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Richard Briffault
Columbia Law School, brfflt@law.columbia.edu

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THE ITEM VETO IN STATE COURTS

Richard Briffault *

Contemporary debates about state constitutional law have concentrated on the role of state constitutions in the protection of individual rights and have paid less attention to the state constitutional law of government structure. This is ironic since the emergence of a state jurisprudence of individual rights has been hampered by the similarity of the texts of the state and federal constitutional provisions concerning individual rights, whereas many state constitutional provisions dealing with government structure have no federal analogues, and thus state jurisprudence in this area is free to develop outside the dominating shadow of the Federal Constitution and the federal courts. Moreover, as the "laboratories of democracy" metaphor suggests, the study of the structural features of state constitutions can enable us to consider alternative means of organizing representative democratic governments, assess the efficacy of different mechanisms for governing, and illuminate the implications and consequences of aspects of the federal government's structure that we ordinarily take for granted.

One of the distinctive structural features of state governments is the item, or partial, veto. Whereas under the Federal Constitution, the President must accept or reject in toto a bill passed by Congress, most state constitutions enable governors to veto items in appropriations bills while simultaneously approving other parts of those bills. The state item veto provisions have had an impact on federal constitutional debate. Citing the states' experience, Presidents Reagan, Bush, and Clinton have all called for some form of presidential item veto of congressional appropriations measures, and Congress and scholars have deliberated the wisdom of such a change.2

* Professor of Law, Columbia University School of Law. B.A., Columbia; J.D., Harvard. Research for this article was supported by the Walter E. Meyer Research in Law and Social Problems Fund.


2. Proposals to create a federal item veto date back to the Grant Administration and were debated during the 1930s. See Note, Federal Legislation: The Item Veto in the American Constitutional System, 25 Geo. L.J. 106 (1936). President Reagan repeatedly proposed that the federal constitution be amended to give the president an item veto. See generally Symposium on the Line-Item Veto, 1 Notre Dame J.L. Ethics & Pub. Pol'y 157-283 (1985) (many articles note President Reagan's attempts to gain item veto power). Citing the powers of state governors, President Bush
Within the states, the item veto has been a fertile source of state constitutional litigation. By one count, there were approximately 120 state item veto cases from the nineteenth century through 1984. Moreover, the frequency of item veto litigation appears to be increasing. From 1985 through 1992, there were at least twenty-five state supreme court decisions construing the item veto provisions of state constitutions, with eleven decisions in the 1991-1992 biennium alone. Certain state supreme courts—Colorado, Florida, Iowa, Massa-
chusetts, Washington, and Wisconsin—have repeatedly wrestled with disputes over the scope and interpretation of the item veto. The item veto, thus, is an important aspect of state constitutional law in a number of states.

The volume of item veto litigation, however, is not necessarily a sign of a healthy state constitutional discourse. Rather, the very number of litigated cases indicates that even after decades of experience many critical issues in the interpretation of the item veto remain unresolved. The item veto alters the

(Mass. 1991) (governor may reduce sum of money appropriated or disapprove appropriation entirely, but may not change nonmonetary terms of appropriations); Inter Faculty Org. v. Carlson, 478 N.W.2d 192, 194-97 (Minn. 1991) (governor's power to veto to be narrowly construed and confined to entire "items"); State ex rel. Sikeston R-VI Sch. Dist. v. Ashcroft, 828 S.W.2d 372, 376 (Mo. 1992) (permitting governor to allocate portion of appropriated funds to new programs pursuant to federal court orders for desegregation, provided total appropriation to public school system not altered); Johnson v. Walters, 819 P.2d 694, 698-99 (Okla. 1991) (governor may not exercise "partial veto" over nonappropriation portions of multi-subject bill).

6. Over the last two decades there have been four major item veto cases in Colorado, four in Florida, seven in Iowa, five in Massachusetts, three in Washington, and three in Wisconsin. In addition to the cases cited in notes 4 and 5, supra, see Anderson v. Lamm, 579 P.2d 620, 628-29 (Colo. 1978) (governor may properly veto substantive portions of appropriation bill, even individual footnotes, where such portions interfered with executive's administrative authority); Brown v. Firestone, 382 So. 2d 654, 671 (Fla. 1980) (governor may veto specific appropriations, not qualifications or restrictions on appropriations); Welden v. Ray, 229 N.W.2d 706, 713-14 (Iowa 1975) (governor may not veto lawful qualifications upon appropriations under item veto amendment); State ex rel. Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141, 152 (Iowa 1971) (appropriation that combines purpose and amount constitutes entire "item" that may be properly vetoed by governor); Opinion of the Justices, 428 N.E.2d 117, 123 (Mass. 1981) (governor may not constitutionally veto portions of bill that are "inseparable" and have effect of altering remainder's legislative goals); Attorney Gen. v. Administrative Justice, 427 N.E.2d 735 (Mass. 1981) (governor may not separate monetary appropriation items from accompanying restrictions or conditions for purposes of veto power); Opinion of the Justices, 425 N.E.2d 750, 753-54 (Mass. 1981) (governor may treat any separable provision attached to general appropriation bill as "item" for purposes of veto power); Washington Fed'n of State Employees v. State, 682 P.2d 869, 874-75 (Wash. 1984) (former judicial test of item veto validity abandoned; governor free to veto sections of enactment or appropriation items without judicial review); Washington Ass'n of Apartment Ass'n v. Evans, 564 P.2d 788, 791 (Wash. 1977) (governor may not veto sections of bill if such veto would substantially alter scope of remaining sections), overruled by Washington Fed'n of State Employees v. State, 682 P.2d 869 (Wash. 1984); State ex rel. Klczek v. Conta, 264 N.W.2d 539, 552 (Wis. 1978) (governor may exercise partial veto, even though bill's policy is thereby altered, provided remaining portions of appropriations bill constituted "complete and workable" law); State ex rel. Sundby v. Adamaney, 237 N.W.2d 910, 918 (Wis. 1976) (governor may veto portions of items in appropriations bill, provided they are "separable provisions").

In addition, Florida and Wisconsin have modified their item veto provisions in response to certain state supreme court decisions. See Fla. Const. art. III, § 8(a) (amended in 1968 in response to Green v. Rawls, 122 So. 2d 10 (Fla. 1960)); Wis. Const. art. V, § 10 (amended in 1990 in response to State ex rel. Wisconsin Senate v. Thompson, 424 N.W.2d 385 (Wis. 1988)).

7. But see Gardner, supra note 1, at 778-805 (dearth of state judicial decisions interpreting state constitutional decisions indicates impoverished state constitutional discourse).

8. In its two most recent item veto cases, the Supreme Court of Washington repudiated the two doctrines that had governed its item veto decision-making during the first seven decades of this century. See Washington State Motorcycle Dealers Ass'n, 763 P.2d at 449; Washington Fed'n of State Employees, 682 P.2d at 784. The Supreme Court of Oklahoma also recently overturned a leading item veto precedent. See Johnson, 819 P.2d at 699.
balance of constitutional authority between a governor and a legislature, yet many state courts either fail to recognize this or are unable to articulate a vision of executive-legislative relations that adequately incorporates the changes affected by the item veto. Some state judges find the item veto to be a deviation from the standard federal constitutional "model" of executive-legislative relations, and, as a result, interpret the item veto grudgingly, rather than see it as constitutive of a separation of powers that differs from the federal norm. At the opposite extreme, one state supreme court has construed the item veto to give the governor enormous powers to modify legislation. Many courts reluctantly find themselves umpiring disputes between the political branches and engaging in highly fact-specific balancing that fails to provide clear guidance for the resolution of future disputes.

These state court difficulties are rooted in the two basic conceptual components of the item veto: the notion of an "item" and the often uncertain definition of an "appropriations bill."

The use of the item veto assumes that a bill is composed of separable parts, some of which a governor may subtract after the legislature has passed the bill without doing violence to the idea that the bill is still the legislature's product. There is, however, no obvious definition of an "item;" that is, there is often no easy way to determine whether a particular provision of a bill is itself a free-standing item and not an inseparable part of a larger item. Moreover, legislation is not just a matter of cobbled together discrete provisions into a bill. It is a process of negotiation and compromise in which the votes essential to the passage of a bill are attained by tying different elements together or by modifying minority proposals with new provisions, conditions, or restrictions until there is a majority ready to support the result. By putting asunder what the legislature has put together, the item veto results in laws that the legislature never passed. As a result, the item veto poses a profound challenge to the view of legislation as the domain of the legislature.

The limitation of the item veto to appropriations bills might appear to be capable of more straightforward application, but the increased complexity of state finances often makes the determination of what is an appropriations bill a knotty problem. At a time when state finances rely heavily on standing appro-

9. See, e.g., Hunt, 588 So. 2d at 864 (Houston, J., concurring) (item veto intended to be "narrowly or strictly construed so as not to thwart the lawmaking powers of the legislative department"); Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1383 (Colo. 1985) (item veto "in derogation of the general plan of state government"); Thompson v. Graham, 481 So. 2d 1212, 1220 (Fla. 1985) (Ehrlich, J., dissenting) (item veto "deviati[on] from the normal system of checks and balances").


11. See, e.g., Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1380 (Colo. 1985) ("In broad outline, it is the province of the general assembly to enact legislation and the province of the executive to see that the laws are faithfully executed. . . . The delineation of the dividing line between these powers is often difficult, and must be accomplished on a case-by-case basis."); Brown v. Firestone, 382 So. 2d 654, 663 (Fla. 1980) ("Our task here is to define and delimit the relationship between the gubernatorial veto power and the legislature's authority . . . .").
priations, earmarked taxes, and revolving funds, it is often unclear whether legis-
islation providing for the payment of the proceeds of a special tax into a particular
fund, changing the distribution of earmarked taxes, making other interfund
transfers, or altering the formula in an intergovernmental assistance program is
an appropriation or general legislation. Even when a particular measure is
clearly an appropriation it may be debatable whether a bill that combines appro-
priations and non-appropriations measures is an appropriations bill for item veto
purposes.

This article considers the state courts’ experience with the item veto. Part I
sketches the origins and basic elements of the item veto and its relationship to
other structural features of state governments. Parts II and III deal with two
central issues of interpretation in state item veto litigation—the definition of an
item and the definition of an appropriation bill. I suggest that in defining the
scope of “item” and “appropriations bill,” state courts are frequently influenced
by the federal model of the proper balance of power between the executive and
legislative branches in the enactment of legislation, even though the item veto
alters that balance and changes the division of executive and legislative responsi-
bilities. Conflicting opinions, shifting doctrines, and ad hoc decision-making
may be the inevitable result.

