 1996

Constitutional amendment adding Victims' Right Amendment,
giving crime victims basic rights to participate in the justice system.

[ ]FOR
[ ]AGAINST

The Alternative Punishments Amendment

Since 1868, the Constitution of North Carolina has limited the punishments judges may impose on criminals to "death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State." Because this list is exclusive, prisoners have been able to elect to serve prison time instead of receiving an alternative punishment. With prison space at a premium, some criminals think they will be released earlier if they are sentenced to a prison term instead of serving an alternative punishment. This amendment would expand the criminal punishments the constitution allows judges to impose.

PRO

by James E. "Mike" Roark, *Senior Field Director of the Justice Fellowship,* P.O. Box 18603, Raleigh, N.C. 27619-8603. Telephone: (919) 781-7010.

Over the last several years, North Carolinians have been subjected to endless diatribes and political posturing by both parties aimed at cracking down on criminals and getting tough on crime. Until last year, repeated legislative attempts to amend the North Carolina Constitution to plug a quirky loophole that allowed many criminals to refuse to accept alternative punishments and opt instead for a few days or months in prison, were annually derailed by opponents in the N.C. House of Representatives. Senate Bill 4, repeatedly introduced by Senator Charles Albertson (D-Duplin) and commonly referred to as the "Albertson Amendment," was finally passed by both the state Senate and House in 1995. Senate Bill 4 offers voters the opportunity to amend Article XI, Section 1 of the North Carolina Constitution so that courts may sentence convicted offenders to punishments that have evolved over the years.

Senator Albertson's constitutional amendment extends the list of constitutionally sanctioned and permissible punishments to include suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty (such as house arrest), and work programs. If amended in this manner, criminal courts could clearly and unquestionably impose these punishments and penalties without the offender's consent.

The Criminal's Right to Refuse Alternative Punishments

Article XI, Section 1 of the North Carolina Constitution was adopted as part of the 1868 Constitution. In the 1976 case of *Shore v. Edmisten*,[1] the North Carolina Supreme Court said that the intent of Article XI, Section 1 was to stop the use of degrading punishments such as "corporal punishment in the form of mutilation and dismemberment, public whippings, branding, [and] cropping of ears." However, the court said that a necessary consequence of the constitutional provision limits the judiciary in fashioning sentences. Language in that decision led many to believe that future probationary sentences in lieu of prison would require the consent of the offender.

As a result, a person convicted of some crimes can refuse a suspended sentence with impunity and insist on imprisonment. Until recently, many convicted criminals relied on the fact that an *active* prison sentence would be shorter than the length of the *suspended* sentence because of limited prison space, the cap on prison population, and the resulting pressure to move less serious offenders out of prison to make space to accommodate new or more serious criminals.

When this amendment was first proposed, its proponents hailed it as a way to stop or slow down the "revolving door" justice that was occurring with increasing frequency throughout North Carolina. At that time, a judge had the discretion to sentence offenders to prison or suspend an active prison term and order other punishments. Whether an offender was sentenced to prison by a judge or was given a suspended sentence and alternative punishments was in most cases discretionary with each judge. However, once the sentence was imposed, the criminal could

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[1] 290 N.C. 628 (1976).

refuse to comply with the terms of the suspended sentence (such as paying restitution, attending drug and alcohol abuse counseling or being gainfully employed, to name a few) and ask for the prison sentence to be activated. Thus, if a criminal were sentenced to two years in prison and that sentence was suspended and the offender then was ordered to do community service, pay restitution, and have his conduct regulated by a probation officer for two or three years, the cunning offender instead would ask to go to prison with the almost certain knowledge that he would only serve months or less and then be released without any supervision or conditions. By opting for prison over probation or other alternative punishments, many offenders knew that they would be back on the streets within a few months or weeks. Probationary sentences, on the other hand, could last for years and involve frequent contact and lengthy supervision by a probation officer.