I. THE ITEM VETO AND STATE CONSTITUTIONS

A. State Item Veto Provisions

The item veto, or partial veto, enables an executive to disapprove part of a
bill while allowing the rest of it to become law. Although the exact language of
the item veto differs from state to state, a typical provision is in the Arkansas
Constitution:

The Governor shall have the power to disapprove any item or
items of any bill making appropriation of money, embracing distinct
items; and the part or parts of the bill approved shall be the law; and
the item or items of appropriations shall be void, unless repassed ac-
cording to the rules and limitations prescribed for the passage of other
bills over the executive veto.12

Forty-three states provide for the item veto, including every state admitted
to the Union since the Civil War and every state but one west of the Missis-
pippi.13 In forty-two of those states, the item veto is limited to bills making
appropriations;14 in Washington, the Governor enjoys the power of partial veto

1993 ed.). The only states without the item veto are Indiana, Maine, New Hampshire, Nevada,
North Carolina, Rhode Island, and Vermont. North Carolina makes no provision for any form of
gubernatorial veto. Id.
14. Several state courts have emphasized that the governor can wield the item veto only on bills
containing more than one item of appropriation. See, e.g., Perry v. Decker, 457 A.2d 357, 360 (Del.
1983) (state constitution confers veto power only where bill contains more than one “distinct” item
of appropriation of money); Cenarrusa v. Andrus, 582 P.2d 1082, 1089 (Idaho 1978) (court would
with respect to all legislation. At least ten states allow governors to reduce as well as to disapprove items. Many states permit governors to veto general legislation that the legislature has incorporated in an appropriations bill, although other states limit the item veto to monetary items. As with other gubernatorial vetoes, legislatures may seek to overturn the governor's action, but in most states a two-thirds vote is required to nullify an item veto.

The item veto dates back to the second half of the nineteenth century. States first began to amend their constitutions to provide for an item veto of appropriation bills in the immediate aftermath of the Civil War. By the eve of

not consider acts of general legislation containing one item of appropriation as "appropriation" bill for purposes of line item veto); Regents of State Univ. v. Trapp, 113 P. 910 (Okla. 1911).

15. Wash. Const. art. III, § 12. As a result of an amendment to this section, adopted in 1974, the Governor's power is more expansive with respect to appropriations than non-appropriations items. The constitution authorizes the Governor to "object to one or more sections or appropriations items while approving other portions of the bill" but provides that the Governor may not object to less than "an entire section, except that if the section contains one or more appropriation items he may object to any such appropriation item or items." Id. What is a "section" for purposes of Washington's section veto remains a subject of debate. See Washington State Motorcycle Dealers Ass'n v. State, 763 P.2d 442, 448 (Wash. 1988).

16. There is some uncertainty in the figure because some state constitutions expressly grant their governors the power to reduce items of appropriations, whereas in other states that power has emerged as an interpretation of the governor's power to disapprove items. Constitutional grants of the power to reduce may be found in Alaska, California, Hawaii, Illinois, Massachusetts, Nebraska, Tennessee, and West Virginia. See Alaska Const. art. II, § 15; Cal. Const. art. IV, § 10(c); Haw. Const. art. III, § 16; Ill. Const. art. IV, § 9(d); Mass. Const. art. LXIII, § 5; Neb. Const. art. IV, § 15; Tenn. Const. art. III, § 18; W. Va. Const. art. VI, § 51(11). The New Jersey Constitution authorizes the governor to "object in whole or in part" to items of appropriation. N.J. Const. art. V, § 1(15). The authorization has been held to include the power of reduction. Karcher v. Kean, 479 A.2d 403, 416-17 (N.J. 1984). The Pennsylvania Supreme Court has determined that the item veto includes the power to reduce. Commonwealth ex rel. Attorney Gen. v. Barnett, 48 A. 976 (Pa. 1901). But see Wood v. State Admin. Bd., 238 N.W. 16 (Mich. 1931) (governor lacks power to reduce items under item veto provision that does not mention power to reduce). The Wisconsin Supreme Court interpreted that state's item veto provision to allow the governor to veto digits in appropriation items, thereby effecting reductions, but it has not decided whether the governor may otherwise reduce items. State ex rel. Wisconsin Senate v. Thompson, 424 N.W.2d 385, 396-97 & n.17 (Wis. 1988).

17. Compare Opinion of the Justices, 425 N.E.2d 750, 753 (Mass. 1981) ("[T]he Governor may treat as an 'item' any separable provision attached to the general appropriation bill.") and State ex rel. Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141, 152-53 (Iowa 1971) (noting Governor's ability to treat any separable provision of general appropriation bill as "item") with Jessen Ass'n, Inc. v. Bullock, 531 S.W.2d 593, 599 (Tex. 1975) (disallowing veto of nonmonetary item) and State ex rel. Cason v. Bond, 495 S.W.2d 385, 392 (Mo. 1973) (same).

18. Of the 43 item veto states, 34 require a two-thirds vote for the legislature to override the governor's action. See The Council of State Governments, supra note 13, at 49-50. In five states, a three-fifths vote will suffice, and in four states the legislature may act by a simple majority. Id.

19. The item veto was first established in the Constitution of the Confederate States of America, although it was never exercised by the Confederate President. After the Civil War, it was immediately adopted by Georgia and Texas. See Roger H. Wells, The Item Veto and State Budget Reform, 18 Am. Pol. Sci. Rev. 782, 782-83 (1924).
World War I thirty-six states had given their governors the item veto. The last state to adopt the item veto was Iowa, which added the provision to its constitution in 1968.

B. The Item Veto in State Constitutional Perspective

The item veto represents the coming together of three widespread state constitutional policies: the rejection of legislative logrolling; the imposition of fiscal restrictions on the legislature; and the strengthening of the governor's role in budgetary matters. In other words, the item veto may be said to be at the confluence of the policies underlying the single-subject rule, the balanced budget requirement, and the executive budget.

1. Anti-logrolling

Like the single-subject rule, the item veto grows out of the state constitutional effort to control logrolling, or the practice of adding together in a single bill provisions supported by various legislators in order to create a legislative majority. In such a situation, no one provision may command majority support, but the total package will. A related phenomenon is the attachment of minority provisions as legislative riders to bills enjoying majority support. In this way, a measure which could not have passed on its own enjoys a free ride on a more popular bill.

Most state constitutions seek to prevent logrolling by requiring legislatures to limit bills to a single subject. The single-subject requirements, however, have largely failed to attain their intended purposes. The notion of a subject is inherently incapable of precise definition. As Professor Lowenstein has observed, "what constitutes a 'subject' is a matter of choice based on considerations of convenience, rather than some objective demarcation of the human mind. . . . [A]ny combination of concepts and things may appropriately be re-

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21. IOWA CONST. art. III, § 16.
22. See Colton v. Branstad, 372 N.W.2d 184, 192 (Iowa 1985) (purpose of item veto amendment to "balance proper legislative and executive powers with respect to the state budget" and to expand governor's role in state budgetary process).
23. See, e.g., Hunt v. Hubbert, 588 So. 2d 848, 860 (Ala. 1991) (Maddox, J., concurring) ("The general purpose of giving the governor 'line item' veto power over appropriations bills, at least in part, was to prevent 'logrolling,' a practice the framers of the 1901 Constitution attempted to preclude by other provisions of the 1901 Constitution, one being [the single subject rule.]")); State ex rel. Coll v. Carruthers, 759 P.2d 1380, 1383 (N.M. 1988) ("The major factors which prompted drafting of constitutions to include the item-veto were . . . most importantly, to prevent 'logrolling' tactics by the legislature."); State ex rel. Link v. Olson, 286 N.W.2d 262, 269 (N.D. 1979) (purpose of item veto to "prevent 'logrolling,' the practice of attaching riders of objectionable legislation to general appropriation bills").
24. According to one recent survey, 42 states have single subject provisions in their constitutions; this includes 40 of the 43 states that have the item veto. See Nancy J. Townsend, Single Subject Restrictions as an Alternative to the Line-Item Veto, I NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 248 & n.75 (1985).
garded as a ‘subject’ so long as there are people who find it expedient to so classify them.”

Lacking a clear definition of “single-subject” and reluctant to intervene in the internal workings of the legislative process, courts have generally held that the single-subject rule is to be given a “liberal” interpretation and have strained to uphold the constitutionality of most challenged measures.

The invalidation of a state law for a violation of the single-subject rule is a rarity.

Nevertheless, logrolling continues to be a cause for concern. Courts and commentators have condemned the “practice of jumbling together in one act inconsistent subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits.” The standard critique is that by combining multiple subjects supported by different interests into a single bill, logrolling impairs the quality of legislative deliberation and erodes the executive veto. Unrelated measures cannot be considered on their individual merits; instead, some legislators are compelled to accept measures they would otherwise oppose in order to win support for the measures they favor, while the governor may have to refrain from vetoing objectionable measures if those measures have been inserted into a bill containing legislation the executive desires.

Logrolling is particularly prevalent with respect to matters that provide discrete benefits to narrower interest groups while spreading the costs across the general public.

The item veto carries forward the anti-logrolling principle, but because it is more limited than the single-subject rule in two ways it may be more effective. First, the item veto is vested in the executive, a political actor. This both obviates the problem of having the courts pass on the political process and places the power to enforce the single-subject concern in a state officer who is far more likely to use it. Second, as noted, in every state but Washington the item veto is


26. See, e.g., Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 214-15 (Ind. 1981) (“[I]f, from the standpoint of legislative treatment, there is any reasonable basis for the grouping together in one ‘act’ of various matters, this court cannot say that such matters constitute more than one subject.”).


28. State ex rel. Martin v. Zimmerman, 289 N.W. 662, 664 (Wis. 1940); see also Commonwealth v. Barnett, 48 A. 976, 977 (Pa. 1901) (bills, “popularly called ‘omnibus bills,’” that “join[ed] a number of different subjects in one bill . . . became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits”).

29. See generally Townsend, supra note 24, at 232-42 (discussing woes of “logrolling” at federal level).

30. See James M. Buchanan & Gordon Tullock, The Calculus of Consent 131-45 (1962) (examining benefits and consequences of “logrolling” within democratic, simple-majority political system).
limited to appropriations. Rather than block all omnibus measures, the item veto focuses on the area most prone to pork barrel legislation and which the states have concluded most needs protection against logrolling and riders—the budgetary process.

2. Balanced Budgets

Nearly all state constitutions require that state budgets be balanced. The item veto is closely associated with the effort to reduce state spending and balance state budgets. The spread of the item veto in the late nineteenth and early twentieth centuries was a response to concerns that state legislatures were profligate with state revenues. The turn of the century was an era of rapidly growing state spending, and the item veto, like the balanced budget requirement, was intended to control state spending. The item veto would enable the governor to control spending and meet the state constitutional requirement of a balanced budget at the start of the fiscal year.

The actual role of the item veto in balancing budgets and holding down state spending is uncertain. Empirical studies of the actual effects of the item veto on the size of state budgets are few, and those that do exist have found that the item veto is more commonly associated with partisan conflict, not fiscal restraint. Many item vetoes are based on policy considerations that have little budgetary impact. Indeed, some have suggested that the item veto actually promotes legislative fiscal irresponsibility, with a legislator “tempted to bolster himself politically by voting large sums of money to a popular cause” on the assumption that the governor will do the politically unpopular task of vetoing or reducing the appropriation. Nonetheless, whatever the effect of the item veto

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31. In addition, the single-subject rule was particularly ill-suited to policing logrolling in the appropriations process. Modern budget practices seek to address state spending comprehensively in one budget or general appropriations bill. By definition such a bill includes more than one subject; indeed, it ought to include all subjects that are matters for state appropriation. As a result many states exempt budget or appropriations bills from the single subject rule. See, e.g., COLO. CONST. art V, § 21. The item veto for appropriations bills in effect plugs this gap; multisubject appropriations bills remain but the governor can consider each item within the bill separately.

32. See THE COUNCIL OF STATE GOVERNMENTS, supra note 13, at 355-56.

33. See Karcher v. Kean, 479 A.2d 403, 416 (N.J. 1984) (“The constitutional line-item veto power serves the governmental need to have a balanced budget in place at the start of the fiscal year.”).


35. See James J. Gosling, Wisconsin Item-Veto Lessons, 46 PUB. ADMIN. REV. 292 (1986). Gosling’s study of the item veto in Wisconsin may be of limited applicability to other states since under the Wisconsin case law the governor has unusually broad item veto powers and this may permit its greater use on policy matters.

36. M. Nelson McGearry, The Governor’s Veto in Pennsylvania, 41 AM. POL. SCI. REV. 941, 943 (1947) (discussing how practice of veto discourages acceptance of responsibility by legislature); cf. L. Peter Schultz, An Item Veto: A Constitutional and Political Irrelevancy, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 177, 186 (1985) (with federal item veto “Congress could act even more irresponsibly than it does at present, packing appropriations bills with questionable items. . . . Then a congressman
in practice, its rationale is clearly linked to expenditure reduction and fiscal balance.

3. Executive Budget

Even in the early twentieth century it was recognized that the item veto alone was "insufficient to cope with the mounting costs of state government." Reformers urged an administrative reorganization of state fiscal practices. "The outcome was a budget reform movement which swept the country and led to the enactment of budgetary legislation in forty-seven states." The centerpiece of reform was the executive budget. Most states, either by constitutional provision or by statute, give the governor a central role in the budget process. The governor is usually responsible for submitting a budget to the legislature, and for carrying out budgetary goals once the budget is adopted. The turn to the executive reflected the view that governors have the greater institutional motivation and capacity for achieving fiscal restraint. Legislators represent local constituencies and may be more likely to seek state tax dollars for local projects. The competition among local legislators for state moneys tends to drive up the overall size of the state budget. Governors may be more likely to seek state-wide budget goals and hold down the size of the budget because they answer to a state-wide constituency and are in a better position to assess the impact of spending measures on the state budget.

The item veto fits in with the executive budget structure and the balanced budget goal. Under the executive budget systems in most states, the governor submits a budget plan to the state legislature. The legislature must act by a certain date. If the legislature adds to the governor's budget, the governor may veto those items. The item veto makes it more difficult for the legislature to depart from the governor's spending plan. Moreover, on the assumption that
the governor has submitted a balanced budget plan, the item veto enables the
governor to maintain a balanced budget after the legislature has acted. The gov-
ernor's authority is by no means absolute, since in every state the legislature can
override gubernatorial item vetoes, usually by a two-thirds vote. But the item
veto conforms to the judgment of most states of shifting the balance of power
towards the governor with respect to appropriations.44

The executive budget's simultaneous assumption of and provision for the
primacy of the governor in fiscal matters was consistent with the traditionally
limited institutional capacity of most state legislatures. Until three decades ago,
state legislatures "were generally considered 18th century relics" with "little or
no staff, and . . . heavily dependent on executive agencies and lobbyists for infor-
mation."45 Starting in the 1960s, however, most legislatures embarked on pro-
grams of modernization; added staff facilities, and sophisticated information and
data processing systems; and reformed internal procedures. With their new
information-gathering and oversight capacities, legislatures have developed fiscal
expertise and "play an active role in reviewing and monitoring state budgets as
well as overseeing the operation of state agencies."46 Enhanced legislative capac-
ity has led to increased legislative activism. Legislatures are more inclined to
challenge gubernatorial budgetary priorities and to seek inclusion of legislative
initiatives in state budgets. Much as the item veto assumes an executive-cen-
tered vision of state budget-making, increased legislative activism in budgetary
matters has led to conflict and to the current upsurge in state item veto
litigation.47

II. DEFINING THE ITEM

A. The Problem

The item veto authorizes a governor to veto an "item" of a bill without
vetoing the bill. But just what is an "item?" What part or parts of a bill are
sufficiently discrete that they may be separated from the other parts and taken
out of the bill without doing violence to the legislative process and legislative
compromises that gave rise to the initial bill? This is a problem that the federal
system does not face since the President can veto a whole bill only, and not a

44. See Karcher v. Kean, 479 A.2d 403, 406 (N.J. 1984) (governor's authority to propose
budget and power to veto selectively confer significant responsibility for state's fiscal affairs and are
essential to "efficient modern system of government").

13, at 108.

13, at 109.

47. See, e.g., Louis Fisher & Neal Devins, How Successfully Can the States' Item Veto Be
Transferred to the President?, 75 GEO. L.J. 159, 184-85 (1986) (because item veto used more to
accomplish political aims than to reduce budget, vetoes trigger numerous political battles and legisla-
tive challenges of gubernatorial vetoes); Stephen Masciocchi, Comment, The Item Veto Power in
Washington, 64 WASH. L. REV. 891, 893 (1989) (distrust of executive authority in 1970s has led to
resurgence of legislation, court challenges to item vetoes, and several amendments to constitutional
item veto provisions).
The item veto enables a governor to consider the parts of a bill separately, approving some and disapproving others. It, thus, empowers the executive to enact into law a measure that differs from the one the legislature passed. This works a major departure from the traditional separation of executive and legislative functions. The definition of a vetoable item, thus, raises a serious conceptual problem.

Disputes over whether a provision that a governor has sought to veto is in fact a vetoable item usually take two forms. The legislature and governor may disagree over the level of specificity at which the governor may wield his veto power. And the governor and legislature may clash over whether a non-mone-
tary provision in an appropriations bill constitutes a discrete item or is inseparably wedded to an appropriation. Both conflicts grow out of the essential indeterminacy of the notion of an item.

To illustrate the problem of the level of specificity at which the item veto is to be used, a hypothetical may be instructive. Within the context of a state’s education budget, may the governor veto the line appropriating funds for salaries for administrators at a specific four-year college, or is the proper item the entire appropriation for salaries at the college, the entire appropriation for that college, the entire appropriation for all four-year colleges, or the entire appropriation for higher education? Is the budgetary appropriation for higher education to be treated as a single item, with all the sub-items seen as inseparable parts of an overall legislative funding plan, so that (in the absence of the power to reduce) the governor must veto either all of it or none of it? Or, if the budget makes more detailed specifications, may the governor apply the item veto at any level of detail she chooses?

Generally, if the legislature has made the more detailed specifications of appropriations, and it has not made the more general appropriation contingent on the more specific ones (or made the specific appropriations contingent on each other), the courts have allowed governors to apply the item veto to the more specific and smaller dollar items. However, courts have not always given clear guidance as to how specific the itemization in an appropriations bill must be.

Although some courts have recognized that inadequate itemization would
undo the item veto power and have permitted sub-item vetoes despite the lumping of items by the legislature,\textsuperscript{51} others have been reluctant to allow the governor to veto parts of what the legislature has determined to be a single, broader item.\textsuperscript{52} Moreover, where legislatures expressly provide that the more general appropriation requires the allocation of specified funds to a particular sub-item, courts have often treated the more general appropriation and the more specific allocation as one item and have precluded the governor from vetoing the more specific sub-item.\textsuperscript{53}

The dilemma posed by the express conditioning of a general appropriation on a specific allocation of that appropriation may also be seen as an instance of the other major item definition problem—the relationship of the vetoed provision to the rest of the bill. Where one section of a bill is intertwined with another, the governor, by vetoing one section, may render a non-vetoed section meaningless or ineffective.\textsuperscript{54} More commonly, the issue arises when the governor seeks to veto language within a bill section, such as a condition, restriction, or other proviso placed in an appropriation. Here the issue often is not simply the amount of state funds to be spent on a particular program but how that program will be implemented, or how the agency responsible for the program will be operated. Instances of legislative efforts to incorporate policy or administrative directives into an appropriation are manifold and diverse. For example, funds might be appropriated for the Department of Corrections "provided" prison overcrowding is reduced.\textsuperscript{55} Funds for an agency might be made contingent on consultation with or review by a particular legislative committee before

\textsuperscript{51} See Green, 122 So. 2d at 15-17 (definition of "item" in terms of smaller appropriation motivated in part by need to avoid legislative evasion of item veto authority); Fairfield v. Foster, 214 P. 319, 323 (Ariz. 1923) (if legislature permitted to consolidate "items" and to "direct" how money is spent, governor's veto power nullified); People ex rel. State Bd. of Agriculture v. Brady, 115 N.E. 204, 207 (Ill. 1917) (governor has power to veto items that are separate and distinct entries); see also People v. Tremaine, 21 N.E.2d 891, 894-96 (N.Y. 1939) (lump sum appropriations violate spirit of state constitutional requirement of itemization).

\textsuperscript{52} See, e.g., Florida House of Representatives v. Martinez, 555 So. 2d 839, 844-46 (Fla. 1990) (governor must veto entire appropriation; cannot modify or reduce); Regents of the State Univ. v. Trapp, 113 P. 910 (Okla 1911) ("item" applies to general appropriation that must be wholly approved or rejected, not to specific objects and amounts); Fulmore v. Lane, 140 S.W. 405, 421 (Tex. 1911) (appropriation language preceding group of items evidence legislature's intent to consider group as one appropriation).

\textsuperscript{53} See Opinion of the Justices, 428 N.E.2d 117, 122-23 (Mass. 1981) (governor could not veto part of item because legislature decides level of funding; governor may only disapprove or reduce entire item).

\textsuperscript{54} See, e.g., State ex rel. Link v. Olson, 286 N.W.2d 262, 270-71 (N.D. 1979) (governor could not veto section of bill because veto would destroy purpose and meaning); Commonwealth v. Dodson, 11 S.E.2d 120, 127-31 (Va. 1940) (legislative provision enabling attorney to have special counsel essential to office and "interlocked" with successful administration so cannot be vetoed by governor).