In 1995, 2,704 misdemeanants and 900 felons agreed to serve alternative punishments and then later elected to serve prison time instead. This costs the state a lot of money. While criminals on probation cost $1.35 per day for regular supervision and $10.75 per day for intensive supervision, they cost the state an average of $63.53 per day if they are in prison. By choosing to serve time in prison, criminals also are able to repay their debt to society without paying restitution.[2]

The Structured Sentencing Act passed by the General Assembly in 1993[3] and the subsequent removal of the cap on prison population[4] has afforded some relief, especially with more serious violent offenders. Under structured sentencing, an offender sentenced to prison must serve all of the sentence; likewise, an offender who is placed on probation and picks prison instead must serve all of the sentence. However, today's prisons are still overcrowded to an unprecedented extent. Misdemeanants continue to make a mockery of the system by demanding to be jailed and then being released within a few days without conditions. Many of these misdemeanants are petty thieves and bad check writers who avoid paying back their victim's restitution and/or performing community service. They pick their punishment and thumb their noses at law-abiding North Carolinians.

Vote FOR the Albertson Amendment

The Albertson Amendment to allow alternative punishments should be passed for two reasons. First, it will legitimize a myriad of alternative punishments that may then be imposed by judges on criminals who are non-violent, non-career offenders. This serves several purposes. It requires the offender to follow a plan of rehabilitation and restitution that will pay back and restore the victim and the community to their position before the crime. It also allows judges to fashion a course or program of rehabilitation for each individual offender to mandate responsibility for criminal conduct and change that behavior. It also frees up valuable and costly prison beds for violent career predatory offenders from whom we all need to be protected. And since most offenders return to their communities, it affords a constitutional basis for dealing with these offenders at the community level.

Secondly, it remedies an historical deficiency in the North Carolina constitution that has allowed convicted criminals to make a mockery of the criminal justice system by picking the easiest way out. Structured Sentencing and increased prison construction remedied this to a great extent. Although it is currently a stable sentencing scheme, Structured Sentencing may not last any longer than the Fair Sentencing Act or other previous sentencing structures. This loophole should be closed once and for all now.

Some will argue that even if the constitution is amended, criminals can still refuse to comply with probationary or alternative punishments and go to jail. This is true. But a recent legislative act to allow for imprisonment for contempt for failing to comply with probationary restrictions

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[2] Telephone interview with Gregg Stahl, assistant secretary of policy and planning with the N.C. Department of Correction, October 7, 1996.

[3] Chapter 538 (HB 277) of the 1993 Session Laws.

[4] Chapter 324, Section 19.9(e) of the 1995 Session Laws; effective January 1, 1996.

gives new teeth in this area.[5] By refusing to comply with probationary conditions, the offender can be found guilty of contempt of court and sentenced to prison for a short time, then released under the original or more stringent conditions of probation. The total active sentence in prison still awaits repeated violations of probation.

North Carolinians should not allow criminals to veto or determine the sentence they receive. Judges should have the power to impose appropriate sentences without asking criminals' permission and Senator Albertson's amendment deserves our support.

[5] N.C.G.S. 15A-1344(e1) and 5A-11(9a).

CON

by N.C. Representative Paul Luebke (D-Durham), *Professor of Sociology at the University of North Carolina at Greensboro*

I support alternatives to incarceration as an important way to stress rehabilitation and treatment for the nonviolent criminal. With successful rehabilitation of a criminal, not only do we North Carolinians gain a productive, tax-paying citizen, we also avoid the $23,000 per year[6] cost of incarcerating one person in a state correctional center. That $23,000 is more than six times what the state of North Carolina contributes for each child's K-12 education,[7] and about what it costs for one year's tuition at Duke University.

As a consequence, you would probably expect me to support an amendment to the Constitution of North Carolina that would permit our state judges to require criminals to accept more modern punishments, including alternatives to prison. But, on the balance, I have concluded that the amendment's passage is not necessary for North Carolina's criminal justice system to work effectively.

A Constitutional Amendment Is Not Necessary

The slight possible improvement in the numbers of criminals who accept rehabilitation programs as part of, say, an electronic parole system, is not significant enough to warrant an amendment to our state constitution. Constitutional amendments should be saved for important constitutional questions such as women's right to vote or the Equal Rights Amendment. The alternative punishments amendment simply will not have that kind of impact on North Carolina government and society.