\textsuperscript{55} See, e.g., Brown v. Firestone, 382 So. 2d 654, 658, 668 (Fla. 1980) (governor's veto of conditional proviso invalid because no identifiable fund in proviso); cf. State ex rel. Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141, 148-50 (Iowa 1971) (appropriation to highway commission with proviso barring relocation of highway engineers' offices did not constitute appropriation nor direct method of use).
appropriated funds are actually expended.\textsuperscript{56} An appropriation might be made the basis of an administrative restructuring of the agency to be funded.\textsuperscript{57} An appropriation might provide that funds for the appropriation must come from a specified source.\textsuperscript{58} In some instances, legislative provisos test the bounds of germaneness by conditioning an expenditure on a state action not clearly related to the purpose of the appropriation.\textsuperscript{59}

In each of these examples, the legislature sought to use the appropriation to leverage an administrative or policy decision. In wielding the item veto, the governor sought to obtain the appropriation without being bound by the legislature's accompanying policy determination. The legislative actions raise the specter of the inappropriate combination of discrete policies in a single measure, that is, logrolling. But the governor's effort to sever an appropriation from the accompanying condition is an attempt to enact into law a provision the legislature never approved, and can be seen as an intrusion of executive power into the legislature's domain.

### B. Three Approaches to Resolving the Legislative-Executive Conflict

Each case concerning the proper definition of a vetoable item implicates all three branches of state government. There is the direct clash between the executive and the legislature: the greater the discretion of the governor to excise bill language from the surrounding text, the greater is her power to shape the law enacted; conversely, the more the legislature may insist that elements in a bill are intertwined and that the governor can veto larger portions only, the more the legislature can determine budgetary policy and use the budget to attain other policy goals. The role of the judiciary is more subtle. In each case, the court must consider not only the proper balance of power between the executive and the legislature, but also how deeply judges ought to get involved in these conflicts between the political branches.

The state item veto decisions resist easy classification. Courts within a given state vary in their approach to the item veto over time and in different contexts. Nevertheless, at the risk of enormous oversimplification, I will organize the case law around three general approaches.

The first tends to favor the legislature, either by limiting the portions of an appropriations bill that a governor can veto, or by assimilating the item veto to the traditional executive veto in order to limit the governor's ability to disaggre-

\textsuperscript{56} See, e.g., State ex rel. CoI v. Carruthers, 759 P.2d 1380, 1385 (N.M. 1988) (legislative requirement that district attorney not use funds to purchase automated data processing or word processing equipment reasonable condition on appropriation and may not be vetoed by governor).


\textsuperscript{58} See, e.g., Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1384-85 (Colo. 1985) (restrictions on funding sources not separate items and could not be vetoed without vetoing remainder of items); Opinion of the Justices, 582 N.E.2d 504, 511 (Mass. 1991) (governor may not change specified funding source to general one, but may veto item that establishes funding source).

\textsuperscript{59} See, e.g., Opinion of the Justices, 582 N.E.2d at 510 (proviso intended to make changes in membership, operation, and deposit insurance coverage of Deposit Insurance Fund inserted into appropriation for office of Commissioner of Banks, who did not operate Fund).
igate the legislative compromises incorporated in a bill. In effect, the court will defer to the legislature's determination of how the portions of a bill fit together and whether two arguably severable provisions are really one item. This approach generates relatively predictable case law, but fails to appreciate how the item veto differs from the traditional veto and thereby erodes the item veto's anti-logrolling function.

The second approach relies on some of the basic conceptual assumptions of the first and seeks to maintain the legislature's primacy in determining the structure and contents of legislative bills, but recognizes that the historic purpose of the item veto was to enhance the executive's role and to empower the governor to undo some of the linkages of material within a bill. Courts pursuing this approach seek an ongoing reconciliation of executive and legislative prerogatives, but the balance struck by particular courts will often seem arbitrary, and the lack of consistency in judicial decisions increases the likelihood of future litigated conflicts.

The third, and least common, approach is to give the executive broad authority to determine the contours of a vetoable item. Like deference to the legislature, this approach raises the possibility of consistent, categorical decision-making. It also advances the item veto's historic purpose of enabling the governor to undo legislative logrolling. On the other hand, it dramatically shifts the balance of power between the legislature and the executive and gives the governor considerable capability to engage in unilateral law-making. An executive-centered approach to the definition of an item may follow from the logic of the item veto, but it is such a departure from the traditional approach to separation of powers that it has taken root in only one state—Wisconsin—and even there it has been the focus of considerable controversy.

1. The "Negative" Item Veto

Some courts have sought to avoid the difficulty of defining an item by adopting relatively mechanical rules that limit the scope of the item veto. Thus, some courts restrict the item veto to monetary items so that nonmonetary language may not be vetoed, or accept the legislature's definition of bill sections, so that the governor could never break up a legislative section. These rules certainly curtail the number of disputes—although conflicts over the level of specificity at which the veto may be wielded would still remain—but they do so in a manner that endangers the item veto's purpose of giving the governor authority to unbundle appropriations measures and undertake a separate review and determination concerning every appropriation. A definition of an item

60. See, e.g., State ex rel. Stephan v. Carlin, 631 P.2d 668, 672 (Kan. 1981) (governor may not veto section of appropriations bill that is not "an item of appropriation of money"); In re Opinion of the Justices, 2 N.E.2d 789, 790 (Mass. 1936) (words and phrases not "items or parts of items"). The Massachusetts court subsequently abandoned this position in Opinion of the Justices, 428 N.E.2d 117, 120-23 (Mass. 1981).

61. Washington State Motorcycle Dealers Ass'n v. State, 763 P.2d 442, 443-49 (Wash. 1988) (constitutional amendment prohibits governor from vetoing "less than entire section of nonappropriation bill").
keyed to monetary amounts or section signs in a bill invites legislators to combine different appropriations or appropriations and conditions on those appropriations in the same section of a bill, or to resort to lump sum appropriations. This legislative response to a narrow judicial interpretation of the notion of "item" would limit the governor to the choice of signing or vetoing an entire multi-part appropriation or an appropriation that combines funding with policy language or administrative directives. Indeed, as one empirical study found, such clever legislative drafting has limited the efficacy of the item veto in many states.\textsuperscript{62}

Most state courts permit governors to veto nonmonetary words and phrases, but the dominant judicial analytical framework for considering the relationship of nonmonetary conditions and restrictions to the underlying appropriations continues to favor the legislature and to cabin the effect of the item veto on executive-legislative relations. For many courts, the critical distinction is between gubernatorial actions that are "negative," that is, those that block the enactment of legislation, and those that are "affirmative" or create new legislation. Consistent with the traditional relationship between the executive and legislative branches of government, the governor's use of the item veto must be negative, not affirmative. As one state supreme court put it,

The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions. ... Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part or does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses, or sentences.\textsuperscript{63}

The "affirmative/negative" test assumes that the affirmative/negative distinction can be drawn in theory, that courts can do so in practice, and that the distinction is consistent with the purposes of the item veto. It derives its appeal from the notion that the traditional role of the gubernatorial veto was wholly negative, with affirmative lawmaking solely a matter for the legislature. It reflects the view that either the item veto is really only a special case of the general gubernatorial veto, and not something different, and so should be interpreted accordingly; or, rather, that the item veto is an unwise "exception to the separation of powers otherwise required ... and ... in derogation of the general plan

\textsuperscript{62} See Abney & Lauth, supra note 34, at 373 ("Sixteen of the 37 respondents from states having the item veto reported that legislatures write appropriations acts so as to limit the item veto opportunities for the governor.").

\textsuperscript{63} State ex rel. Sego v. Kirkpatrick, 524 P.2d 975, 981 (N.M. 1974) (citations omitted); see also Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1382-83 (Colo. 1985) (item veto "merely a negative legislative power" vesting governor with authority "to nullify but not to create statutes"); Brown v. Firestone, 382 So. 2d 654, 664 (Fla. 1980) (veto power intended to be negative power, "to nullify, or at least suspend, legislative intent" not "to alter or amend legislative intent"); Inter Faculty Org. v. Carlson, 478 N.W.2d 192, 194 (Minn. 1991) (item veto gives governor "negative authority, not a creative one ... to strike, not to add to or even to modify the legislative strategy").
of state government” and as such ought to be “narrowly construed to prevent an unwarranted usurpation by the executive of powers granted the legislature in the first instance.”

The affirmative/negative test fails to recognize just how different the item veto is from the traditional executive veto. The traditional executive veto can be characterized as wholly “negative.” A president or governor can prevent a legislative measure from becoming law, but cannot change any aspect of the measure that the legislature passed and cannot sign into law anything that the legislature has not already approved. Although in some circumstances this veto might be said to have “affirmative” attributes—e.g., when the executive vetoes a bill necessary to prevent an existing law from lapsing—the executive is not creating any new law that had not previously passed both chambers of the legislature.

The item veto, however, is quite different. Every time the governor wields the item veto, even in the most non-controversial setting, the governor is acting affirmatively. To veto an item and approve the remainder of a bill is always to enact a piece of legislation that the legislature had not approved. A bill missing an item that was in the bill the legislature passed is a different bill from the one the legislature passed. The “negative” instances of the item veto are a null set.

The judicial proponents of the affirmative/negative test, of course, assume that there will be many “negative” item vetoes, especially the vetoes of discrete monetary items which the item veto was plainly intended to allow. To find these vetoes to be “negative,” judges implicitly rely on the proposition that the greater includes the lesser, that is, that the legislature that passed the bill-with-the-vetoed-item simultaneously passed the bill-without-the-vetoed-item. But it is not always the case that the legislature would have passed the bill without the vetoed item. The vetoed item may have been essential to win the approval of some member or group of members whose support may have been necessary to advance the bill, or other, non-vetoed items in the bill, at some critical stage in the legislative process. The vetoed item may have been vital to getting the bill out of committee or to winning majority support on the floor of one legislative chamber.

Legislation is a mechanism for the transmission of individual preferences over a wide range of issues into the collective choice of the legislature as a whole. The very process of reaching a collective preference affects the outcome. As one commentator has observed, “[s]tatutes are . . . the vector sum of political forces

64. Lamm, 704 P.2d at 1383.
65. Inter Faculty Org., 478 N.W.2d at 194.
66. The executive’s veto may have an affirmative lawmaking function in a different sense: by threatening to veto a legislative bill unless the legislature also passes measures she favors, the executive can leverage the authority to veto into the power to make laws. Indeed, a skillful executive can wield the veto threat to have a substantial effect on the shape of legislative measures. Nevertheless, there is a significant formal difference in the “affirmative” lawmaking potential of the two types of vetoes. With an executive limited to the traditional all-or-nothing veto, the legislature may choose not to give in to the executive’s pressure and instead accept the veto, in which case no new law—either the legislature’s or the executive’s—is enacted. In the item veto case, the governor’s action automatically creates a new law unless the legislature is able to summon up the supermajority necessary to override the veto.
expressed through some institutional matrix which has had profound, but probably unpredictable and untraceable, effects on the policies actually expressed."  

Every bill emerges from a unique path marked by internal procedures, preliminary votes, leadership decisions, and political contingencies. "The winning majority consists of many legislators; their respective reasons for voting against the status quo may well be as varied as their number."  

There is simply no way of knowing, as a general matter, if a particular bill would have passed had the legislators been advised at the outset that a particular item would be vetoed. The bill as a whole commanded a legislative majority; the bill without the vetoed item might have been supported by a minority. Thus, every item veto may, in theory, be a creative act, effectuating an affirmative change in the law.

To work, the affirmative/negative test requires a way of distinguishing those vetoes that produce a law that the legislature would have passed anyway—a truly "negative" veto—from those that undo a compromise or remove a provision essential to the affirmative vote of a critical legislator or group of legislators and thereby enact a law that the legislature would not have passed. One possible method of implementing the affirmative/negative test is to review closely the legislative procedure, votes, bargaining, and compromises that led to passage of the bill. But the legislative process is multi-faceted and marked by complex interactions, strategic behavior, and unrecorded subjective judgments by critical legislative players. The difficulties inherent in unpacking the history of any bill are compounded by the general paucity of legislative history materials at the state level. It is no surprise that few courts are eager to engage in this time-consuming and, often, ultimately fruitless enterprise.

The more common method of assessing legislative intent is to look at the text of the legislation itself. Frequently, courts have determined that if the legislature fails to make an appropriation expressly contingent on the vetoed provision that provision may be treated as a separate item. However, where the legislation states that an appropriation is available "provided" that a nonmonetary provision is adhered to, or on "condition" of a specific restriction or compliance with a specific directive, then the legislature intends that the appropriation and the nonmonetary language be treated as linked, and the governor's attempt to veto the condition or proviso will be rejected as an invalid attempt to engage in "affirmative" lawmaking.

Although this construction will sometimes lead to judicial validation of gubernatorial item vetoes, legislators can quickly adapt to the judicial rules and learn to place language of condition throughout their

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69. See Attorney General v. Administrative Justice, 427 N.E.2d 735, 738 (Mass. 1981) (veto of words and phrases permitted where "Legislature did not use conditional or restrictive wording in the disapproved provisions").
70. Compare Welden v. Ray, 229 N.W.2d 706, 710-14 (Iowa 1975) (provision expressed as condition on appropriation may not be vetoed) with State ex rel. Turner v. Iowa State Highway Comm'n, 186 N.W.2d 141, 148-50 (Iowa 1971) (provision not express condition on appropriation may be vetoed).
appropriations. As a result, a careful legislature will usually be able to craft provisos that are considered to be inseparably linked to appropriations.

This careful drafting may be indicative of a legislative intent that an appropriation not become law without the concurrent enactment of a condition attached to it. But the logic of applying the affirmative/negative test to make legislative intent the touchstone of the definition of an item is ultimately subversive of the item veto itself. On the theory that the affirmative/negative distinction is to be drawn according to the language of the bill, the legislature could draft the bill so that every element in the bill is contingent on the enactment of every other. In other words, the legislative intent would be that either all of the bill becomes law or none of it does. A gubernatorial veto of an item in such a bill would surely be affirmative lawmaking as it would alter legislative policy and create a bill inconsistent with the professed intent of the legislature. But plainly not permitting the governor to utilize the item veto on such a bill would render the item veto a nullity.

The affirmative/negative test fails not simply because it is in tension with the internal workings of the legislature in creating legislation, but because it misses the change in the distribution of power between the executive and legislature that the item veto is designed to effect. To undo the perceived harmful effects of legislative logrolling and to fortify the governor's primacy with respect to budget matters, the item veto gives the governor the power of separate consideration with respect to the various elements in an appropriations bill. This allows the governor to escape from the Hobson's choice posed by the legislative attachment of additional funding or undesirable conditions to the governor's budget proposals. As a result, the item veto inevitably gives the governor an affirmative power with respect to the creation of new legislation. The real question is not whether the governor's power is affirmative or negative, but, rather, what affirmative power the item veto ought to create.

2. Of Conditions and Riders: Judicial Efforts to Balance Legislative and Executive Prerogatives

The affirmative/negative distinction influences most state courts, although judges applying this test tend to ignore the inevitably "affirmative" quality of most item vetoes. If the legislature has paid careful attention to its drafting, this approach precludes the governor from vetoing conditions or restrictions attached to appropriations. A number of courts, however, even when professing to follow the affirmative/negative test, have looked past the language the legislature used to tie a condition to an appropriation and have sought to make a substantive judgment as to whether the vetoed language could be severed from the bill. These courts continue to hold that the governor may not sever a condition from the appropriation to which the legislature has attached it, but, con-

71. See Brent R. Appel, Item Veto Litigation in Iowa: Marking the Boundaries Between Legislative and Executive Power, 41 Drake L. Rev. 1, 20 (1992) (interpreting Iowa Supreme Court as holding legislature "to a demanding standard of drafting if it wished restrictions to be a part of an item").
cerned that the legislature may use careful drafting to erode the item veto, they have found that the legislature's definition of what is a condition is not determinative. As the Massachusetts Supreme Judicial Court put it in one opinion, although the vetoed language was "cast in conditional terms . . . skillful drafting will not convert a separable piece of legislation to a restriction or condition on the expenditure of an appropriation."72 "Looking to the substance of the provisions," the court found the vetoed language separable from the appropriation.73

Courts pursuing this approach seek to find a middle path that will prevent legislative circumvention of the veto authority without enabling the governor to assume legislative power. Such a middle path would preserve the traditional primacy of the legislature with respect to lawmaking but would recognize that the item veto represents a shift in power that enables the governor to disaggregate at least some legislative provisions. But the attempt to hold together both the traditional balance of power and the enhanced position of the governor can result in a zigzag course of decisions in which the judicial basis for permitting a veto in one setting and disallowing it in another may be difficult to discern. The course of the Iowa Supreme Court through five cases over two decades may be instructive.

In State ex rel. Turner v. Iowa State Highway Commission,74 the Iowa court's first item veto case, the court held that the governor may veto nonmonetary items, and it sustained a veto of language inserted into the appropriation for highways which prohibited the relocation of the offices of permanent resident engineers. Consistent with the affirmative/negative approach, the court noted that the legislature had failed to make the highway appropriation expressly contingent on the relocation prohibition.75 By the next item veto decision four years later in Welden v. Ray,76 the legislature had learned its drafting lesson, and the court invalidated the governor's vetoes of nonmonetary language that expressly restricted or conditioned appropriations on spending practices of the agencies funded by the appropriations.77

Subsequently, over the votes of three dissenters, the court in Rush v. Ray78 reiterated its position that the governor could not veto conditions on the use of appropriated money. The close division in Rush, however, may have indicated some discomfort with the affirmative/negative test. Rush concerned the veto of a provision attached to five appropriations that sought to exclude those appropria-

73. Id.
74. 186 N.W.2d 141, 148-50 (Iowa 1971).
75. Id. at 149. In dicta, the Turner court also indicated that the legislature would not be permitted to evade the item veto by lumping all appropriations into one item. Id. at 152.
76. 229 N.W.2d 706, 710-14 (Iowa 1975).
77. Id. The vetoed language consisted, inter alia, of legislative efforts to limit the percentage of appropriated funds that could be allocated to any particular institution or program within an agency budget and to limit the number of permanent full-time employees in the affected agencies. Id. at 707-09. The court found these clauses "to be integral parts of the appropriations themselves" and thus "quite different" from the situation in Turner where the legislature had placed the appropriation in one bill section and the vetoed restriction on relocation of offices in a separate section. Id. at 714 (citing Turner, 186 N.W.2d at 150).
78. 362 N.W.2d 479, 481-82 (Iowa 1985).
tions from the general statutory mechanism for the inter-agency transfer of appropriated funds under specified circumstances. Although the majority found that the governor's action would have made the appropriation “available for purposes not authorized by the legislation as it was originally written” and therefore was unconstitutional “affirmative” legislation by the governor, the governor’s veto would have preserved the existing legislative framework for inter-agency transfers and was, thus, arguably a “negative” action. More importantly, the legislature sought to effectuate a general change in state fiscal practices through provisos attached to appropriations. This compelled the governor to accept the proposed changes as the price for obtaining funding for state agencies. If the legislature had passed a separate bill, the governor could have considered the bill on its separate merits and vetoed it without risk to the appropriations. The provisos, thus, resembled the combination of appropriations and general legislation that the item veto was intended to permit the governor to undo. The Iowa court's heavy reliance on the bill's “condition” language, thus, contributed to an erosion of the governor's item veto power.

Shortly thereafter, in Colton v. Branstad, the Iowa court added a new twist to the affirmative/negative test when it held that the governor could veto a condition attached to an appropriation if the condition were really only a “rider.” The provision in Colton was textual language attached to the appropriation to the State Department of Health that directed the Department to relinquish authority over certain federal grants to the State Family Planning Council. Although the directive explicitly stated that it was “a condition of the appropriation,” the Iowa court found that since the language did not “limit or direct the use of that appropriation” it was not a “condition” at all but a “contingency” or a “rider,” and, thus, the governor could treat it as a discrete vetoable item separate from the attached appropriation. In effect, the court treated the condition as a non-germane attachment—although the court also noted that the condition was sufficiently related to the underlying appropriation that the appropriation-rider combination did not run afoul of the state constitution’s single-subject rule. The court recognized that even if the spirit of the affirmative/negative distinction were to guide its definition of vetoable items, the need to protect the governor's item veto power meant that legislative drafting alone could not determine the contours of a vetoable item:

The Governor's constitutional power to veto bills of general legislation cannot be abridged by the careful placement of such measures in

79. Id. at 480.
80. Id. at 482-83.
81. Cf. Henry v. Edwards, 346 So. 2d 153, 158 (La. 1977) (“The Governor's constitutional power to veto bills of general legislation . . . cannot be abridged by the careful placement of such measures in a general appropriation bill, thereby forcing the governor to choose between approving unacceptable substantive legislation or vetoing 'items' of expenditure essential to the operation of a government.”).
82. 372 N.W.2d 184 (Iowa 1985).
83. Id. at 185-86.
84. Id. at 190-92.
85. Id. at 192.
a general appropriation bill, thereby forcing the Governor to choose between approving unacceptable substantive legislation or vetoing "items" of expenditure essential to the operation of government. The legislature cannot by location of a bill give it immunity from executive veto.\textsuperscript{86}

The Iowa Supreme Court applied the "condition/rider" distinction six years later in \textit{Welsh v. Branstad},\textsuperscript{87} when it considered the governor's veto of language attached to an appropriation for tourism and export trade promotion activities which provided "as a condition, limitation, and qualification, any official Iowa trade delegation led by the governor which receives financial or other support from the appropriation in this subsection shall be represented by a bipartisan delegation."\textsuperscript{88} Although the proviso used language of condition and limitation and purported to affect the spending of the funds provided by the appropriation, the court found it to be a vetoable rider because it did not affect "the amount or purpose of the appropriated funds."\textsuperscript{89}

The Iowa court's condition/rider distinction, as a reflection of its underlying goal of reconciling traditional legislative primacy over legislation with the item veto's express grant of power to the governor to disaggregate bills and give separate consideration to items, is well-intentioned but fraught with difficulty.\textsuperscript{90} There is no obvious definition of a rider or clear distinction between a rider and a condition. As one member of Congress recently observed, "riders are simply amendments; they do not fall from the sky."\textsuperscript{91} The courts that have sought to follow the condition/rider distinction have yet to develop a test that clearly separates the former from the latter.