Alternative punishments are not new. In essence, this amendment is just a technical change that validates existing practices in our criminal justice system. Courts routinely impose a variety of alternative punishments as conditions of suspended prison terms. A North Carolina statute gives prisoners the right to choose active prison time, but the General Assembly could repeal that law.[8] Furthermore, it is not clear that a prisoner's consent to an alternative punishment is necessary for it to be valid.[9]

Advocates for the amendment argue that it will keep criminals from "beating the system" by accepting active prison time and then receiving early release from prison because of parole, good time, and prison overcrowding. But that argument, while true before North Carolina's Structured Sentencing laws took effect for crimes committed after September 30, 1994, is moot for several reasons. In 1993, the General Assembly launched a prison construction program that is adding new beds like never before. For instance, in 1995, 6,000 beds were added to our correctional system. Plus, the Structured Sentencing law abolishes parole, good time, and gain time. Now, with Structured Sentencing, we have truth-in-sentencing: a ten-year minimum active sentence is just that; there is no way a criminal can leave prison earlier than the ten years imposed by the judge.

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[6] North Carolina spent an average of $63.53 per prisoner per day or $23,188.45 per prisoner in fiscal year 1994-95. Telephone interview with Patty McQuillan, public information officer with the N.C. Department of Correction, September 17, 1996.

[7] In fiscal year 1994-95, North Carolina spent an average of $3,369.08 per student. *Selected Financial Data 1994-95*, Statistical Research Section, N.C. Department of Public Instruction, Table 5, pp. 7-9.

[8] N.C.G.S. 15A-1341(c).

[9] For example, see Stevens H. Clarke, *Law of Sentencing, Probation, and Parole in North Carolina* (1996 revised edition), preliminary draft cited with permission of author, Institute of Government, Chapel Hill, NC, Chapter 1 (citation omitted). Clarke writes, "Some North Carolina Supreme Court decisions say that the defendant's consent is required for sentence suspension to be valid. However, the consent requirement remains questionable as a matter of North Carolina constitutional law. The appellate courts have treated this consent as almost a formality. It need not be explicit, but may be implied from the fact that the suspension spared the defendant from a more severe penalty. The statements by the appellate courts are *dictum* because none of the decisions they accompanied held suspended sentences invalid because of failure to obtain the defendant's consent."

Criminals Will Still Be Able to Refuse to Participate in Alternative Punishments

Advocates for the amendment also argue that it will require reluctant criminals (those wanting to avoid drug treatment or other rehabilitation programs) to accept the rehabilitation alternative. But, in fact, a criminal sent to an alternative rehabilitation program can refuse to participate. Such "sit-down" resistance means that the prisoner will ultimately get his or her wish -- to be dropped from the alternative punishment program and given active prison time instead. Thus, even if the amendment passes, the problem will not be solved.

Finally, pro-amendment advocates believe that the amendment's defeat could easily be misinterpreted. That is, they fear that politicians and the press would interpret the amendment's defeat as a vote in favor of expensive prison cells and in opposition to sensible cost-effective prison alternatives. If you share this fear, you should vote for the amendment.

But if you are more persuaded that the proposed constitutional amendment in addressing a small problem (now that truth-in-sentencing is the law in North Carolina) constitutes constitutional overkill, then just vote NO.

The Alternative Punishments Amendment: A Summary of the Arguments

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This amendment would clear up all doubts about the courts' ability to impose alternative punishments, with or without the defendant's consent.	Constitutions should be amended only when absolutely necessary. This amendment involves a technical change. Furthermore, as a matter of constitutional law, it is not clear that the defendant's consent to an alternative punishment is required.
Prison overcrowding is still at an all time high, and thus prisoners will still take the chance that they will be moved through the prison system quickly.	Because of the Structured Sentencing Act -- which abolishes parole, good time, and gain time, and establishes truth-in-sentencing -- this amendment is no longer needed.
This amendment would legitimize alternative punishments, which are especially appropriate for non-violent, non-career offenders.	Prisoners would still be able to refuse to participate in alternative punishments. Thus, the amendment may not solve the problem.
Judges are best able to determine the appropriate sentence for a defendant. Convicted criminals should not be allowed to pick their sentence.	Criminals have rights and should be allowed to refuse alternative punishments.

The Question on the Ballot on November 5, 1996

Constitutional amendment to provide that probation, restitution, community service, work programs, and other restraints on liberty are punishments that may be imposed on a person convicted of a criminal offense.

[ ]FOR
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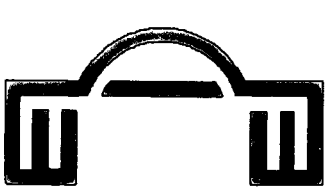

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