The Louisiana Supreme Court, for example, defined "riders" as measures that are "inappropriate provisions in a general appropriation bill;"\textsuperscript{92} provisos that "do not exhibit such a connexity [sic] with the appropriation of funds that they logically belong in a schedule of expenditures."\textsuperscript{93} But what is "inappropriate" for an appropriation bill is a highly subjective judgment. Few legislatures really limit their appropriations bills to the simple granting of funds to an agency, or a specific unit within that agency, for a particular matter. The structure and operation of an agency could be established by general legislation; in-

\textsuperscript{86} Id. at 190-91.
\textsuperscript{87} 470 N.W.2d 644 (Iowa 1991).
\textsuperscript{88} Id. at 647.
\textsuperscript{89} Id. at 650.
\textsuperscript{90} Other courts attempting to pursue a similar condition/rider strategy appear to include Louisiana, see \textit{Henry v. Edwards}, 346 So. 2d 153 (La. 1977) (item in general appropriations bill requiring legislative approval prior to disbursement of funds); Massachusetts, see \textit{Opinion of the Justices}, 582 N.E.2d 504, 508 (Mass. 1991) (governor may veto any separable item even if item does not directly apportion money); and New Mexico, see \textit{State ex rel. Coll v. Carruthers}, 759 P.2d 1380, 1384-85 (N.M. 1988) (restriction in general appropriation bill that funds could not be used for rental of parking space deemed not "an item of appropriation" and item could be vetoed without vetoing entire appropriation provision).
\textsuperscript{91} Mickey Edwards, \textit{The Case Against the Line-Item Veto}, 1 \textit{NOTRE DAME J. L. ETHICS & PUB. POL'Y} 191, 196 (1985).
\textsuperscript{92} \textit{Henry}, 346 So. 2d at 158.
\textsuperscript{93} Id. at 162.
deed, typically, authorizing legislation directs the creation of a program in the first place. But the details of an appropriation bill inevitably affect the way the agency functions and the nature of the programs the agency undertakes. In the hurly-burly of the political process, legislatures often combine appropriations and non-appropriation matters that are theoretically distinct but in practice hard to keep apart. Language that is arguably general legislation is, thus, frequently a part of appropriations bills. There is no objective standard for determining whether a particular specification or detail is a part of the appropriation or an "inappropriate" addition.

The notion of "connexity" is similarly unhelpful. If it means "germaneness," then few provisions will be treated as riders. Although there is not much dispute in the courts that a nongermane proviso to the underlying appropriation can be treated as a rider, in most cases the arguable rider will be germane to the appropriation. In Colton and Welsh, for example, there was no contention that the riders were nongermane. If "connexity" is to have more bite than germaneness, then it is as vague and open-ended as "inappropriate." To ask whether a provision attached to an appropriation that seeks to affect the structure or performance of the agency funded by the appropriation has a "connexity" with the appropriation is simply another way of asking whether a condition attached to an appropriation is really a part of that appropriation or a separable piece of general legislation. The appropriateness and connexity tests simply restate the question of what an item is; they do not resolve it.

In Welsh v. Branstad, the Iowa Supreme Court suggested that the condition/rider line can be drawn "on the basis of whether the vetoed provision effectively qualified the subject, purpose, or amount of the appropriation either quantitatively or objectively;" provisions that do not have that effect are vetoable riders. This test appears to be more precise and to provide a definition of an item of appropriation, but as the Iowa court's own decisions indicate, that appearance is deceptive, for the actual distinction is quite murky. The court has held that the governor may not veto a proviso attached to the appropriation funding a certain program that determines the number of full-time paid positions in that program. Does a proviso controlling staffing "effectively qualify the subject, purpose, or amount" of the appropriation? Conversely, the court has sustained the governor's veto of the proviso, attached to the funding for trade missions, requiring those commissions to be bipartisan in composition. Isn't the composition of an agency funded by an appropriation part of the "subject" of that appropriation? More to the point, are the two cases really distinguishable—is a proviso directing an agency not to cut its staffing really different, in terms of its relationship to the underlying appropriation, from a proviso requiring that the agency be bipartisan in composition?

As noted, there may be cases where the vetoed language actually has noth-

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94. 470 N.W.2d 644, 649 (Iowa 1991); see also Opinion of the Justices, 582 N.E.2d at 510 (does proviso "affect the purpose of providing funds for the department" or "how the money was to be spent").
95. Welsh, 470 N.W.2d at 649.
96. Id. at 651.
ing to do with the underlying appropriation and in those cases the proviso may easily be treated as a rider. But as long as the proviso purports to direct the structure, function, operations, or procedures of the agency funded, it still in some sense affects the subject of the appropriation. A restriction may be a "condition" not simply as a matter of drafting, but because at some key step in the legislative process the restriction may have been crucial to the approval of the appropriation.

Just as the affirmative/negative test misses the fact that the item veto is always potentially affirmative, the attempt to apply the condition/rider test in terms of the "subject, purpose, or amount" of the appropriation ignores the possibility that in the legislative process the subject or purpose of the appropriation may be defined more broadly than the funding of a particular program and may instead include the structure, organization, or procedures of the agency receiving the appropriation. To say that these broader policy issues are not a part of the appropriation simply reopens the question of the appropriate place of language having broader policy consequences in an appropriation.

The condition/rider approach seeks to reconcile the item veto with traditional separation of powers concerns. Unlike the pure affirmative/negative approach it recognizes that a function of the item veto is to allow the governor to undo the effects of legislative logrolling and to enable the governor to give separate consideration to measures that the legislature preferred to tie together. It recognizes that the item veto changes the balance of power between the political branches, and that consistent with this change the legislature cannot be given unilateral authority to define a vetoable item. Yet the condition/rider test is also faithful to the traditional primacy of the legislature over legislation. Many restrictions will be treated as conditions and protected from the governor's separate itemization. The problem is that the condition/rider distinction is amorphous, if not indeterminate. It generates few predictable outcomes and instead results in considerable subjective judicial resolution of political conflicts.

The goal of integrating the item veto into the traditional executive-legislative relationship is an admirable one, and a number of state courts have attempted to resolve item veto questions through something like the condition/rider framework. That this approach is premised on an illusory distinction and leads to highly fact-specific ad hoc decision-making is less a fault of the courts than an indication of the depth of the conflict between the traditional separation of powers and the item veto.

3. The Executive-Centered Veto

Although most state courts have sought to view their item veto cases through the prism of the affirmative/negative distinction, sometimes modified by the condition/rider rule, the Wisconsin Supreme Court has articulated a dramatically different vision, interpreting the item veto to give the governor enormous quasi-legislative powers with respect to appropriations bills. The Wisconsin court has construed that state's item veto provision to enable the governor to veto words and phrases, even if they are expressed as conditions on an appropriation, and even when the effect of the gubernatorial action is to change
legislative policy completely. Thus, in *State ex rel. Sundby v. Adamany*, the court sustained a gubernatorial item veto which, by artful deletions, altered the procedure for subjecting local tax increases to popular referenda. The legislative bill had provided for optional referenda, contingent on the timely submission of taxpayer petitions with a certain number of signatures, when local governments sought to raise their tax levy limits. The governor’s veto, by striking certain words and phrases, made the local referendum mandatory. Similarly, in *State ex rel. Kleczka v. Conta*, where the legislature created a system for the public financing of election campaigns and funded it by allowing taxpayers to “add-on” to their tax liabilities an additional dollar that would be placed in the state campaign fund, the governor, by clever use of the veto, converted the “add-on” to a “check-off” in which taxpayers could commit a dollar of their existing tax liabilities to the campaign fund. Most recently, in *State ex rel. Wisconsin Senate v. Thompson*, the Wisconsin court held that the governor could veto word fragments, individual letters from words, and individual digits from numbers. The only limitation the court would place on the governor’s veto power is that “what remains after the veto must be a complete and workable law” and the result must be “germane” to the bill originally passed by the legislature.

Wisconsin’s executive-centered approach has two strengths: it safeguards the item veto from legislative efforts at circumvention, and it enables the judiciary to avoid the frequently subjective and always difficult effort of determining whether a governor’s item veto is “affirmative” or “negative.” But the Wisconsin approach goes far toward converting the veto authority into a broad affirmative law-making power. Indeed, the only limits on the Wisconsin governor’s powers to craft new laws are the configuration of letters and digits on the pages of the legislature’s appropriations bills and the governor’s own powers of imagination.

The Wisconsin approach concentrates too much power in one branch of government; indeed, the power would be in the hands of one individual. It is no defense to say that the governor’s action is subject to legislative override. So long as a mere one-third plus one of the members of one house of the legislature are willing to stand by the governor his item veto will not be overridden. It will be rare that a governor would be unable to command the support of enough mem-

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97. 237 N.W.2d 910 (Wis. 1976).
98. 264 N.W.2d 539 (Wis. 1978).
99. As passed by the legislature, the bill read: “Every individual filing an income tax statement may designate that their income tax liability be increased by $1 for deposit into the Wisconsin Election Campaign Fund for the use of eligible candidates.” *Id.* at 545. Acting Governor Schreiber lined out the words “that their income tax liability be increased by” and the words “deposit into.” *Id.* at 541.
100. 424 N.W.2d 385 (Wis. 1988).
101. *Id.* at 393.
102. The Washington Supreme Court cited the Wisconsin court’s criticism of the subjectivity of the affirmative/negative test and the test’s tendency to insert the courts into a political dispute when the Washington court also repudiated the affirmative/negative distinction as a limitation on the governor’s power to veto bill sections to change legislative policy. See *Washington Fed’n of State Employees v. State*, 682 P.2d 869, 874-75 (Wash. 1984).
bers of his own party to stave off an override. Nor is it an adequate defense that the governor’s “affirmative” lawmaking power is limited to appropriations bills so that the legislature could curb gubernatorial creativity by keeping general legislative matters out of appropriations bills.103 As previously noted, appropriations and the programs those appropriations fund are often closely intertwined. It may be difficult, if not unwise, for the legislature always to seek to separate the two into different bills. In State ex rel. Kleczka v. Conta, the Wisconsin campaign finance case, for example, is it clear that it would have been preferable for the legislature to have separated into two bills the mechanism for the creation of the campaign fund and the appropriation for the fund solely to avoid the governor’s power to convert the “add-on” into a “check-off”?

Even if the legislature could cabin the governor’s power through a greater separation of appropriations and general legislation, and, perhaps, a new level of attention to the precise sequence of the letters used in legislative bills, the Wisconsin court’s extreme approach would still be inconsistent with the historic purpose of the item veto. The item veto is an anti-logrolling device focused on appropriations. It enables the governor to disaggregate what the legislature has put together. At most, the governor’s power to disassemble ought to be congruent with the legislature’s power to put items together, but the Wisconsin decisions actually give the governor the even broader power of disassembling the words that constitute an item.

In a sense, the flaw in the Wisconsin approach is related to the court’s “complete and workable law” test. While the result of a valid item veto must, of course, be a “complete and workable law” the item veto is not a grant of power to create entirely new laws. Rather, it authorizes the disapproval of “items,” or, in Wisconsin, “parts.”104 The court inappropriately focused solely on the law-after-veto without also addressing the nature of the material vetoed. Given the background of the item veto, the governor must be limited to the veto of component parts of the legislature’s bills. And while the scope of an item may be indeterminate, surely a bill is not constructed out of word fragments and letters. As the Thompson dissenters noted, “as a practical matter, legislators do not assemble legislative provisions by proposing and arranging individual letters.”105 Representatives legislate by combining concepts and proposals and translating those ideas into specific bill language. The text of a bill incorporates that collection of concepts; it is not “a potpourri of individual letters, an alphabet soup.”106 Not only the law that results, but also the material vetoed should be “complete and workable,” in the sense of denoting the concept or policy or proposal vetoed.

Although all item vetoes have some affirmative or creative effect, allowing the governor to veto word fragments and letters extends the item veto well be-

103. State ex rel. Wisconsin Senate, 424 N.W.2d at 399 (“The solution is obvious and simple: Keep the legislature’s internally generated initiatives out of the budget bill (unless the legislature is prepared to face the possibility of a partial veto).”).
105. State ex rel. Wisconsin Senate, 424 N.W.2d at 401 (Bablitch, J., dissenting).
106. Id. (Bablitch, J., dissenting).
yond the elimination of logrolling. It shifts the executive-legislative balance sharply in the executive direction. In this setting neither “complete and workable law” nor “germaneness” is much of a limitation on gubernatorial power. In Wisconsin the governor may be able to wield the item veto pen to produce a law that has the exact opposite effect of the measure that passed the legislature. The new law would be germane to the legislative measure and it could be “complete and workable,” but it would still be largely the act of one man and would be enacted if he were able to persuade just one-third plus one of the members of one house of the legislature to protect the item veto from an override. Nor does it make for sound lawmaking to have a rule that permits the terms of the statute ultimately enacted to turn on something as fortuitous as the exact sequence of words used by the legislature or the cleverness of the governor in being able to splice words and letters together to create new concepts.

Indeed, in 1990 in the aftermath of the Thompson decision the Wisconsin voters approved a constitutional amendment which provides that in vetoing an appropriation bill “the governor may not create a new word by rejecting individual letters in the words of the enrolled bill.”107 This amendment properly limits the governor to the anti-logrolling function of the item veto. The governor’s partial disapprovals may still have the effect of making new law, but that is only as a consequence of his unbundling of legislative packages—which the item veto is intended to permit. By its silence, this amendment preserves the Wisconsin case law that gives the governor the power to veto digits—which gives him a partial power of item reduction—and to veto words and phrases in a manner that changes legislative policy and creates new legislation, as in the Kleczka and Sundby decisions. As a result, the Wisconsin governor still has the broadest item veto power in the country.108 But, with the 1990 amendment, the Wisconsin rule has the advantages of reflecting the changes in the executive-legislative relations that the governor’s power to undo legislative compromises necessarily entails, while providing a clear rule for all three branches of government that avoids the subjective applications of the arbitrary affirmative/negative test and minimizes judicial involvement in executive-legislative conflicts. If it still leaves the governor with far too much law-making power, the fault may be with the item veto itself rather than with the Wisconsin court’s interpretation.

In short, none of the three approaches to the definition of a vetoable item is satisfactory. The narrow approach confines the item veto power and constitutes an invitation to the legislature to evade the governor’s authority through the

107. WIS. CONST. art. V, § 10(1)(c).
108. See Dennis Farney, When Wisconsin’s Governor Wields Partial Veto, the Legislature Might as Well Go Play Scrabble, WALL ST. J., July 1, 1993, at A16. Another state court that has given its governor broad item veto authority is the Supreme Court of New Jersey. In Karcher v. Kean, 479 A.2d 403 (N.J. 1984), the New Jersey Supreme Court held that the governor may veto “general and broad conditions affixed to the expenditure or use of appropriated funds . . . without necessarily and simultaneously eliminating or reducing any specific item of appropriated funds.” Id. at 416-17. The court interpreted the item veto provision of the state constitution to include the veto of “parts” of items of appropriations and concluded that the governor enjoyed that “broad discretion” to veto conditions. The court did not articulate a general definition of a vetoable item or consider whether the governor could veto individual words, as can the Governor of Wisconsin.
agglomeration of matters in single sections of bills. The broad approach protects the item veto but at the price of a definition of "item" that strains credulity and effects an enormous extension of the governor's law-making power. The middle path is more sensitive than the others to the purpose of the item veto and seeks to reconcile the item veto with traditional concepts of separation of powers rather than have one ignore or displace the other. The middle approach, however, vests enormous discretion in the judiciary and so far has failed to produce a coherent standard for resolving item veto disputes or predicting the outcome of future item veto cases.

III. THE DEFINITION OF APPROPRIATIONS BILL

Forty-two of the forty-three states that grant their governors the item veto authority limit it to "appropriations bills." Just like "item," "appropriations bill" is a term in need of a definition, yet most state constitutions do not provide one. The definition of an appropriations bill raises two questions: how to categorize a bill that combines appropriations with general legislation; and whether a measure that affects the spending of state funds, but does not actually appropriate those funds, is an appropriation. These issues are not as conceptually knotty as those involved in the definition of an "item." Nevertheless, their resolution has considerable impact on the scope of the governor's item veto authority.

A. The Combination of Appropriations and General Legislation

When the legislature combines appropriations and general legislative provisions in the same bill is the result an appropriations bill? Courts have pursued three general approaches to the definition of "appropriations bill." Some would limit the availability of the item veto to only those bills that have the "primary purpose" of making appropriations. Others would permit the item veto in any bill that makes an appropriation, even if the bill is largely devoted to other purposes. And one court would permit the item veto to apply in a bill making an appropriation with a significant effect on state government.

The leading "primary purpose" case is also the only United States Supreme Court case dealing with the item veto—Bengzon v. Secretary of Justice of the Philippine Islands, which involved the construction of the item veto provision of the Philippines' territorial constitution. In Bengzon, the United States Supreme Court held:

an appropriation bill is one the primary and specific aim of which

109. The only exception is Washington. See WASH. CONST. art. III, § 12.
110. A handful of state courts have held that because the texts of their constitutions make the item veto available only for bills making "items" of appropriation, a requirement for the item veto is that the bill make more than one appropriation. See, e.g., Perry v. Decker, 457 A.2d 357, 360 (Del. 1983) (use of plural "appropriations" indicated exclusion of bills making only one appropriation); Cenarrusa v. Andrus, 582 P.2d 1082, 1089 (Idaho 1978) (allowing item veto of appropriations bill suggests that item veto does not apply to bills making a single appropriation). Even in these states, there will be some question whether a bill that makes two appropriations and also contains considerable general legislative matter is an appropriations bill.
111. 299 U.S. 410 (1937).
is to make appropriations of money from the public treasury. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident.112

At the opposite end of the spectrum, several state supreme courts, including those of New Mexico and Wisconsin, have found that any bill that contains an appropriation is an appropriation bill. Thus, the item vetoes in the Sundby and Kleczka cases occurred in bills which had the primary purpose of regulating local levy limits or creating a state election campaign fund. The Supreme Court of New Mexico, in Dickson v. Saiz, sustained a veto of a portion of the state Liquor Control Act which dealt with Sunday sales; presumably the bill had an appropriation in it somewhere, but it was never discussed in the opinion and was clearly not the primary purpose of the bill.113

In the middle here as in the definition of a vetoable item is the Iowa Supreme Court which recently rejected both the "primary purpose" and the "any appropriation" tests and determined that the "proper test is to review each bill on an ad hoc basis and determine whether the bill contains an appropriation which could significantly affect the governor's budgeting responsibility."114

By limiting the availability of the item veto, Bengzon is congruent with the federal constitutional setting, where the item veto is an aberration and distorts the traditional separation of powers. But in the state constitutional setting, where the item veto was intended to alter the separation of powers and enhance the role of the governor in the budgetary process, the primary purpose test creates incentives for evasion and is, in any event, difficult to apply. The "primary purpose" approach gives the legislature considerable power to exempt bills containing appropriations from the item veto by the simple expedient of combining appropriations with other types of legislation. Under the primary purpose test, once enough non-appropriations matter is included, an appropriations bill would be converted into a piece of general legislation and immunized from the item veto.

The primary purpose test can also be highly subjective. How is the primary purpose of a bill to be determined? Is it by the percentage of the bill's text—the number of sections, pages, or lines—devoted to appropriations and to non-appropriations purposes? If so, then the applicability of the item veto could turn on the constitutional irrelevancy of the detail, rather than the scope, of the general legislative portion of the bill. In a bill that created a new program and provided the appropriations necessary to fund it, a short description of the program might lead a court to conclude that the bill was primarily an appropriations measure,

112. Id. at 413.
113. 308 P.2d 205 (1957); see also State ex rel. Sego v. Kirkpatrick, 524 P.2d 975, 981 (1974) (item veto applies to "bills of general legislation, which contain incidental items of appropriation, as well as general appropriations bills").
114. Junkins v. Branstad, 448 N.W.2d 480, 484-85 (Iowa 1989); see also Thompson v. Graham, 481 So. 2d 1212 (Fla. 1985) (permitting item veto in bill in which only one of bill's 800 sections contained appropriation because sum of money involved and number of projects funded made appropriation more than "incidental").
while a more extensive description might cause a court to determine that the appropriation was only secondary. A less mechanical, more qualitative approach might seem less arbitrary but each controversial item veto could lead to a court contest in which the governor and legislative leaders would offer to the judge conflicting evidence concerning the intent and effect of a piece of legislation. The courts would be compelled to examine the inner workings of the legislative process, and perhaps, the motives of legislators in sponsoring or voting for a measure, in order to determine the primary purpose. In any particular case the results of the "primary purpose" test would be impossible to predict and the determination of "primary purpose" would inevitably be the product of a subjective judgment.

The same uncertainty plagues Iowa's significant effect test. Is there to be a dollar threshold for significance, or a minimum percentage of the total state budget? It is not at all clear how significant an effect must be to qualify as a "significant effect," nor is it clear how significance is to be determined.

The "any appropriation" test is an executive-centered approach, but that is less problematic in the definition of an appropriations bill than in the definition of an item. The "any appropriation" standard is easier to apply than either of the other tests and it is more clearly consistent with the history and purpose of the item veto: to permit the governor to give separate consideration to, and make a separate determination about, every item of appropriation. This reflects the concern, under an executive budget system, that the governor play a primary role, subject to legislative override, in determining the state's budget; that the governor be able to limit appropriations in order to meet balanced budget requirements and achieve the general goal of fiscal restraint; and that the governor be able to unbundle appropriations measures and pass on each item of appropriation separately. Although the "any appropriation" test expands the governor's authority, this is just the kind of alteration in the balance of legislative-executive power that the item veto was intended to achieve. Moreover, the legislature can protect itself by adhering to a strict separation of appropriations and non-appropriations matters, thereby vindicating the single-subject rule as well.115

B. What Is An Appropriation?

The question of what is an appropriation requires a court to determine when legislative action would clearly commit the state to the expenditure of state funds for a public purpose.116 One issue is the relationship of an appropriation to an authorization to spend state money on a specific program. An authori-

115. The "any appropriation" test is particularly appropriate in states that allow the governor to veto nonmonetary items and legislative riders on appropriations. If the item veto authority exists when appropriations and non-appropriations provisions are found in the same bill, and can be applied to the nonmonetary items, why should it matter that a bill contains more non-appropriations items than appropriations items? The threats to the executive budget, fiscal constraint, and the anti-logrolling principle are posed whenever appropriations and non-appropriations provisions are combined, whatever the proportion.

116. See Junkins, 448 N.W.2d at 483 (test for "appropriation" whether money may be paid or drawn on authority of act).
ORIZATION is an essential precondition for subsequent spending. It may create a political climate in which the state feels compelled to appropriate the funds necessary to honor the commitment in the authorization. It may be quite specific, as in the adoption of a formula for aid to localities or the poor or for the payment of private parties who provided state-subsidized services to the poor. Such an authorization may give rise to a claim of entitlement on the part of the intended recipients and, thus, have a powerful impact on state spending. The effects of such authorizations and aid formulas on state budgets support an argument that they be treated as appropriations for item veto purposes even if they are not appropriations in the technical sense. Nevertheless, state courts have generally adhered to a formal definition of appropriations and have excluded from the definition of appropriation authorizations and other substantive legislation that create spending programs but do not actually appropriate funds.\textsuperscript{117}

This interpretation of appropriation has had the effect of limiting the item veto without undermining it. The authorization/appropriation distinction has a long pedigree, and may have been assumed by the drafters of state item veto provisions. It may also be that rigid adherence to this formal distinction is more judicially manageable than a standard requiring the courts to gauge the effect of an authorization measure on state spending. The sharpness of the distinction has also sometimes benefited governors, as state courts have held that governors may veto or reduce appropriations without having to veto the underlying authorization for the entitlement program that the legislature intended to implement through the appropriation.\textsuperscript{118}

More thorny than the appropriation/authorization distinction have been the difficulties created by the states’ increased utilization of earmarked taxes and special funds. The traditional conception of the state budget is that revenues are collected from taxes and other sources and deposited into the state’s general fund and then annually or biennially appropriated for the purposes specified in the budget. Today, however, many states rely extensively on special taxes and special funds. Taxes may be authorized with the requirement that the revenues be earmarked for deposit into a special fund which may be used only for a special purpose. This may make the tax more acceptable politically and may give the beneficiaries of the funded program greater assurance that the expenditures

\textsuperscript{117} See, e.g., Thomas v. Rosen, 569 P.2d 793, 797 (Alaska 1977) (bond issue authorization not appropriation); Harbor v. Deukmejian, 742 P.2d 1290, 1296 (Cal. 1987) (provision requiring AFDC benefits to be paid from date of application rather than from date application processed, and ultimately requiring payment of additional funds from state treasury, is substantive measure and not appropriation); State ex rel. Akron Educ. Ass’n v. Essex, 351 N.E.2d 118, 120 (Ohio 1976) (change in formula for calculating state aid to school districts not appropriation); State ex rel. Finnegan v. Dammann, 264 N.W. 622, 624 (Wis. 1936) (revenue bill intended to fund state program not appropriation); cf. Karcher v. Kean, 479 A.2d 403, 410 (N.J. 1984) (“[T]he operative statutes imposing the public utilities franchise and gross receipts taxes and providing for their distribution are not themselves appropriations.”).

\textsuperscript{118} See, e.g., People ex rel. I.F.T. v. Lindberg, 326 N.E.2d 749, 752 (Ill.) (governor permitted to reduce amount of appropriations made to school districts not appropriation); cert denied, 423 U.S. 839 (1975); Barnes v. Secretary of Admin., 586 N.E.2d 958, 961 (Mass. 1992) (governor’s reduction by 50% of emergency assistance program within power of item veto).
will ultimately be made. Is the deposit of tax dollars into a special fund to be treated as an appropriation?

If the focus of analysis is on the expenditure of state funds for a public purpose, then the deposit into the special fund may not be an appropriation. After all, the mere placement of tax dollars in the special fund does not mean they will be spent and it is conceivable that subsequent legislative changes will return those dollars to the general fund. On the other hand, if the focus is on the segregation of the tax dollars from the general fund and the commitment of the revenue to the designated statutory purpose, then the creation or deposit of funds into a special fund might very well be treated as an appropriation. Indeed, the more a special fund resembles a "locked box" from which moneys can be withdrawn only as expenditures for the statutory purpose, the more the deposit of moneys into the fund resembles an appropriation.

The situation becomes more complicated as the special funds, and the relationships among the general fund and various special funds, become more complex. Are measures that redesignate certain tax revenues from one special fund to another, or that transfer funds out of the special fund and back to the general fund, appropriations? Some special funds consist of moneys received from private contributions (such as withholding from state employees) and general fund dollars as well as earmarked tax revenues. Are changes in the formulas for payments into the funds, with concomitant changes in the amount of general fund dollars placed in these funds, appropriations?

There is no consistent line of decisions among the state courts, but in a number of cases the court’s resolution of the definition of an appropriation was plainly influenced by its attitude toward the item veto, and the item veto’s effect on the traditional separation of powers. Thus, the Iowa Supreme Court, citing its general view that the item veto “gives the governor a larger role in the state budgetary process,” determined that “the allocation of funds ... into a separate and distinct fund that the State can no longer utilize for other purposes absent subsequent legislation is an appropriation” for item veto purposes. Similarly, the Arizona Supreme Court has held that legislation transferring funds out of a special fund is an appropriation subject to the governor’s item veto power because such an action would reduce the amount of the previous deposit into the special fund. Such transfers would reduce the appropriation for the specially funded purpose: “The Constitution does not permit such reductions free of gubernatorial oversight. To hold otherwise ... would seriously limit the Execu-


121. See, e.g., Rios, 833 P.2d at 26-27 (transfer of funds from special to general fund appropriation and subject to item veto).


123. Id. at 483-84.
tive's constitutional role in the appropriation process." On the other hand, a Minnesota court recently held that the transfer of certain earmarked tax dollars from one special fund to another did not involve an appropriation. As the court acknowledged, its decision was largely driven by a previous Minnesota Supreme Court decision that determined that the governor's item veto "is an exception to the authority granted to the legislature" and "must be narrowly construed."

As the Iowa and Arizona cases suggest, the item veto and the executive budget are intended to give the governor an enhanced role in the state budgetary process and in the determination of state fiscal priorities. These factors counsel against a narrow definition of appropriation and suggest instead that when legislation depositing state moneys into a special fund effectively subtracts those funds from the general fund and commits them to a particular program, the purposes underlying the item veto require that such legislation be treated as an appropriation. It may at times be uncertain, however, just how locked up the moneys in a special fund are, and the state courts have only begun to address this question.

Moreover, as the Minnesota decision suggests, the definition of appropriation is inevitably shaped by judicial attitudes concerning the impact of the item veto on executive-legislative relations. Courts concerned that a governor may use the veto power to "modify the legislative strategy" may be apt to define "appropriation" not solely in terms of state budget practices and the effect of special fund mechanisms on the general fund but also in terms of a concern to cabin the governor's power.

In short, in the definition of "appropriation bill," as in the definition of an "item," state courts have had to grapple with the uncertainties of language in the light of contemporary fiscal and institutional practices in state government. And, as with the definition of "item," the resolution of this issue has powerful implications for the distribution of power between the executive and the legislature.

CONCLUSION

As the state item veto cases indicate, the item veto is not simply a mechanical device for increasing executive control over the budget or reducing fiscal imbalances. Rather, by altering the role of the executive in the enactment of laws, the item veto opens questions about basic structural arrangements. The item veto forces us to think closely about the relationship of the parts of a bill to each other and to the bill as a whole; to consider the degree to which the executive's power to unravel legislative packages conflicts with our customary notions of legislative intent and the way in which legislatures reach agreement; and to

126. Id. at 517.
127. Id. at 518.
128. Id. (quoting Inter Faculty Org. v. Carlson, 478 N.W.2d 192, 194 (Minn. 1991)).
address the meaning of appropriation at a time when state finances are seriously affected by measures that do not fall within the traditional definition of appropriation. Although the item veto has long been a part of the state budget process, these issues remain unresolved or inadequately resolved in many states. This may be attributable to their inherent difficulty. Indeed—to return for a moment to the value of state constitutional law as a "laboratory" of democratic experimentation and a potential model for federal constitutional changes—if Congress, driven by fiscal and political concerns, should ever decide to give serious attention to the state item veto as a model for the Federal Constitution, it must also give comparable attention to the questions of interpretation and allocation of law-making responsibility that result when the item veto is grafted onto the long-standing federal system of separation of powers.